

UPDATED REPORT TO BOARD OF SUPERVISORS ON STATUS OF INFORMATION-SHARING PROTOCOLS

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Introduction

This report of the Santa Clara County's Office of Correction and Law Enforcement Monitoring ("OCLEM") is intended to update this Board of Supervisors on the status of information-sharing protocols between OCLEM and the Santa Clara County Sheriff's Office. Recently, the Sheriff has proposed an agreement that will provide OCLEM very limited access to information and is, in some ways, even more restrictive in its scope than the Sheriff's proposal of last year. That being said, at this juncture, the limited access to materials that the information-sharing agreement would provide is preferable to the minimal access that has been afforded OCLEM to date. OCLEM intends to supplement any access provided by this agreement with its subpoena authority granted by this Board effective January of this year.

The Sheriff has indicated that she is prepared to sign her proposed agreement following discussions with the relevant employee associations and she has inquired whether OCLEM is also prepared to sign.¹ As we have advised the Sheriff (and her counsel), before signing the proposed agreement (which is attached to this report), OCLEM wanted to fully apprise this Board of its limitations.

If any Supervisor has further questions, or if the Board as a body wishes to revisit this issue at a public meeting, we would welcome the opportunity to respond as requested. If we do not receive a request from a Board member to place this matter on the Agenda by October 1, 2021, we intend to sign the proposed agreement.

¹ At a press conference held on August 17, 2021, Sheriff Smith said that she had signed an information sharing agreement. Because we were not aware of any signed agreement, we asked her attorney whether there was such a signed agreement, and if so, to share with us. To date, we have not received a response to our inquiry.

The Ordinance

As you know, this Board created OCLEM and set out its monitoring responsibilities in an originating Ordinance (NS-300.923). The Ordinance's overarching purpose is to:

assist in the County's efforts to reimagine the culture and operation of the jails, as well as the Sheriff's law enforcement operations, to better align those services with the County's ongoing public safety reform efforts.

The Ordinance states that through its monitoring and reporting functions, the Office will:

help foster transparency and accountability, identify unmet needs and service gaps; encourage timely and serious considerations of complaints; and provide independent review of serious incidents involving County personnel. Through its research and policy recommendations functions, the Office will continuously and proactively recommend improvements in custody and law enforcement practices, police, and services; update the Sheriff's Office, Department of Correction, and other relevant departments on developments in best practices; and identify trends that require changes in policy or practice.

The Ordinance expressly includes the following tasks for OCLEM:

- Periodically reviewing the Sheriff's Office and Department of Correction's use of force patterns, trends, and statistics.
- Reviewing the Sheriff's investigations of use of force incidents and allegations of misconduct.
- Conducting its own periodic audits and inspections of the Sheriff's Office and the Department of Correction.
- Monitoring the use of force in the jails and law enforcement operations.
- Monitoring the Sheriff's Office's response to inmate and public complaints
- Monitoring and reviewing investigations of serious incidents

The Ordinance also sets out the expected level of cooperation and access to information from other Departments:

The Sheriff's Office, the Department of Correction, Custody Health Services, and all other County agencies/departments shall cooperate with the Office and promptly supply information or records requested by the Office, including, to the extent permitted by law, confidential peace officer personnel records, inmate medical and mental health records, and related records as necessary for the Office to carry out its duties.

[...]

It is the intent of the Board of Supervisors that the Office shall have access to information and cooperation from County departments under this section to the greatest extent permitted by law.

In sum, the Ordinance sets out a wide spectrum of responsibility for OCLEM and indicates a fundamental understanding of the need for independent monitors to have unfettered access to information in order to carry out those duties.

Information-Sharing Protocols

The Ordinance requires that OCLEM establish written protocols with the Sheriff's Office, the Department of Correction, and the County Executive to maintain, access, and disclose confidential information. In accord with this requirement, OCLEM has entered into written agreements with the Department of Correction, the County Executive, and County Counsel. However, despite numerous discussions and protracted efforts, OCLEM has not been able to establish an information-sharing agreement with the Sheriff that would allow it to effectively perform most of its functions as established in the Ordinance.

As set out in her most recent proposal, the Sheriff is willing to provide the following materials:

- 1) Non-public policies, directives, training curricula, bulletins, and similar policy, procedure, and training materials;
- 2) For completed Internal Affairs investigations, the entire Internal Affairs file including without limitation confidential peace and custodial officer records and all supporting documents and recordings;
- 3) A monthly list of all open Internal Affairs investigations;

- 4) Inmate grievances and responses to grievances including related supporting materials;
- 5) Written complaints from members of the public about the conduct of the Sheriff's Office, or one of its peace officers or correctional officers, which are logged and tracked in a Sheriff's Office database; and
- 6) A monthly list of all reportable uses of force stating the date of the use of force, whether it involved the Enforcement or Custody bureau, and the type of force used.

Moreover, the Sheriff's proposal preserves her ability to redact information before providing it to OCLEM. And significantly, and unlike her earlier proposal, the Sheriff's proposal only extends to materials created *after* January 15, 2020.

As detailed below, this list is problematic in two ways: first, because of significant limitations in each proffered component as framed by the Sheriff, and second because of the important items that are omitted in their entirety.²

Completed Internal Affairs Investigations. Limiting OCLEM access to "completed" Internal Affairs investigations would prevent it from monitoring investigations as they proceed – an important means by which OCLEM could help promote the thoroughness and efficacy of internal accountability measures. Theoretically, this narrower scope of access could also incentivize the Sheriff's Office to delay or even inactivate investigations to avoid monitoring.

While the Sheriff agrees to provide a monthly list of all open Internal Affairs ("IA") investigations, she declined to agree to provide sufficient information about the *nature* of the investigation that would facilitate OCLEM's ability to monitor the case in a meaningful way. The Sheriff further declined to agree to provide further information on any new investigation upon request of OCLEM. As a result, OCLEM's "list" of open Internal Affairs investigations could theoretically be limited to the existence of a new case number – a form over substance concession that does little to advance OCLEM's awareness of potential misconduct or ability to assess the IA response.

OCLEM suggested that it be provided direct access to the Sheriff's Office IA database (as it has received in other monitoring capacities), or at least an understanding that the information provided would be sufficient to carry out OCLEM's monitoring

² An updated chart comparing the agreement proposed by OCLEM and the Sheriff's most recent proposal is attached to this Memorandum.

responsibilities, but the Sheriff rejected both suggestions.³ OCLEM further suggested that the Sheriff designate an IA contact with whom it could speak on a regular basis regarding the status of Internal Affairs investigations, but she also rejected that suggestion.

Accordingly, the limited agreement to provide OCLEM unspecified information about the opening of Internal Affairs investigations, as well as the proposed qualifications to full access for completed IA investigations, will significantly hamper the robust monitoring of those investigations contemplated by the Ordinance. No legal reasons were offered to explain the constrained access proposed by the Sheriff.

Complaints About Sheriff’s Office Personnel. The Sheriff’s agreement to provide the complaints relating to Sheriff’s Office personnel will be of limited utility to OCLEM. During discussions, OCLEM requested timely receipt of all complaints about Sheriff personnel, but also sought information about how the Sheriff’s Office responded to the complaints. That substantive component is obviously essential to a full understanding of the underlying issues and the legitimacy with which the Sheriff’s Office handles them – the focal points of the Ordinance’s directive that OCLEM review allegations of misconduct against Sheriff’s personnel. No legal obstacles were offered in support of the Sheriff’s refusal to provide the Sheriff’s Office response to any complaints.

Inmate Grievances and Responses to Grievances. In an improvement over the earlier proposal, the Sheriff has agreed to provide inmate grievances and the responses to grievances, including related supporting materials. Despite this improvement, the January 15, 2020, time limit restricts OCLEM’s ability to conduct audits over time and whether any reforms to the system have made a difference. No legal obstacles were offered in support of the January 15, 2020, time limit on grievances.

A monthly list of all reportable uses of force stating the date of the use of force, whether it involved the Enforcement or Custody bureau, and the type of force used. The Sheriff has only agreed to provide a list of all uses of force and declined to provide the reports, video/audio recordings, and other materials relating to the use of force, (except when the use of force resulted in an IA investigation or inmate grievance.) Moreover, the Sheriff has further declined to provide any documents relating to the internal review of those uses of force.

³ The Sheriff’s proposal indicates that she “is not required to grant OIR Group direct access to any databases owned, used, and/or maintained by the Sheriff’s Office, but may do so in its sole discretion to the extent permitted by law”.

As with the other categories, a list alone is of limited utility in enabling OCLEM to fulfill its intended responsibilities. Given the connections between OCLEM's creation and the County's rigorous response to the Michael Tyree murder case, this is a particularly unfortunate gap. Concerns about force in the jails go to the very essence of the public's interest in heightened oversight, and the materials in question are critical to effective review.

No legal reasons have been offered in support of this constrained access.

Timely Notification of Critical Incidents. OCLEM requested that the Sheriff's Office provide real-time notification of critical incidents such as deputy-involved shootings and in-custody deaths. The Sheriff indicated an unwillingness to provide such "real time" notification, citing the already burdensome list of individuals the Office is already required to contact. The Sheriff also declined to agree to allow OCLEM to participate in "walk throughs" at the scene of any critical incident.

In past and current monitoring assignments in other jurisdictions, OCLEM team members have regularly been afforded real time notifications of critical incidents and the ability to roll out to scenes and participate in "walk throughs." This early involvement heightens the monitor's ability to identify potential issues and track the thoroughness and effectiveness of subsequent administrative responses. The Sheriff did not cite any legal impediments preventing her from affording OCLEM similar access.

Access to Sheriff's Supervisory Personnel. OCLEM requested that the Sheriff's Office provide access to her higher-ranking personnel. The purpose for this request was that, in our experience, documents do not always reveal decision-making and other analyses that provided the backdrop to accountability outcomes and systemic adaptations. The opportunity to talk with individuals who have managerial responsibilities for keeping inmates safe and maintaining public safety in the field has been a valuable source of insight in our work with other law enforcement agencies. We have benefitted from this opportunity throughout twenty plus years of experience – in part because it has made us more knowledgeable in ways that redound to the benefit of the agencies as well.

In our earlier discussions, the Sheriff had agreed to designate custody and law enforcement liaisons, of captain-level or higher, to facilitate access to staff and information, and members of the Sheriff's Executive Team to respond to inquiries from OCLEM. However, the current proposed agreement eliminates the Sheriff's prior agreement to this provision and provides that all OCLEM requests must be made to the Sheriff or persons designated by her.

The Hogan Incident: A Case Study of the Need for Meaningful Access

On August 17, 2021, this Board directed OCLEM to review, assess, describe, comment, and make recommendations on the issue of disciplinary action and/or lack thereof (to the maximum extent provided by law) undertaken by the Sheriff's Office in connection with the Andrew Hogan case and provide a report of its findings.

Beginning on April 5, 2021, OCLEM has endeavored to learn more about the Hogan matter and has repeatedly asked the Sheriff for information relating to the incident. Particularly, and on three separate occasions, OCLEM asked the Sheriff for the following information:

1. Current Santa Clara Sheriff's Office policy regarding transport of mentally ill inmates and/or inmates placed under a WIC 5150 hold.
2. Records of all transports of mentally ill inmates or inmates placed under a WIC 5150 hold from September 1, 2018 to present.
3. All incident reports written by Sheriff's office personnel relating to the Hogan matter.
4. All documents pertaining to the opening of an internal affairs investigation relating to the Sheriff's Office handling of the Hogan matter.
5. All documents collected during the pendency of the internal affairs investigation relating to the handling of the Hogan matter.
6. All documents pertaining to the closing and/or inactivation of an internal affairs investigation relating to the handling of the Hogan matter.
7. All documents relating to the Elmwood facility review of the conduct of deputies relating to the Hogan matter.
8. All documents relating to the review of the conduct of Elmwood deputies and other jail staff in their dealing with Mr. Hogan on August 25, 2018.
9. Copy of memoranda from Sheriff's Office command staff to correctional staff instructing staff that inmates with 5150 holds are to be only transported by ambulance or sedan.
10. Access to current and former Internal Affairs supervisors of the Sheriff's Office following personnel for interview:

Despite these repeated requests, until recently, the Sheriff had provided a total of *two* documents that sets out current policy regarding the transport of inmates (Requests 1 and 9). Recently, the Sheriff provided materials that were intended to be responsive to Requests 3, 7 and 8. The Sheriff has represented that there are no documents responsive to Request 2.

At a press conference on August 17, 2021, the Sheriff stated that she welcomed all investigations set out in this Board’s referral. Yet, importantly, the Sheriff, through her attorney, has expressly rejected providing OCLEM any access to the requested documents or named personnel relating to the Hogan internal affairs investigation. It is these documents and personnel (Requests 4, 5, 6 and 10) that are critical for OCLEM to be able to meaningfully respond to the essence of the Board referral; namely, any disciplinary action (or lack thereof) undertaken by the Sheriff’s Office. And it is these documents that the Sheriff has flatly refused to provide.

Critically, even if this information sharing agreement was signed, it would not offer any relief with regard to the currently denied request for Hogan related internal affairs materials. This is because the agreement specifically states that information prior to January 2020 will not be covered – thereby precluding access to the internal affairs materials from that case.⁴

In short, the Hogan example is demonstrative of the problematic limitations that the Sheriff’s proposed agreement would impose on the flow of needed information.

The Path Forward: Available Options

As described above, OCLEM’s mission continues to be frustrated by the Sheriff’s refusal to execute an agreement that aligns with the spirit and particulars of the County Ordinance. That being said, at this juncture, OCLEM is prepared to execute the proposed agreement. We take this position under the theory that some information is better than almost none. If OCLEM were to sign the proposed agreement, it could at least begin to access, review, and assess what limited material the Sheriff has agreed to provide.

⁴ In addition, setting aside the date limitation, it is unclear whether there are any “completed IA investigations” relating to the Hogan matter that would be covered by the information sharing agreement. This is a good example of why limiting access to “completed investigations” significantly impedes OCLEM’s monitoring responsibilities.

At the same time, OCLEM could supplement its access to materials by exercising its authority – established by this Board last year – to subpoena the requisite documents. Our ability to carry out the Board’s recent assignment regarding the Hogan matter will presumably turn on the use of such a subpoena, and we intend to move forward accordingly.

To summarize, our intention is to sign the proposed agreement in spite of its many limitations, and to obtain additional information as needed through OCLEM’s subpoena authority. However, in light of the significance of the underlying issues and this Board’s extended involvement in the process, we are sharing our thinking and welcoming any further dialogue before taking these additional steps.