



Kate Harrison  
Councilmember District 4

## **SUPPLEMENTAL AGENDA MATERIAL**

**Meeting Date:** July 10, 2018

**Item Number:** 32b

**Item Description:** Direct the City Manager to analyze the Mayor's proposed Police Commission Charter Amendment, and initiate meet-and-confer where required

**Submitted by:** Councilmember Harrison and Mayor Arreguin

- Strike "in instances of large investigations" from Section 13(f) relating to the hiring of a Chief Investigator.
- Convert all instances of "will" to "shall"
- Correct inconsistency in capitalization
- Correct reference in Section 13(h) from 199 to 119
- Reformat Sections 15 and 16 regarding annual reports
- Adds language in Section 2 preserving existing council power over policing issues
- Adds language to allow an implementation ordinance
- Allow PBD up to 30 additional business days to respond to requests for documents

## CHARTER AMENDMENT TO ESTABLISH A POLICE COMMISSION

The People of the City of Berkeley hereby amend the Charter of the City of Berkeley to read as follows:

Section 1. The Charter of the City of Berkeley is amended to add Article XVIII, to read as follows:

### Article XVIII. POLICE COMMISSION AND INDEPENDENT POLICE AUDITOR

#### Section 1. Establishment and purpose.

A Police Commission is hereby established in the City of Berkeley. The purpose of the Police Commission is to promote public trust through independent, objective, civilian oversight of the Berkeley Police Department, provide community participation in setting and reviewing Police Department policies and procedures, and to provide a means for prompt, impartial and fair investigation of complaints brought by individuals against the Berkeley Police Department. The Commission shall have the functions and duties enumerated in this Charter, as well as those assigned to the Commission by Ordinance.

The Office of the Independent Police Auditor is hereby established, which shall have the functions and duties enumerated in this Charter, as well as those assigned to the Independent Police Auditor by Ordinance. The purpose of the Independent Police Auditor is to investigate all complaints filed against sworn employees of the Berkeley Police Department, to reach an independent finding as to the facts and recommend corrective action where warranted. The Independent Police Auditor shall also serve as the Secretary to the Police Commission and assist the Commission in carrying out duties prescribed herein.

#### Section 2. Police Commission powers and duties.

(a) The Police Commission has the following powers and duties:

(1) To advise and make recommendations to the public, City Council, and City Manager regarding the operation of the Berkeley Police Department, including without limitation all written policies, practices, and procedures in relation to the Berkeley Police Department;

(2) Review and recommend ~~for to~~ City Council approval all agreements, letters, or memoranda of understanding, of policies which express terms and conditions of mutual aid, information sharing, cooperation and assistance between the City of Berkeley Police Department and all other local state and federal law enforcement, intelligence, and military agencies or private security organizations operating in the City of Berkeley;

(3) To review and make recommendations on Police Department policies, practices and procedures as further described below;

(4) To receive and consider the findings and recommendations of the Independent Police Auditor regarding complaints against sworn employees of the Police Department, and to recommend discipline when misconduct is found;

(5) To participate in the hiring of the Chief of Police and command staff as further

described below;

(6) To access records of City Departments, compel attendance of sworn Police Department employees, and exercise the power of subpoena as necessary to carry out its functions and as further described below;

(7) To adopt rules and regulations necessary for the conduct of its business; and

(8) Any other powers and duties as the City Council may assign it by Ordinance.

(b) Nothing in this chapter granting powers and duties to the Police Commission shall limit the Council's independent authority to act on policing issues derived from elsewhere in this Charter, unless explicitly stated.

### **Section 3. Independent agency; budget authority and allocation**

(a) Notwithstanding Article VII of the Charter, the Police Commission, the Independent Police Auditor and its staff shall be independent of the City Manager.

(b) The Commission is authorized to propose a budget to the City Council for its operations, and the Council shall allocate to the Police Commission and Independent Police Auditor a budget sufficient to protect the due process rights of complainants and officers, for the Commission and its staff to carry out the investigative and policy responsibilities stated herein, and to ensure the independence of the Commission.

### **Section 4. Composition of Police Commission; eligibility**

(a) The Police Commission shall be composed of nine Commissioners selected by the City Council. Each member of the Commission must:

(1) Be a resident of the City;

(2) Be of voting age;

(3) Not be an employee, officer, or contractor with the City; a current sworn police officer from any agency; or a current employee, official, or representative of an employee association representing sworn police officers;

(4) Be fair minded and objective with a demonstrated commitment to community service;

(b) Desirable qualities of a Commissioner are familiarity with human resources, law, police procedures, or police oversight; or involvement in civil rights or community organizations.

(c) All appointees to the Commission shall be subject to background checks before final appointment. No person convicted of aA felony shall may serve as a bar to appointment on the Police Commission, at the discretion of the Council.

### **Section 5. Commissioner selection.**

(a) Candidates for the Commission must complete and file with the City Clerk an application form and an affidavit of residency required by Berkeley Municipal Code Section 2.04.145. Commission vacancies will-shall be widely advertised and publicly posted. The Mayor and each Councilmember will-shall nominate one candidate from an applicant pool at a meeting of the City Council. Each individual nominee must be

approved by a majority vote of the Council.

(b) The Council shall endeavor to establish a ~~e~~C~~ommission~~ that is broadly inclusive and reflective of race, ethnicity, age, sexual orientation, economic status, neighborhoods, and various communities of interest in this City. Toward that end, in soliciting applications for ~~the position of~~ Commissioner ~~positions~~, the Independent Police Auditor shall reach out to civic, community, and civil rights organizations, among others.

#### **Section 6. Terms; term limits.**

(a) Commissioner terms end four years after appointment, or upon the expiration of the nominating Councilmember's term, whichever is earlier. Commissioners are limited to serving eight consecutive years and may be reappointed following a break in service of at least four years.

(b) To the extent not in conflict with subsections (a) above, the provisions of Berkeley Municipal Code Section 3.02.040, regarding commissioner term limits and the effect of interruption in service, apply.

#### **Section 7. Conflicts of interest.**

Commissioners ~~will~~~~shall~~ be subject to the requirements of the California Political Reform Act and other state and local conflict of interest codes.

#### **Section 8. Expiration of term; termination; leaves of absence; removal.**

(a) A Commissioner whose term has expired may continue to serve until a successor Commissioner is appointed, unless the sitting ~~C~~e~~ommissioner's~~ term expires due to term limits.

(b) The term of a Commissioner who fails to remain eligible to serve on the ~~C~~e~~ommission~~ (e.g., by moving out of the City of Berkeley, or becoming an employee of the City) expires automatically as of the date the reason for ineligibility arises.

(c) The provisions of Berkeley Municipal Code Section 3.02.020, establishing a termination procedure for absence from meetings, Section 3.02.030, leaves of absence, and Section 3.02.035, regarding alternate ~~C~~e~~ommissioners~~, apply to the Police Commission.

(d) A Commissioner may either be replaced by the Council if their term has expired or may be removed during their term by ~~five~~~~six~~ votes of the City Council.

#### **Section 9. Commission Chairperson and Vice-Chairperson.**

The Commission shall elect one of its members as chairperson and one as vice-chairperson, whose terms shall be one year each, or until their successor is elected. No chairperson is eligible to serve more than two consecutive terms, or portions thereof. Following election of the initial chairperson and vice-chairperson, the Commission shall elect subsequent officers each January.

#### **Section 10. Commissioner stipends.**

Each Commissioner is entitled to receive a stipend of \$100.00 for each regular and special full commission meeting attended, and \$20.00 per hour for each subcommittee

meeting attended as a member of the subcommittee. However, the total stipend paid may not exceed \$300.00 per month per Commissioner.

### **Section 11. Commissioner training.**

The Commission shall establish mandatory training requirements for Commissioners, with input from the Independent Police Auditor and Chief of Police.

### **Section 12. Commission meetings; quorum; rules of procedure; subcommittees.**

(a) At the beginning of each calendar year, the Commission shall establish a regular meeting schedule consisting of at least 18 meetings. Special meetings may be called by the chairperson of the Commission or by a majority of the Commission.

(b) A majority of appointed Commissioners constitutes a quorum to conduct business and take any action.

(c) The Commission shall establish rules of procedure governing the conduct of its business.

(d) The Commission may establish subcommittees that it deems necessary to carry out its functions. The ~~c~~Chairperson shall appoint subcommittee members at a Commission meeting, and may include members of the public who express an interest in the business of the subcommittee. Public subcommittee members ~~will~~ shall serve without compensation. The Commission may establish further rules and procedures for the appointment of members of the public to subcommittees.

### **Section 13. Office of the Independent Police Auditor.**

(a) The Police Commission shall nominate an Independent Police Auditor subject to confirmation by the City Council. ~~shall appoint an Independent Police Auditor, who shall serve at the pleasure of the Council.~~

The Independent Police Auditor shall serve as secretary to the Police Commission and carry out the work of the Commission as described herein, including, without limitation, day-to-day operations of the Commission office and staff, and performance appraisals and discipline of all subordinate employees.

(b) By majority vote, the Police Commission may recommend removal for cause of the Independent Police Auditor to the Council. The council may remove the Independent Auditor by six votes.

~~(b)~~(c) In addition to the duties prescribed, upon receipt of a complaint, the Independent Police Auditor shall ensure a timely, thorough, complete, objective and fair investigation into the complaint.

~~(c)~~(d) The Independent Police Auditor shall provide timely updates on the progress of all investigations conducted by the Office of the Independent Police Auditor to the complainant and the Police Department employee who is the subject of the investigation, unless specific facts of the investigation would prohibit such notification.

~~Based on the facts of the investigation, reach an independent finding as to the facts.~~

The Independent Police Auditor shall assess the conduct of the sworn Police Department employee in light of the facts discovered through the investigation, the law, and the policies

and procedures of the Berkeley Police Department.

~~(d)~~(e) The Independent Police Auditor shall present the results of their investigative findings and recommendations to the Police Commission who ~~will~~ shall make a recommendation to the Chief of Police regarding the specific complaint.

~~(e)~~(f) The Independent Auditor may, with budgetary authority from the Council and the Commission's consent, hire a Chief Investigator ~~in instances of large investigations~~.

~~(f)~~(g) The Independent Police Auditor has the sole authority to hire and dismiss consultants, additional investigators, and all subordinate employees as needed.

~~(g)~~(h) The powers in this Section 13 are conferred notwithstanding Article VII, Sections 28(b) and (c) and Article XVI, Section 1199 of this Charter.

~~(h)~~(i) The Commission and Independent Police Auditor may use the City's Human Resources Department for hiring, performance evaluation, discipline, and removal of employees.

~~(i)~~(j) The Independent Police Auditor shall meet periodically with stakeholders, including but not limited to employee organizations representing officers, organizations promoting civil rights and liberties, and organizations representing communities of color, with and seek input from the Berkeley Police Association and solicit from them input regarding the work of the Commission and the Office of the Independent Police Auditor.

#### Section 14. Legal counsel.

The Commission and the Independent Police Auditor may use the services of the City Attorney's Office for legal advice. ~~;~~ ; The Commission may also seek the services of outside counsel when it deems necessary.

#### Section 15. Commission reports.

~~(a)~~ (a) The Independent Police Auditor shall ~~prepare~~ issue an annual report to the public, including but not limited to the following:

1 A -description of the Commission's activities during the year, ~~which shall include~~ including:

i -a summary of the number, type, and disposition of complaints filed with the Commission

ii -A; a summary of the number, type, and disposition of complaints filed with the Police Department that Commission staff has reviewed

iii -; Policy investigations and reviews undertaken

iv -O; and ~~such other~~ such information as the Commission may request.

2 The Department's and the Commission's processes and procedures for investigating alleged misconduct, and for determining the appropriate level of discipline for sustained findings of misconduct

3 Trends and patterns regarding Department training and education, and the Department's use of any early warning system;

4 Training and/or policy issues that arise during the investigations of complaints;

5 Trends and patterns in vehicle and pedestrian stops, citations, arrests, searches and seizures or other patterns by the Berkeley Police Department by race or ethnicity, purpose of the stop and disposition, and location of stop, in compliance with General Order B-4, Fair and Impartial Policing, and any disparate outcomes.

6 Trends and patterns regarding use of force and officer-involved shootings.

(a)(b) This annual report shall be presented to the Commission for approval. Upon adoption by the Commission, it shall be presented to the Mayor and Council, the Chief of Police and the City Manager, and shall include, where appropriate, recommendations for changes in the processes and procedures that were reviewed.

## **Section 16. Policy review and approval.**

(a) The Commission may review police policies, practices, and procedures on its own motion, at the request of a member of the public as a result of a policy complaint or an individual complaint against an officer, or the Police Department. Commission staff shall carry out any Commission directives required to fulfill this function.

~~(b) The Commission shall prepare an annual report, summarizing the following:~~

~~(c) The Department's and the Commission's processes and procedures for investigating alleged misconduct, and for determining the appropriate level of discipline for sustained findings of misconduct;~~

~~(d) Trends and patterns regarding Department training and education, and the Department's use of any early warning system;~~

~~(e) Training and/or policy issues that arise during the investigations of complaints;~~

~~(f) Trends and patterns in vehicle and pedestrian stops, citations, arrests, searches and seizures or other patterns by the Berkeley Police Department by race or ethnicity, purpose of the stop and disposition, and location of stop, in compliance with General Order B-4, Fair and Impartial Policing, and any disparate outcomes.~~

~~(g) Trends and patterns regarding use of force and officer-involved shootings.~~

~~(h) This annual report shall be presented to the Commission, the Mayor and Council, the Chief of Police and the City Manager, and shall include, where appropriate, recommendations for changes in the processes and procedures that were reviewed.~~

(i)(b) Before taking effect, the Chief shall submit all new Departmental policies and revisions to existing policies to the Commission for review and recommendation. If the Police Department and the Commission are unable to reconcile their differences about a policy, the policy shall be sent to the City ~~Manager~~ Council for a final decision.

## **Section 17. Complaints filed with the Independent Police Auditor.**

(a) The Independent Police Auditor and Commission shall adopt regulations for handling complaints filed from members of the public alleging misconduct by sworn Police Department employees and undertake investigations of complaints as it deems warranted. The regulations must include the following:

(1) A provision for mediation of complaints in lieu of an investigation;

(2) What constitutes a complainant;

(3) The Independent Police Auditor ~~will~~shall hear and decide findings on allegations of misconduct, at which subject employees must appear to testify and answer questions;

(4) In making findings, the standard of proof ~~will~~shall be “preponderance of the evidence”;

(5) The time limit for investigations and notification of discipline shall be one year, unless a Government Code section 3304(d) exception applies.

(b) Investigation of all complaints filed with the Independent Police Auditor and Commission shall begin immediately after complaints are filed and proceed as expeditiously as possible.

(c) Complaints filed with other offices, boards, bureaus and departments of the City, including the Police Department, shall be referred to the Independent Police Auditor for investigation.

(d) No City employee, officer, official or member of the Police Commission shall attempt to unduly interfere or undermine the work of the Independent Police Auditor or any employee of the Office of the Independent Police Auditor in the performance of the duties and responsibilities set forth in this Charter or by Ordinance.

### **Section 18. Review of complaints filed with the Berkeley Police Department.**

(a) The Police Department shall provide the Independent Police Auditor with copies of all ~~newly filed~~ complaints newly filed with the Department, both those filed from outside the department and within the department. The Independent Police Auditor shall present each case to the Commission to decide which complaints staff ~~will~~shall ~~conduct parallel investigations of~~, after receiving recommendations from its staff. If the Commission staff elects to conducts an investigation, the Department shall share all written and unwritten information, documents, materials and evidence the Department collects during its investigation.

(b) For complaints that the Commission staff does not select for investigation, the Independent Police Auditor shall have the authority to review and discuss those cases with the Department. If the Independent Police Auditor believes that the Commission should open an investigation, s/he may present the case to the Commission to approve an investigation.

(c) The Police Department shall inform the Independent Police Auditor of its planned disposition before closing an investigation into a complaint.

(d) After reviewing a Police Department investigation, the Independent Police Auditor shall advise the Commission of recommended disciplinary action in any sustained finding by the Independent Police Auditor. The Commission may affirm, modify, or reject the recommendation, and its decision shall be submitted to the Chief.

### **Section 19. Involvement in discipline of sworn department employees**

~~After reviewing a Police Department investigation, the Independent Police Auditor~~

~~shall advise the Commission of recommended disciplinary action in any sustained finding by the Independent Police Auditor. The Commission may affirm, modify, or reject the recommendation, and its decision shall be submitted to the Chief.~~

(a) In a confidential personnel meeting, the Independent Police Auditor shall submit their investigative findings and recommendations, including any recommended disciplinary action, including all evidence and documentation obtained or produced during the course of the investigation, to the Police Commission for review. The Independent Police Auditor shall provide the Commission with all evidence and documentation obtained or produced during the course of the investigation to enable their review of the complaint. At said meeting, both the officer who is the subject of the investigation and the complainant must be present to answer questions from Commissioners. To the extent allowed by law, the Independent Police Auditor and Commission shall ensure that both the officer and complainant are able to freely testify. If the Independent Police Auditor Commission makes ~~upholds the Independent Police Auditor's sustained finding on an allegation against a subject employee, they shall also recommend disciplinary action to the Chief of Police.~~

(b) Should the Police Commission agree with the findings and recommendations of the Independent Police Auditor, the report ~~will~~ shall be submitted to the Chief of Police for appropriate action. The Commission may affirm, modify or reject the recommendations. If the Commission modifies or rejects the recommendations of the Independent Police Auditor, it shall issue findings explaining its decision.

~~(c)(a) After reviewing a Police Department investigation, the Independent Police Auditor shall advise the Commission of recommended disciplinary action in any sustained finding. The Commission may affirm, modify, or reject the recommendation, and its decision shall be submitted to the Chief.~~

~~(d)(c)~~ If the Chief proposes to impose a disciplinary action that differs from the recommendation of the Independent Police Auditor or the Commission, the Commission shall have the opportunity to appeal the Chief's proposal to the City Manager. The City Manager shall make the final determination and explain his or her decision in writing to the Commission within 15 business days of the appeal.

~~(e)(d)~~ This Article does not prohibit the Chief of Police from investigating the conduct of a Police Department employee or taking disciplinary or corrective action that is otherwise permitted by this Charter and not in conflict with this Article, when such action is warranted; and this Article does not limit or otherwise restrict the disciplinary powers vested in the City Manager and the Chief of Police under other provisions of this Charter, that are not in conflict with this Article.

~~(f)(e)~~ The City Manager and Chief of Police may impose disciplinary action up to a period consistent with Government Code section 3304. This Section nullifies and supersedes any provisions of agreements to the contrary.

## **Section 20. Access to records of City departments; compelling testimony and attendance.**

(a) Notwithstanding Article VII, Section 28 of this Charter, all departments, officers, and employees of the City shall cooperate with and assist the Independent Police Auditor, Police Commission and its staff and, unless prohibited by state or federal law, produce all records and written and unwritten information, documents, materials and evidence the

Commission or its staff requests for the purpose of carrying out its duties and functions. The records and information include without redaction or limitation: (1) records relevant to Police Department policies or practices, (2) personnel and disciplinary records of sworn Police Department employees, and (3) Police Department investigative records. Responding departments, officers, or employees of the City shall comply promptly, but in no event later than 10 business days from the date of request, unless additional time is needed to comply. If additional time is needed to comply, the responding departments, officers or employees shall specify how much time ~~within a reasonable period~~ up to 30 additional business days is needed and explain the reasons for delay in producing the necessary records and information.

(b) The Independent Police Auditor, Police Commission and its staff shall maintain the confidentiality of any records and information it receives consistent with state or federal law governing such records or information.

(c) The Independent Police Auditor and Police Commission may require the testimony or attendance at Commission proceedings of any member of the Police Department to carry out the Commission's responsibilities.

(d) The Independent Police Auditor and Police Commission is empowered to issue subpoenas to compel the production of books, papers, and documents, and the attendance of persons to take testimony, as needed to carry out its duties and functions; and to enforce subpoenas if necessary.

### **Section 21. Advice regarding Police Department budget.**

The Commission is empowered to review and make recommendations to the City Council regarding the Police Department budget. The Chief shall submit his or her final budget proposal to the Commission for review and recommendations, but the Commission's failure to complete that review and make recommendations in a timely manner shall not delay the budget process.

### **Section 22. Hiring of Chief of Police.**

Notwithstanding Article VII, Section 28 of this Charter, the process for hiring the Chief of Police is as follows:

Upon the notice of vacancy of the position of Chief of Police, the City Manager shall engage with the Police Commission on the job requirements and application process. The Police Commission shall play an active role in the evaluation of candidates for the Chief of Police.

### **Section 23. Hiring of subordinate Departmental staff.**

(a) The Chief of Police shall include a member of the Commission on all oral boards for all command staff positions and allow that Commission member to have input.

### **Section 24. Chief or command staff to attend Commission meetings.**

The Chief of Police shall attend at least one regular Commission meeting per month, for each month a regular meeting is held and attend a minimum of 12 meetings per year. The Chief shall send a member of his or her command staff to any regular Commission meeting that the Chief does not attend.

### **Section 25. Berkeley Police Department written reports to the Commission.**

The Chief of Police shall submit reports to the Commission on such subjects and at such intervals as the Commission, in consultation with the Chief, may prescribe. At least one report shall provide information on all use of force statistics, and the number of complaints filed with Internal Affairs, the allegations in each complaint, and the disposition of closed complaints, including any discipline imposed.

### **Section 26. Contract negotiations.**

The City Manager shall inform the Police Commission of any prospective changes discussed in contract negotiations that may directly affect the work, duties, or responsibilities of the Commission; and provide the Commission reasonable time to evaluate and respond to those proposals.

### **Section 27. Commendation program.**

The Commission shall establish a regular means of recognizing sworn employees of the Police Department for instances of outstanding service to individuals, the community at large, or the Department.

### **Section 28. Transition from Police Review Commission to Police Commission.**

(a) The Police Review Commission established by Ordinance No. 4,644-N.S., as amended, ~~will~~ shall continue in existence until its functions are transferred to the Police Commission, but no later than June 30, 2019.

(b) To assist in an orderly transition between the Police Review Commission and the Police Commission established by this Article, PRC staff shall serve as interim Police Commission staff until the Police Commission hires an Executive Director and the Executive Director hires subordinate employees.

(c) The Police Review Commission staff shall transfer all PRC files, records, books, publications, and documents of whatever kind to, and for the use and benefit of, the newly created Police Commission.

### **Section 29. Review of processes.**

The Commission shall conduct a review of its processes every two years after the passage of the initiative in order to ascertain the efficacy of its processes.

### **Section 30. Enabling Legislation**

The Commission may make recommendations to the City council for enacting legislation or regulations that will further the goals and purposes of Article XVIII of this Charter. The City Council may, on its own initiative, enact legislation or regulations that will further the goals and purpose of this Charter. Once the Commission is seated, subsequent legislation or regulations, shall be submitted to the Commission for review and comment.

The Commission shall have forty-five (45) days to submit its comments to the City Council, such time to be extended only by agreement of the City Council.

**Section 310. Repeal of Ordinance No. 4,644-N.S., as amended.**

Ordinance No. 4,644-N.S. and all amendments thereto ~~will~~shall cease to be operative and are repealed as of the date of the first meeting of the Police Commission established by this Article.

**Section 321. Severability.**

If any word, phrase, sentence, part, section, subsection, or other portion of this Article, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the prescribed application thereof, shall be severable, and the remaining provisions of this Article, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The People of the City of Berkeley declare that it would have passed this title, and each section, subsection, sentence, clause and phrase of this Article, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases is declared invalid or unconstitutional.