

# Memorandum

## City of Lawrence

TO: Community Police Review Board  
FROM: Brandon McGuire, Assistant City Manager  
DATE: 07/02/2021  
RE: Draft Ordinance

As requested, staff provides the following comments regarding the board's draft ordinance amending Chapter 1, Article 25 of the Code of the City of Lawrence, Kansas, 2018 Ed.

**Legal / Form of Government** During the course of the Community Police Review Board's (CPRB) drafting of the proposed CPRB ordinance, the CPRB sought legal advice from the City Attorney's Office. As the proposed CPRB ordinance advanced through various permutations, staff would, as the occasion demanded, advise the CPRB that certain provisions, concepts, or ideas, presented for inclusion in the CPRB ordinance, might be illegal or might present legal difficulties. To the CPRB's credit, on virtually all of those occasions, it followed staff's advice and removed, abandoned, or altered the provision, concept, or idea in question.

At the request of the CPRB, made at its April 2021 meeting, the City Attorney's Office has again reviewed the **legality** of the proposed CPRB ordinance with reference to the various laws and other obligations of the City. While that review of the CPRB ordinance discloses some areas where the language could perhaps be tightened and other areas where failure to conform strictly to the CPRB ordinance's procedures might give rise to issues, it is the opinion of this office that, for the most part, the proposed CPRB ordinance comports with federal, state, and local laws and other obligations of the City.

This office would note, however, that the CPRB, against advice, did include in the CPRB ordinance a provision that the City Manager **shall**, upon the request of the CPRB, hire outside counsel to investigate certain complaints. It is the opinion of the City Attorney's Office that the mandatory nature of that provision runs afoul of the Commission-Manager government in that it intrudes impermissibly upon the City Manager's express authority to oversee the operations of the City and to execute its laws. And, to the extent that the City Commission does not set aside funds in the budget for such expenditure, then the mandate might implicate certain budgetary laws and might violate the Kansas Cash-Basis Laws of 1933, codified as amended at K.S.A. 10-1101 *et seq.* Similarly, provisions which mandate the LPD staff to take specific actions may intrude upon the City Manager's authority to oversee the department's operations.

Staff reiterates that, during the drafting of the CPRB ordinance, the City Attorney's Office was asked only to comment on legal issues related to the CPRB ordinance. As such, in giving advice to the CPRB, this office ignored any policy, practical, logistical, or

similar issues that the CPRB ordinance might create, and **only** advised the CPRB regarding the legality of the proposed provisions, concepts, and ideas.

Staff highlights the following issues for the board's consideration.

**Employer-Employee Relationship** The City values its employees and strives to attract and retain the best people to serve our community. To that end, the City has traditionally been reticent to disclose personnel records of its employees, and has discretionarily closed such records pursuant to an exception in the Kansas Open Records Act. Further, the City has also traditionally refrained from commenting publicly on matters involving the performance or discipline of city employees. These practices stem from a recognition of the privacy and due process rights of public employees. The City recognizes that individuals do not forfeit constitutional rights possessed by all citizens by accepting a law enforcement officer position. Any ordinance providing for oversight of the Police Department should be crafted carefully, with input from officers, to maintain constitutional rights of employees. Engaging employees in process changes that will affect employees has also been a value of the City Manager.

### **Other Considerations**

- Staff recommends the draft ordinance focus on two critical purposes – to receive community member concerns and to review completed personnel investigations.
- Workload – review of completed personnel investigations is manageable. Should the board review all community member concerns this would require significant staff and board time.
- Timing – disclosure of complaints received by the department will be provided at each meeting. Depending on the level of detail this could be done in the open meeting or executive session. Due process will dictate timing of the review of some personnel investigations.
- Privacy – consideration should be given to the privacy of those filing complaints. Some parties making a complaint may not want the complaint to be reviewed by the board. There should be a mechanism available to persons filing a complaint that includes an “opt-in” for disclosure of complaint details to the board. Disclosures related to personnel information should be consistent with City personnel policies and practices.

### **Final Thoughts**

Board members and City staff share a common interest in establishing a well-functioning process to provide public oversight of the City's handling of complaints against our law enforcement employees. The issues identified in this memorandum are submitted for the Board's consideration as it looks to further develop and improve upon its draft ordinance.

Finally, the City's Strategic Plan (<https://lawrenceks.org/strategic-plan/>) has implications on the ordinance drafting project as well as the outcome of the project. The City has committed to the strategic outcome of Safety and Security, in which all people feel safe and secure in the Lawrence community and have access to trusted public and community-based safety resources. The Strategic Plan includes commitments which guide how we work and accomplish the strategic outcomes. Particularly relevant to this project are the commitments of Community Engagement, Efficient and Effective Processes, Equity and Inclusion, and Engaged and Empowered Teams.

As the Board contemplates next steps for its ordinance project, City staff continues to stand ready to facilitate a collaborative process to work through these issues if the Board desires.

# Memorandum

## City of Lawrence

### City Attorney's Office

TO: Community Police Review Board Members  
CC: Brandon McGuire, Assistant City Manager  
FROM: City Attorney's Office  
DATE: July 1, 2021  
RE: April 22, 2021 Meeting Follow-up

At its April 22, 2021, meeting, the Community Police Review Board (CPRB) posed a number of questions as follow-up to its review of the Lawrence Listens survey results. Staff appreciates the opportunity to weigh in and provides the following responses. Please note that the information contained in this memo is based upon current law and policy and is subject to change in the future. City staff stands ready to work collaboratively with the Board, and to assist in stakeholder engagement as the Board continues refining its draft ordinance.

***Question 1: How may the Board access additional training for its members?***

Board members expressed an interest in learning how they can receive additional training, such as the Citizens' Police Academy, with some reference to the Board actually *requiring* the availability of such training from the City Manager. As currently written, in its most recently revised draft, the Board may:

“[R]eceive training, as directed by the City Manager or designee to assist the Board in its duties. Such training may include, but is not limited to, police use of force, de-escalation, and training to ensure the Board's understanding of the police department's current complaint investigation procedures. Any training that the Board receives shall be provided by a trained professional in the fields of law, Racial or Other Bias-Based Policing, law enforcement, and other such fields as the City Manager, in consultation with the Chief, deems appropriate.”

The City Manager providing some oversight of training helps ensure oversight of spending and compliance with approved budgets, for any case in which a future Board may seek to attend a training located outside of Lawrence, for example. Staff would recommend the Board identify its training needs, work with staff to determine budgetary needs, then work within the annual budget to accomplish training goals.

***Question 2: What are the limits regarding the Board's ability to engage in an investigation of a complaint against a member of the Police Department?***

One of the Board’s limitations is its lack of subpoena power. Calling or compelling witnesses to speak—whether officers or non-law enforcement—could be challenging.

Another limitation relates to an officer’s Fifth Amendment rights during disciplinary proceedings. While the Board can be empowered to review investigations conducted by the police department, it would be limited by law in its ability to *conduct* investigations itself due to self-incrimination laws under the protections recognized by *Garrity*.<sup>1</sup> *Garrity* is a watershed United States Supreme Court decision that considered how the Fifth Amendment right against self-incrimination applies in law enforcement disciplinary settings.<sup>2</sup> The Court held that police officers are not “relegated to a watered-down version of constitutional rights,”<sup>3</sup> and that statements which a law enforcement officer is compelled to make under a threat of discipline cannot subsequently be used against the officer in a criminal prosecution.<sup>4</sup>

It is unclear whether *Garrity* could be applied to compel an officer to answer questions before an oversight board. The question was considered once previously by a Colorado appellate court, and that court concluded that, because the oversight board was not the officers’ employer, it could not compel statements.<sup>5</sup> Similarly, in this case, the Board is not the “employer” of the officers and would most likely be unable to compel an officer to answer certain questions.

Workload is an additional consideration when analyzing the limitations on the Board’s ability to engage in an investigation. If the Board were to review all complaints made to the police department, rather than only those complaints investigated by the Office of Professional Accountability, there would likely be a tremendous amount of document and video review for the Board, necessitating careful planning for the frequency of Board meetings.

It is also important to note that, generally, the Board is comprised of members who are not intimately familiar with police matters, and who do not currently possess the knowledge of police procedure and legal standards. That can prove challenging when tasked with determining whether an officer acts reasonably and within policy or the law.

Funding is also a consideration, because investigations will likely cost money, and there is currently no funding mechanism for this Board. Although the monetary figure may not be significant, there nevertheless may be a cost associated with storing and making copies of records, as well as potential mileage if members must drive to a particular location to interview a witness.

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<sup>1</sup> *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616 (1967).

<sup>2</sup> Aitchison, Will (2020). *The Rights of Law Enforcement Officers* (8<sup>th</sup> Edition) (p. 178). Portland, Oregon: LRIS Publication.

<sup>3</sup> *Garrity*, 385 U.S. 493, 500 (1967)

<sup>4</sup> Aitchison, Will (2020). *The Rights of Law Enforcement Officers* (8<sup>th</sup> Edition) (p. 178). Portland, Oregon: LRIS Publication.

<sup>5</sup> *City and County of Denver v. Powell*, 969 P.2d 776 (Colo. Ct. App. 1998). See also, Kristen Chambers, *Citizen-Directed Police Reform: How Independent Investigations and Compelled Officer Testimony Can Increase Accountability*, 16 Lewis & Clark L. Rev. 783, 811 (2012) (“[M]ost oversight agencies do not have the authority to impose a consequence for an officer's failure to testify,” and “the power to compel testimony must technically reside with a disciplinary figure” that is not an oversight board.

One final potential limitation includes balancing a Board investigation with a criminal prosecution or civil litigation, as the Board’s concurrent involvement may impact other pending legal matters.

The Board may wish to clarify precisely what type of involvement it seeks to have in an investigation, and keep in mind the previously mentioned challenges that it will likely be confronted with in an expansion of its authority.

***Question 3: What is the appropriate involvement of the Board in reviewing complaints that are referred to the District Attorney’s Office by the Police Department?***

Board members questioned whether the revised ordinance should address the review of complaints that are concurrently referred to the District Attorney’s Office (or Municipal Court) by the police department, expressing some sensitivity for avoiding interference with an ongoing criminal prosecution.

The Board could conduct a cursory review of complaints before they are investigated. In that case, the Board would do so in executive session and would be subject to the breach of privacy provision as provided for in the ordinance. On the other hand, in-depth reviews, or even investigations by the Board, could be problematic.

Whether a particular Board investigation would impact a criminal prosecution depends on the facts of a particular case. As mentioned previously, there may be risk that the Board’s investigation—or perhaps even its final decision—could impact pending prosecution, by potentially influencing a jury pool or casting an unfair light on a particular person.

***Question 4: Should other types of diversity be included when determining “ethnic and racial diversity” of the Board?***

Section 1-2505 of the CPRB ordinance states that the Mayor and the Governing Body shall, when making appointments to the Board, include Community Members who reflect the “racial and ethnic composition of the community.” This language is a carry-over from the previous Board, the Citizen Advisory Board for Fair and Impartial Policing, and comes directly from the state statute having authorized that board. K.S.A. 22-4610(c)(3)(A) states in relevant part that community advisory boards should be composed of “participants who reflect the racial and ethnic community,” and are tasked with advising and assisting in policy development, education and community outreach and communications related to racial or other biased-based policing by law enforcement officers and agencies.

Additionally, Resolution No. 7224, which adopts standard policies and procedures relating to advisory boards, committees, and commissions of the City, requires the Mayor, in selecting appointees to City advisory boards, to “strive to reflect the diversity of the community in appointments, including, but not limited to: income level, race, sex, religion, color, national origin, ethnicity, age, ancestry, familial status, gender identity, and sexual orientation.” City of Lawrence, Kan., Res. No. 7224 (Sept. 19, 2017).

While that Resolution is fairly comprehensive, the Board could further expand or clarify the requirement of a diverse membership, so long as such language would not conflict with any existing law or existing City policy. At this time, staff is unaware of any such conflict.

***Question 5: Can the revised ordinance be more specific as to what exactly disqualifies a person from being on the Board and potentially remove the requirement for a background check?***

There is currently no law or rule that requires the City to perform a criminal background check as a prerequisite to a person's appointment to a City advisory board, generally. But for this Board specifically, a criminal background check was previously recommended as one of the qualifications during the drafting of the current ordinance to ensure objectivity and to prevent bias on either side. A requirement that Board members undergo a criminal background check may be more restrictive, but it can also be eliminated; it is a question for the Board to consider in determining what is most practical.

***Question 6: How do we define "conflict of interest" as a disqualifier of Board membership?***

Finally, Board members questioned how "conflict of interest" should be defined. Generally, municipal officers are "fiduciaries and trustees of the public interest," and their position is one of "public trust created in the interest of, and for the benefit of, the people."<sup>6</sup> Currently, the ordinance does not address "conflict of interest" per se, but the list of qualifications of board members was included to minimize conflicts. In addition, Resolution No. 7269—which establishes the City's Ethics and Professional Conduct Policy—applies to advisory boards, and provides a list of items that would render an advisory board member in violation of the policy, including a reference to conflict of interest. City of Lawrence, Kan., Res. No. 7269 ( Nov. 6, 2018) (effective Jan. 1, 2019.).<sup>7</sup>

If, upon review of this Resolution, the Board has additional questions or wishes to clarify this particular question, staff would be happy to respond more specifically.

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<sup>6</sup> *Governing Body Handbook, A Reference for Elected Municipal Officials* (19<sup>th</sup> Edition) (p. 18). Topeka, Kansas: The League of Kansas Municipalities.

<sup>7</sup> Consider also that the Kansas Governmental Ethics Commission is a state agency tasked with administering, interpreting, and enforcing laws related to conflicts of interest, and ensuring the public's right to information about the financial information of public officials.