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February 3, 2023

Leon Todd
Milwaukee Fire and Police Commission
200 E. Wells Street, Room 705

RE: Proposed SOP Mandating Release of Video Footage of Officer-Involved Incidents that Result in Death or Great Bodily Harm

Dear Mr. Todd,

On November 11, 2022, you requested the City Attorney's Office's assistance in reviewing a proposed Standard Operating Instruction ("SOP") for the Milwaukee Police Department ("MPD") that would require MPD to release video footage of any officer-involved death or critical incident within 15 days of the incident. Specifically, you asked:

1. Whether there are any legal issues that the Milwaukee Fire and Police Commission ("FPC") should be aware of before it begins substantive discussion on the matter;
2. Whether there is anything in Wis. Stat. § 175.47 or any existing Milwaukee Area Investigative Team ("MAIT") that would prohibit MPD from releasing video footage within the specified timeframe; and
3. Whether any record confidentiality laws would prevent MPD from releasing part or all of a video within the specified timeframe.

In January of 2023, an amended version of the proposed SOI was posted online as proposed Standard Operating Procedure ("SOP") 575 – Video Release Policy, with a number of changes having been made. A copy of this amended version was not provided to the City Attorney's Office; however, assuming that your preference is for the most recent version of the proposal to be reviewed, the most recent version of the Proposed SOP is the version that we have reviewed.

One significant distinction of note between the two versions is that while the proposed SOI related to video footage of any "officer-involved death or other critical incident," the proposed



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SOP instead relates to video footage of any “incidents that result in death or great bodily harm.” Proposed SOP 575.00(B). Despite the broad nature of this new description, it is clear, based on proposed SOP 575.00(A) and 575.75(A), that the proposed SOP is still only intended to cover incidents where an MPD member is involved, rather than any video footage in the possession of MPD that depict death or great bodily harm.¹

After reviewing the proposed SOP, it is the opinion of the City Attorney’s Office that nothing per se prohibits the Milwaukee Fire and Police Commission (“FPC”) from adopting an SOP which dictates when MPD must release video footage of any officer-involved incidents that result in death or great bodily harm; however, there are a number of laws, public policies and contractual obligations that the FPC should be aware of before beginning substantive discussion on whether to adopt the proposed SOP. While these considerations do not outright prohibit the disclosure of body-worn camera footage, some impact the timing of the release, and may dissuade the FPC from adopting an SOP that would require MPD to release body-worn camera footage within 15 days of an incident. In other instances, it is the opinion of the City Attorney’s Office that certain provisions in the proposed SOP should be amended to ensure that the City does not have its ability to have any officer-involved deaths timely and properly investigated, and to prevent exposing the City to further legal liability.

A detailed description of the proposed SOP, and the legal considerations that the FPC should be aware of, are set forth below. As the answers to all of your questions involve potential legal issues, each consideration is addressed individually rather than as a specific response to each of your specific questions.

THE PROPOSED SOP

The proposed SOP generally provides that, within 15 days of one of the following types of incidents, MPD must release video evidence of:

- (1) Any officer-involved death as defined by Wis. Stat. § 175.47(1)(c);
- (2) Any other critical incident as defined in SOP 575.05(B); and
- (3) Any incident involving the death of a person where a department member discharges a firearm, even if the death was not the result of the firearm discharge by the department member.

¹ Even though proposed SOP 575.75(A) sets forth which types of video footage are subject to release under the proposed SOP, you may wish to amend the language in 575.00(B), to ensure that there is no confusion as to the purported purpose of the proposed SOP.

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Proposed SOP 575.15(A).² These three types of incidents are referred to below as “officer-involved incidents that result in death or great bodily harm.”

Currently, the definitions of “officer-involved death” and “other critical incident” in the proposed SOP are as follows:

- An “*officer-involved death*” is defined in the proposed SOP as “A death of an individual that results directly from an action or an omission of a law enforcement officer while the law enforcement officer is on duty or while the law enforcement officer is off duty but performing activities that are within the scope of his or her law enforcement duties.” Proposed SOP 575.05(A).
- A “*critical incident*” is defined in the proposed SOP as “an incident involving a department member that results in death or great bodily harm to a person that is caused by a member’s actions, occurs while in police custody, or any incident that the Chief of Police, or his/her designee (must be Assistant Chief or Inspector rank) declare a critical incident.” The proposed SOP also notes that any injury to a person as a result of a firearm discharge by a department member, not resulting in death, is also considered a critical incident. Proposed SOP 575.05(B).

Notwithstanding the above, the proposed SOP indicates that video footage shall not be released if disclosure would otherwise be prohibited by law or court order. Proposed SOP 575.25(A). There are also provisions in the proposed SOP that would allow redactions to the footage to protect juveniles, victims of crimes, and the privacy interests of those who appear in the video. Proposed SOP 575.25(B). Redactions are also allowed to protect the privacy interests of those who appear in the video, and to obscure depictions of nudity, extremely disturbing images or sounds, and gruesome bodily injuries. Proposed SOP 575.25(C). In officer-involved incidents that result in death or great bodily harm, the proposed SOP would allow the footage to be redacted, edited or withheld based on requests from the person’s next of kin. Proposed SOP 575.25(D). No other editing or alteration of video footage is to be permitted. Proposed SOP 575.25(E).

Although the proposed SOP includes a provision requiring MPD to make reasonable attempts to notify certain individuals and entities prior to the release of video footage, there is no requirement that any specific individuals or entities actually receive such notice, other than the

² Despite the above reference to statute, the proposed SOP also includes its own definition of what constitutes an “officer-involved death,” which is substantively identical to the definition found in Wis. Stat. § 175.47(1)(c). As a drafting recommendation, you may want to make it clearer either that the definition of “officer-involved death” is set forth in 575.05(A), or that the definition of “officer-involved death” in 575.05(A) reflects that the definition is taken from Wis. Stat. § 175.47(1)(c).

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District Attorney's Office and any outside agencies investigating the officer-involved death or critical incident. None of these individuals or agencies have the ability to block MPD from releasing the video footage, other than the next of kin, as set forth above. *See* Proposed SOP 575.30 and 575.25(D).

In instances where the release of video footage could (1) implicate the safety of depicted individuals, such as department members, witnesses, and bystanders, or (2) impact the integrity of an active investigation, or (3) disclose confidential sources or investigative techniques, or (4) violate the constitutional rights of an accused individual, or (5) infringe on the next of kin's interest in viewing the video prior to its release, the proposed SOP allows MPD to delay the release of the video footage, provided that the FPC Executive Director is provided a statement summarizing the reasons for the delay. Any decisions to delay the release of the records are to be reassessed at least every 30 days, with a new statement submitted to the FPC Executive Director at that time. Proposed SOP 575.35.

The delayed release of video footage is intended to be the exception rather than the rule. The fact that the investigating agency has a high workload, the investigation remains ongoing, and the fact that the circumstances surrounding an incident are not fully known, are not reasons, by themselves, for delaying the release of the video footage. Proposed SOP 575.35(C).

The proposed SOP also provides that in instances involving an officer-involved death or the death of an individual where an MPD member discharges a firearm, but that discharge does not result in that individual's death, MPD must make a reasonable attempt to notify the individual's next of kin, and to allow the next of kin to view the video footage within 48 hours of the incident. This requirement does not apply if there is good cause to delay the release of the video footage, as set forth above, or if the next of kin is a witness or otherwise involved in the incident. Proposed SOP 575.30(A).

A copy of the most current proposed SOP that was reviewed for the purposes of this Opinion is attached.

LEGAL CONSIDERATIONS

-The Milwaukee Area Investigative Team Agreement and Protocol

Wisconsin Statute § 175.47(2) provides that law enforcement agencies such as MPD must adopt a written policy regarding the investigation of officer-involved deaths involving officers of that agency. The policy must require that any criminal investigation of such an incident be conducted by at least two investigators who are employed by a different law enforcement agency. Wis. Stat. § 175.47(3)(a). These investigators are required to conduct the investigation in an expedient manner, and then provide a report to the local District Attorney. Wis. Stat. § 175.47(5)(a).

In compliance with Wis. Stat. § 175.47, MPD has entered into a intergovernmental cooperation agreement with other surrounding law enforcement agencies which dictates how investigations of officer-involved deaths are to proceed. In this agreement, the signatories, to be known collectively as the Milwaukee Area Investigative Team (“MAIT”), agreed to establish a formal Protocol to control investigations into: (1) Officer-involved, duty related applications of deadly force which result in death or wounding of a subject; (2) Death, or injury which may result in death, to a subject while in police custody, detention or control; (3) Officer initiated actions or omissions in which death, or injury which may result in death, including traffic accidents resulting from police pursuits; and (4) Any other officer-involved critical incident that involves suspected criminal action that results in death, or injury which may result in death, including but not limited to off duty or non-duty related incidents. In instances where the severity of the injury to the subject resulting from the officer involved action is uncertain, the agreement specifies that the provisions of Wis. Stat. § 175.47 are to be applied.

The MAIT Protocol was last revised on April 1, 2022. It includes several provisions relating to whether relevant video or other evidence can be released while the investigation is ongoing. The first related provision is located in the section titled “**Investigative Requirements**,” and provides:

- Investigators will maintain the integrity of the investigation by following the rules of evidence throughout the investigation and consulting with and obtain the permission of the prosecutor prior to releasing any evidence, to include 911 tapes, or witness statement, video, etc.

MAIT Protocol, Apr. 1, 2022, pg. 7 (emphasis added).

The second related provision is located in the section titled “**Involved and Witness Officers and the Viewing of Digital Evidence**,” and discusses when digital evidence, such as body-camera footage, can be viewed by an involved officer or officer who is a witness. It provides:

- Formal interviews of involved or witness officer(s) should be conducted without the officer(s) having any prior review of related squad or dash camera video, surveillance or body mounted camera video, electronic control device downloads or other definitive evidence. This best practice investigative technique allows investigators the opportunity to obtain a statement that reflects the officer’s observations, perceptions, thoughts and feelings.

MAIT Protocol, Apr. 1, 2022, pg. 13 (emphasis added).

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The third related provision is located in the section titled “**Evidence Storage/Retention,**” and provides:

- Evidence retention; *No evidence shall be released* or destroyed *without the consent or agreement of the agencies involved in the criminal investigation.* Once the criminal prosecution is completed, all property owned by private citizens will be released in accordance with state law. All involved agencies shall receive their evidence back as soon as practicable and it will be up to the involved agency to hold evidence pending any civil litigation that may arise from the incident. This may include inventoried property owned by private citizens.

MAIT Protocol, Apr. 1, 2022, pg. 14 (emphasis added).

The last related provision is located in the section titled “**Case Files,**” and provides:

- All original reports, statements, photographs, *videos* and other investigative documentation shall be maintained by the lead investigative agency. The lead investigative agency head or records designee shall safeguard the investigative product until the final ruling by the District Attorney of the county of occurrence.

MAIT Protocol, Apr. 1, 2022, pg. 16 (emphasis added).

Read together, these provisions prohibit MPD from releasing any video of officer-involved deaths or critical incidents while any investigation is ongoing without: (1) obtaining the permission of the prosecutor; (2) ensuring that the release does not occur prior to the interviews of any involved and witness officers or officers; and (3) obtaining the consent or agreement of the agencies involved in the investigation. The protocol also makes it clear that the outside investigating agency is the law enforcement agency tasked with maintaining relevant video footage and safeguarding the investigation, not the law enforcement agency who employs the Department member who was involved in the death or critical incident.

Under the proposed SOP, MPD would be required to release most video evidence of any officer-involved incidents that result in death or great bodily harm within 15 days, regardless of whether MPD has obtained the permission of the prosecutor or any outside agencies involved in the investigation. While the proposed SOP does indicate that MPD must consult with and seek feedback from the District Attorney’s Office and any outside investigating agency, it does not include language that would prohibit MPD from releasing the video evidence in the event that the District Attorney’s Office and/or outside investigating agency object to the release of the footage.

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Similarly, there is nothing in the proposed SOP that would prohibit MPD from releasing the video footage prior to the outside investigating agency having had the opportunity to interview all involved and witness officers. The proposed SOP does allow MPD to delay the release of video footage when the integrity of the investigation could be compromised; however, the proposed SOP also makes it clear that such a delay is intended to be the exception rather than the rule, and is not to be used in every instance. Additionally, if the reason for the delay is an outside investigating agency's high workload, the fact that an outside investigation is still ongoing, and/or the fact that there are still unknown circumstances surrounding an incident, MPD would be unable to delay the release of video footage, even if disclosure would impact the integrity of the investigation, and despite the fact that these are issues outside of MPD's control.

Although the MAIT Protocol includes these prohibitions on the release of video footage, the Protocol indicates that any relevant statutes, case law ruling, department rules and/or policies, on contents of the collective bargaining agreement shall take precedence over the Protocol, should the contents of the Protocol conflict. MAIT Protocol, Apr. 1, 2022, pg. 3. The department's SOPs are likely to be properly deemed departmental rules and/or policies; especially considering that MPD does not have a set of "rules" or "policies" separate from the SOPs and SOIs that it follows. As a result, it is our opinion that the FPC does have the ability to enact the proposed SOP, even though it does not include requirements that the district attorney and investigating agency consent to the release of the footage, and does not prevent the release of the footage prior to the investigatory interviews of the involved or witness officers.

Although we believe that the FPC has the power to adopt the proposed SOP in its current form, we stress that there appear to be good reasons why the MAIT Protocol agreement includes these prohibitions, and that there may be serious consequences if the FPC does not amend the proposed SOP to bring it in line with the contractual obligations set forth above.

For example, if video footage of an officer-involved incident that results in death or great bodily harm were to be released prior to the criminal investigators having had a chance to interview all of the involved or witness officers, it could potentially color the testimony of those witnesses, who will now have had the opportunity to conform their stories to what is shown in the footage. Depending on the nature and scope of the investigation, 15 days may not be enough time for the investigating agency to interview all involved or witness officers. Rights granted to officers through collective bargaining may also make it difficult to complete all involved or witness officer interviews within 15 days.

Similarly, it may not always be readily apparent within 15 days whether the release of video footage of an officer-involved incident that results in death or great bodily harm will impact the investigation. Evidence might not surface until, for example, 20 days after an incident. In such a scenario, the premature release of the video footage might impact the investigating agency's ability to capitalize on that newly discovered evidence.

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Most importantly, if the FPC were to adopt a proposed SOP that mandates the release of video footage of officer-involved incidents that result in death or great bodily harm, it is possible that the outside law enforcement agencies may refuse to investigate these incidents in the City of Milwaukee. Under the terms of the MAIT Protocol agreement, any agency can withdraw from the agreement upon providing written notice of their withdrawal to the other agencies 30 days in advance of the date of withdrawal. Wisconsin Stat. § 175.47 mandates that MPD cannot criminally investigate officer-involved deaths that involve an MPD officer-involved death, but it does not mandate that any specific law enforcement agency, such as the Wauwatosa or West Allis Police Departments, have to perform the investigation. As a result, if all outside law enforcement agencies withdraw from the MAIT agreement as a result the proposed SOP, and enter into a separate MAIT agreement that does not include MPD, MPD will be left in a scenario where no investigation whatsoever can be performed of any officer-involved death other than investigations performed by state or federal law enforcement agencies. Such a scenario is a significant risk to the City's ability to ensure these incidents are properly and timely investigated, and would not be in the public interest.

As a result of the above, the City Attorney's Office recommends that the proposed SOP be amended such that it conforms with the provisions of the MAIT Protocol.

Copies of the most recent MAIT agreements and MAIT Protocol provided by MPD are attached to this Opinion.

-Rights of Crime Victims and their Families

The Wisconsin Constitution provides that victims of crime are to be treated with dignity, respect, courtesy, sensitivity and fairness. Wis. Const. art I, § 9m. In 2020, Wisconsin residents voted via ballot referendum to adopt what is referred to as "Marsy's Law," which buttressed already existing rights of crime victims, made those rights self-executing, and added, among other things, a right to privacy for crime victims. Wis. Legis. Ref. Bureau, *2017 Enrolled Joint Resolution 13: Constitutional Amendment Approved on First Consideration Relating to the Rights of Crime Victims* (Mar. 2018), available at https://docs.legis.wisconsin.gov/misc/lrb/lrb_reports/lrb_reports_2_3.pdf, last visited Jan. 27, 2023. Marsy's law has been struck down by a Dane County Circuit Court; however, that decision was stayed pending appeal, and Marsy's Law continues to be in effect as of the date of this Opinion.

Similarly, Wis. Stat. ch. 950 creates rights for victims and witnesses of crimes. The legislative intent behind chapter 950 is to ensure that "all victims and witnesses of crime are treated with dignity, respect, courtesy and sensitivity; and that the rights extended in [Wis. Stat. ch. 950] to victims and witnesses of crime are honored and protected by law enforcement agencies..." Wis. Stat. § 950.01.

On May 13, 2021, the Wisconsin Attorney General issued an Advisory on how Marsy's Law affects public records, such as body-worn or dash camera footage in the possession of a law enforcement agency. The Attorney General indicated that when determining whether to release records pertaining to victims of crime in response to public records requests, there is no absolute bar to the disclosure of such records, but that the following public-policy interests favoring the non-disclosure of such records may include:

- Protecting the privacy of victims by avoiding any unnecessary public attention or possible harassment of victims;
- Affording dignity, respect, courtesy, and sensitivity to victims by minimizing victims' further suffering, exploitation, re-traumatization, and re-victimization;
- Protecting the confidentiality of victims' personally identifiable information and contact information when necessary to afford victims reasonable protection from the accused or to ensure victims' safety;
- Preventing any economic, physical, or psychological effects upon victims that release of records or information might cause; and
- Facilitating victims' cooperation with the investigation and prosecution of crimes.

Wis. Dep't of Just., *Office of Open Government Advisory: Marsy's Law and Public Records* (May 13, 2021), available at <https://www.doj.state.wi.us/sites/default/files/news-media/OOG%20Advisory%20-%20Marsy%27s%20Law.pdf>, last visited on Jan. 27, 2023.

The Wisconsin Attorney General advised that while Marsy's Law does not distinguish among types of crimes or victims, public policies evidenced elsewhere can often make clear the circumstances in which individuals should have a heightened privacy interest, such as cases involving victims of violent or sensitive crimes or crimes involving victims who are minors. The Wisconsin Attorney General also noted that, based on the definition of a "person" in Wis. Stat. § 990.01(26), partnerships, associations and bodies politic or corporate can be considered victims of crime. In such a scenario, the Wisconsin Attorney General advised that when a victim of a crime is a business, the interest in protecting the victim's privacy weighs less heavily. *Id.*

While the Wisconsin Attorney General's Advisory examined Marsy's Law in the context of responding to public records requests, the public policies identified in the Advisory exist outside of the public records law, and should be considered by the FPC when it deliberates on whether to adopt the proposed SOP.

Marsy's Law allows crime victims to bring causes of action against a municipality or police department based on a failure to treat them with dignity, respect, courtesy, sensitivity and fairness. Consequently, if a crime victim opposes the release of video footage of a critical

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incident in which they are involved, and MPD released the footage as required by the proposed SOP, it could expose the City to liability.

The definition of “crime victim” includes “a person against whom a crime has been committed,” and, if that individual is deceased, his or her family members or a person with whom the victim resided. Wis. Stat. § 950.02(4)(a). As such, it should be noted that, depending on the circumstances of an incident, a crime victim could include not only a citizen or a business, but also an MPD member, or, if the MPD member is deceased, the MPD member’s family member or an individual with whom the deceased MPD member resided. In such a scenario, an MPD member, or, if the MPD member is deceased, one of his or her family members or co-habitants, would have the ability bring a cause of action against the City, in the event that they are not treated with dignity, respect, courtesy, sensitivity and fairness in compliance with the public policy interests identified above.

As the City should not be in a position where it is re-victimizing crime victims or their families by improvidently releasing video footage, and because there is potential liability as a result of such a release, the FPC should carefully consider the above-referenced statutes and public policies regarding the rights of crime victims when it begins its deliberations on whether to adopt the proposed SOP.

It is also the recommendation of the City Attorney’s Office that the proposed SOP be amended such that it allows MPD to withhold or redact video footage if it has reason to believe that disclosure of that footage would re-victimize a crime victim, or a deceased crime victim’s family members or co-habitants, in the manner described above. Although the most recent proposed SOP does include provisions that provide that MPD must make reasonable efforts to notify certain individuals prior to the release of video footage, and does allow a deceased individual’s next of kin to block the release of video footage, it is our opinion that these provisions are not strong enough to ensure that MPD does not release video footage or portions of video footage that would re-victimize a crime victim, or a deceased crime victim’s family members or co-habitants, as conceived in the Wisconsin Constitution, ch. 950, and Marsy’s Law.

-Statutory Exemptions

While no statute in Wisconsin prohibits the FPC from creating an SOP that would require MPD to release video footage of officer-involved incidents that result in death or great bodily harm, a number of statutes preclude MPD from disclosing specific content in such footage. It is our opinion that the current version of the proposed SOP allows for the redaction or blurring of such content, as it includes a provision that provides that MPD shall not release video footage where prohibited by law or court order. *See Proposed SOP 575.25(A).*

Statutes that could impact the release of video footage are set forth below, in the event that the FPC wishes to amend the proposed SOP to ensure that the MPD is clearer on what to look for

when reviewing applicable video footage prior to disclosure. This is not an exhaustive list of exceptions; just a short list of statutes that have a high probability of being implicated.

- **The Driver's Privacy and Protection Act**

The Driver's Privacy and Protection Act ("DPPA") prohibits recipients of "personal information" from the Department of Transportation ("DOT") from redisclosing that information, unless one of 14 exceptions is found to apply. 18 U.S.C. § 2721(c). If an exception applies, the recipient must still keep a record of every person and entity that the information was disclosed to for five years. *Id.*

"**Personal Information**" is defined as "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. § 2725(3).

In evaluating DPPA claims, courts have held that an individual who obtains personal information from an individual's driver's license is obtaining the information from the DOT. *See e.g. Pavone v. Law Offices of Anthony Mancini, Ltd.*, 205 F.Supp.3d 961 (N.D. 2016). As such, if an individual's driver's license, or information that was obtained from the DOT (such as an accident report that's being filled out in a squad using TRACs), appears in video-footage associated with an officer-involved incident that results in death or great bodily harm, that driver's license or information must be redacted from the video prior to its public disclosure.

- **Law Enforcement Records of Children and Juveniles**

Law enforcement officers' records of children and juveniles, as well as records of adult expectant mothers of unborn children, are prohibited from being disclosed by a law enforcement agency absent a statutory exception or court order. Wis. Stat. §§ 48.396(1) and 938.396(1)(a). These prohibitions would apply to video footage of officer-involved incidents that result in death or great bodily harm, as video footage is a record. Wis. Stat. § 19.32(2).

Additionally, the Wisconsin Supreme Court has opined that the constitutional right to privacy of juvenile crime victims was a valid reason for nondisclosure of a video recording where that juvenile crime victim was discussed, if the victim could be identified from the video and would likely be re-traumatized by its disclosure. *Democratic Party of Wis. v. Wis. Dep't of Justice*, 2016 WI 100, ¶¶ 28-32, 372 Wis. 2d 460. Note that this case was analyzed under the public records law, and did not address an SOP mandating the release of video footage by a specified date.

The proposed SOP already includes language that specifically mandates that video footage of juveniles be redacted or edited to ensure that the identity of any juvenile is protected, prior to disclosure. The only potential change that the FPC may wish to make to this current language is to make it clearer that this prohibition also applies to the adult expectant mothers of unborn children, as set forth in Wis. Stat. § 48.396(1).

- **Wisconsin's Address Confidentiality Program**

It is possible that video footage of an officer-involved incident that results in death or great bodily harm could implicate the address of a participant in the state's address confidentiality program. In such a scenario, MPD would be prohibited from disclosing the address of a program participant, including a disclosure of video footage that depicts the address, unless disclosure of the video footage is ordered by a court. *See* Wis. Stat. § 165.68(4)(d)1. It is not always disclosed to local law enforcement who is a participant in the state's address confidentiality program. To the extent that a participant's identity is known, however, MPD would have an obligation to redact or blur any address of a program participant in any video footage of an officer-involved incident that results in death or great bodily harm, prior to disclosure.

-Wisconsin's Public Records Law

Video footage, including body-worn camera footage, is a public record, and subject to the right of inspection and copying under Wisconsin's Public Records law. *See* Wis. Stat. §§ 19.32(2) and 165.87(3)(b). When a public records request is made for video footage of an officer-involved incident that results in death or great bodily harm that is in the possession of a law enforcement agency, that footage has to be reviewed before it can be released, as there are laws that can prohibit the disclosure of some or all of the footage. In the event that no laws prohibit the footage from being released, records custodians are required to evaluate public policies prior to release of the footage. If a custodian determines that public policies favoring nondisclosure outweigh public policies favoring disclosure, the custodian can withhold records or portions of records, on that basis. This is known as the "balancing test."

It is important to note that the balancing test and many of these laws only apply if the video footage is being released in response to a public records request. Consequently, any laws specific to the release of video footage in response to a public records request would not apply in instances where the MPD is releasing video footage of an officer-involved incident that results in death or great bodily harm as required by the proposed SOP.

Where complications could arise are in instances where MPD has a pending public records request open for video footage of an officer-involved incident that results in death or great bodily harm at the same time that the proposed SOP mandates that the footage is to be released. It is possible that a record subject could file an action against MPD, claiming that by releasing the video footage while a public records request is still pending, MPD violated an applicable legal

requirement that it deny requests for that same footage under the public records law. In the event such an action is filed, the City Attorney's Office is confident that passage of the proposed SOP prior to the receipt of any public records request specific to a given officer-involved incident that results in death or great bodily harm, along with a history of compliance with the proposed SOP, would likely nullify such an argument. But in order to minimize this risk, it is recommended that MPD close out any open public records requests for video footage of this nature prior to the specific date that the proposed SOP mandates that the footage be released.³

Even though certain statutes are only triggered when a public records request is filed, it is important to note that some of these statutes are indicative of public policy, which the FPC may wish to take into account when it discusses whether to amend and/or adopt the proposed SOP. Relevant statutes and case law that the FPC may wish to be aware of are as follows:

- **Wis. Stat. § 19.36(2) Law Enforcement Records.** Except as otherwise provided by law, whenever federal law or regulations require or as a condition to receipt of aids by this state require that any record relating to investigative information obtained for law enforcement purposes be withheld from public access, then that information is exempt from disclosure under [the public records law];
- **Wis. Stat. § 19.36(8) Identities of Law Enforcement Informants.**
...
(b) If an authority that is a law enforcement agency receives a request to inspect or copy a record or portion of a record under [the public records law] that contains specific information including but not limited to a name, address, telephone number, voice recording or handwriting sample which, if disclosed, would identify an informant, the authority shall delete the portion of the record in which the information is contained or, if no portion of the record can be inspected or copied without identifying the informant, shall withhold the record unless the legal custodian of the record... makes a determination, at the time the request is made, that the public interest in allowing a person to inspect, copy or receive a copy of such identifying information outweighs the harm done to the public interest by providing such access...
- **Wis. Stat. § 19.36(10) Employee Personnel Records.** Unless access is specifically authorized or required by statute, an authority shall not provide access under [the public records law] to records containing the following information...

³ Public records requests can be closed out by fulfilling the request, denying the request, or fulfilling part of a request and denying the remainder the remainder of the request. A denial of all or part of a public records request is only allowed when nondisclosure is required by statute or common law, or where the record custodian has determined that information is not subject to disclosure after proper application of the balancing test.

(b) Information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation...

- **Wis. Stat. § 165.87(3) Body Cameras and Law Enforcement**

...
(c)

1. It shall be the public policy of this state to maintain the privacy of a record subject who is a victim of a sensitive or violent crime or who is a minor and that access to data from a body camera used on a law enforcement officer that record such a record subject shall be provided only if the public interest in allowing access is so great as to outweigh that public policy. In that case, the record subject's face and anything else that would allow the record subject to be identified may be redacted using pixelization or another method of redaction. The presumption under this subdivision regarding the privacy of a record subject who is a victim of a sensitive or violent crime does not apply if the record subject, or his or her next of kin if the record subject is deceased, does not object to granting access to the data. The presumption under this subdivision regarding the privacy of a record subject who is a minor does not apply if the parent or legal guardian of the record subject does not object to granting access to the data.
2. It shall be the public policy of this state to maintain the privacy of a record subject who is in a location where the record subject has a reasonable expectation of privacy and that access to data from a body camera used on a law enforcement officer that record a record subject in such a location shall be provided only if the public interest in allowing access is so great as to outweigh that public policy. In that case, the record subject's face and anything else that would allow the record subject to be identified may be redacted using pixelization or another method of redaction. The presumption under this subdivision does not apply if the record subject does not object to granting access to the data...

- ***Linzmeyer v. Forcey*, 2002 WI 84, ¶30, 254 Wis. 2d 306**

“[R]ecord[s] of a law enforcement investigation...can be particularly sensitive. Law enforcement records are generally more likely than most types of public records to have an adverse effect on other public interests if they are released. First and foremost, there is a strong public interest in investigating and prosecuting criminal activity, and when the release of a public record would interfere with an on-going prosecution or investigation, the general presumption of openness will likely be overcome. Similarly, the release of

some police records might endanger the safety of persons involved in that report – another strong public policy reason which would work against release.”

- ***National Archives and Records Admin. v. Favish, 541 U.S. 157, 167-171 (2004)***
“[W]e think it proper to conclude from Congress’ use of the term “personal privacy” that it intended to permit family members [of suicide victims] to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions. This does not mean that the family is in the same position as the individual who is the subject of the disclosure. We have little difficulty, however, in finding in our case law and traditions the right of family members to... limit attempts to exploit pictures of the deceased family member’s remains for public purposes...”

...
[W]e hold that FOIA recognizes surviving family members’ right to personal privacy with respect to their close relative’s death-scene images. Our holding is consistent with the unanimous view of the Court of Appeals and other lower courts that addresses the question... Neither the deceased’s former status as a public official, not the fact that other pictures had been made public, detracts from the weighty privacy interests involved.”

The proposed SOP already includes references to some of the public policies set forth above, such as the provisions that allow MPD to redact footage to protect juveniles and victims of crime, to protect the privacy interests of others who appear in the video footage, and to obscure images of nudity or gruesome bodily injuries. But the current version of the proposed SOP does not allow for the redaction of information that could identify a confidential informant, or interfere with an ongoing investigation or prosecution, or put state aid at risk, or interfere with a family member of a deceased individual’s right to privacy. The proposed SOP does allow MPD to delay releasing footage that could identify a confidential source or to protect the integrity of an active investigation, but it indicates that such footage must ultimately be disclosed, that such a delay should be the exception rather than the rule, and would not be allowed in instances where the reason for the delay is that the investigating agency has a high workload, the fact the investigation is ongoing or the fact that the circumstances surrounding an incident are not fully known.⁴ Proposed SOP 575.35(C).

To the extent that the FPC has concerns about the identities of confidential informants, the integrity of ongoing investigations or prosecutions, the potential loss of state aid, and the privacy

⁴ It must be noted that in instances where the investigating agency is an outside law enforcement agency, MPD will have no knowledge as to whether the release of relevant video footage within 15 days of an incident would identify a confidential source or prejudice the integrity of an active investigation, or whether the reason that an investigation is still active is because of high workload or unknown circumstances. In order to gain such knowledge, MPD would have to communicate with the outside investigating agency, which, in certain instances, would seem to run contrary to the intent behind Wis. Stat. § 175.47 - that law enforcement agencies do not become involved in the investigations of their own members in incidents involving an officer-involved death.

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rights of a deceased individual's family members, it may wish to amend the proposed SOP to add language to address those concerns.

-Safety Concerns

The public records law allows information to be redacted from records if the release of the information could pose a risk to an individual's safety; however, broadly sweeping, generalized safety concerns have been held to be an insufficient reason for redacting records under the public records law. *Milwaukee Journal Sentinel v. Wis. Dep't of Admin.*, 2009 WI 79, ¶ 63, 319 Wis. 2d 439. Instead, there needs to be a particularized safety concern that the custodian can point to in order to redact the information that, if released, could pose a risk to an individual's safety. *State ex rel. Ardell v. Milwaukee Bd. of Sch. Dirs.*, 2014 WI App 66, ¶ 17, 354 Wis. 2d 471. The Wisconsin Attorney General has also opined that statutory provisions that would preclude an individual from obtaining copies of records that contains their own personally identifiable information due to safety concerns, such as Wis. Stat. §§ 19.35(1)(am)3.a. and c., may be considered as indicative of public policies recognizing safety concerns as a reason for withholding information when applying the balancing test. Wis. Dep't of Just., *Wisconsin Public Records Law Compliance Guide*, 35-36 (Oct. 2019).

Currently, the proposed SOP allows the MPD to delay the release of video footage, but not redact it, when the safety of individuals, including department members, witnesses, bystanders or other third parties, is at risk. Proposed SOP 575.35(A)(1). If MPD releases video footage containing information that it knows could endanger an individual's safety, and that individual is in fact harmed, it could expose the City to a significant amount of liability.

As a result, the City Attorney's Office strongly recommends that the proposed SOP be amended to allow MPD to redact or withhold portions of video footage where there is a particularized, specific risk that can be pointed to that shows that the release of the footage would endanger the safety of an individual.

-Wis. Stat. § 19.356/Woznicki Notices

Under Wis. Stat. § 19.356, if certain records are requested in a public records request, and the subject of the records is an MPD employee, MPD has to provide notice to a record subject either via certified mail or personal service, and the record subject then has 10 working days to bring an action in Milwaukee County Circuit Court to attempt to block MPD from releasing the requested records. See Wis. Stat. §§ 19.356(2)(a) and (4). If such an action is filed, MPD is prohibited from releasing those records until after the court case has concluded, and the time to appeal any adverse determination has lapsed. Wis. Stat. § 19.356(5). If the case is appealed, then MPD is likewise prohibited from releasing the records until after the appeal has concluded, and the time for seeking review of the appeal has lapsed. *Id.* If no court actions are filed, MPD can release the records at issue 12 working days after providing notice to the record subject. *Id.*

Wis. Stat. § 19.356 only applies if records are requested under Wisconsin's public records law. Consequently, there would be no obligation to provide notice under Wis. Stat. § 19.356 if the records at issue were being released in response to an SOP that required video footage of officer-involved incidents that result in death or great bodily harm to be released within 15 days.

Similar to the scenario discussed above in the public records law section of this opinion, complications could arise in instances where MPD has a pending public records request open for video footage of an officer-involved incident that results in death or great bodily harm at the same time that the proposed SOP mandates that the footage is to be released. In such a scenario, a record subject who is an MPD employee could file an action against MPD, claiming that MPD failed to comply with the notice requirements set forth in Wis. Stat. § 19.356, which would have afforded the record subject the right to file an action to attempt to block the release of certain records. In the event such an action is filed, the City Attorney's Office is again confident that passage of the proposed SOP prior to the receipt of any public records request specific to a given officer-involved incident that results in death or great bodily harm, along with a history of compliance with the proposed SOP, would likely nullify such an argument. There are also additional arguments that could be made with regard to the types of records that require pre-release notice under Wis. Stat. § 19.356 and the types of records that do not. Again, in order to minimize this risk, it is recommended that MPD close out any open public records requests for video footage of officer-involved incident that results in death or great bodily harm prior to the specific date that the proposed SOP mandates that the footage be released.

-Scope of Employment

The definition of an officer-involved death in the proposed SOP is taken from Wis. Stat. § 175.47(1)(c), the statute that mandates that officer-involved deaths must be investigated by investigators from an outside law enforcement agency. Considered an officer-involved death in this definition is the death of an individual while a law enforcement officer is off duty but performing activities that are within the scope of his or her law enforcement duties.

We recognize that this language comes from the statute; however, whether an off-duty officer is acting in the scope of employment is often the key factual determination that a jury is called to make in civil rights cases involving off-duty law enforcement officers. So as to not prejudice any potential defenses that the City may wish to assert in any future legal challenges involving an off-duty officer, we recommend that the FPC amend the definition of an officer-involved death in the proposed SOP so that instead of adopting a blanket definition of "officer-involved death" that includes all instances where an off-duty officer is acting within the scope of his or her law enforcement duties, it adopt a definition that includes instances where an officer *is asserting or could assert* that he or she was acting within the scope of his or her law enforcement duties.

-Other Considerations

Other considerations that the Board may wish to consider are as follows:

- ***Crime Prevention and Detection Strategies.*** The exemptions to the requirement of a governmental body to meet in open session under the Open Meetings Law are indicative of public policy, and may be used as grounds for denying public access to a record. Wis. Stat. § 19.35(1)(a). One such exception that law enforcement agencies can use to deny access to portions of video footage allows a governmental body to go into closed session to consider confidential strategies for crime detection or prevention. See Wis. Stat. § 19.85(1)(d). It should be noted that this exception is only applicable if (1) the strategies for crime detection or prevention are unknown to the general public, or (2) if the general public is aware of the strategies, but unaware that they are being employed in Milwaukee. To the extent that the general public is aware of the strategies for crime detection or prevention being used in Milwaukee, this would not be a valid reason for nondisclosure of any video. As this would be a public policy reason underlying a non-disclosure determination if certain video footage was requested under the public records law, the FPC may wish to consider whether to amend the proposed SOP to allow for a similar exception. Currently, the proposed SOP allows MPD to delay the release of confidential investigative techniques in certain instances, but it mandates that the information must eventually be released. See Proposed SOP 575.35(A)(3).
- ***Medical or Mental Health Information.*** While statutory and common law protections exist that prohibit the disclosure of health care and mental health treatment records, including statements of emergency detention, no such protections exist that relate to discussions or depictions of an individual's medical or mental health condition. See Wis. Stat. §§ 51.30 and 168.42; *Watton v. Hegerty*, 2008 WI 74, ¶ 30, 311 Wis. 2d 52. In order for authorities to redact such information from records being released in response to public records requests, these redactions must be made pursuant to the balancing test, after a weighing of public policies. Video footage of officer-involved incidents that result in death or great bodily harm may include the discussion or depiction of an individual's health or mental health condition. Currently, the proposed SOP allows for MPD to make redactions in order to protect the privacy interests of individuals and to obscure gruesome bodily injuries. See Proposed SOP 575.25(C). This may be sufficient enough language to allow for the redaction of discussions and depictions of an individual's medical or mental health condition; however, to the extent that the FPC wishes to specifically ensure that MPD knows to redact medical or mental health information when the release of such information is not in the public interest, it may wish to amend the proposed SOP to make this clearer.
- ***Secured Facilities.*** It is possible that video footage of an officer-involved incident that results in death or great bodily harm could include footage from inside a secured facility. To the extent that the release of video footage could reveal potential security risks in facilities such as power stations, water pumping facilities, hospitals, jails, facilities that

are used for safekeeping large sums of money, negotiable instruments, securities or other valuables, facilities used to store weapons, and other facilities with heightened security requirements, the FPC may wish to amend the proposed SOP to allow MPD to redact any parts of the footage that, if disclosed, would pose a security risk at the facility.

- **Timing of the Release.** Given the breadth of the considerations outlined above, the FPC may wish to reconsider the 15-day time period to allow for a longer period of time in between the date of the incident and the date the video footage is required to be released. Officer-involved incidents that result in death or great bodily harm are incredibly serious matters, and the more serious the incident, the more there is a public interest in ensuring that the matter is not rushed, and is able to be properly investigated. As the premature release of evidence pertaining to such an investigation may negatively impact or otherwise prejudice such an investigation, the FPC should consult with MPD to ensure that a time period for release is established in the proposed SOP that would not jeopardize any such investigations.

Additionally, it takes time to review and redact video footage, and depending on the nature of an officer-involved incident that results in death or great bodily harm, and the number of officers present at the scene, there could be a substantial amount of body and dash camera footage to review. Legal counsel may also need to be consulted regarding any questions on statutory and common law restrictions on the release of information contained on the video footage to be released. As the time calculation set forth in the proposed SOP is actual days and not working days, it does not give MPD staff much time to conduct the review and, if required, complete redactions, and to consult with legal counsel regarding any potential legal concerns.

- **Next of Kin.** The proposed SOP mentions “next of kin” a number of times; however, there is no definition as to what that term means. Black’s Law Dictionary includes a number of different definitions for the term next of kin, including “persons most nearly related by blood,” “nearest blood relations according to law of consanguinity,” “those entitled to take under statutory distribution of intestate’s estates...and may embrace persons, who in natural sense of word, and in contemplate of Roman law, bear no relation or kinship at all,” and “those who inherit from decedent under law of descents and distributions.” Merriam-Webster’s dictionary defines next of kin as “one or more persons in the nearest degree of relationship to another person.” Other dictionary definitions reviewed were consistent with the above definitions in that multiple people could be considered an individual’s next of kin. As a result, the FPC may wish to be more specific with regard to 1) who the next of kin notice obligation under proposed SOP 575.30(A) applies to; 2) which next of kin are provided with the opportunity to view the video footage within 48 hours of the incident under the same section; and 3) which next of kin have the ability to block the release of any video footage or portion of video

footage under proposed SOP 575.25(D). To the extent that the FPC wishes to include individuals who were in civil unions with a deceased individual or individuals who were co-habitants with the deceased, those individuals should be added to any next of kin definition adopted by the FPC.

The FPC may also want to create specific exceptions to the requirement that in instances involving an officer-involved incident that results in death or great bodily harm, MPD must provide the deceased individual's next of kin the opportunity to view video footage within 48 hours of the incident, unless the next of kin is a witness or otherwise involved in the incident. Proposed SOP 575.30(A). Assuming the proposed SOP provides additional clarity as to which family members constitute a deceased individual's next of kin, there may be instances where within 48 hours of the incident at issue 1) the identity of a deceased individual's next of kin is still unknown; 2) a deceased individual's next of kin cannot be located; and/or 3) it cannot be determined whether a deceased individual's next of kin was a witness or otherwise involved in the incident at issue. Provided that there is good cause consistent with the reasons for delaying the release of video footage under proposed SOP 575.35(A), the proposed SOP does allow MPD to take more than 48 hours to show video footage to a deceased's individual's next of kin; however, SOP 575.35(A) does not address instances where an individual's next of kin cannot be identified or located. As a result, the FPC may wish to provide more clarity as to what MPD should do in those instances.

CONCLUSION

Factoring in all of these considerations, it is the opinion of the City Attorney's Office that there are no legal issues prohibiting the FPC from adopting an SOP which dictates when MPD must release video footage of an officer-involved incident that results in death or great bodily harm. As set above, however, there are many instances where the FPC is required to redact or withhold videos or portions of videos, or instances where the FPC may wish to allow MPD to redact information from video footage before its release. It is also the opinion of the City Attorney's Office that certain provisions in the proposed SOP should be amended, as set forth above.

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If you would like the City Attorney's Office to further research any of the above considerations, or if you have any further questions related to the above Opinion, please do not hesitate to contact the undersigned.

Very Truly Yours,



TEARMAN SPENCER
City Attorney



PETER J. BLOCK
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