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Yi-An Huang
City Manager

To: City Manager, Yi-An Huang
From: Police Commissioner, Christine Elow
Date: June 26, 2023
Ref.: Calendar Item #2 of 5/22/23 Policy of Releasing Names of Officers and Use of Force

The purpose of this response is to address Calendar Item #2 of 5/22/23, whereby the "City Manager is hereby requested to work with PERF (the Police Executive Research Forum) and the relevant departments to establish a policy of releasing the names of officers involved in any use of force incident resulting in injury or death, including retroactively" and "report back to the City Council on this matter as soon as possible." In preparing this response, I have consulted with City Solicitor Nancy Glowa regarding the legal issues involved in this matter.

An officer-involved death, though rare, can be a high-profile event that draws media coverage and citizen concern. The Cambridge Police Department is committed to demonstrating its accountability to the community by supporting an impartial, transparent, and systematic investigation into any officer-involved death. The Department recognizes the importance of protecting the integrity of an investigation. In addition, the Department recognizes the increased importance of balancing that protection of the investigation's integrity with the need to fulfill the community's and the media's desire for timely information. This balancing of important interests has been amplified in the context of other significant nationally publicized incidents. In the first calendar year after the May 2020 murder of George Floyd at the hands of Minneapolis police, 49 states proposed legislation to increase transparency in policing.

The national standard for use of force policies that incorporate the timely release of identifying information associated with officers involved in a deadly use of force incident has evolved due in large part to the aforementioned significant incidents that have occurred around the country. Some of the most progressive law enforcement agencies around the country are beginning to shift from past practice to establishing policies around when and how an officer's name would be made available to the public in the event of a deadly use of force incident. However, the adoption of such an enhanced policy in the Commonwealth of Massachusetts would be precedent setting. Preliminary research indicates that no such policy currently exists within any Massachusetts police department.

When considering the context of the Cambridge Police Department's development of such a policy with transparency provisions, the Department should consider that the City has to balance the desire for transparency with:

- (1) the impact of the Middlesex District Attorney's Office's (MDAO) role in leading a criminal investigation, its current policy to request an inquest for every fatal officer-involved shooting in Middlesex County, and what is involved in the inquest process;
- (2) protecting the Cambridge Police Department's investigatory privilege relating to information pertinent to an ongoing criminal investigation; and

- (3) the involved officer's privacy rights as defined by Massachusetts and federal law.

For background, the MDAO and the Massachusetts State Police (MSP) assigned to the MDAO conduct a criminal investigation into any officer-involved shooting or other fatal event in Middlesex County. Any fatal event, including an officer-involved shooting, is a death investigation, so by law MDAO is required to "direct and control" the investigation.¹ The Rules of Professional Conduct² govern what information attorneys are permitted to disclose during any case. In addition to the rules that apply to all attorneys, prosecutors are also subject to Rule 3.8, which states that prosecutors cannot make any extrajudicial statements that "have a substantial likelihood of heightening public condemnation of the accused." While the Cambridge Police Department is not itself explicitly bound by Rule 3.8, the MDAO, as prosecutors, must take reasonable steps to prevent law enforcement from making any extrajudicial statements that "have a substantial likelihood of heightening public condemnation of the accused."

Additionally, the MDAO, under its current policy, has determined that it will always request that the state District Court conduct an inquest for all fatal officer-involved shootings in Middlesex County.^{3,4} An inquest procedure is governed by the state District Court's Standards of Judicial Practice: Inquest Proceedings (1990) ("Standards")⁵. All inquest documents, including the report, transcripts, medical examiner's report, and any evidence, are impounded during the course of a judicial inquest.⁶ A court cannot lift the impoundment until:

- (1) the DA's office files a certificate of no prosecution;
- (2) a grand jury returns a no bill⁷;
- (3) the criminal trial of the person named in the report as responsible for the death has been completed (although some information will be released upon arraignment of a defendant and as trial approaches); or
- (4) a judge in the Superior Court determines that no criminal trial is likely.⁸

In addition to the impoundment of documents in every inquest, the judge conducting an inquest has the discretion to issue a protective order that would prohibit any parties involved in the inquest from releasing any information.⁹

While there is an ongoing investigation, both the Cambridge Police Department and the MDAO hold an investigatory privilege over all information related to the investigation. The investigatory privilege allows the Department and the MDAO to withhold information from the public when, among other things, releasing the information would "probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest."¹⁰ When evaluating whether the Cambridge Police Department has waived the investigatory privilege, a court will examine how much information the Department has already disclosed publicly. If a court determines that the Department previously disclosed a substantial amount of information, a court will likely deem the Department to have waived the investigatory privilege.¹¹

In addition to the constitutional right to privacy, everyone in the Commonwealth has a broadly defined right to privacy against "unreasonable, substantial or serious interference" with their privacy.^{12,13} When evaluating whether the Cambridge Police Department has violated an involved officer's privacy rights, a

¹ G.L. c. 38, s. 4.

² The Rules of Professional Conduct govern the conduct of all attorneys licensed in Massachusetts.

³ [Inquest Policy on Fatal Officer-Involved Shootings | Middlesex County District Attorney's Office \(middlesexda.com\)](https://www.middlesexda.com/inquest-policy-on-fatal-officer-involved-shootings)

⁴ G.L. c. 38, s. 8.

⁵ <https://archives.lib.state.ma.us/bitstream/handle/2452/847411/ocm22225965.pdf?sequence=1&isAllowed=y>

⁶ Standard 4:03.

⁷ A refusal by the grand jury to indict.

⁸ Standard 4:04.

⁹ Standard 3:00.

¹⁰ *Bogas v. Chief of Police of Lexington*, 371 Mass. 59, 62 (1976).

¹¹ *Continental Assur. Co. v. Diorio-Volungis*, 51 Mass. App. Ct. 403 (2001).

¹² *Daury v. Smith*, 842 F.2d 9, 13 (1989).

¹³ G.L. c. 214, s. 1B.

court will balance the officer's privacy against the competing interests of the Department in protecting the integrity of the investigation. The Cambridge Police Department's interests as a law enforcement agency may differ from the interests of the Department as an employer. An individual's right to privacy is violated when there is a gathering and dissemination of facts of a private nature that results in an unreasonable, substantial, or serious interference with the individual's privacy.¹⁴ When considering the perspective of the Cambridge Police Department as an employer, the Department should consider the environment into which the name is released, whether the incident is of public interest, and whether the involved officer is already a public figure.¹⁵ The Department does not publicly name subjects of criminal investigations until there is an arrest, an indictment, or the court issues an arrest warrant. And while no published case in Massachusetts directly addresses whether a police department violates the privacy rights of an individual by naming that individual as the subject of a criminal investigation without a judicial finding of probable cause, officers have been subject to suit for violations of the right to privacy in other contexts.¹⁶

To help navigate complexities such as these, the Cambridge Police Department has contracted with the nationally recognized Police Executive Research Forum (PERF) to make recommendations for the Department and to help the Department evaluate areas for improvement following the review of the January 4th fatal police shooting of Arif Sayed Faisal. Part of this work includes a review of existing policies and helping draft the next-generation use of force model policy that will serve as a precedent in the Commonwealth and incorporate language of when, how, and what information will be released in the event of a deadly use of force incident involving a Cambridge Police officer. As part of this work, the Cambridge Police Department has procured sample use of force policies from some of the most progressive departments around the country. While those policies do not account for the complexities listed above, they provide a starting point for the discussion.

The most common policies require the release of an officer's name within 15 days of a use of deadly force incident, but only if there are no credible threats made against the officer and/or their loved one(s). Based on our analysis, these use of force policies provide a careful balance of right to privacy, while enhancing the legitimacy of the organization through its increased transparency. In any policy adopted by the Cambridge Police Department, we will weigh the effect of the public release of information on any ongoing investigation and upon any heightened privacy rights of all individuals involved. We are also closely evaluating the release of additional information beyond an officer's name and the implications of future variables such as body cameras. Due to the internal impact associated with integrating such language into the Department's use of force policy, the Cambridge Police leadership will engage both the Cambridge Police Patrol Officers Association (CPPOA) and the Cambridge Police Superior Officers Association (CPSOA) prior to establishing a more encompassing use of force policy.

We expect to have a final report from PERF within the next few weeks, after which we will finalize a draft policy and submit it to the two unions for review.

Regarding the January 4th fatal shooting of Arif Sayed Faisal, that investigation has proceeded to a judicial inquest, which is being conducted by the state District Court. We have explored this further, specifically as it pertains to the release of names of officers involved in past use of force incidents. The judge overseeing the inquest has issued an expansive protective order, preventing all parties involved, including the Cambridge Police Department, from releasing any additional information until the inquest is completed and the court issues a report.

In the unfortunate event of any future officer-involved fatalities, the Cambridge Police Department will follow its policy, currently in development, allowing for how, when, and what information will be released about the involved officer, fulfilling the Cambridge Police Department's commitment to transparency.

¹⁴ Branyan v. Southwest Airlines Co., 105 F.Supp.3d 120 (D. Mass 2015).

¹⁵ Ayash v. Dana-Farber Cancer Institute, 443 Mass. 367, 384 (2005).

¹⁶ Doe v. Town of Plymouth, 825 F.Supp. 1102 (1993).

We hope that this report provides sufficient background information and demonstrates how thoughtful the Department is when making these important evaluations. If there are any additional questions, information needed, or concerns regarding this matter, please let me know.

Respectfully,

A handwritten signature in blue ink, appearing to read "C. Elow", is positioned above the printed name.

Christine Elow
Police Commissioner