Dear San Francisco Police Commission,

During the July 8, 2020 Police Commission meeting, Commissioner Elias asked the Department of Police Accountability (DPA) to provide information related to recent litigation with the San Francisco Police Officer’s Association (POA). It should be noted that all events described below took place between March 31, 2020 and May 7, 2020; a time period during which the Commission was not in session based on the Public Health Order mandating a shelter-in-place in response to the COVID pandemic.

The litigation stemmed from the POA’s position that officers would not participate in DPA investigative interviews due to the COVID-19 pandemic. Two cases in particular brought the issue to a head. In one matter, DPA received a complaint in July 2019 about the Department’s use of force during a protest at Pride. That matter involved at least two arrestees, numerous officers that need to be questioned, and so much body-worn camera footage that DPA received the last round of video on or about April 2, 2020, after the shelter-in-place order went into effect. DPA then attempted to schedule interviews of both named and witness officers in that case. POA attorney Alison Berry Wilkinson told the investigator attempting to schedule the interviews that she and DPA Chief of Staff Sarah Hawkins were negotiating terms of the officer interviews.

DPA believed that all parties understood that essential interviews would be noticed, and officers could opt to (1) attend an in-person interview observing social distancing, (2) appear by video or telephone to be interviewed, or (3) sign a limited waiver of their Government Code section 3304 rights until the SIP order was lifted. For weeks, DPA negotiated in good faith to pin down dates and times for in-person interviews, at the request of Ms. Berry Wilkinson on behalf of the officers. Ms. Berry Wilkinson then wrote a letter to DPA arguing that in-person officer interviews, requested by her officers and required by the MOU, violated the SIP orders because DPA employees were not essential.
Ultimately, the officers refused to appear for interviews in any format. Instead, on May 6, 2020 the POA submitted a lawsuit for filing in Superior Court seeking injunctive relief. "COMPLAINT FOR DECLARATORY, INJUNCTIVE AND EXTRAORDINARY RELIEF; VERIFIED PETITION FOR WRIT OF MANDATE" filed on behalf of the entire POA. This filing argued that DPA was not essential and thus our directive that officers participate in interviews violated the Health Orders. This filing was initially rejected by the Court.

However, based upon that filing, Attorney Christopher Shea cancelled an upcoming interview in another case. Mr. Shea and DPA had agreed as to the date and time of that interview, and that the interview would proceed by video conference. Once the POA submitted the Writ for filing, Mr. Shea cancelled the interview and his client declined to sign the Government Code section 3304 waiver. That refusal caused DPA to refer that officer to Internal Affairs for discipline.

DPA took many steps and offered several alternatives for officer interviews to avoid litigation around this issue. DPA takes seriously its mandate to investigate complaints against members of the San Francisco Police Department (SFPD). Given the unprecedented COVID-19 pandemic and public health emergency, DPA made every effort to simultaneously fulfill its investigative obligations and balance health and safety concerns.

The City’s Memorandum of Understanding (MOU) with the POA requires DPA to conduct in-person interviews with officers. To balance that MOU requirement and health and safety concerns during the COVID-19 emergency, DPA offered, and continues to offer, two alternatives for officers to participate in investigative interviews: (1) appear telephonically or by video for the interview; or (2) sign a waiver of the one-year statute of limitations under the Public Safety Officers Procedural Bill of Rights Act (POBRA), Government Code § 3304 (Section 3304), to allow the interview to take place in person as required by the MOU, but at a later date. If officers decline both alternatives, then DPA is prepared to proceed with the in-person interviews under the MOU, while following all applicable public health guidance to ensure health and safety of participants.

In the case referenced above, the POA insisted on the in-person interviews under the MOU, but refused to participate in them because of the public health shelter-in-place orders. Additionally, the POA rejected DPA’s two alternate approaches. By rejecting all three of these options and arguing against the essential nature of DPA’s investigations, the POA demonstrated that this dispute was nothing more than a tactical tool to entirely avoid DPA investigations and potential discipline of officers if DPA finds misconduct. Finally, the POA argued that all interviews in this case should proceed by “Member Response Form” (MRF). While DPA used MRFs in many cases where that format was appropriate, the MRF was not an appropriate interview substitute for most officers in the Pride case, due to the complexity of the investigation and necessity of reviewing body-worn camera footage during the interviews.

The POA further frustrated DPA’s essential investigative duties by asserting that Governor Newsom’s April 19, 2020 Executive Order N-40-20 – extending by 60-days the one-
year statute of limitations contained in Section 3304(d) for imposing discipline on peace officers – does not apply to POA members.

The City Charter sets DPA’s mission and investigative obligations: “DPA shall promptly, fairly, and impartially investigate all complaints regarding police use of force, misconduct or allegations that a member of the Police Department has not properly performed a duty, except those complaints which on their face clearly indicate that the acts complained of were proper and those complaints lodged by other members of the Police Department. DPA shall use its best efforts to conclude investigations of such complaints and, if sustained, transmit the sustained complaint to the Police Department within nine months of receipt thereof by DPA.” (SF Charter §4.136(d).) Because of the importance of DPA’s investigative role, the Charter provides that “DPA shall receive prompt and full cooperation and assistance from all departments, officers, and employees of the City and County…” (SF Charter §4.136(jj).) Once it became clear that the shelter-in-place order was extending beyond the initial three week period, DPA maintained that its investigative function is essential to ensuring police officer accountability and therefore preserving public trust and confidence in those officers, the SFPD, and City government generally. Delaying investigations, and potentially missing the POBRA deadline to impose discipline where DPA finds misconduct, undermines DPA’s core and essential purpose.

DPA’s investigations are an essential government function and DPA must continue to perform those functions, even during this public health emergency, to meet its Charter obligation to promptly investigate complaints, and to ensure the statute of limitations under Section 3304 does not run on alleged misconduct, thereby preventing discipline if there is an adverse finding. While DPA believes that the Governor’s April 19 Executive Order extends the statute of limitations under 3304, because the POA did not expressly agreed to that position (and made contrary arguments in negotiations), DPA had no choice but to proceed. In addition, the 60-day extension under the Order, standing alone, was an insufficient basis to halt DPA investigations. Doing so would simply delay and build a backlog in pending investigations.

The POA’s position in this case – and with respect to DPA generally – was also at odds with officers’ conduct in other City matters. For example, POA members had appeared remotely for prehearing conferences on disciplinary matters with the assigned Police Commissioner. DPA attorney Stephanie Wargo-Wilson personally participated in one of these, where the officer and his attorney appeared remotely without objection. Similarly, the POA has not made the same objection to proceeding with or properly tolling IA interviews, demonstrating that the POA’s approach to DPA interviews was merely an attempt to single out DPA, a department which serves a critical role in police oversight and accountability, and ensuring public trust in the SFPD and its officers.

It should be noted that the May 6 filing was rejected by the court. On May 15, Ms. Berry-Wilkinson filed an Ex Parte Application on behalf of the entire POA, seeking to enjoin DPA from conducting in-person interviews because DPA investigators were not essential personnel, and alternative methods of interviews were available. However, the POA purported to suggest
only the MRF as an alternative. Later in the same filing, the POA erroneously stated that it had offered DPA the use of remote technology, but DPA had not accepted that offer.

Our City Attorney responded the same day (Friday), setting forth why DPA functions were essential and pointing out all the alternatives DPA previously suggested. The actual proposed order from the POA was almost exactly what DPA had been offering all along.

On May 18 (Monday), the case was heard and the Order that the Court ultimately issued was exactly what DPA had offered: officers had to (1) appear in-person for interview, (2) appear by remote technology, or (3) sign a waiver of their GC 3304 rights.

In the case that was the basis for the litigation, interviews conducted via Zoom took place the very next day.

Sincerely,

Paul Henderson
Executive Director
Department of Police Accountability