

# EUGENE CITY COUNCIL AGENDA ITEM SUMMARY



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## Work Session: Civilian Review Board Annual Report Presentation

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Meeting Date: June 23, 2010  
Department: Police Auditor  
*www.eugene-or.gov*

Agenda Item Number: B  
Staff Contact: Mark Gissiner, Police Auditor  
Contact Telephone Number: 541-682-5016

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### **ISSUE STATEMENT**

The Civilian Review Board will present its 2009 Annual Report to the City Council.

### **BACKGROUND**

The Civilian Review Board is required to annually present a report and overview of the work of the Police Auditor.

### **RELATED CITY POLICIES**

City of Eugene Ordinance Number 20374.

### **COUNCIL OPTIONS**

This items is advisory only.

### **CITY MANAGER'S RECOMMENDATION**

Not Applicable.

### **SUGGESTED MOTION**

Not applicable.

### **ATTACHMENTS**

A. Annual Report of the Civilian Review Board

### **FOR MORE INFORMATION**

Staff Contact: Mark Gissiner, Police Auditor  
Telephone: 541-682-5016  
Staff E-Mail: [mark.a.gissiner@ci.eugene.or.us](mailto:mark.a.gissiner@ci.eugene.or.us)

Eugene Civilian Review Board  
2009 Annual Report

**Introduction**

A primary goal of Eugene's Civilian Review Board ("Board") is to increase transparency and public confidence in the police complaint process. We evaluate the work of the independent Police Auditor, and may review complaints to provide comment, from a civilian perspective, about whether the complaint was handled fairly and with due diligence.

In 2009, the Board reviewed its first Community Impact case that occurred in October of 2008 at Broadway and Willamette. In a public meeting, Board members discussed, debated and probed the investigation, the Auditor's recommended adjudication, and the police administration decisions. The meeting provided a valuable and unique opportunity for the public to learn more about the events leading to the complaints, and how the complaints were investigated by the police department.

Aside from the community impact case, the Board also reviewed numerous other closed cases, all in open meetings. Again, discussing the complaints in public affords the community the opportunity to learn more about the complaint process, and to hear those complaints discussed openly and critically.

Internally, the Board and the City began its work with the new police auditor, Mark Gissiner. The Council also expanded the Board to seven members. Those additional members have broadened the Board's viewpoint and strengthened our voice.

We continue to work to increase transparency and public confidence. Board members contribute a substantial amount of time in this endeavor. We express our appreciation to the Eugene Police Department, the Council, and the citizens of Eugene for the confidence entrusted to us. All of us on the Board volunteer our time and our effort because we believe in the strength and the potential of this community.

Thank you for the opportunity to be of service.

Kate A. Wilkinson  
Board Chair

Tim Laue  
Vice-Chair

## **2009 Overview**

**In 2009 the Board performed eight case reviews including the first Community Impact Case** Throughout first eight months of the year, the Board monitored the status of the Community Impact case through the criminal proceedings and IA investigation.

February – Board training from Dr. David Murphy (Western Oregon University) on excessive force and the use of Tasers.

March – Dr. Snell Fontus joins the Board. A case review was conducted regarding issues of an unlawful arrest and an illegal search. The Board majority concurred with the Police Auditor’s recommended adjudication to sustain the allegations. Acting police auditor Dawn Reynolds was placed on administrative leave by the Council.

April – A Case review conducted regarding use of force/use of the Taser. Specifically, the case involved the use of a Taser on a mentally ill person. Unanimously, the Board concurred with the Auditor’s recommendation that the allegations be sustained. The review highlighted the need for refinement of the Taser policy with regard to its usage on people who are mentally ill and/or appear to be experiencing a psychotic episode.

May – Tim Laue is appointed to the Board. A case review held regarding use of force/use of the Taser. The board majority voted in agreement with the Auditor’s recommendation to sustain the allegations on use of force, and concurred with the recommendation and decision that the use of the Taser was within Policy. Mark Gissiner was hired by the Council as the new Police Auditor.

June – A case was reviewed regarding use of force. The review also raised policy issues of when officers should be required to seek medical attention for persons injured during arrest. The majority of the Board agreed with the Chief’s decision that the use of force was within Policy.

July – Mark Gissiner attends his first Civilian Review Board meeting. The case reviewed pertained to wrongful arrest, excessive force and courtesy allegations. The Review raised issues regarding the police department “party policy” – how loud parties should be dispersed while protecting the civil rights of individuals.

August – Bernadette Conover and Marisa Mendoza join the Board. The case reviewed pertained to constitutional rights, and courtesy involving a late night stop the complainant alleged to be discriminatory in nature. The Board majority agreed with the findings that the actions were within Policy.

October – The Board reviewed Eugene’s first community impact case during a public meeting at the downtown library. Six Board members participated. Ann Marie Lemire resigned from the Board shortly before the meeting and did not participate.

For several hours, the Board members reviewed, discussed and debated numerous aspects of the internal affairs investigation and report. The Board considered witness interviews, as well as interviews with the involved police officers and video of the events.

By a 4-2 vote, the majority of the Board concurred with the Chief that the allegations of use of force/use of the Taser were within Policy. On October 26, 2009, the Board held an additional meeting to discuss and de-brief the Community Impact case and to provide a forum for public comment on the case. The Council voted not to re-appoint Board Chair Richard Brissenden to an additional term.

November – Eric Van Houten and Steven McIntire join the Board. Kate Wilkinson is elected chair. The Board discussed the Auditor’s decision not to classify the Chinese student case as a community impact case.

December – In an effort to accommodate City Council members who might wish to attend meetings, the Board changed its evening meeting time to the second Tuesday of the month. The case review in December involved use of force, property seizure and handling, and mental health crisis response issues. The majority of the Board agreed with the finding that the use of force allegations were unfounded. The review highlighted areas of concern around mental health response/community caretaking and the need for clarification and caution in those areas.

### **Overall 2009 Board Summary of Case Reviews**

During 2009, the Board performed 8 case reviews. Issues of concern highlighted by those reviews included:

*Search and Seizure issues* – Need for increased and better EPD training on probable cause requirements and clear evidence of a consent to search in the absence of a warrant.

*Community care-taking doctrine* - Need for better understanding of when this doctrine is applicable and the limitations on the use of the doctrine. Need for better communication to citizens when the doctrine is used as the basis for a search, warrantless entry into a home, or detention of persons.

*Use of the Taser* – Continued concerns regarding use of the Taser as a pain compliance tool, and a need for refinement of department practices regarding Taser use on mentally ill subjects.

*Incident Escalation* - In several of our reviews, Board members noted that incidents seem to spiral quickly into active confrontation and conflict. The Board discussed the need for better de-escalation techniques (possibly more CIT training) with the hope that some situations can be brought under control without the use of force. Better de-escalation would lower the threat to officers, as well as subjects, and be more aligned with community values and community policing.

*Quality of IA Investigations* – Overall the quality of IA investigations is very good. Relevant witnesses are contacted and interviewed respectfully. Reports are generally thorough and complete. Nonetheless, the Board encourages Internal Affairs to seek continuous improvement in its investigative efforts and fact-finding reports, thus assuring the community that the investigations and reports are presented in a thorough, neutral and unbiased manner.

### **Other Activities**

At its June 2010 meeting, the Board finalized and adopted its Policies and Procedures Manual. Those Policies and Procedures are available for review. It is the Board's goal that adopting written guidelines will improve our processes and increase transparency regarding the Board's work.

### **Recommendations**

In the course of our reviews and other Board work, several areas of concern have emerged that we would highlight to seek guidance from Council. In particular, these concerns relate to the work of the Civilian Review Board and its unique role in Eugene's model of civilian oversight.

- **Community impact case designations** – Under the current ordinance, only the auditor designates community impact cases; and the perspective has been expressed that the Board should have a role in that decision.
- **Information/disclosure** - The Board continues to discuss, and is conscious of, the need for more openness and transparency in the complaint and auditor processes. To that end, the Board has discussed providing the auditor summaries, the on-going status reports of open and closed cases, the internal affairs reports, and the police administration case evaluations. Because of uncertainty surrounding the legal requirements of confidentiality and privacy rights for officers and individuals in some or all of these documents, the Board requested a legal opinion from the Oregon Attorney General on whether exceptions to specific public records statutes apply. The Attorney General declined to comment (see attached letter and request). The Board's goals are to increase transparency and public confidence and we believe that both goals are advanced by providing as much transparency and information as possible.

- **CRB authority to order cases reopened** - In our review of the Chinese student case,<sup>1</sup> a majority of the Board voted to order the Chief to re-open the investigation. The ordinance is silent as to whether the Board has the authority to order closed cases reopened. The ordinance clearly allows the Board to require the city to reopen the investigation with regard to community impact cases (See Ordinance Section 2.244(4)). However, the Eugene charter states that the city council shall authorize the civilian review board to “\* \* \* require that the city re-open an investigation; \* \* \*.” City Attorney Glenn Klein provided a March 5, 2010 opinion to Mark Gissiner and to Chief Kerns concluding that the Board does not have authority to re-open investigations in closed cases (copy attached). In our view, the ordinance is not clear on this point.
- **Definition of Good Cause exception to 6 month filing deadline** – The ordinance, Sec. 2.456 (1) (i) – (j), states that complaints shall be filed within 6 months of the incident, except for “good cause”. The ordinance does not define good cause, and thus, vests discretion in the auditor to determine good cause. The Board believes that a definition of good cause is warranted, and that an established definition would avoid any appearance of bias on the part of the OPA when dealing with untimely complaints.

In light of the above issues, and because we now have almost four years of experience with oversight in Eugene, the Board believes that it is time for a review of the Ordinance 20374 as it pertains to the Civilian Review Board, perhaps in a fashion similar to the process employed by the Council when it reviewed the ordinance as it pertained to the Auditor’s role early last year. In any event, we believe that a review and clarification of some of the ambiguities and concerns regarding the role of the Civilian Review Board, particularly as it relates to ordinance language, is called for and would be helpful in the performance of our work.

### **Police Auditor Assessment and Recommendations**

All seven Board members completed individual written reviews of the police auditor. The Board also discussed those reviews in a May 11, 2010 executive session meeting.

Overall, the Board concluded that the Auditor has provided strong support to the Board. Mr. Gissiner has established a good working relationship with Eugene Police while maintaining the necessary independence. He has a professional and diplomatic manner which is appreciated. He meets or exceeds expectations in all core areas assessed.

Per ordinance, the Auditor is working to implement a system to provide on-going, regular status reports with relevant data to the Board and that process needs to be completed.

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<sup>1</sup> The Board reviewed this case in February 2010 so it is not included in the 2009 case summaries. However, the Board wanted to bring the authority issue to the Council’s attention as soon as possible.

Also per ordinance, the Auditor is working to complete a specific training curriculum for the Board. In 2008 the Board adopted a requirement of eight hours of yearly training and the Auditor and Board are working to finalize training options presented to the Board for its consideration at our June meeting.

The Board has suggested the Auditor broaden community outreach efforts to include various and diverse groups, and to include board members in those educational and outreach activities. The auditor should continue efforts to improve alternative dispute resolution options (including mediation).

Complaint classification nomenclature remains an issue of concern. The use of “inquiry” as an initial classification should be clarified, and descriptions and guidelines should be adopted for subsequent classifications of ‘Service Complaint,’ ‘Policy Complaint,’ “Allegation of Misconduct” or a subsequent decision to ‘Dismiss’ for valid reasons. Such descriptions and guidelines will help minimize misunderstandings and provide clarity for all involved.

### **Evaluation of the Office of the Police Auditor**

In evaluating the functioning of the Office of the Police Auditor the Board has identified several areas of note:

The OPA should improve follow-up with complainants, including tracking and analysis of satisfaction with the complaint process.

There is a continued need for transparency and openness, including the provision of more information to the public.

Finally, we note that the rate of Auditor’s recommendations to the Chief for sustained Use of Force allegations fell in 2009. In 2008 there were forty-nine use of force complaints and three were dismissed or reclassified without subsequent action resulting in forty-six allegations. Eleven of those allegations received ‘sustain’ recommendations from the Auditor’s office. In 2008 the Auditors recommendation rate for sustained use of force allegations to the chief equaled 24%.

In 2009 there were forty-six use of force complaints and eight were dismissed without subsequent action resulting in forty allegations. Three of these allegations received ‘sustain’ recommendations from the Auditor’s office. In 2009 the Auditors recommendation rate for sustained use of force allegations to the chief equals 8%. These and similar trends should continue to be reviewed to identify underlying patterns and concerns.

## **Conclusion**

In 2009, the civilian oversight system continued to evolve and develop. The Board evolved through changes in membership and changes in the Office of the Police Auditor. The Board and the Auditor worked through Eugene's first community impact case and provided an invaluable public opportunity for review and discussion of the complaint process. We look forward to continuing our work and to improving our processes wherever possible. Thank you.





## Civilian Review Board

Kate Wilkinson, Chair  
Tim Laue, Vice Chair  
Bernadette Conover  
Snell Fontus  
Marisa Mendoza  
Steve McIntire  
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April 5, 2010

Mr. John Kroger, Esq.  
State of Oregon Attorney General  
Oregon Department of Justice  
1162 Court Street NE  
Salem, Oregon, 97301

Dear Attorney General Kroger:

On behalf of the City of Eugene Civilian Review Board (CRB) we are writing to seek clarity on issues involving the release of records to the public in investigative complaint cases reviewed by the CRB.

As Eugene considered the development of a model for civilian oversight, the concept of transparency was one of the primary principles emphasized. Legal opinions used in the development and implementation of the model clearly indicated that by choosing a “closed case” form of review the CRB could discuss and make available investigative files in cases that were found to be “unfounded,” “within policy” or “not sustained” and where no discipline was imposed.

The CRB is covered under four governing layers: by City Charter, by Council Ordinance, by a Labor Contract with the Eugene Police Employees Association (EPEA) and by collectively bargained protocols between the City, the Police Auditor and the EPEA.

The goal was to have those records made publicly available to show the “thoroughness, completeness and absence of bias” in the complaint investigation. Or, on the other hand, to indicate where the Board felt the investigations did not meet those same standards.

Now we are informed by the Eugene City Attorney that such is not the case, citing another statute that was not considered at the time the Council put the initial charter amendment before the community. Nor was the Council informed of the implications of the statute at the time. In part, that letter from the Eugene City Attorney’s office to the CRB states:

***“In sum, between ORS 181.854 and 192.501(12), unless an exception applies, records related to a personnel investigation of a public safety officer are exempt from disclosure, whether or not discipline is imposed.”***

In our view, the result of this is that the public will continue to remain in the dark regarding “quality assurance” of police complaint investigations and will be forced to rely upon the Board’s determination of the “thoroughness, completeness and absence of bias” in complaint investigations.

The Eugene City Attorney refers to exceptions in the statute but was not specific about what they are. In fact, there are four in ORS181.854(3):

- (a) When the public interest requires disclosure of the information.*
- (b) When the employee consents to disclosure in writing.*
- (c) When disclosure is necessary for an investigation by the public body, the Department of Public Safety Standards and Training or a citizen review body designated by the public body.*
- (d) When the public body determines that nondisclosure of the information would adversely affect the confidence of the public in the public body.*

We believe (a) and (d) are exceptions that apply to the work of Eugene’s Civilian Review Board, and we seek an opinion of the Attorney General with regard to these matters, particularly as it relates to public disclosure in relation to the two exceptions [(a) & (d)] of ORS 181.854 and whether they may apply to Eugene’s Civilian Review Board. Once we have that opinion to consider, we can decide on the next steps for the Board.

We believe the current State of Oregon public records laws provide no consistent standard for the release of administrative public safety records. Rather than well defined state requirements, the current laws seem to rely on subjective decisions by each respective jurisdiction. What may be considered of “significant public interest” in say, Medford, may not be considered of “significant public interest” in Salem. Public record laws should be State wide and clear. Relying on the subjective decisions of local governments erodes the confidence of citizens in their government because transparency is not clearly defined.

We also seek clarity as to who is authorized to release the records. In the case of the CRB, we are tasked with reviewing police investigative files and a few documents generated by the Police Auditor for the City of Eugene. Thus, with the vast majority of administrative records on police complaints, those records are generated by the Eugene Police Department. As the generator of an administrative record, is the Eugene Police Department the only entity authorized to release the record or, once in the possession of the CRB or Police Auditor, are they authorized to release to the public records originally generated by the police?

The final issue we seek clarity on is whether any collective bargaining agreements take precedence over state public records law. Currently in place is an EPEA contract and negotiated protocols that include clauses with regard to confidentiality and the public discussion of citizen complaints and administrative processes and decisions as a result of these complaints. We believe that this is an important question to be answered as well.

Our process to provide the public with printed material of police department administrative investigations would include redacting individual names and places so that the individual identities are more easily protected.

In the attachments are nine opinions of the City Attorney's office related to the development and implementation of the model of civilian oversight in Eugene. Four of these opinions are particularly pertinent to the discussion we had concerning closed case public records and bargaining issues at the last meeting:

*City Attorney Opinion dated March 1, 2005* [Pages 49-53 in attachment]

- Attorney opinion on impact of the Public Employees Collective Bargaining Act on civilian review.

*City Attorney Opinion dated June 7, 2005* [Pages 36-45 in attachment]

- Attorney opinion on legal issues related to Eugene's model of civilian oversight

*City Attorney Opinion dated July 8, 2005* [Pages 31-35 in attachment]

- Attorney opinion on legal issues related to Civilian Review Board requiring reopening of closed case investigations.

*City Attorney Opinion dated June 29, 2006* [Pages 23-28 in attachment]

- Attorney opinion on legal issues related to Civilian Oversight Ordinance Framework and Mandatory Subjects of Bargaining.

Of the four the opinion dated June 7, 2005 provides the best overview. Below we have also listed the Oregon Statutes and court rulings cited in these opinions.

#### Statutes relating to issues of public records

- Oregon Public Meetings Law
  - ORS.192.610(3); ORS.192.501(12); ORS.192.630(1)(3)
  - ORS 181.854 (most recently brought to our attention)

#### Court rulings relating to issues of public records

- *City of Portland v. Rice*, 308 Or 118, 775 P2d 1371 (1989)
- *City of Portland v. Anderson*, 163 Or App 550, 998 P2d 402 (1999)
- *City of Portland v. Oregonian Publishing Co.*, 2005 WL 1283302

#### Statutes relating to issues of collective bargaining

- Public Employees Collective Bargaining Act
  - PECCBA, ORS 243.650 through 243.782
    - ⌚ 243.672 (1)(e); 243.656; 243.650(7) (a-f)

#### Rulings relating to issues of collective bargaining

- *OPEU v. State of Oregon*, ERB UP-71-93, 14 PECBR 746 (1993)
- *Assoc of Oregon Corrections Employees v State of Oregon*, ERB UP-91-93, 14 PECBR 832 (1993)

*Portland Firefighters Association, Local 43 v. City of Portland*, ERB UP-99-94, 16 PECBR (245) 1995

• *Springfield Police Association v. City of Springfield*, ERB UP-28-96, 16 PEBCR 712 (1996)

• *Gresham Grade School District No. 4*, ERB C-61-78, 5 PECBR 2771 (1980)

• *Springfield Police Association v. City of Springfield*, ERB UP-37-94, 15 PEBCR 325, 332 (1994)

We look forward to your opinions on these important issues. We believe that to best ensure transparency and confidence in our governing bodies, public records laws in Oregon need to be better defined and less subjected to the current decentralized decision making at the local level. It is in the best interest of our state to provide as public records all administrative documents that do not expose personal information such as social security numbers, home addresses, etc. of our public safety forces. It is not our intent to expose individual public safety officials to embarrassment or exposure of mistakes. Rather, we believe that a broader public records mandate provides citizens the opportunity to review how government offices operate administratively.

Our liaison in this matter is Mark Gissiner, Eugene Police Auditor, 800 Olive Street, Eugene, Oregon, 97401; phone: 541-682-5005. He is available at your convenience if you have any questions or need additional information.

We look forward to your response.

Sincerely yours,

Kate Wilkinson, Chair  
City of Eugene Civilian Review Board



DEPARTMENT OF JUSTICE

1162 Court Street NE  
Justice Building  
Salem, Oregon 97301-4096  
Telephone: (503) 378-4400

April 14, 2010

Kate Wilkinson, Chair  
Eugene Civilian Review Board  
800 Olive Street  
Eugene, OR 97401

Dear Ms. Wilkinson:

We have received your letter dated April 5, 2010. It appears you are requesting an opinion from the Attorney General. Unfortunately, state law does not permit us to give an opinion or provide legal advice to the Eugene Citizen's Review Board.

Thank you for contacting the Oregon Department of Justice.

Sincerely,

A handwritten signature in black ink that reads "Tony Green".

TONY GREEN  
Director of Communications and Policy

DM1989682

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# MEMORANDUM

**Date:** March 5, 2010

**To:** Mark Gissiner, Police Auditor  
Pete Kerns, Police Chief

**From:** Glenn Klein 

**Subject:** CRB's Motion to Re-Open Investigation in Closed Case

At its February meeting, the Civilian Review Board (CRB) reviewed the closed case involving the use of a taser on a University student at his west Eugene apartment. At the conclusion of its review, the CRB adopted a motion directing the Chief to re-open the investigation. The purpose of this Memorandum is to discuss the CRB's authority to require that the Chief re-open an investigation.

As discussed below, whether the CRB has authority to require the re-opening of an investigation is tied to whether the investigation involves a "community impact case" or a "closed case." The Police Commission (in proposing the civilian oversight system), the Eugene Code (in authorizing and creating that system), and the Civilian Oversight Protocols approved by the former Police Auditor (in implementing that system), all differentiate closed cases from community impact cases, authorizing the re-opening of investigations for the latter, but not the former.

The civilian oversight system was adopted by the voters and the City Council based on the work and report of the Police Commission (Commission). In its July 25, 2005, report to the City Council (*Police Complaint System and Civilian Oversight Recommendations*), the Commission explained why it chose a hybrid model of oversight involving both a full-time auditor and a civilian review board. As explained in the Executive Summary, the Auditor would monitor internal investigations, "including ability to participate in interview, [and] **require additional investigation. . . .**" (Emphasis added.) The CRB, on the other hand:

[r]eviews and comments on investigations sent to it by the auditor . . . and **in specific situations**, can require the case to be re-opened for further investigation. (Report at 1, emphasis added.)

In developing its recommendations to the City Council, the Commission's committee on adjudication developed four distinct civilian review board models. The committee agreed that its preferred options were:

Bifurcated Investigation Model, where the board would oversee specific cases as they were being investigated and with the auditor, would develop findings on those cases prior to the Chief developing an adjudication; and

**Closed Complaint Review**, where a complainant can present concerns about the outcome of the case to the review board, which will review the file and develop findings on the case for delivery to the auditor and Chief of Police, **but would not impact the outcome of the investigation.** (Report at 7, emphasis added.)

The Commission's committee ultimately decided to combine elements of both of those options into a new model. The Report describes the new model as a hybrid oversight system consisting of both a full-time professionally staffed auditor's office and a CRB.

The role of the auditor's office is to provide a neutral location to lodge complaints and to actively monitor on-going internal affairs investigations to ensure objective, thorough and high quality investigations. . . . The role of the review board is to evaluate the case handling decisions and investigative recommendations of the auditor's office, and in a set of pre-established circumstances, assess how complaints are being investigated and responded to. (Report at 9.)

With respect to the auditor's role, the Commission provided the following additional explanation:

The auditor will actively monitor on-going investigations to ensure a thorough, objective, and timely process and a high quality end product.

.....

In his/her review of an investigation, **the auditor may require additional investigation** by internal affairs staff to ensure that, to the extent feasible, all relevant investigative leads were explored and the facts of the case have been fully established. (Report at 17 – 18; emphasis added.)

With respect to the CRB's role, the Commission differentiated between review of "closed cases" and review of "community impact cases." For "closed cases" the Commission explained the CRB's role as follows:

The closed case review is prospective in nature, the focus of which is to establish if the complaint system worked as intended in that particular case and to develop recommendations for process improvements. . . .

If the board agrees to a closed case review, it will be provided access to the full investigative file so that it can **make a reasoned judgment about the quality of the investigation and the rationale for the case disposition.** (Report at 20; emphasis added.)

Nothing in the Commission's report suggests that the CRB's role in closed cases includes the option of requiring the re-opening of a closed investigation. In contrast, the Commission made clear that the CRB should have that power with respect to community impact cases:

The board would have full access to all investigative materials related to these cases, in a non-public setting, in preparation for discussion of the case in a public meeting. The board will then convene to discuss the quality of the investigation and the outcome of the case with the auditor/lead investigator, and based on its discussion, **could**:

- Concur with the adjudication; and/or
- Develop findings regarding possible improvements about the investigative process, complaint handling practices, and/or other police procedures relevant to that case; and/or
- **Find that there were deficiencies in the investigation that impacted the outcome of the case, or that the adjudication was not supported by the facts in the case, and vote to re-open the case to examine those areas.** (Report at 21; emphasis added; footnote omitted.)

Thus, the Commission made a deliberate decision to differentiate between closed cases and community impact cases, recommending that the CRB have the authority to require re-opening of an investigation in a community impact case, but not in a closed case.

Following the voter's approval of the Charter Amendment that granted the City Council the authority to implement the Commission's recommended oversight system, the City Council adopted sections 2.240 – 2.246 and 2.450 – 2.456 of the Eugene Code. The first group of code provisions creates and empowers the CRB; the second group creates and governs the police auditor. As discussed below, those code provisions create an oversight system like the one proposed by the Commission.

The City Council granted the police auditor the power to actively monitor all internal investigations and to require that the City undertake additional investigation in any of them. Section 2.456(2)(d) states:

The police auditor shall actively monitor internal investigations to ensure a thorough, objective, and timely investigation, and is authorized to:

1. Participate in complainant, employee and witness interviews;
2. **Require the city to undertake additional investigation.** (Emphasis added.)

In contrast, the City Council granted the CRB the authority to re-open investigations in only selected cases and for a limited number of reasons. As the City Council explained when it established the CRB, the primary purpose of the CRB's review was focused in a different direction than the police auditor's. Subsection 2.240(1) states, in part:

In general, the civilian review board shall evaluate the work of the independent police auditor, and may review completed complaint investigations involving



sworn police employees to provide comment, from a civilian perspective, about whether the complaint was handled fairly and with due diligence.

Subsection 2.244(2) describes the CRB's role with respect to *closed cases*. That subsection provides that the CRB may review completed investigations and adjudications, and then "shall . . . report on such case(s), which may include comments on the handling of the complaint, the fairness and thoroughness of the investigation, and the reasonableness of the adjudication."

Subsection 2.244(4) specifies the powers and responsibilities of the CRB with respect to *community impact cases*. For these cases, the City Council granted the CRB the authority to direct the re-opening of an investigation, provided the CRB made certain findings. More specifically, subsection (4) directs the CRB, within 30 days of receiving a community impact case, to do one or more of the following:

- (a) Concur with the case adjudication;
- (b) Develop recommendations regarding the handling of the complaint and the investigation process, and/or identify other relevant policy or procedural issues for further consideration;
- (c) **Require the city to reopen the investigation if it finds either:**
  - 1. The investigation was incomplete or inadequate, and the civilian review board has reason to believe that additional investigation is likely to reveal facts that could change the case adjudication; or
  - 2. The adjudication reached by the city is not supported by substantial evidence. (Emphasis added.)

Since the oversight system affected the rights of the union members under the collective bargaining agreement, before the civilian oversight system could be fully implemented, the City and the police union needed to bargain over a set of protocols. (Under state law, the City cannot unilaterally change the rights granted to members of unions under collective bargaining agreements.) In September of 2007 the City and the Eugene Police Employees' Association (EPEA) reached agreement on a set of protocols (the Protocols); these protocols were signed by both then-Police Auditor Cris Beamud and EPEA President Willy Edewaard.

The Protocols provide, in part, that the auditor can require the City to undertake additional investigation in any investigation that the police auditor believes to be incomplete; that the CRB can require the re-opening of an investigation for a community impact case (under certain circumstances); and that the CRB cannot take action in a closed case that can affect the outcome of the case. The Protocols on "Auditor Review" state, in part:

- 2. The police auditor may require the city to undertake additional investigation if the investigation is deemed incomplete.

The Protocols on CRB review of "Community Impact Cases" contain the same language quoted above from the Eugene Code regarding when the CRB can require the City to re-open an investigation. Protocol 7 (page 6) states that the CRB may require re-opening of a community impact case if the CRB finds that the investigation was incomplete or inadequate, or was not supported by substantial evidence.

The Protocols on CRB review of “Closed Cases,” however, do not allow for re-opening of investigations. Instead, the Protocols state, in part:

1. . . . [T]he Civilian Review Board [may] review the complaint investigation and adjudication decision for a determination whether it was handled fairly and with due diligence. . . . This review shall not impact the outcome of the case but the board may make recommendations concerning the investigation.
2. The purpose of the Civilian Review Board review of closed cases includes the following:
  - a. Identify deficiencies regarding the complaint system (intake and classification).
  - b. Develop recommendations for process improvements.
  - c. Make judgments about the quality of the investigation.
  - d. Make judgments about the rationale for the case disposition.
  - e. Increase transparency by the public discussion of a complaint.

The Protocols, the Eugene Code and the Police Commission’s Report all contain similar provisions. They authorize the auditor to actively monitor the internal investigations and require additional investigation if the auditor believes that more investigation is needed. They authorize the CRB to require an investigation be re-opened in a **community impact case**, but only if the CRB makes certain findings. These documents do **not** authorize the CRB to require an investigation to be re-opened in a closed case. The reasons for differentiating the handling and review of closed cases as compared to community impact cases – some of which are based on policy concerns and others based on legal concerns<sup>1</sup> – are explained in the Police Commission’s report to the City Council.

It is my understanding that some CRB members identified the City Charter as authorizing the CRB to require re-opening of any investigation, whether the case is a community impact case or a closed case. The City Charter provisions regarding the police auditor and the CRB govern the actions that the City Council takes. Specifically, those provisions begin with the phrase “[t]he city council shall. . .”, thus applying only to the City Council, not directly to the police auditor or the CRB. Because the charter provisions govern the actions of the City Council, the charter cannot serve as an independent source of the CRB’s authority. Rather, it is the City Code that establishes the CRB’s authority. These code provisions both empower the CRB as well as limit its powers. The CRB cannot perform a function not authorized by the City Council. In addition, the CRB cannot require the City to undertake an action that is inconsistent with a valid collective bargaining agreement: state law requires the City to abide by its collective bargaining agreements.

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<sup>1</sup> Some of the major legal concerns include constitutional protections against double jeopardy and the provisions of the collective bargaining agreement which preclude a second bite at the apple after a decision has been rendered on a complaint and the case closed. Specifically, re-opening a completed investigation is contrary to adopted policies and protocols and, therefore, would likely violate the City’s contract with the EPEA. Also, unless the City had incomplete knowledge of the facts, re-opening a closed case would arguably constitute a violation of the officer’s constitutional double jeopardy, just cause and due process rights. “Closed cases” and “community impact cases” are in very different procedural postures when they get to the CRB. In a community impact case, the Police Chief has not yet made a final decision, so the Chief can re-open the investigation, consider additional information, and then make a final decision. In a closed case, the Chief has made a final decision (which is why this is called a “closed case”) weeks, or perhaps months, before the CRB discusses the case.

In addition, it is worth noting the history of the Charter provision that was cited. Section 15a of the Charter (External Review of Police) originally granted certain powers to the City Council to establish and empower a police auditor and a CRB. In reliance on that new Charter section, the City Council adopted the Eugene Code provisions discussed above. In 2008, the City Council referred to the voters an amendment to section 15a that changed the Council's authority (to create and empower an auditor and the CRB) to an obligation that the City Council do so. In referring that measure, the City Council made clear that the purpose of this new amendment was to prevent a future City Council from eliminating the auditor or the CRB, and that the 2008 amendment would **not** require the City Council to make any change in the existing code language (as the existing language would be consistent with the amended section 15a).<sup>2</sup>

Based on the discussion above, the CRB's authority to require the City to re-open an investigation is limited to community impact cases; this authority does not include closed cases. As the Police Commission explained in its Report: "The closed case review is prospective in nature, the focus of which is to establish if the complaint system worked as intended in that particular case and to develop recommendations for process improvements."

GK:abm

cc: Mayor and City Council  
Jon Ruiz

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<sup>2</sup> It is also worth noting that the Charter makes the same distinction between the CRB's authority related to closed cases and cases that have not yet reached finality as the code and other documents discussed above do. Specifically, section 15a(2) of the Charter separately addresses the CRB's authority to "review the **completed investigation and adjudication** of complaints filed against sworn police officer" and the CRB's authority to "require that the city re-open an **investigation**." This Charter provision, consistent with all of the documents discussed above, distinguishes between the CRB **reviewing** a closed/completed case and the CRB requiring that an **investigation** be re-opened. As discussed above, at the point that the CRB can require a community impact case to be re-opened, that case is not yet complete.

**08-09 Use of Force  
Closed Case Allegations  
Statistics**

**2008 (from Auditor 2008 annual report)**

**Auditor Reco**

<u>Closed Allegations</u>	<u>Use of Force</u>	<u>Dismissed</u>	<u>Reclassify</u>	<u>Investigated</u>	<u>Unfounded</u>
Jan-Mar	9	0	0	9	3
Apr-Jun	5	1	0	4	2
Apr-Jun	9	0	0	9	0
Jul-Sep	6	1	0	5	1
Jul-Sep	8	0	0	8	5
Jul-Sep	6	0	0	6	2
Oct-Dec	6	0	1	5	2
	<b>49</b>	<b>2</b>	<b>1</b>	<b>46</b>	<b>15</b>

**2009**

<u>Closed Allegations</u>	<u>Use of Force</u>	<u>Dismissed</u>	<u>Reclassify</u>	<u>Investigated</u>	<u>Unfounded</u>
Jan-Jun	16	7	0	9	6
Jul-Dec	30	1	0	29	4
	<b>46</b>	<b>8</b>	<b>0</b>	<b>38</b>	<b>10</b>

## mmended Adjudications

<u>Within Policy</u>	<u>Insuff Evidence</u>	<u>Sustained</u>
4	1	1
0	2	0
8	1	0
0	0	4
0	0	3
1	0	3
3	0	0
<b>16</b>	<b>4</b>	<b>11</b>

<u>Within Policy</u>	<u>Insuff Evidence</u>	<u>Sustained</u>
3	0	0
21	1	3
<b>24</b>	<b>1</b>	<b>3</b>