



POLICE DEPARTMENT

NEW YORK, N.Y. 10038

LAWRENCE BYRNE
DEPUTY COMMISSIONER, LEGAL MATTERS

July 17, 2015

Honorable Bill de Blasio
Mayor of the City of New York
City Hall
New York, NY 10007

Honorable Melissa Mark-Viverito
Speaker
The New York City Council
250 Broadway, 18th Floor
New York, NY 10007

Honorable Mark G. Peters
Commissioner
Department of Investigation
80 Maiden Lane
New York, NY 10038

Honorable Phil Eure
Inspector General
Office of the Inspector General – NYPD
80 Maiden Lane
New York, NY 10038

Dear Mayor de Blasio, Speaker Mark-Viverito, Commissioner Peters and Inspector General Eure:

Pursuant to Local Law 70 and the New York City Charter, the New York City Police Department (NYPD) hereby submits its response to the Office of Inspector General for the NYPD's (OIG-NYPD) April 2015 Report entitled "Using Data from Lawsuits and Legal Claims Involving NYPD to Improve Policing" (April Report). Prior to the release of the April Report, the NYPD was far along in working on several objectives that are related to the OIG's current recommendations. As such, the NYPD agrees with all of the recommendations in the OIG's April Report and which were already being implemented. Specifically, the OIG recommended: 1) the NYPD should perform a qualitative review of the most relevant data contained within legal claims and lawsuits against the NYPD; 2) the NYPD should create an interagency working group between the NYPD, the Comptroller's Office and the Law Department to improve their police-involved litigation data collection, coordination, and exchange; and 3) the NYPD should provide the public with details about the NYPD's early intervention system and its litigation data

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analysis team and solicit suggestions for further development. The NYPD is already in the process of implementing each of these recommendations. There are, however, certain barriers that exist that prevent the Department from adopting all aspects of some of the OIG's recommendations at this time. This response will include an explanation of those limitations and discuss other projects undertaken that relate to the OIG's recommendations.

1) Analysis of Litigation Data

With respect to the first recommendation that the NYPD perform a qualitative review of relevant data within legal claims and lawsuits filed involving police action, the NYPD agrees that analysis of litigation data can be a useful tool for enhancement of the NYPD's practices department-wide as well as in the review of officer performance. A quantitative and qualitative review of relevant litigation data can help law enforcement: (i) identify patterns and trends of police misconduct that warrant remediation; (ii) enhance the current Early Warning Systems already in place to identify at-risk officers; (iii) improve and positively shift Department culture overall; (iv) identify issues at both the officer and departmental level, in an effort to decrease both costs to the City¹ and legal claims/ lawsuits filed against the NYPD and (v) enhance the Department's reputation by improving the relationships between NYPD officers and the communities we serve.

In order for litigation data to be valuable, however, the data must be derived from sources that are verifiable, credible and must be attained from high quality, fact-driven investigations. Litigation data derived from simply reviewing a Notice of Claim or Complaint and information on its face without any investigation, for example, has little probative value. Data derived from settlement practices that are driven for reasons unrelated to the substance of the allegations is also of little if any probative value and needs to be discounted when analyzing litigation data.

As the April Report noted, the practice of collecting and analyzing a broad set of litigation data points remains a relatively new endeavor in law enforcement. In 1999, the United States Department of Justice² published a series of reports (1999 Report), that sought objective evidence to support whether there was an increased frequency in police use of excessive force³ at the time, or whether the public's perception could be attributed to a misconception or misunderstanding of police use-of-force generally.⁴ During preliminary studies, analysts used data obtained from civilian complaints and civil lawsuits but discovered that this analysis was "critically flawed." This flaw was attributed to the use of lawsuit data in *isolation*, i.e., as an exclusive means of analysis conducted without regard to the qualitative review (of police use of

¹The amount paid in a particular settlement is ultimately controlled by the Comptroller's office. However, the NYPD is dedicated to adopting best practices as between NYPD, the Comptroller's office and the Law Department moving forward, which we expect will likely lower settlement payouts (i.e., costs to the City's taxpayers) but more importantly, are likely to decrease the rate in which lawsuits are filed against the Department overall.

²Research Report, Nat'l Ins. of Justice & Bureau of Justice Statistics, "Use of Force by Police, Overview of National and Local Data," NCJ 176330 (Oct. 1999) ([6 studies], 30 pages).

³The OIG's April Report and the response of the NYPD is not limited to litigation data on use-of-force complaints, rather, it considers the use of data obtained from all legal claims and lawsuits against individual officers or the Department and City as a whole. However, the 1999 Report and its related studies are informative and still relevant today. For example, it remains true as a matter of fact that "[l]aw enforcement officers are authorized to use force in specified circumstances, are trained in the use of force, and typically face numerous circumstances during their careers when the use of force is appropriate." *Id.* at 5. Further, it was aptly noted that the "activities of the police often fall under public scrutiny nonetheless." *Id.*

⁴*See supra*, fn. 10. *Id.* at 5.

excessive force).⁵ The use of such data is meaningless unless it is expanded to include additional information gathered from “all use-of-force incidents,” such as use-of-force reports, arrest records, injury reports, and medical records. Each source of information is relevant to measuring both the incidence of the problem and to provide an accurate perspective that would adequately address the issue.

Data that has been taken from sources that fail to account for whether a particular outcome was reached purely as a “business-decision” without regard to the merits of a case are devoid of any useful metrics in performing qualitative analysis and review. Such data includes frivolous lawsuits that contain weak or meritless assertions, even those asserted in good faith, and nuisance lawsuits that may be filed with an improper purpose,⁶ in order to extort a settlement less than the defendant’s cost to defend. Settlement data is most limited in the context of early settlements, which indicates that minimal or no investigation of the allegations in the claims was conducted. When a case settles prior to completed discovery (or sworn statements, at a minimum), the outcome may be unrelated to an officer’s actual conduct or behavior. Criminal cases may also create limitations that devalue the use of litigation data. Internal prosecutorial policies or other resource constraints may lead to the dismissal of certain criminal charges that are unrelated to the strengths or weaknesses of the evidence in particular cases. Instances where a prosecution is declined or dismissed without regard to the legality of the underlying arrest may result in a civil claim against the arresting and or investigating officer(s). In these instances, the NYPD is often unable to obtain any useful data or address any legitimate concerns related to officer misconduct or other departmental issues.

Moreover, many other entities are exploiting litigation data that is unverified or gathered without sufficient investigation into the merits (as described above). The creation of so-called “police accountability” databases is one example of such exploitation. These databases contain information about police-action lawsuits without regard for truth, accuracy or verification of the allegations.⁷ They also often do not reflect the outcomes of the suits or the merits. Our officers are rightfully concerned about the effects of the use of litigation data on their careers and reputations. When an officer is acting lawfully and in a manner that is consistent with department policy and procedures, fear of lawsuits should never deter officers from taking lawful actions.

Mayor de Blasio, Corporation Counsel Carter, and Commissioner Bratton recognized that the City’s prior business-oriented decisions to offer settlement agreements without either a satisfactory investigation into the merits of a case, or sometimes even in spite of evidence tending to dispute the strength of a plaintiffs’ allegations, encouraged the filing of frivolous lawsuits and resulted in adverse consequences that negatively impacted the Department’s

⁵ *Id.* at 10, 23.

⁶ McMillian, Lance P., The Nuisance Settlement “Problem”: The Elusive Trust And a Clarifying Proposal, 31 Am. J. Trial Advoc. 221 (Fall 2007) (discussing many of the “misconceived perceptions” surrounding the concepts and theories underlying nuisance litigation and “so-called ‘nuisance settlement.’”)

⁷ It has come to the attention of NYPD that at least some of these databases have not endeavored to identify and/or exclude lawsuit data it obtained where either: (i) a particular officer was dismissed entirely due to mistake; (ii) the case reached some other resolution favorable to the officer (e.g., trial verdicts, discovery, or successful motion practice); or when (iii) the prosecutor’s office declined to move forward with the prosecution of a criminal defendant. Moreover, information taken from so-called “bad cop” databases—which is used as a tool in criminal trials during cross-examination, where police officers frequently serve as witnesses—can have an adverse effect shifting the jury’s attention away from the defendant and instead, toward improperly attacking the credibility of a police officer.

reputation, the reputations and morale of individual officers, and trust within the community. Mayor de Blasio implemented significant changes to city policies and procedures to ensure that cases are defended and to discourage the settlement of frivolous claims. The Mayor (i) increased the size of the staff at the City's Law Department to enhance its ability to defend claims brought against officers and the City; (ii) changed the general city policy to require dismissal of all claims against individual officers as part of any stipulation of settlement; and (iii) implemented a "no pay" policy in instances where a case is brought against police officers regarding the performance of their duties that lacks merit even if an economic cost-benefit analysis suggests settlement might be more cost-effective in the short term.⁸ These significant changes were well received by all of the police unions.

With respect to efforts to perform a qualitative analysis of relevant and trustworthy police-related litigation data, as the April Report noted, the Department had already begun to develop and implement an integrated database dedicated to utilizing litigation data it collects from the Comptroller's Office and the Law Department for use in the future. This database is intended to provide real time data regarding officer performance not only to the newly created Risk Management Bureau, which is responsible for department-wide risk mitigation and analysis, but to the officer's supervisors. This new bureau has over 150 personnel and is still growing.

The Department has used various sources of data to develop monitoring programs designed to assist members of service with personal problems or other negative behavior as early as the 1970's. In 2003, the Performance Monitoring programs used performance indicators such as civilian complaints, evaluations and a point system on the personnel record of the member to enlarge the Early Warning System. As of June 2011, the Department's Performance Analysis Section (which is now part of the newly-created Risk Management Bureau) started incorporating litigation data as another performance indicator with respect to individual officers who were already in monitoring programs. Appreciating that a quantitative review of litigation data can have value in and of itself as a performance indicator, the Department implemented a Civil Lawsuit Monitoring program in September 2013. This program utilizes basic litigation data to identify officers eligible for this program. The criteria are initially based solely on a quantitative analysis of the number and type of lawsuits filed against individual officers within a set time frame. Any officer fitting these criteria could be placed in one of the Performance Monitoring Programs after a further qualitative analysis off the lawsuits and the underlying events.

Additional uses of the litigation data include analyzing trends and patterns on a broader scale. The newly organized Risk Management Bureau has been dedicated to this task since 2014. As such, the Department remains committed to continuing and improving its already-existing "Early Warning Systems" as discussed in the April Report as well as expanding the analysis of the litigation data to improve Department's practices.

2. Interagency Communications

With respect to the second recommendation that NYPD establish an interagency working group between the Comptroller's Office and the Law Department to improve the collection and analysis of police-involved litigation data, under Commissioner Bratton's leadership, and with the leadership of Corporation Counsel Carter and City Comptroller Stringer, the NYPD has

⁸ Letter from Anthony Shorris, First Deputy Maory to Roy Richert, President, Captain's Endowment Association et al (Jan. 30, 2015). Attached as Exhibit A

established effective lines of communication and inter-agency working groups to ensure that the parties involved can perform full investigations of the claims or lawsuits. Specifically: (i) NYPD has established an unprecedented open line of communication with the City Comptroller in an effort to assist in a thorough review of claims to determine which claims to settle and is working collaboratively toward identifying other patterns and trends that may need to be addressed citywide; (ii) NYPD has devoted more resources in support of the City Law Department's efforts to defend the NYPD and its members through establishment of a Police Action Litigation Section, devoted to gathering information, documents, and witnesses to assist in the defense and proper resolution of claims and lawsuits. This new unit within the NYPD Legal Bureau consists of over 25 very experienced and highly trained lawyers and investigators.

3) Transparency Regarding Litigation Data Analysis and Early Warning System

We agree in principle with the third recommendation that NYPD make certain aspects of both its EIS and its litigation data analysis process more transparent. Specifically, OIG suggests NYPD disclose more about which performance indicators it tracks for officers and how the monitoring levels operate and recommends NYPD's litigation analysis team publish reports disclosing trends detected. NYPD is committed to transparency on these topics subject to legal limitations such as Civil Rights Law § 50-a that the April report notes, as well as the deliberative process privilege and other legal privileges. The legislative history of Civil Rights Law § 50-a⁹ originally adopted and later amended, however, simply cannot be read in a manner that would allow the NYPD to fully adopt the OIG's recommendation. The statute was designed to prevent abusive exploitation of personally damaging information contained in officers' personnel records—perhaps most often in connection with a criminal defense attorney's FOIL application for purposes of general cross-examination of a police witness in a criminal prosecution. From the record, the legislature's objective went beyond precluding disclosure on behalf of defendants in pending criminal cases¹⁰ and was extended to also prevent disclosure of officers' personnel records¹¹ *except* when a legitimate need for them has been demonstrated sufficiently to obtain a court order, generally upon a showing that they are actually relevant to an issue in a pending proceeding.¹² The original legislation and construction of its reach was sponsored and passed as a safeguard against potential harassment of officers through unlimited access to information contained in personnel files, explicitly in recognition of the fact “[i]t has become a matter of harassment (of police officers) that personnel records (are) constantly requested, scrutinized, reviewed and commented upon, sometimes publicly.”¹³

Conclusion

The NYPD agrees that quality analysis of litigation data can improve the NYPD's reputation, officer morale, and police-community relations. Under the direction and leadership of Commissioner Bratton, the NYPD has been working cooperatively with the Law Department and the Comptroller's office to identify and exclude from analysis any litigation data that was derived from “nuisance” claims or lawsuits or “nuisance-value” settlements and are pleased with

⁹ See *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 154-55 (N.Y. 1999).

¹⁰ See, Mem of Senator Padavan and Member of Assembly DeSalvio, Mem of Div of Criminal Justice Servs, Mem of Div of Budget and Mem of Div of State Police, Bill Jacket, L 1976, ch 413.

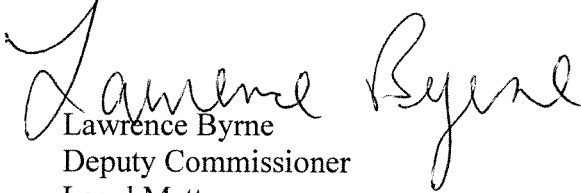
¹¹ *E.g.*, Freedom of Information Act requested pursuant to New York City local law, or Freedom of Information Law requested under federal law (FOIA and FOIL, respectively).

¹² *Id.* (emphasis supplied).

¹³ See Mem of Police Conference of New York, Bill Jacket, L 1976, ch 413.

the progress to date. The NYPD is committed to: (i) using valuable litigation data as a measure for improving policing as well as other patterns and trends citywide; (ii) continuing to work with the Comptroller and the Law Department in the mutual objective of ensuring that claims and lawsuits are not resolved without a more substantive review that will provide valuable litigation metrics; (iii) greater transparency with the public, to the extent it does not conflict with our existing legal obligations or is otherwise contrary to applicable law; and (iv) rebuilding community trust, enhancing the NYPD's reputation as a law enforcement agency, and ensuring the safety of the public and our officers. We look forward to continuing to improve collaboration and cooperation between the Comptroller's Office and the Law Department to further these goals. We welcome the continued input from the OIG-NYPD and intend to work continue to work collaboratively with your Office and the Community as a whole to ensure the safety of the public and our Police Officers in every neighborhood throughout the City.

Very truly yours,


Lawrence Byrne
Deputy Commissioner
Legal Matters