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Jared Goyette et al.,

Court File No.: 20-cv-1302 (WMW/DTS)

Plaintiffs,

v.

INDEPENDENT EXPERT REPORT

City of Minneapolis et al.,

Defendants.

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Submitted pursuant to the Order of Magistrate Judge David Schultz. (Order of Hon. David T. Schultz, *Goyette et al. v. City of Minneapolis et al.*, Case No. 0-20-cv-01302 (WMW/DTS) (filed May 3, 2022.))

November 21, 2023

s/Clifford M. Greene  
CLIFFORD M. GREENE

s/James J. Welna  
JAMES J. WELNA

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## **Prologue - The Internal Affairs Function**

“[I]nternal Affairs serves two communities – law enforcement and the general public – and Internal Affairs is essential in building and maintaining mutual trust and respect between agencies and the public.”<sup>1</sup>

Internal Affairs investigations of complaints and incidents serve several important functions. Investigations provide a process for determining (a) whether misconduct has occurred; (b) the identification of the agencies and officers involved in the incident; (c) whether the conduct at issue violates the complainant’s legal or constitutional rights, or rights set out in department policies and training; and (d) whether disciplinary or other personnel actions are warranted where misconduct has been established.

Investigations also go beyond disciplinary objectives and outcomes, including (e) a determination of whether existing policies are adequate and set appropriate standards governing future performance; and (f) whether the scope and quality of training is adequate to assure that future performance complies with these standards.

“Information gained from a complaint can teach an agency about its policies, personnel, and activities that it may not learn otherwise.”<sup>2</sup>

A citizen’s complaint about agency practice or the conduct of specific State Troopers is an important source of information and feedback for State Patrol leadership. The complaint and ensuing investigation may reveal the need for revised policies and augmented training. The complaint may confirm the need for “coaching” of individual troopers, or in some cases, may document grounds for disciplinary proceedings.

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<sup>1</sup> Standards and Guidelines for Internal Affairs: Recommendations From a Community of Practice, U.S. Department of Justice, Office of Community Oriented Policing Services, 2009, pg. 11.

<sup>2</sup> Standards and Guidelines for Internal Affairs, supra; see also, “Building Trust Between the Police and the Citizens They Serve: An Internal Affairs Promising Practices Guide for Local Law Enforcement, U.S. Department of Justice, Office of Community Oriented Policing Services (“COPS”), in cooperation with the International Association of Chiefs of Police (“IACP”); *see generally, Id.* “References” at p. 20.

Internal Affairs investigations of past incidents are not exclusively prompted by “outside” complaints filed by citizens or other agencies. Investigations can be internally initiated by supervisors (or troopers) when information comes to their attention that misconduct may have occurred, or that policies may have been inadequate regardless of the disciplinary implications of such an investigation.

## **I. INTRODUCTION**

### **Origin of This Report**

This Report was requested by parties settling a federal lawsuit. See Order [confirming settlement], *Goyette et al. v. City of Minneapolis et al.*, Case No. 20-cv-1302 (D. Minn. May 3, 2022)(WMW/DTS). In that lawsuit, journalists and members of the media sued various law enforcement agencies and government entities. They alleged violations of their constitutional rights to gather and report news during the demonstrations and civil unrest following the deaths of George Floyd in 2020 and Daunte Wright in 2021 during their encounters with law enforcement. Some of the journalists also alleged unlawful arrests and improper use of force resulting in physical injury.

In October 2021, U.S. District Judge Wright issued an Order enjoining the defendants from engaging in practices deemed unlawful and unconstitutional. *Goyette et al. v. City of Minneapolis et al.*, 20-cv-1302 (WMW/DTS) (Order Granting Plaintiffs’ Motion for Preliminary Injunction) (D. Minn. Oct. 28, 2021).

Defendants, Minnesota Department of Public Safety and Minnesota State Patrol (referred to as the “State Defendants”), entered into separate settlement negotiations with the plaintiffs facilitated by U.S. Magistrate Judge Schultz.

Those parties reached a separate settlement involving payment of damages, among other components. (The lawsuit persisted for the various non-settling defendants.)

The settling parties also agreed to commission an “Independent Expert Report” examining the Internal Affairs process available to journalists who had submitted – or who contemplated submitting – Internal Affairs complaints. The settling parties identified specific information that should be addressed in the Report, including the number of complaints filed (or that might be filed through October 2022), the duration of the investigation of those complaints, and the outcome of those complaints as determined by the investigation.

In addition to compiling requested Internal Affairs data, the “Experts” were also instructed to “suggest changes to the Internal Affairs investigation process.” Engagement Agreement, SWIFT Contract No. 208746 (“Engagement Agreement”).

The parties agreed that Clifford Greene and James Welna would serve as the “Independent Experts.” Magistrate Judge Schultz issued an Order establishing that Messrs. Greene and Welna would serve in a “quasi-judicial” capacity. *Goyette et al. v. City of Minneapolis et al.*, Case No. 20-cv-1302 (WMW/DTS) (Order, Magistrate Judge Schultz, May 3, 2022).

## **II. INDEPENDENT INITIATIVES TAKEN BY THE MINNESOTA STATE PATROL**

Quite apart from (and before) settlement of the federal lawsuit, the Minnesota State Patrol (“MSP” or “State Patrol”) took the initiative to improve and update its media policies, practices and training during 2021 through the spring of 2022. In particular:

--MSP engaged nationally-respected law enforcement consultants “21CP Solutions” to conduct surveys, focus groups, and listening sessions in order to understand and develop new policies and practices regarding interactions with the media. (21CP Solutions issued a report describing their activities, impressions and recommendations.)<sup>3</sup>

-- MSP developed a new comprehensive set of policies and practices recognizing the constitutional rights of journalists.<sup>4</sup>

-- The issuance of the General Order in 2022 did not create journalists’ rights, but rather recognized pre-existing constitutional rights.

As part of this process, the MSP (1) committed to the establishment of a Public Information Officer (“PIO”) to facilitate communication with journalists during high profile law enforcement operations, and (2) engaged a prominent authority on media rights to present mandatory training for all sworn officers, addressing the rights of journalists and the authority of law enforcement.

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<sup>3</sup> Media/Law Enforcement Recommendations for the Minnesota Department of Public Safety; 21CP Solutions (Dec. 2021).

<sup>4</sup> Minnesota State Patrol, General Order 22-10-013, First Amendment Assemblies; Strikes and Industrial/Labor Disputes; Signs and Banners on Highway, March 4, 2022.

### **III. TONE AND OBJECTIVE OF THIS REPORT**

This Report addresses questions posed by the parties in their Mediated Settlement Agreement and the Engagement Agreement.

This Report intentionally avoids an adversarial tone and is not intended as a prosecutorial exposé of deficiencies. The Experts received full cooperation and constructive candor from MSP leadership and from those responsible for conducting, supervising, and evaluating the investigations conducted by the Internal Affairs/Affirmative Action Division of the Department of Public Safety (“IA/AA”). In fact, they welcomed our insights and suggestions that might lead to improvements in the Internal Affairs function. IA/AA leadership have already expressed a willingness to adopt some of the suggestions offered in this Report.

Likewise, this Report is not intended as an academic treatise on the subject of Internal Affairs investigations generally. Rather, this Report asks a practical question: “How might the MSP improve Internal Affairs investigations of citizen complaints?”



#### **IV. THE INTERNAL AFFAIRS PROCESS FOR COMPLAINTS INVOLVING THE MINNESOTA STATE PATROL**

Internal Affairs investigations of the Minnesota State Patrol and its personnel are conducted by the IA/AA, a separate and independent agency. The IA/AA is authorized to “[i]nvestigate complaints of serious misconduct, including criminal conduct, discrimination and protected class harassment made against DPS employees.” (Correspondence, Lynn M. Mueller to Messrs. Greene and Welna, May 22, 2023.)

The IA/AA is also responsible for investigating affirmative action complaints for all agencies operating under the umbrella of the Minnesota Department of Public Safety. IA/AA investigators and their supervisor, Director Lynn Mueller, are not employees of the agencies they investigate, nor are they co-employees of the individuals they investigate.

The IA/AA employs experienced investigators with law enforcement backgrounds to investigate Internal Affairs complaints. These investigators are responsible for the initial meeting with complainants, explaining the IA process to them, and understanding the facts and circumstances giving rise to the complainants’ allegations. The IA/AA investigators investigate complaints as deployed by Director Mueller; investigation is their sole focus and function.

The investigators report to the IA/AA Director. Upon completing the investigation, the investigator assembles an investigation file, which is studied by Director Mueller to assure its sufficiency. Director Mueller prepares a “synopsis” distilling the investigation to its key components. Director Mueller then presents the synopsis, along with a recommended finding, to Col. Langer, Chief Law Enforcement Officer (“CLEO”) of the Minnesota State Patrol, who then reviews and studies the report and recommendation. Although the investigations of complaints involving the actions of the State Patrol or its troopers is delegated to the independent IA/AA Division to minimize bias or conflict of interest, the complaint itself, *and its disposition*, is the responsibility of the State Patrol. This responsibility is consistent with the Minnesota POST Board mandate. Ultimately, it is Col. Langer’s responsibility to come to his own decision regarding the merits of the complaint, and to determine what actions may be required or appropriate to

improve the quality of service to the public, to modify or augment policies and training, and if appropriate, to provide coaching or initiate disciplinary proceedings.

We reviewed the completed investigation files compiled by the investigators for each complaint alleging unlawful violations of the journalists' First Amendment and other constitutional rights, and in some cases, physical injury. We also reviewed the synopsis prepared by Director Mueller of each investigation and her findings submitted to Col. Matt Langer.

We interviewed Director Mueller and the investigators, as well as Col. Langer and Deputy Commissioner O'Hern. All were fully cooperative. They oriented us to the process in place and gave us access to all relevant investigation documents and procedures. They candidly acknowledged some issues and deficiencies warranting improvement expressing a constructive, rather than an adversarial or defensive, approach to possible reforms of the process.

## **V. NOTIFICATION OF INVESTIGATION OUTCOME**

When the investigation has been completed and the disposition has been determined, Director Mueller informs the complainant that the investigation has concluded in a standard form letter identical for all complainants.

*Dear [Complainant's name]*

*An investigation into your report of misconduct was conducted under my direction. The investigation is now complete. The Department of Public Safety takes complaints made against its Employees seriously. While the Minnesota Government Data Practices Act, Minnesota Statute Chapter 13 prevents me from informing you of the results of the information, I want to thank you for bringing your concerns to my attention.*

*Thank you for your cooperation during the investigation. If you have any questions, please feel free to contact me.*

*Lynn M. Mueller, Director  
Internal Affairs/Affirmative Action*

The form letter is non-substantive; it does not inform the complainant of the disposition of the complaint or whether the complaint was sustained. The form letter attributes the lack of information about the outcome of the investigation to Minnesota Statutes.

## **VI. COMPILATION OF REQUESTED DATA**

The parties requested information about the volume, duration, and outcome of complaints filed by journalists.

### **Volume of Complaints**

Journalists filed ten (10) complaints, generating nine (9) investigations.

### **Duration of Investigations**

The complaint investigations took between six (6) and thirty (30) months to complete, from complaint filing through notification to complainant that the investigation had concluded.

### **Outcomes**

Zero complaints alleging constitutional violations (such as use of unlawful force or infringement of First Amendment rights) were sustained.

One complaint alleging a trooper's inappropriate language was sustained.

## **VII. FACTUAL SUMMARY AND GOYETTE LITIGATION<sup>5</sup>**

### **The Deployment of the Minnesota State Patrol and Other Law Enforcement Agencies in Response to Demonstrations and Crime Following the Deaths of George Floyd (2020) and Daunte Wright (2021)**

On May 25, 2020, George Floyd died while being arrested and restrained by Minneapolis Police Officer Derek Chauvin for allegedly passing a counterfeit twenty-dollar bill at a convenience store. The following year, Daunte Wright was shot and died after a traffic stop by Brooklyn Center Police Sergeant Kimberly Potter. Sergeant Potter testified that she had intended to use her TASER to apprehend Wright, but mistakenly drew and discharged her firearm. Both Officer Chauvin and Sergeant Potter were convicted of crimes and sentenced to prison.

George Floyd and Daunte Wright—African-American men—were initially arrested or detained in conjunction with suspicions of non-violent crimes in 2020 and 2021, respectively. Their deaths spurred widespread demonstrations in Minneapolis, Brooklyn Center, and beyond. While many demonstrators protested these tragic events peacefully, some of the demonstrations were accompanied by crime—including arson and looting. In addition, the demonstrations had the collective effect of blocking or impeding passage on city streets and obstructing police and fire vehicles responding to crime scenes and active fires. Emergency vehicles seeking to access and transport injured or sick people to hospitals were delayed—also posing significant threats to public safety.

In response, these emergencies warranted mobilization of law enforcement personnel statewide. Various law enforcement agencies were deployed in unfamiliar settings to perform crowd management and urban law enforcement functions for which they were not trained (at least not at this scale). Equally important, officers and supervisors from independent agencies

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<sup>5</sup> The Engagement Agreement, Section 2.4(a), states: “Create and submit a written report to the State’s Authorized Representative, or his/her designee ... [that] will include (a) a factual summary . . . .”

unfamiliar with each other were required to work shoulder-to-shoulder despite little or no prior inter-departmental coordination.

And once deployed, often working with little or no sleep, law enforcement personnel faced significant dangers and uncertainties while making or carrying out orders in the “fog” of quickly evolving events.

The demonstrations following the deaths of Messrs. Floyd and Wright were newsworthy, and members of the news media attempted to report on events as they were occurring. At the same time, law enforcement personnel from diverse agencies attempted to clear the streets of demonstrators, restore order, and enforce a curfew issued by Governor Walz.<sup>6</sup>

Eight of the interactions, that were the basis for the IA complaints, occurred after May 29<sup>th</sup>, the date of Governor Walz’s first curfew order.

Law enforcement representatives asserted that it was sometimes difficult to distinguish the media from the demonstrators. Conversely, members of the media could not readily distinguish the agency affiliations of the various law enforcement personnel deployed to restore order.

During these law enforcement operations, some journalists were arrested; others alleged physical injuries arising from the use of force by law enforcement personnel. Journalists also alleged that law enforcement personnel intentionally and unjustifiably interfered with their lawful efforts to report the news.

**Governor Walz’s Emergency Executive Orders Imposing An Emergency  
Nighttime Curfew With Explicit Exemptions for News Media**

Declaring an emergency, Governor Walz’s Executive Order stated:

Unfortunately, some individuals have engaged in unlawful and dangerous activity, including acts of arson, rioting, looting and damaging public and private property. These activities threaten the safety of lawful

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<sup>6</sup> Emergency Executive Order 20-65, p. 2.

demonstrators, the surrounding communities, and first responders – and Minnesotans have already been injured.<sup>7</sup>

Governor Walz deemed the public safety threat so severe that a nighttime curfew was ordered. “This senseless violence tears at the fabric of our society, does not reflect our values, and presents a clear and present danger to life and property in Minnesota.” “Credible threats of arson and other violence remain,” he declared.<sup>8</sup>

While the Governor’s Curfew Orders were phrased broadly, each included explicit and unambiguous exemptions for the news media:

### 3. Exemptions

All law enforcement, fire, medical personnel, **and members of the news media** ... as well as other personnel authorized by the Minnesota State Patrol ... are exempt from the curfew....<sup>9</sup> (emphasis added)

Law enforcement officers from Minneapolis, St. Paul, Hennepin and Ramsey Counties, and other police departments, along with the National Guard, responded to the widespread civil unrest threatening public safety in the Twin Cities metro area. Of particular relevance to this Report, the Governor deployed the Minnesota State Patrol and its troopers to assemble in the Twin Cities to work alongside personnel from other law enforcement agencies in order to deter violence, respond to crime, and restore civic order. Their mission included the enforcement of the curfew issued by Governor Walz requiring that city streets be cleared of demonstrators or bystanders during certain hours. This crowd dispersal assignment was complicated by crowds gathering at night.

It is fair to say that such a deployment – mobilizing State Troopers from remote corners of the state to help restore public safety in the metro Twin Cities – was unprecedented in the experience of the MSP. Addressing “crowd control” emergencies in urban settings, in

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<sup>7</sup> Emergency Executive Order 20-65 (May 29, 2020) (“Implementing a Temporary Nighttime Curfew in the Cities of Minneapolis and Saint Paul”).

<sup>8</sup> Emergency Executive Order 20-71 (June 3, 2020) (“Extending the Temporary Nighttime Curfew in the Cities of Minneapolis and Saint Paul”).

<sup>9</sup> Emergency Executive Orders 20-65 and 20-71, pg. 2

coordination with other law enforcement agencies and the National Guard, was neither a familiar nor routine deployment for the State Patrol. To the contrary, State Troopers are typically deployed in individual squad cars, enforcing traffic and criminal laws and responding to highway emergencies and calls for service throughout the state.

Nor was it typical for individual troopers to interact extensively or come into conflict with the media at crime scenes, accidents, and law enforcement operations. Accordingly, at the time of the civil unrest in 2020 and 2021, the MSP did not maintain a policy or offer comprehensive training educating troopers about the rights of journalists or the scope of law enforcement authority to restrict members of the media during ongoing law enforcement operations.

### **The Goyette Litigation**

Journalists and their representatives filed a federal lawsuit alleging that various law enforcement agencies and unnamed officers violated their First and Fourth Amendment rights to report on newsworthy events. Some of the journalists also alleged physical injury by the officers. *Goyette et al. v. City of Minneapolis et al., supra*. Each defendant agency denied those claims, asserting (*inter alia*) that their actions, if proven, fell within their agency's authority to respond to a public safety emergency. The defendants blamed the individual plaintiffs for failing to obey lawful orders to disperse and comply with the curfew. In addition, the defendant agencies asserted that wrongdoing, if any, was the result of actions taken by the co-defendants and their officers.

### **Federal Judge Wright Issues a Preliminary Injunction Following an Evidentiary Hearing**

In October 2021, U.S. District Judge Wright issued a Preliminary Injunction following an evidentiary hearing about interactions between police and journalists during the civil unrest. The Court's injunction confirmed the likelihood of unlawful acts by the various law enforcement defendants, and prohibited policies and actions that would interfere with journalists' First and Fourth Amendment rights. *Goyette et al. v. City of Minneapolis et al., Case No. 20-cv-1302 (WMW/DTS) (Order Granting Plaintiffs' Motion for Preliminary Injunction, Oct. 28, 2021)*.



At the preliminary injunction hearing, then Commissioner of Public Safety Harrington, testified (July 28, 2021, at p. 189-190) that he was “concerned” upon learning of the arrest of a T.V. broadcast crew: “It is an exceptional event. And even in the context of what was a fairly massive amount of civil unrest, it still was concerning that it happened.”

Commissioner Harrington’s “concern” was linked to a question: “. . . what happened behind the scene there.”

Rather than file an “agency-initiated” Internal Affairs complaint seeking to understand why the arrest was ordered, the Commissioner decided to wait for the journalist to file a complaint. (There was more than a two-year delay in conducting an Internal Affairs investigation into the circumstances leading to this arrest.)

### **The State Defendants and Goyette Plaintiffs Settle Their Claims Pursuant to a “Mediated Settlement Agreement”**

After the Preliminary Injunction was issued, the plaintiff-journalists participated in settlement negotiations with the Minnesota Department of Public Safety (“DPS”) and the MSP (the “State Defendants”). Those negotiations, facilitated by Magistrate Judge David Schultz, resulted in a “Mediated Settlement Agreement” resolving all claims by the *Goyette* plaintiffs against the State Defendants. (Mediated Settlement Agreement, January 2022.) Co-defendant City of Minneapolis and the *Goyette* Plaintiffs did not enter into settlement, and litigation between those parties is ongoing.

### **The “Mediated Settlement”**

In addition to resolving damage claims and agreeing to abide by the terms of the Court’s Preliminary Injunction, the Mediated Settlement Agreement provided that the settling plaintiff-journalists would be afforded a fixed time period during which to submit individual Internal Affairs complaints alleging misconduct by State Troopers. Prior to the MSP settlement of the *Goyette* lawsuit, some journalists had already filed individual Internal Affairs complaints alleging violations of their First and Fourth Amendment rights by the MSP.

Most of these individual Internal Affairs complaints alleged that the State Defendants interfered with the journalists' constitutional rights to cover newsworthy events. In addition, some journalists accused troopers of unlawfully arresting them, and for some, physically injuring them.

### **Independent Expert Report**

As part of the settlement, the parties commissioned an "Independent Expert Report" to provide data about (1) the number of complaints received; (2) the duration of the investigation process from initiation to conclusion; and (3) the outcome of the Internal Affairs investigation. The Engagement Agreement also directed the Experts "to offer suggested changes to the Internal Affairs investigative process." The Engagement Agreement specifically excluded identification of troopers' individual disciplinary information from the scope of the Report, instructing the Experts to "[r]efrain from providing any recommendation on discipline or potential discipline based on any complaint." (Engagement Agreement at 2.5.)

## VIII. METHODOLOGY

Our review of the Internal Affairs investigations of the media complaints included:

- Reading each of the complaints and supporting materials provided
- Personal Interviews with three of the complainants
- Meetings with the Deputy Public Safety Commissioner responsible for oversight of the Division that conducts and processes Internal Affairs investigations
- Meetings with the head of the Minnesota State Patrol
- Meetings with the Director of the IA/AA Division, the two investigators, and the administrative assistant.
- Each completed IA case file was reviewed, and for some, on multiple occasions, which included the following:
  1. Complaint
  2. List of potential policy violations
  3. Transcribed interviews with complainants, if provided
  4. Transcribed interviews with over 80 troopers as either subjects of the investigations or potential witnesses
  5. Transcribed interviews with other witnesses
  6. Video tapes of incidents that were recorded at the time of the allegations submitted by complainants or that were available from other sources
  7. Summary of the investigation by the investigator
  8. Summary and recommended findings by the Director that were sent to Colonel Matt Langer
  9. Form letter that was sent to each complainant by Internal Affairs after results of the investigations were sent to the Minnesota State Patrol
- Relevant changes to the MSP policies and new initiatives related to the media on arrests and use of force.
  1. New policy on interactions with media that included the statement “MSP respects the rights of the media to cover First Amendment activity and shall never intentionally target them for dispersal or enforcement action based on their media status.”<sup>10</sup>

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<sup>10</sup> MSP General Order, First Amendment Assemblies; Strikes and Industrial/Labor Disputes; Signs and Banners on Highway, March 9, 2021.

2. More visible markings on response gear that identifies both the Minnesota State Patrol and the individual employee
  3. GPS equipment with each team leader
  4. Establishment of a media liaison position (“PIO”) that could be present at civil unrest events
- A media training course and video by Mr. Osterreicher, a national authority on media rights and police media interactions, that all troopers, supervisors, and administrators have completed
  - The process by which citizens learn how to file complaints
  - The durations and timeliness of the investigations
  - The communications which occurred or did not occur with the complainants over the course of the investigations

## **BIBLIOGRAPHY**

The following resources were consulted:

Standards and Guidelines for Internal Affairs: Recommendations from a Community of Practice, U.S. Department of Justice, Office of Community Oriented Policing Services, 2009

Building Trust Between the Police and the Citizens They Serve, An Internal Affairs Promising Practices Guide for Local Law Enforcement, International Association of Chiefs of Police, U.S. Department of Justice Office of Community Oriented Policing Services, 2006

Evaluating the Complaint Process With a Checklist of Best Practices, U.S. Department of Justice, Office of Community Oriented Policing Services, April 2022, Volume 15, Issue 4

Best Practices Guide, Internal Affairs: A Strategy for Smaller Departments, International Association of Chiefs of Police, U.S. Department of Justice, Office of Community Oriented Policing Services, 2002

Internal Affairs Survey Report, 213 Large Department IA Responses to 85-Question Survey, UMASS Lowell, Chris Harris, Ph.d and Sean Perry, M.A., National Internal Affairs Investigators Assn., 2022

Report on the Audit of the St. Paul Police Civilian Internal Affairs Review Commission, Jennifer Blevins, Dr. Raj Sethuraju and Dr. Mark Ambreit, Center for Restorative Justice and Peacekeeping, PCIARC Audit 2015



## **IX. COMPILATION OF REQUESTED DATA**

The Mediated Settlement Agreement called for the report to include the following:

- A factual summary
- The total number of complaints
- The number of complaints sustained and not sustained
- The length of time to complete the investigation
- Suggested changes to the Internal Affairs process

We had full cooperation from the Office of the Commissioner of Public Safety; Colonel Matt Langer, Chief Law Enforcement Officer for the Minnesota State Patrol; and the Internal Affairs Office, an independent division of the Department of Public Safety not affiliated with the Minnesota State Patrol.

We had access to all requested documents including complaints, emails, videos, photographs, department policies and transcripts of interviews. Staff of the Internal Affairs office made themselves available for questions throughout the review.

We conducted electronic interviews with three of the complainants. Attorneys representing the interviewed complainants were present on the calls.

### **Total Number of Complaints:**

- There were ten complaints filed during the period covered by our review.
- No complaints alleging violations of media rights were sustained.
- The complaints were filed by members of the media including support staff, attorneys representing specific media complainants, and in one case, by the State Patrol itself, when the complainant wished to remain anonymous.
- Two of the complaints were combined into one investigation.
- There were nine investigations.
- The following terms were used in closing investigations: exonerated, not sustained, not sustained/exonerated, sustained, and closed.
- One exonerated.
- Seven not sustained.

- One not sustained/exonerated.
- One was sustained in part and found that a trooper acted unprofessionally during his interaction with the complainant.
- One investigation closed based on a determination that MSP was not the law enforcement agency involved.

**Duration: Length of time to complete the investigation of each complaint:**

The time from receipt of the complaint by the IA/AA to notifying the complainant by letter that the Internal Affairs investigation process had concluded ranged from 189 days to 964 days.

Below are the durations for each investigation:

- 255 days
- No formal IA investigation because it was initially determined that the Minnesota State Patrol was not the law enforcement agency involved in the incident.
- 964 days/ 908 days – two complainants filed on different dates for same incident.
- 703 days
- 393 days
- 382 days
- 350 days
- 228 days
- 189 days

## **X. ANALYSIS**

For purposes of our analysis and evaluation, we divide the Internal Affairs process into three components:

- A. Intake
- B. Investigation
- C. Outcome
  - i. Results
  - ii. Post-Outcome Communications

### **A. INTAKE**

On its website dashboard, the MSP assures the public that “[t]he State Patrol takes complaints made against members of our agency seriously.”

The State Patrol takes complaints made against members of our agency seriously. All complaints alleging serious misconduct, like harassment, discrimination, excessive use of force, or violations of First Amendment rights, are handled by DPS’ Internal Affairs/Affirmative Action (“IA/AA”) division. This division is independent of the State Patrol and reports directly to the Commissioner’s office.

(MSP website dashboard, as of October 2023)

Prospective complainants should find information about the Internal Affairs process easily-accessed, user-friendly and informative.

One authority offers the following recommendations, reflecting the importance of the intake phase:

Ensure that citizens and employees alike are aware that a complaint process exists, know how to use it, and understand how the agency processes and investigates complaints.



Publicize this information through the media, the agency's website, community meetings.... Make all complaints accessible in an annual report.<sup>11</sup>

In addition to being accessible and user-friendly, the intake phase should set and manage "customer" (citizen) expectations about the process. In particular, the agency should emphasize that Internal Affairs complaints are welcomed.

The MSP and IA/AA websites should highlight that IA complaints will be investigated "independently" by professionals who are not biased co-employees of the subjects of the investigation. (The independent investigator's function is more like an outside, "external investigator" who is not investigating one of his own.)

There are several objectives for the "intake" phase: (1) easily-accessed, (2) informative, and (3) encouraging. The web page also provides an opportunity to explain the "independence" of the IA investigator who receives and investigates the complaint. This function becomes the responsibility of the IA investigator at the initial intake interview with the citizen complainant.

Interviews with the Director of the IA/AA highlighted areas for prospective improvement. We shared impressions from some of the complainants that IA/AA information was difficult to access on the web, not easily navigable, and not particularly informative. In fact, one complainant we interviewed was so disappointed with the lack of information on the website and the difficulties navigating the site that he considered discontinuing the complaint process. The website conveyed the impression to him that the agency did not take the Internal Affairs process seriously and did not seek citizen complaints.

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<sup>11</sup>Evaluating the Complaint Process with a Checklist of Best Practices, [HTTPS://COPS.USDOJ.GOV/RIC/RIC.PHP](https://cops.usdoj.gov/ric/ric.php), (Apr. 2022), Vol 15, issue 4.

Information about filing IA complaints and about the IA process should be easily accessed, informative and navigable. The information and layout of the website we reviewed would benefit from an update to include the issues we have just mentioned.

When raising these concerns with Director Mueller, she informed us that a website overhaul is planned that will update the site(s) to encourage citizen complaints, and to provide information about the process. We understand that the IA/AA Director will post a Frequently Asked Questions Info Sheet which will make the site more informative.

The intake phase of the process did not inform the complainants that they would not be provided with any details at the outcome of the investigation.

Some complainants commented that they would have been unwilling to proceed with filing their complaints if they were informed at the start of the process that they would not receive any results.

Finally, the [prospective] complainant's initial interview with the IA investigator is an important aspect of the intake function. An accurate explanation of the IA process is critical to managing citizen expectations about the duration and what they will learn at the conclusion of the investigation.

These steps are crucial to assure "transparency" in the IA process:

"Transparency: a clear and concise understanding of an agency's Internal Affairs process, and function, by the general citizenry."

"Building Trust ...," [op. cit.,] References, at pg. 20.

## **B. INVESTIGATION**

### **Overall Impressions**

1. The IA investigators (Cziok and Skoglund) are experienced and conscientious professionals. They prepared detailed reports and assembled voluminous materials into well-organized files.
2. Likewise, their supervisor, Director Lynn Mueller, takes her responsibilities very seriously. She maintains close contact with the investigators as their investigations proceed.
3. For eight of the complaints the investigations did not expand to include management/supervisors. This further inquiry would assist in determining why the responding troopers were unaware of the media exemption in place after May 29, 2020.
4. Upon receipt of the investigator's completed investigation files, Director Mueller studies and digests key information into her own thorough and well-organized Report and Recommendation to Col. Langer, the Chief Law Enforcement Officer ("CLEO") of the Minnesota State Patrol. (It is ultimately Col. Langer's responsibility to determine the outcome of the complaint: Does the investigation support the citizen's complaint? If so, does this circumstance warrant disciplinary proceedings and/or revisions to policy and training?)
5. In our several interviews, Director Mueller encouraged our suggestions and recommendations to improve the Internal Affairs process within the scope of our Mediated Settlement Agreement assignment.

The current IA process is most efficient and fair where the misconduct alleged in the complaint would violate specific MSP policies and training (such as use of excessive force or use of disrespectful (e.g., "unprofessional") language by a trooper.)

Internal Affairs investigations must extend beyond the examination of violations of agency policies. Violations of constitutional or statutory rights must be defined and investigated as part

of the investigation plan. The POST Board Allegations of Misconduct Policy<sup>12</sup> recognizes the outcome-category of “Policy Failure.” Policy Failure applies where citizens’ constitutional or statutory rights were violated without violating a corresponding agency policy.

Investigators are well aware of the MSP’s General Orders and policies in effect that are implicated by the more typical or recurring citizen complaints. But that is not the case where a complainant alleges violation of a constitutional right, here, a right under the First Amendment to gather and report the news in the midst of demonstrations and civil unrest.

The investigators are not lawyers and cannot rely on their experience and intuition to define the complainant’s constitutional rights and whether MSP troopers exceeded their lawful authority. And the question, “What are the constitutional rights allegedly violated?” demands resolution at the outset of the investigation in order to help define the investigation plan. Granted, both Director Mueller and Deputy Commissioner O’Hern are legally trained and have practiced law. They may indeed be qualified to interpret the constitutional rights and legal duties implicated by a citizen’s complaint. They also have access to guidance by specialized legal counsel from the Attorney General’s Office, the General Counsel’s Office, or elsewhere.

At the time most of the journalists’ IA complaints were investigated, there were accessible sources of law which defined and described journalists’ rights, including Judge Wright’s Preliminary Injunction Order issued in *Goyette*, a new MSP First Amendment Media Policy, and the MSP training sessions (in 2022) conducted by a national authority on journalists’ rights.

The rights placed at issue by journalists need to be identified at the outset of the investigation to help define the scope and objectives of the investigation. Defining the rights at issue – especially constitutional rights -- cannot be left to the discretion of the investigators.

### 1. Investigation Plan

The IA process would benefit from a written investigation plan. That plan would identify issues where additional legal input or guidance is required to properly identify and describe the

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<sup>12</sup> Allegations of Misconduct Model Policy MN Rules 6700.2200 through 6700.2600, Definitions L, Policy Failure.

rights possibly violated by a trooper or the policy and practices of the agency. The plan would also identify the amount of time and resources required to conduct the investigation, along with a timetable for completion.

The IA/AA Director and the assigned investigators are responsible for translating the citizen's complaint into alleged violations of constitutional rights, statutory laws, specific regulations governing State Patrol conduct, and normative policies (e.g., treating citizens with respect).

The investigators are experienced with respect to recurring scenarios for which there is a written agency policy such as excessive force, treating a citizen disrespectfully, etc. The standard process is to determine if there is an existing regulation bearing on the conduct of the citizen and the State Patrol. At the time of the civil unrest prompted by the deaths of George Floyd and Daunte Wright, the MSP had no regulations defining journalists' First Amendment rights governing interactions between journalists and the State Patrol other than release of information<sup>13</sup>—and nothing specifically addressing crowd control scenarios when media were present. (The MSP generated comprehensive and state-of-the-art policies after these events.) The investigators are not trained to analyze case law and statutory law to derive the constitutional rights of journalists vis-a-vis the authority of law enforcement.

The written policies that are placed at issue by typical complaints (e.g., use of force, disrespect/discourtesy, etc.) are familiar to the experienced IA investigators. But the alleged rights of citizen-journalists to cover civil unrest were neither well-known nor intuitive to the investigators. The investigators must find facts relevant to the journalists' complaints that constitutional rights were violated and to the officers' justifications that they engaged in lawful use of police authority to protect the public and restore order.

The "new" (2022) media First Amendment policy issued by the MSP might have served as an instructive resource to investigators seeking to define the constitutional rights of journalists.

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<sup>13</sup> Minnesota State Patrol, General Order 10-10-053, Media Requests and Information, August 2, 2010.

Similarly, the Preliminary Injunction opinion issued by Judge Wright addressed these rights. And perhaps most valuable in clarifying the rights of journalists: The mandatory videorecorded training sessions presented by an authority on media rights. These seminars were presented in 2022 before most of the journalists' IA complaints were submitted or investigated. We understand that investigators were not invited to attend the live sessions, nor did they review the videorecordings. Leadership at the MSP and IA/AA may want to consider making such training accessible to investigators. For these cases, they would have helped the IA investigators appreciate the scope of the alleged First and Fourth Amendment violations they were investigating.

The Investigation Plan should reflect an understanding of citizen rights and law enforcement authority as defined or explained in judicial opinions or departmental policies. The required First Amendment training seminar was mandated after the incidents giving rise to the journalists' complaints. The new media policy and the required training would have assisted the investigator in determining whether the complainant's constitutional rights were violated, and would have been useful in determining whether there had been a policy failure. In addition, Judge Wright's relatively recent analysis when issuing the injunction might also have been instructive regarding an understanding of the journalist's rights allegedly violated. Granted, it might be too much to expect from investigators not trained in constitutional analysis to perform this legal research, but specialized legal counsel might have provided guidance in defining journalists' constitutional rights.

In March 2022, several months after Judge Wright's October 2021 Order, the MSP issued a comprehensive "Best Practices" policy recognizing the rights of journalists to gather and report on news during active police operations, as well as limits on the authority of troopers interacting with media during the course of police operations.

But most of the police-journalist encounters giving rise to IA complaints took place in 2020 and 2021, before the new MSP policies addressing media rights and interactions were issued in 2022.

What was the relevance (or irrelevance) of the MSP effort to define journalists' constitutional rights after the events giving rise to the journalists' complaints? (The new policy was in effect during most of the investigations of journalists' complaints, but not during the civil unrest of 2020 and 2021.)

For purposes of employee discipline, a policy issued in 2022 (and related training provided to all MSP troopers contemporaneously) would seem to have little relevance to the discipline of troopers for conduct in 2021; the 2022 regulation cannot be applied ex post facto as a basis for employee discipline. But the absence of a comprehensive media policy in 2020 and 2021 does not mean that journalists lacked rights that were violated by troopers during those years. Stated otherwise, the absence of MSP policies governing interactions with media does not mean the absence of journalists' First Amendment rights during those years. The absence of policy and training may mean that the violation is the responsibility of the agency for failing to implement timely policies and training (e.g., sometimes referred to as "Policy Failure").

## **2. Investigation: Duration**

The durations of investigations and ultimate disposition of journalists' complaints have been compiled, *supra*. Investigation through resolution of complaints took between 6 to 30 months.

There are no IA/AA policies or guidelines setting mandatory or aspirational deadlines for the duration of Internal Affairs investigations.

Nor does there appear to be a policy or practice within the IA/AA requiring the preparation of an "Investigation Plan" that includes a case-specific deadline for the completion of the investigation.

## **3. Requirements Imposed by the Minnesota POST Board**

Finally, there is no acknowledgement of the Minnesota POST Board requirement for completing investigations within thirty (30) days of receipt of the complaint and notifying parties if more time is needed. This standard, prescribed by the Minnesota POST Board, was in effect in

2021 and for a number of years prior. See MN Rules 6700.2200-6700.2600. The Minnesota State Patrol and its CLEO are subject to POST Board Regulations. The POST Board regulations include a standard that investigations should be given priority and conducted expeditiously.

The Minnesota State Patrol is a law enforcement agency employing peace officers<sup>14</sup> that are licensed and regulated by the Minnesota POST Board.<sup>15</sup> Law enforcement agencies must comply with an extensive list of requirements including the adoption of Minnesota POST Board model policies.

Implementing the Minnesota POST Board requirements is the responsibility of the Chief Law Enforcement Officer for each agency (“CLEO”).<sup>16</sup> The CLEO for the State Patrol is the Colonel.

Two of the Minnesota POST Board policy requirements related to this review are:

1. Allegations of Misconduct Model Policy, “MN Rules 6700.2200 through 6700-2600.”
2. Public Assembly and First Amendment Activity, “MN Rules 6700.1615, First Amendment, US Constitution, and the Minnesota Constitution.”

The Minnesota POST Board requires that the agencies adopt and implement policies that “must be identical or substantially similar to the POST Board model policy.”<sup>17</sup> The POST Board “Allegations of Misconduct Model Policy” allows the CLEO to “delegate the duties and

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<sup>14</sup> Minn. Stat. 2022, Section 626.84, defines Peace Officer as:

Subdivision 1. Definitions:

...

(c) “Peace officer” means:

(1) an employee or an elected or appointed official or a political or subdivision or law enforcement agency ...charged with the prevention and detection of crime and the enforcement of the general criminal laws of the state and who has the full power of arrest, and shall also include the Minnesota State Patrol ....

<sup>15</sup> See, e.g., Minn. 299D.03 State Patrol Subd. 1 . . . (b) The members of the Minnesota State Patrol shall have the power and authority: (1) as peace officers . . .

<sup>16</sup> Minn. Stat. 6700.1615 Required Agency Policies. Subpart 1. Required Policy. The Chief Law Enforcement Officer must ensure that the agency adopts, implements, and enforces the required policies listed in Items A and B.

<sup>17</sup> Minn. State 6760.1615, A. ... An agency may incorporate additional agency requirements, or more stringent requirements in its adopted policy, but must include the identical or substantially similar provisions of the Board’s Model Policy. . . .



responsibilities required of a CLEO by this policy to an appropriate designee(s).” The CLEO for the MSP has delegated these duties and responsibilities to the IA/AA Division of the Minnesota Department of Public Safety.

The absence of deadlines for the completion of investigations—even aspirational timetables subject to modification- means that there are no alarms assuring the “timeliness” of investigations or indicating if investigations are stalled or delayed.

Delay prolongs stress of officers who are subjects of complaints. Delays compromise the quality of investigations: memories fade, witnesses disappear, and the evidence trail grows stale. Delay also isolates and confuses complainants, especially when they are not receiving periodic status updates on the progress of the investigation of their complaints.

Col. Langer, Director Mueller, and Deputy Commissioner O’Hern each agreed that the duration of the investigations was excessive, and that steps should be taken to improve the “timeliness” of investigations, such as increasing investigation personnel and resources.

Director Mueller candidly identified factors protracting the Internal Affairs process, including,<sup>18</sup>

- Excessive investigation demands placed on a limited number of part-time investigators (25 hours per week) assigned to investigate complaints involving various DPS agencies (not just the State Patrol).
- The IA/AA Division preference for its investigators to conduct face-to-face interviews with subjects and witnesses who may be located throughout the State. (This is especially true regarding complaints involving State Patrol

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<sup>18</sup> Correspondence, Lynn M. Mueller, Director of the IA/AA Division to Clifford Greene and James Welna, re: “Investigation Timelines[s] [sic] (May 22, 2023).

members and witnesses who often reside in dispersed and remote locations throughout Minnesota.)

In this correspondence and in our interviews with Director Mueller, she described some of the steps being taken to reduce the duration of complaint investigations, most notably:

- the hiring of additional part-time investigators
- the engagement of a DEI Director, “who will perform work currently done by the Director and the Executive Administrator.”

In May 22, 2023, correspondence, Director Mueller indicated that she is initiating or recommending specific changes in light of our questions and concerns about the excessive duration of investigations and also about improvements to intake and practices regarding communications with complainants. Director Mueller’s letter includes the following “Current or Proposed Steps to Address Internal Affairs Factors.”

The external review of IA/AA has highlighted the need to better communicate with all parties to investigations: complainants, subjects, unions, and the general public. While the external review will likely provide additional feedback, **IA/AA has already committed** to the following changes: (emphasis added)

--Creating data sheets/FAQs for complainants that explain the role of IA/AA as a neutral fact finder, the steps of the investigative process, and expected timelines (“Complainant FAQ”).

--Updating the DPS complaint website to clarify which employees are covered (e.g., specifically identifying divisions, like State Patrol, and identifying employee titles, like trooper), and posting the complainant FAQ information.

--Creating a public-facing dashboard to show summary data on open IA/AA cases and the average timeframe for completing cases.

--Providing complainants with notification when investigations go beyond the expected timeframes.

**--Revising the closing letter to complainants to include the results of the investigation, if public under the Minnesota Data Practices Laws and DPS’ data request processes for disciplinary information.** (emphasis added.)

(Mueller Correspondence, pg. 7, May 22, 2023).

## **XI. INTERIM COMMUNICATION AND NOTIFICATION OF OUTCOME**

### **Interim Communication**

Currently there is little or no communication with complainants after their initial interview. There should be a periodic check-in with complainants to update them on the progress of the investigation or to solicit new information, particularly when the investigation takes longer than expected.

Best Practices guidelines distinguish between (a) maintaining the confidentiality of investigations “during their pendency” (to protect the rights of officers and “minimize interference and undue pressure on Internal Affairs and the department at large”), and (b) the “obligation to keep the public informed of the progress of the investigation . . . to the extent allowed by law.”

Standards and Guidelines for Internal Affairs: Recommendations from a Community of Practice, U.S. Department of Justice, Office of Community Policing Services (“COPS”), cops – p. 164 – pub.pdf at p. 59.

## **XII. POST-DISPOSITION COMMUNICATIONS WITH COMPLAINANTS ARE ESSENTIAL TO AN EFFECTIVE INTERNAL AFFAIRS PROCESS**

Under the heading of “Implementing an Effective and Transparent Internal Affairs process,” one authority stated that after investigations are concluded, the agency must “[n]otify the subject officer and complainant in writing of the outcome.”<sup>19</sup>

This recommendation is consistent with observations offered to the MSP by 21CP Solutions.

Post-disposition communications between MSP leadership and journalists-complainants promote organizational “transparency which, in turn, promotes “increased legitimacy and trust.”<sup>20</sup> As MSP’s consultant, 21CP Solutions states:

### Transparency

“Although increased transparency goes beyond the topic of law enforcement-media relations, it was a common refrain from focus group stakeholders.”

**“While DPS must follow the law, we recommend a bias toward releasing information objectively as early as possible.” *Id.* at 18 (addressing release of body cam data.)** (emphasis added)

“In our experience, the increased legitimacy and trust that occurs with transparency far outweighs any logistical concerns . . . . Providing objective evidence fills the speculative gaps for members of the public and can help alleviate social arrest around critical incidents.”

*Id.* at 19.

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<sup>19</sup> “Internal Affairs as an Effective Tool for Building Trust Between the Police and the Citizens They Serve,” *supra* at p. 20.

<sup>20</sup>21CP Solutions, Media Law Enforcement Recommendations for the Minnesota Department of Public Safety, (Dec. 2021), p. 18 (posted at [DPS.Minnesota.gov](https://www.dps.mn.gov)).

These policy preferences appear consistent with POST Board expectations. The relevant POST Board Model Policies<sup>21</sup> state:

c. Additional Investigation, Review and Disposition

“If the decision is “unfounded,” “exonerated,” “not sustained,” or “policy failure,” the CLEO or receiving authority must immediately notify the complainant or respondent of the decision.” (at ¶13) (emphasis added)

\* \* \*

“If the complaint is sustained, the CLEO or Receiving Authority will . . . advise the complainant of any public information regarding the disposition.”<sup>22</sup>

Communication with constituents fosters public trust of the agency. MSP’s consultant 21CP Solutions raised this insight, discouraging IA/AA and MSP policy and practice prohibiting post-investigation communications with complainants about the outcome of their complaints. (“While DPS must follow the law, we recommend a bias toward releasing information objectively as early as possible.”)<sup>23</sup>

Instead of being informed of the outcome, complainants receive a standard, non-substantive form letter from the IA/AA Director that the investigation has concluded. The letter notes that substantive information about the investigation of the complaint or its disposition is restricted by Minnesota law. *See* pg. 11, *supra*.

Note: [We] are advised that an attorney representing one or more of the complainants may challenge the legal basis for restricting disclosure of the outcome of the investigation under the Minnesota Government Data Practices Act (“MGDPA”), Minn. Stat. Ch. 13. We have declined a request to adjudicate the conflicting interpretations of the MGDPA as exceeding the original

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<sup>21</sup> The POST Board requires all authorities to adopt policies that are the “identical or substantially similar provisions of the Board’s Model Policy . . . .” MN Rules 6760.1615A.

<sup>20</sup>Allegations of Misconduct Model Policy, MN Rule 6700.2200 through 6700.2600.

<sup>23</sup> 21CP Solutions, Media Law Enforcement Recommendation for the Minnesota Department of Public Safety.

scope of our authority granted by the Mediated Settlement Agreement. Nevertheless, as a matter of policy, not law, we view the value of such communications as significant in an effective Internal Affairs process, as do other experts with whom we have consulted, and other authorities we researched. Accordingly, we address this topic here as a matter of policy, rather than as an adjudication of conflicting legal positions.

In many cases, the IA/AA notification letter informing the complainant that the investigation has concluded is the first communication from IA/AA personnel— oral or in writing— about the status of the complaint investigation in many months . . . or even years. (Some investigations exceeded more than two years.) The text of the notification letter appears at page 12, *supra*; it does not vary from complainant to complainant.

The journalists we interviewed were surprised by this process—especially so because (1) they waited many months for the completion of the investigations, and (2) they were not informed of this practice during the initial intake interview with the investigator.

Journalist-complainants were also disappointed (at best), discouraged, and in some cases, angered to learn that after the IA investigation ran its course, they would not be informed about the outcome of the investigation and the disposition of their complaint. A complainant deprived of substantive feedback about his or her complaint and its disposition would inevitably wonder:

- Was the information I provided to the investigator disbelieved or contradicted? (If so, why didn't the investigator present me with "evidence" contradicting my account while the investigation was ongoing?)
- How thorough was the investigation?
- Do MSP policies permit troopers to engage in the type of conduct alleged injuring journalists physically or preventing them from exercising their First Amendment rights to gather and report on the news? Stated otherwise, what difference did my complaint make in preventing the recurrence of this conduct?

-- In the absence of communicating information to Complainants (which would be accessible to the public), what will prevent these incidents from recurring in the future?

- The absence of any substantive communications from IA/AA informing journalists about the results of the IA investigation also creates confusion. After all, Judge Wright issued an injunction based on her findings that the journalists’ rights were likely violated by MSP practices.

-- Does the outcome contradict this judicial opinion?

-- Do the internal investigations conducted by IA/AA consider or reject the Court’s findings as incorrect or irrelevant, and if so, on what basis?

Equally important, the journalists were not informed at the outset—in the initial intake interviews with the assigned investigators-- that the results of the investigation and its disposition would be withheld from them. (The investigators did caution complainants that the investigation would likely take longer than they might expect.) However, the intake process failed to “manage the expectations” of the citizens who filed complaints and who reasonably assumed they would be informed of the outcome of the investigation of their complaints.

The Journalists with whom we spoke questioned whether they would have gone through this process at all if they had been initially informed that they would not have access to the ultimate results of the investigation: Was the complaint sustained? If not, why not?

This IA/MSP policy and practice is puzzling from a constituent-relations as well as an Internal Affairs “policy” perspective. The MSP had considerable relevant *public* information that it could have shared with complainants in conjunction with a notification that the investigation had concluded. A significant example: the conclusion of the investigation presented an opportunity for the MSP to describe the [new] 2022 policies explicitly recognizing the constitutional rights of journalists (such policies are public documents). Likewise, if the IA investigation leads to the conclusion that MSP supervisors failed to appreciate the media exemption in the Curfew Order, does communicating that fact violate the MGDPA if there are no disciplinary proceedings related to that finding?

These new policies and their constitutional underpinnings were the subject of mandatory training in 2022—training to which members of the media were invited. These 2022 policies remain publicly accessible. The opportunity for personal post-investigation, communication between MSP leadership and journalists who filed IA complaints can address these developments

without implicating the restrictions on the disclosure of private personnel data concerning individual officers arguably imposed by the MGDPA.<sup>24</sup>

Again, this Report does not intend to construe the language of the MGDPA. But the post-investigation communications between MSP leadership and journalist-complainants proposed here focuses on the existence of new policies and training intended to assure that those policies are understood by MSP Troopers. Why not share (indeed, “showcase”) these new regulations and training programs in conjunction with notifying complainants that individual investigations have concluded?

Such a conversation—conducted by a member of MSP leadership (not IA/AA personnel) might cover the following agenda without (even arguably) crossing Data Practices constraints. It also facilitates personal messages from MSP leadership, such as:

1. Thank you for submitting your complaint.
2. “We heard you.”
  - a. Here is what you alleged. We understood your Complaint and we took it seriously.
  - b. An extensive investigation was undertaken. (number of interviews conducted; review of photography and video, if applicable....)
3. Since these incidents, we have revised, augmented and modernized our policies related to journalists’ rights and MSP interactions with media covering law enforcement operations.
4. We have implemented enhanced officer identification initiatives:
  - a. One of the complications of the investigations has been identification of departments and personnel in crowd control deployment.

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<sup>24</sup> One of the co-authors, a former Police Chief, encourages the MSP to take responsibility for personal post-investigation communications with complainants. These would include notification of complaint outcomes, where appropriate, and actions the department has taken (new policies, training) that might be of interest.



Accordingly, the MSP has taken initiatives to issue distinctive uniform marking and badging, to be prominently displayed when deployed in crowd control situations. By so doing, witnesses, MSP supervisors and prospective complainants can identify troopers they observed or with whom they interacted.

- b. Here is information/photos describing or showing these initiatives.
5. We have also issued new policies that explicitly recognize the First Amendment rights of journalists. Those policies -- recognizing the rights of journalists -- are explained in training sessions made mandatory for all troopers. Video recordings of the training sessions are publicly accessible via hyperlinks.

The new General Order, along with the mandatory training seminar, would have been very reassuring to journalists in communications after the investigations had been concluded.

Based on our review of investigation files and IA recommendations, some limited, direct communication between complainants and MSP leadership may not be controversial as a matter of standard practice and MSP policy. As Director Mueller observed, post-disposition “communication may lead to understanding.” (Memo, Lynn Mueller, June 23, 2022.)

None of these proposed topics comprising a possible agenda for a post-investigation conversation involving a journalist-complainant and an MSP leader would implicate MGDPA restrictions on the divulgence of private personnel data or other non-public information related to trooper discipline.

To the contrary, it would inform complainants of information that is publicly available: initiatives and MSP innovations likely to be of great interest to those who filed complaints. More importantly, it would address journalists’ concerns about whether the MSP has learned from these experiences, and that the new policies and training reflect a sincere and explicit commitment by the MSP to understand and recognize the constitutional rights of journalists in future interactions.

Such post-outcome interactions foster positive relationships between the State Patrol and the public it serves. It is the State Patrol’s opportunity to promote public trust through direct interactions with the public it serves.

If it is ultimately determined that the MGDPA does in fact restrict post-disposition communications with complainants about the merits of their complaint, legislators, as well as the POST Board, should be so advised, permitting the evaluation of the impact that such a statutory interpretation has on the efficacy of the Internal Affairs process.

As previously described, the investigations of complaints involving the actions of the State Patrol or its troopers is delegated to an independent division to minimize bias or conflict of interest. The complaint itself, *and its disposition*, is the responsibility of the State Patrol. This responsibility is consistent with the POST Board mandate. As noted earlier, it is Col. Langer who receives and studies the report and recommendations submitted by IA Director Mueller to determine the adequacy of the investigation, and arrives at his own decision regarding the merits of the complaint. Col. Langer then considers what actions may be required or appropriate to improve the quality of service to the public, to modify or augment policies and training, and, if appropriate, provide coaching or initiate disciplinary proceedings.

#### **Minnesota POST Board Addresses Protected First Amendment Activity**

In July 2021, the Minnesota POST Board issued a Model Policy governing “Public Assembly and First Amendment Activity.”<sup>25</sup>

“The purpose of this policy is to provide guidelines to the (law enforcement agency) personnel regarding the application and operation of acceptable law enforcement actions addressing public assemblies and First Amendment Activity.”

Section 7 of the Model Policy (“Media”) addresses the constitutional rights of media:

- A. The media have a First Amendment right to cover public activity, including the right to record video or film, livestream, photograph, or use other mediums.
- B. The media must not be restricted to an identified area, and must be permitted to observe and must be permitted close enough access to view the crowd event and any arrests. An onsite supervisor/incident commander may identify an area where media may choose to assemble.

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<sup>25</sup> “Model Policy on Public Assembly and First Amendment Activity (Adopted July, 2021) citing Minn. Rules 6700.1615.

C. Officers will not arrest members of the media unless they are physically obstructing lawful efforts to disperse the crowd, or efforts to arrest participants, or engaged in criminal activity.

D. The media must not be targeted for dispersal or enforcement action because of their media status.

E. Even after a dispersal order has been given, clearly identified media must be permitted to carry out their professional duties unless their presence would unduly interfere with the enforcement action.

These declarations are based upon longstanding rights of journalists established by the constitution of the United States and the State of Minnesota.

It is not clear whether this Model Policy was reviewed by investigators during their investigations as a resource for journalists' rights placed at issue by their Internal Affairs complaints. Granted, the Model Policy was issued after the events giving rise to the IA complaints. But the complaints require consideration of whether *constitutional rights* were violated by the journalists' arrests. This Model Policy applies the constitution; it might have served as a helpful resource for identifying the rights at issue, and determining if those rights were violated by the MSP.

Again, determining that constitutional rights were, in fact, violated, does not mean that individual troopers or supervisors are blameworthy or culpable, especially in the absence of policy and training. The violation could nevertheless be sustained under the category of "Policy Failure." The absence of a specific policy does not mean the journalists' rights were not violated.

When a complaint has been fully investigated, and a decision has been made not to pursue any discipline, is the journalist-complainant entitled to receive a response to the question motivating the complaint: "Were my rights violated?"

### **XIII. CONCLUDING OBSERVATIONS AND RECOMMENDATIONS**

#### **INTAKE**

1. Ensure that complainants can easily access up-to-date information on how to file investigations, are informed about the independence of the State Patrol IA process, how long the process will likely take, what information they will receive at the conclusion of the investigations and what information they will not receive.

We have been advised that both the State Patrol and the IA/AA Division are actively working on improving all forms of communication to realize these objectives.

#### **INVESTIGATION**

2. Develop a written investigation plan for each complaint. Where constitutional rights are not clearly defined by a policy, the investigation plan would reflect consultation with internal or external legal resources. The plan should include a timetable for completion of the investigation along with the resources required.

3. Expand investigations beyond the initial focus as developing facts may warrant. For example, in a number of cases, the immediate supervisors may have failed to appreciate the media exemption when ordering the arrests or continued detention of journalists. Yet the investigations did not “go up the chain of command” to determine the source of any oversight. This was a missed learning experience which is a central function of IA processes. (See e.g., pg. 3, fn 2.)

4. Pending or threatened litigation can complicate the Internal Affairs process. This dynamic is beyond the scope of this Report.

5. Provide and assign sufficient resources to complete investigations in a timely manner. This benefits the department, accused employees and the complainants. The Minnesota POST Board Model policy on complaint investigations contains specific time requirements that are consistent with best practices across the country. There were 10 complaints with 9 investigations that took between 6 and 30 months to complete.

Both IA/AA and the State Patrol strongly support expedited completion of IA investigations. Additional resources are being provided to IA/AA.

### **OUTCOME/TRANSPARENCY**

6. The current non-substantive form letter sent to complainants at the conclusion of investigations does not inform the complainant about the disposition of his or her complaint (i.e., sustained, not sustained, exonerated, unfounded or “agency failure”). IA/AA does not provide substantive information about the outcome of the complaint, citing the Minnesota Government Data Practices Act (MGDPA). The Minnesota POST Board prescribes a “results notification” policy in its Model Policy. If the IA/AA interpretation that the MGDPA prohibits informing complainants of outcomes is correct, the POST Board (and the legislature) should be notified to address this inconsistency.

We believe that even if the results cannot be shared with complainants, there is substantial relevant information that nevertheless might be shared with complainants. Such information includes the new policies describing journalists’ constitutional rights, new equipment which will allow for easier identification of individual troopers when wearing crowd control protective gear, the engagement of 21CP Solutions for improved interaction with media and the training on media rights provided by a nationally recognized media law enforcement relations expert to all law enforcement staff on the State Patrol. This information would have been of interest to the complainants. Providing this information to complainants at the conclusion of the investigations would not conflict with the MGDPA however it might be interpreted.

### **CONCLUDING COMMENTS**

We approached this assignment as a collaborative consultation rather than as an adversarial investigation. In conducting our review, we wanted to understand the processes well enough to offer observations and suggestions which may improve the Internal Affairs functions.

Colonel Langer and Director Mueller welcomed our inquiries, patiently educating us about the IA procedures and objectives. We were given full access to Internal Affairs materials and files, for which we thank Director Mueller and Administrative Assistant Angela Geraghty.

We appreciated Investigator Cziok's professionalism and candor in reviewing the case files with us. Likewise, we are grateful for the interviews with several of the journalist-complainants. These interviews helped us understand their motivations and personal experiences as complainants in Internal Affairs cases.

The Prologue to this Report notes the value of Internal Affairs to the law enforcement agency as well as to the community it serves. We hope that this Report will lead to improved timelines and transparency and enhance public trust in this valuable process.

## THE AUTHORS

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