

OFFICE OF THE DIRECTOR
OF POLICE ACCOUNTABILITY

POLICE ACCOUNTABILITY BOARD REGULAR MEETING

**Wednesday, March 9, 2022
7:00 P.M.**

Board Members:

MICHAEL CHANG, CHAIR
NATHAN MIZELL, VICE-CHAIR
KITTY CALAVITA

REGINA HARRIS
JULIE LEFTWICH
DEBORAH LEVINE

JOHN MOORE III
CHERYL OWENS
ISMAIL RAMSEY

PUBLIC ADVISORY: THIS MEETING WILL BE CONDUCTED EXCLUSIVELY THROUGH VIDEOCONFERENCE AND TELECONFERENCE

Pursuant to Government Code Section 54953(e) and the state declared emergency, this meeting will be conducted exclusively through teleconference and Zoom videoconference. The COVID-19 state of emergency continues to directly impact the ability of the members to meet safely in person and presents imminent risks to the health of the attendees. Therefore, no physical meeting location will be available.

To access the meeting remotely: join from a PC, Mac, iPad, iPhone, or Android device using this URL: <https://us02web.zoom.us/j/82237902987>. If you do not wish for your name to appear on the screen, use the drop-down menu and click on "rename" to rename yourself to be anonymous. To request to speak, use the "raise hand" icon on the screen. To join by phone: Dial **1 669 900 6833** and enter Meeting ID **822 3790 2987**. If you wish to comment during the public comment portion of the agenda, press *9 and wait to be recognized.

AGENDA

- 1. CALL TO ORDER & ROLL CALL (5 minutes)**
- 2. APPROVAL OF AGENDA (5 minutes)**
- 3. PUBLIC COMMENT (TBD)**

(Speakers are generally allotted up to three minutes, but may be allotted less time if there are many speakers; they may comment on any matter within the Board's jurisdiction at this time.)

The Police Accountability Board and Office of the Director of Police Accountability (ODPA) were created to provide independent civilian oversight of the Berkeley Police Department. They review and make recommendations on police department policies, and investigate complaints made by members of the public against police officers. For more information, contact the ODPA.

1947 Center Street, 5th Floor, Berkeley, CA 94704 TEL: 510-981-4950 TDD: 510-981-6903 FAX: 510-981-4955
Website: www.cityofberkeley.info/dpa/ Email: dpa@cityofberkeley.info

4. **APPROVAL OF MINUTES** (3 minutes)
 - a. Special meeting of February 23, 2022.
 - b. Regular meeting of February 23, 2022.
(To be delivered.)
5. **CHAIR AND BOARD MEMBERS' REPORTS** (5 minutes)

Update from Board member Calavita on Police Chief Search
Update from Board member Mizell on Reimagining Public Safety Task Force.
6. **DIRECTOR OF POLICE ACCOUNTABILITY'S REPORT** (5 minutes)

Status of complaints; other items.
7. **CHIEF OF POLICE'S REPORT** (10 minutes)

Crime/cases of interest, community engagement/department events, staffing, training, and other items of interest.
8. **SUBCOMMITTEE REPORTS (discussion and action)** (15 minutes)

Report of activities and meeting scheduling for all Subcommittees, possible appointment of new members to all Subcommittees, and additional discussion and action as noted for specific Subcommittees:

 - a. Fair & Impartial Policing Implementation – met March 2.
 - b. Director Search.
 - c. Regulations – met Feb.22; next meeting March 10 at 7:00 p.m.
 - d. Mental Health Response (Policy Complaint #7).
 - e. Policy 351, Fixed Surveillance Cameras.
 - f. PAB Budget Proposal – met March 1.
9. **OLD BUSINESS (discussion and action)**
 - a. Review Policy 319, Hate Crimes, as requested by City Council. (10 minutes)
(See materials in Feb.23, 2022 agenda packet, p. 13.)
10. **NEW BUSINESS (discussion and action)**
 - a. Consider requests from the Fair & Impartial Policing Implementation Subcommittee. (10 minutes)
 - i) Request that the Board seek an opinion from the City Attorney regarding the PAB's access under the Charter to internal documents necessary for the PAB to fulfill its functions.
 - ii) Authorize Chair Chang, FIP Subcommittee Chair Calavita, and FIP Subcommittee member Ramsey to meet with Mayor Arreguin and Councilmember Harrison to discuss difficulties in overseeing implementation.

- b. Review Police Equipment & Community Safety Ordinance Impact Statements. (30 minutes)
From: Berkeley Police Dept.
- c. Consider request from Mental Health Commission to collaborate on using local crisis stabilization as an alternative to sending individuals with mental health concerns to Santa Rita or John George. (15 minutes)
- d. BPD's response to distribution of anti-Semitic hate flyers in Berkeley. (5 minutes)
From: Chair Chang
- e. Discuss continuation of meetings held via teleconference and videoconference. (5 minutes)
From: Board member Leftwich

11. PUBLIC COMMENT (TBD)

(Speakers are generally allotted up to three minutes, but may be allotted less time if there are many speakers; they may comment on items on this agenda only.)

Closed Session

The Board will convene in closed session to meet concerning the following:

12. CONFERENCE WITH LEGAL COUNSEL – ANTICIPATED LITIGATION (30 minutes)

Significant exposure to litigation pursuant to paragraph (2) of subdivision (d) of Government Code Section 54956.9. One potential case.

13. CONFERENCE WITH LABOR NEGOTIATORS; GOVERNMENT CODE SECTION 54957.6 (30 minutes)

Designated representatives: Katherine Lee; Interim Director of Police Accountability; Timothy L. Davis, Labor Negotiator

Employee organization: Berkeley Police Association


End of Closed Session

14. ANNOUNCEMENT OF CLOSED SESSION ACTION (1 minute)

15. ADJOURNMENT (1 minute)

Communications Disclaimer

Communications to the Police Accountability Board, like all communications to Berkeley boards, commissions or committees, are public record and will become part of the City's electronic records, which are accessible through the City's website. Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to a City board, commission or committee, will become part of the public record. If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the Board Secretary. If you do not want your contact information included in the public record, do not include that information in your communication. Please contact the Board Secretary for further information.

 **Communication Access Information (A.R. 1.12)**

To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at 981-6418 (V) or 981-6347 (TDD) at least three business days before the meeting date.

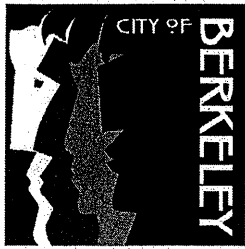
SB 343 Disclaimer

Any writings or documents provided to a majority of the Board regarding any item on this agenda will be made available for public inspection at the Office of the Director of Police Accountability, located at 1947 Center Street, 5th Floor, Berkeley, CA.

Contact the Director of Police Accountability (Board Secretary) at dpa@cityofberkeley.info

**POLICE ACCOUNTABILITY BOARD (PAB)
REGULAR MEETING ATTACHMENTS
MARCH 9, 2022**

<u>MINUTES</u>	
February 23, 2022 Special Meeting Draft Minutes.	Page 7
February 23, 2022 Regular Meeting Draft Minutes. <i>(to be delivered)</i>	
<u>AGENDA-RELATED</u>	
Item 8. – Subcommittee List updated 2-24-2022.	Page 9
Item 10.b. (see below)	
Item 10.c. – Feb. 18, 2022 letter from Mental Health Commission inviting joint collaboration re increasing use of local crisis stabilization.	Page 11
Item 12 – Feb. 8, 2022, letter from Rains Lucia Stern et al. to City Attorney Farimah Brown re BPD demand to cease-and-desist further violations of the Brown Act and City Charter.	Page 13
<u>COMMUNICATIONS</u>	
3-1-2022 email from Interim Chief Louis to Interim DPA re Early Warning System final draft policies, attaching Policy 1041 and General Order E-13.	Page 19
2-2-2022 article from www.esquire.com , “Who Writes the Rules for Cops?” (re Lexipol company).	Page 29
Item 10.b. – separately numbered:	
<ul style="list-style-type: none"> • Police Equipment and Community Safety Ordinance Impact Statements 	Cover page
<ul style="list-style-type: none"> • Appendix to Impact Statements – Applicable Lexipol Policies 	Page 61
<ul style="list-style-type: none"> • B.M.C. Chapter 2.100, Police Equipment and Community Safety Ordinance 	Page 117
<ul style="list-style-type: none"> • Assembly Bill 481 	Page 125
<ul style="list-style-type: none"> • 12-10-2021 memo from John Lindsay-Poland, American Friends Service Committee to PAB re Militarized Equipment Policies and AB 481 Requirements 	Page 135



OFFICE OF THE DIRECTOR
OF POLICE ACCOUNTABILITY

DRAFT

**POLICE ACCOUNTABILITY BOARD
SPECIAL MEETING
MINUTES
(draft)**

Wednesday, February 23, 2022, 5:00 P.M.

RECORDER ON

No physical location; meeting held exclusively through videoconference and teleconference.

1. CALL TO ORDER & ROLL CALL BY CHAIR CHANG AT 5:02 P.M.

Present: Board Member Michael Chang (Chair)
Board Member Nathan Mizell (Vice-Chair)
Board Member Kitty Calavita
Board Member Juliet Leftwich
Board Member Deborah Levine
Board Member John Moore
Board Member Cheryl Owens
Board Member Elisa Batista (alternate)

Absent: Board Members Regina Harris, Ismail Ramsey

ODPA Staff: Katherine J. Lee, Interim Director of Police Accountability; Byron Norris, DPA Investigator

BPD Staff: None

2. PUBLIC COMMENT

0 speakers.

Closed Session

Pursuant to the Court's order in *Berkeley Police Association v. City of Berkeley, et al.*, Alameda County Superior Court Case No. 2002 057569, the PRC will recess into closed session to discuss and take action on the following matters:

3. CONSIDER FINDINGS AND RECOMMENDATIONS OF INTERIM DIRECTOR IN COMPLAINT #6 AND DECIDE WHETHER A HEARING IS NEEDED

Motion to affirm the Interim Director's recommendation of "Unfounded" on all three allegations, and that there is no need for a hearing.

Moved/Second (Leftwich/Calavita) Motion Carried

Ayes: Calavita, Chang, Leftwich, Levine, Mizell, Moore, Owens, and Batista.

Noes: None Abstain: None Absent: Harris, Ramsey

End of Closed Session

4. ANNOUNCEMENT OF CLOSED SESSION ACTION

Chair Chang announced that the Board affirmed all three recommendations of the Interim Director and determined there was no need for a hearing.

5. ADJOURNMENT

Motion to adjourn the meeting.

Moved/Second (Leftwich/Moore) By general consent, the meeting was adjourned at 6:15 p.m.

**POLICE ACCOUNTABILITY BOARD
SUBCOMMITTEES LIST**

2-24-2022

Subcommittee	Board Members	Chair	BPD Reps
Regulations Formed 7-7-21	Calavita Chang Leftwich Owens <u>Public:</u> Kitt Saginor	Chang	Lt. Dan Montgomery
Director Search Formed 8-4-21	Levine Mizell Moore <u>Public:</u> Rivka Polatnick Marc Staton	<u>Co-chairs</u> Levine Moore	
Fair & Impartial Policing Implementation Formed 8-4-21	Calavita Moore Owens Ramsey <u>Public:</u> George Lippman Elliot Halpern Jamie Crook	Calavita	Sgt. Peter Lee
Mental Health Response Formed 11-10-21	Harris Levine <u>Public:</u> Elena Auerbach		Sgt. Joe LeDoux
Fixed Surveillance Cameras (Policy 351) Formed 2-9-22	Moore Ramsey		
PAB Budget Formed 2-23-22	Levine Harris Owens		

Mental Health Commission
c/o Commission Secretary
Jamie Works-Wright
Berkeley, CA

February 18, 2022

Police Accountability Board
c/o Katherine Lee
Interim Director of the Police Accountability Board
Berkeley, CA

Re: Invitation for Joint Subcommittee Collaboration with Mental Health Commission
People with Mental Health Disabilities in Berkeley:
DOJ Investigations re: John George Psychiatric Hospital & Santa Rita Jail
Crisis Stabilization & Diversion from Policing, Criminal and Incarceration Systems

Dear Police Accountability Board,

As members of the Berkeley Mental Health Commission, we feel increasingly concerned about the ways in which Berkeley residents with mental health disabilities and illnesses are being processed through the criminal justice and mental health care systems.

In April 2021, the Alameda County Board of Supervisors was notified by the U.S. Dept. of Justice that the Civil Rights Division had completed their investigation into the conditions and practices at Santa Rita Jail and John George Psychiatric Hospital and issued a report. Specifically, the investigation found that:

“(1) Alameda County violates the ADA by failing to provide services to qualified individuals with mental health disabilities in the most integrated setting appropriate to their needs by unnecessarily institutionalizing them at John George Psychiatric Hospital and sub-acute facilities;

(2) Santa Rita Jail fails to provide constitutionally adequate mental health care to prisoners with serious mental health needs, including those at risk of suicide;

(3) Santa Rita Jail’s use of prolonged restrictive housing under current conditions violates the Eighth and Fourteenth Amendment rights of prisoners with serious mental illness; and

(4) Santa Rita Jail violates the ADA by denying prisoners with mental health disabilities access to services, programs, and activities because of their disabilities."

As a result of the report and its determination of widespread violations, a federal court issued a decision in the case, Babu v. The County of Alameda, identifying changes that will be required at the jail regarding the treatment of inmates with mental health issues.

However, members of the Mental Health Commission are concerned by the following:

1. Alameda County continues to have the highest rate of 5150 holds in California
2. Berkeley Police policies for addressing individuals with mental health concerns are outdated and potentially injurious to these same individuals
3. By participating in 5150 holds that send people to prison instead of a care facility, BPD may be complicit in doing harm to these individuals
4. Existing crisis stabilization and respite centers in our area are currently underutilized
5. The City of Berkeley could easily increase its capacity to assist in crisis stabilization, rewrite its protocols for police and mental health providers and thereby reduce the additional trauma faced by many people in crisis situations and contribute to them receiving proper care and no longer requiring emergency services of 5150 evaluations and holds.

We invite the Police Accountability Board to join in the creation of a Joint Subcommittee on Increasing the Use of Local Crisis Stabilization by police and mental health responders in the City of Berkeley as an alternative to sending people to Santa Rita or John George.

Our goal would be to make recommendations to the City Council for increasing capacity for crisis stabilization and revising policies within the Police Department as well as the Mental Health 100 Division to reflect this new approach to 5150 evaluations and holds and how individuals are processed through these systems.

Sincerely,

The Berkeley Mental Health Commission

RLS RAINS LUCIA STERN ST. PHALLE & SILVER, PC

Rockne A. Lucia, Jr.
Attorney at Law
RLucia@RLSlawyers.com

February 8, 2022

VIA ELECTRONIC MAIL [FBROWN@CITYOFBERKELEY.INFO] & FIRST CLASS MAIL

Farimah Brown, City Attorney
City of Berkeley
2180 Milvia Street 4th Floor
Berkeley, CA 94704

**Re: Berkeley Police Association Demand to Cease and Desist Further Violations
of the Ralph M. Brown Act and the City's Charter**

Dear Farimah:

As you know, this firm represents the Berkeley Police Association ("BPA"). Please accept this letter as the BPA's demand that the City of Berkeley ("City") and its Office of the Director of Police Accountability and its Board ("PAB") immediately cease and desist further violations of the Ralph V. Brown Act, Government Code section 54950, et seq. ("Brown Act"), and the City's Charter, and take all necessary and reasonable steps to cure past violations as set forth below.

As I am sure you are aware, the general purpose of the Brown Act is to prohibit public bodies from deliberating in the dark hidden from public scrutiny. (*Los Angeles Times Communications v. Los Angeles County Bd. of Supervisors* (2003) 112 Cal.App.4th 1313, 1321.)¹ To achieve this purpose, the Brown Act imposes various procedural and notice requirements on "legislative bodies" prior to deliberating on matters within their subject matter jurisdiction. Among those are the obligations to:

- (a) **conduct "open and public" meetings** (Gov. Code § 54953(a) ["All meetings of the legislative body of a local agency shall be open and

¹"The Legislature forcefully stated its intent when passing the Brown Act: "In enacting this chapter, the Legislature finds and declares that the public [] boards [] exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." (*Id.*, citing Government Code § 54950.)

Farimah Brown, City Attorney

Re: Demand to Cease and Desist Violations of the Ralph M. Brown Act

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public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency...”]);

- (b) **provide at least 72 hours advance notice of topics to be discussed during an upcoming meeting, with a prohibition on discussing unnoticed topics** (Gov. Code § 54954.2(a));
- (c) **refrain from communicating with one another about any item of business pending before the legislative body outside of a properly noticed meeting** (Gov. Code § 54957(b)(1) [“A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body”], and;
- (d) **provide at least 24 hours’ notice to an employee prior to holding a closed session meeting to consider “complaints”** against such employee (Gov. Code § 54957(b)(2) [“As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session. If notice is not given, any disciplinary or other action taken by the legislative body against the employee based on the specific complaints or charges in the closed session shall be null and void”].)

Both the PAB generally – and its three-person “panels” convened to accept and consider investigative findings from the PAB Director – are “legislative bodies” subject to the requirements of the Brown Act. (Gov. Code § 54952(b) [“Legislative body” includes any “commission, committee, board, or other body of a local agency, whether permanent or temporary, decision-making or advisory, created by charter, ordinance, resolution, or formal action of a legislative body” and “standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction”].)

The BPA has recently become aware that the PAB has been engaging in Brown Act violations, for an unknown amount of time, and has publicly acknowledged those violations. During its regular meeting on January 26, 2022, PAB member Juliet Leftwich publicly admitted to conducting surreptitious deliberations with other PAB members in advance of a hearing on a complaint of misconduct. Specifically, member Leftwich stated that she and PAB member

Farimah Brown, City Attorney

Re: **Demand to Cease and Desist Violations of the Ralph M. Brown Act**

February 8, 2022

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Levine “were watching some of the body worn camera footage together and were talking a little bit about the merits of [a] case” to be heard on Friday, February 4, 2022 at 5 p.m. Perhaps more worrisome was Member Leftwich’s seeming acknowledgment that this has been an on-going practice of the PAB.² Member Leftwich also acknowledged that she was informed by City staff that she and member Levine “probably shouldn’t do that because it could be a Brown Act violation...,” and that she submitted a request to your office for an opinion.

In response to this revelation, PAB Interim Director Katherine J. Lee disclosed your office’s advice, which was that PAB “hearing panels are subject to the Brown Act,” in part because they are properly considered “legislative bodies” as defined. Moreover, Director Lee expressed your office’s concern that the surreptitious deliberations and communications in advance of the hearing presented “basic due process issue[s]” for the involved officers, because the PAB members “should be deliberating in the hearing and not any time outside of that...”

There is no doubt that this public exchange represents the PAB’s admission of Brown Act violations. The surreptitious communications and deliberations constitute violations of the PAB’s obligations to conduct open and public meetings following proper notice (Gov. Code §§ 54953(a), 54954.2(a)), take action only on properly agendized matters (Gov. Code § 54954.2(a)), refrain from communicating or deliberating about PAB business outside of a properly noticed meeting – whether in closed session or otherwise (Gov. Code § 54957(b)(1)), and provide timely notice to the employee prior to considering “complaints or charges.” (Gov. Code § 54957(b)(2).)

As I believe you’re also aware, any action taken in violation of the Brown Act is “null and void” and enforceable in the superior court, with attorneys’ fees awarded to the party enforcing compliance. (Gov. Code §§ 54960, 54960.1(a), 54960.2, 54960.5; *Los Angeles Times Communications v. Los Angeles County Bd. of Supervisors* (2003) 112 Cal.App.4th 1313, 1327 [an award of attorneys’ fees enforcing the Brown Act are “presumptively appropriate”]; also see *Moreno v. City of King* (2005) 127 Cal.App.4th 17, 29 [“any disciplinary or other action taken by the legislative body against the employee...shall be null and void”].)

Most immediately, **due to the admitted violations any action taken relative to the matter(s) heard during the PAB’s February 4, 2022 panel hearing is “null and void.”** Moreover, any action by the PAB even at a properly noticed “hearing” sometime in the future, would still constitute a violation of the Brown Act. *Morrison v. Housing Auth. of the City of Los Angeles Ed of Comrs.* (2003) 107 Cal.App.4th 860, 876, is directly on point. In that case, the commissioners held a closed session meeting to discuss the findings of an arbitrator regarding

² Member Leftwich: “this had not come up before at least not since I was on this entity or the predecessor board ... the Brown Act really shouldn’t apply because these hearings are not open to the public so the whole rationale of the Brown Act is to shine a light on secret dealings - well these are confidential so I didn’t really see why there should be a prohibition on Board members conferring before a hearing...”

Farimah Brown, City Attorney

Re: Demand to Cease and Desist Violations of the Ralph M. Brown Act

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the plaintiff's discharge, but failed to provide the required 24-hour notice; they did not reach a final decision, and took no final action. The Commissioners then provided the proper notice to the plaintiff of a subsequent meeting to make a determination in the matter. The court found that providing such notice did not cure the previous violation. "To hold otherwise," the court wrote:

would eviscerate the Act because it would allow the agency to make findings of fact in secret which ought to be made in public and then conduct a mere "ceremonial" hearing to satisfy the open meeting requirement. It is the job of the courts in enforcing the Brown Act to block, not facilitate, such evasive techniques.

(*Id.*)

In addition to the Brown Act concerns set forth above, the BPA is also becoming increasingly concerned that the PAB's conduct violates the City's Charter. There have been numerous and repeated public statements made by PAB members which indicate a lack of objectivity and bias against the Police Department and members of the BPA. Accordingly, the BPA would like to remind the City that, in making its determinations, the PAB's members must be "fair" and "unbiased." (Charter Sec. 125, Art. XVIII, (18)(c).) In performing their duties, PAB members must "maintain basic standards of fair play, impartiality, and avoid bias and the appearance of bias." (Charter Sec. 125, Art. XVIII, (18)(b).) They are also obligated to disclose "all ex parte contacts concerning the subject of" hearings," and "submit a report of such contacts in writing prior to the commencement" of hearings. (Charter Sec. 125, Art. XVIII, (18)(b)(2).) The BPA submits that admitted deliberations conducted in secret do not live up to these obligations.

In sum, the BPA demands that the PAB immediately take the following steps to cure its Brown Act violations as set forth above:

- (1) cease and desist from further violations of the Brown Act;
- (2) inform of all prior instances in which PAB members surreptitiously communicated or deliberated concerning matters to be adjudicated at a hearing;
- (3) inform of all prior violations of the Brown Act (in light of the apparent acknowledgment that Brown Act violations have been the prior practice);
- (4) take all necessary steps to cure past violations of the Brown Act, including but not limited to:

Farimah Brown, City Attorney

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- i. declare any action taken on the matters heard on February 4, 2022 as null and void and/or refrain from taking any action on such matters;
 - ii. declare any action taken on any other matters heard in violation of the Brown Act null and void and/or refrain from taking any action on those matters;
- (5) Cease and desist from taking any future actions on any complaints unless and until demands (1)-(4) are complied with;
 - (6) Refrain from making public statements which indicate bias and pre-determined outcomes involving complaints and matters that come before them.

Please inform this office no later than Friday, February 11, 2022, as to the City's compliance with the above. Should the City fail to cure its Brown Act violations, the BPA is prepared to enforce the Brown Act in superior court.

Very truly yours,

RAINS LUCIA STERN
ST. PHALLE & SILVER, PC



Rockne A. Lucia, Jr.

RAL:tw

cc: Darren Kacalek, President, Berkeley Police Association (via email only)

Lee, Katherine

From: Louis, Jennifer A.
Sent: Tuesday, March 1, 2022 6:27 AM
To: Lee, Katherine
Subject: BPD Policy E-13/1041 Early Warning System
Attachments: E-13 Early Warning System FEB 2022 FIP .doc; 1041-EARLY_WARNING_SYSTEM.pdf

Good morning Director Lee,

May I ask you to please forward this email to the PAB. Attached please find the Early Warning System final drafts in both formats, existing General Order and Lexipol. The attached E-13 has the new sections bolded (subsection (h) and the following paragraph) so the PAB can see the language that has been added to our existing policy. Policy 1041 which is identical is the format I will be issuing this policy as to align with our goal of Lexipol issuance of all departmental policies.

The added text is supportive of FIP recommendations as well as the feedback and guidance we received from members of Council, FIP Task Force and PRC (now PAB)

Respectfully,

Jen

Jen Louis
Interim Chief of Police
Berkeley Police Department

EARLY WARNING SYSTEM

1041.1 PURPOSE

The purpose of this Order is to establish policy and procedures for an informal performance review and intervention program, the "Early Warning System" (EWS). The program monitors employee performance that may be inconsistent with professional police conduct and cooperatively engages employees to resolve areas of concern. The goal of EWS is early identification of employee performance issues and correction of these issues through constructive counseling sessions rather than the formal disciplinary process.

1041.2 POLICY

All employees shall participate in the EWS program and comply with the guidelines set forth in this Order.

Participation in the EWS program shall not be deemed punitive, nor a formal disciplinary process.

- (a) Notwithstanding the initiation of the EWS process, the Department retains its right and responsibilities with regard to investigation of policy violation and enforcement of employee discipline.

1041.3 PROCEDURES

Employee behavior or performance that is subject to EWS review includes, but is not limited to:

- (a) Poor attendance and/or abusive use of leave;
- (b) Multiple formal sustained or not sustained complaints;
- (c) Multiple informal complaint inquiries;
- (d) Multiple use of force incidents;
- (e) Multiple obstructing/resisting arrest incidents;
- (f) Multiple vehicle collisions; and,
- (g) Substandard conduct/performance concerns observed by a superior officer.
- (h) Irregular demographic stop data on pedestrian, bike, and vehicle enforcement, while considering the factors of the assignment (geographical area of the city the officer is working, the specific detail/assignment, and the nature of enforcement).

The Racial and Identify Protection Act (RIPA) data will be available to supervisors in the form of an electronic data dashboard. This will provide supervisors and commanders with the ability to review stop data created by officers assigned under their span of control. The individual stop data for individual officers should be considered a personnel record as it may provide supervisory guidance for specific officer stop data, if necessary. The public release of any RIPA data will remain anonymized as previously agreed upon Meet and Confer with the Berkeley Police Association and provisions of Government Code 3300 et.al.

Berkeley Police Department
Law Enforcement Services Manual

EARLY WARNING SYSTEM

Supervisors, commanders and managers shall monitor the activity of their subordinate employees to identify actual or perceived unprofessional behavior and/or substandard performance that is subject to EWS review, and if identified, communicate such information to the Chief of Police via the Chain of Command.

Personnel assigned to the Internal Affairs Bureau (IAB) shall monitor all formal and informal allegations of employee misconduct received by their office for behavior or performance that is subject to EWS review, and if identified, communicate such information to the Chief of Police.

Personnel assigned to the Support Services Division Report Review Detail shall forward to the Chief of Police copies of all reports pertaining to:

- (a) Obstruction/resisting arrests cases (i.e., Penal Code §§148, 69, etc.)

Administrative reports regarding use of force shall be forwarded to the Chief of Police as directed in Policy 300.

1041.4 MANAGEMENT OF PROGRAM RECORDS

The Office of the Chief of Police shall be responsible for aggregation and administrative management of information, data and records associated with the EWS program.

- (a) The administrative assistant assigned to the Office of the Chief of Police shall be responsible for preparing a quarterly report summarizing information and activities associated with the EWS program for use in administrative review.

Information, data and records associated with the EWS program are used for personnel purposes. Accordingly, they are confidential personnel files and not public records.

Documents, data and records shall be maintained by the Office of the Chief of Police for a period of two (2) years.

Access to EWS records shall be restricted to the supervisor, commander and/or manager involved in the monitoring of a particular employee, subject to the approval of the Chief of Police.

- (a) An individual employee may be granted access to EWS records that pertain to him/her.

1041.5 ADMINISTRATIVE REVIEW BOARD

The Chief of Police will convene a quarterly Review Board comprised of all Division Commanders to review program records to determine if initiation of the EWS Program is recommended.

Upon consideration of the Review Board's recommendation, the Chief of Police may direct an employee to participate in the EWS program.

1041.6 INITIATION OF EWS PROGRAM

Upon the direction of the Chief of Police, an informal counseling meeting will be held that may include:

- (a) The subject employee;

Berkeley Police Department

Law Enforcement Services Manual

EARLY WARNING SYSTEM

- (b) The employee's supervisor;
- (c) An Internal Affairs Bureau sergeant;
- (d) The employee's Lieutenant; and,
- (e) The employee's Division Commander, who shall preside over the meeting.

Unless impractical, the counseling meeting shall be held during the employee's regularly scheduled working hours.

- (a) If the meeting cannot be scheduled during the employee's regularly scheduled working hours, personnel participating while off-duty shall be compensated with compensatory time (minimum time as may be authorized by the employee's MOU) or, with Division Commander approval, allowed to flex an equal amount of time within that same work week.

The subject employee may have one fellow employee accompany him/her to the counseling meeting.

- (a) The accompanying employee's presence is allowed to offer general support to the subject employee, not to be an active participant in the counseling meeting.

As in general supervisor counseling meetings, the employee shall be informed of the behavioral and/or performance concern(s) at issue, and he/she shall be allowed an opportunity to offer a response.

The subject employee may be given information regarding the City of Berkeley Employee Assistance Program.

No formal document will be generated referencing this meeting, and the meeting shall not be deemed a punitive or disciplinary proceeding against the employee. There shall be no permanent record of the meeting.

BERKELEY POLICE DEPARTMENT

DATE ISSUED: March 17, 2008

GENERAL ORDER E-13

SUBJECT: EARLY WARNING SYSTEM

PURPOSE

- 1 - The purpose of this Order is to establish policy and procedures for an informal performance review and intervention program, the "Early Warning System" (EWS). The program monitors employee performance that may be inconsistent with professional police conduct and cooperatively engages employees to resolve areas of concern. The goal of EWS is early identification of employee performance issues and correction of these issues through constructive counseling sessions rather than the formal disciplinary process.

POLICY

- 2 - All employees shall participate in the EWS program and comply with the guidelines set forth in this Order.
- 3 - Participation in the EWS program shall not be deemed punitive, nor a formal disciplinary process.
 - (a) Notwithstanding the initiation of the EWS process, the Department retains its right and responsibilities with regard to investigation of policy violation and enforcement of employee discipline.

PROCEDURES

- 4 - Employee behavior or performance that is subject to EWS review includes, but is not limited to:
 - (a) Poor attendance and/or abusive use of leave;
 - (b) Multiple formal sustained or not sustained complaints;
 - (c) Multiple informal complaint inquiries;
 - (d) Multiple use of force incidents;
 - (e) Multiple obstructing/resisting arrest incidents;
 - (f) Multiple vehicle collisions; and,
 - (g) Substandard conduct/performance concerns observed by a superior officer.
 - (h) ***Irregular demographic stop data on pedestrian, bike, and vehicle enforcement, while considering the factors of the assignment (geographical area of the city the officer is working, the specific detail/assignment, and the nature of enforcement).***

* Entire text is revised.

BERKELEY POLICE DEPARTMENT

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5 - The Racial and Identify Protection Act (RIPA) data will be available to supervisors in the form of an electronic data dashboard. This will provide supervisors and commanders with the ability to review stop data created by officers assigned under their span of control. The individual stop data for individual officers should be considered a personnel record as it may provide supervisory guidance for specific officer stop data, if necessary. The public release of any RIPA data will remain anonymized as previously agreed upon Meet and Confer with the Berkeley Police Association and provisions of Government Code 3300 et.al.

Supervisors, commanders and managers shall monitor the activity of their subordinate employees to identify actual or perceived unprofessional behavior and/or substandard performance that is subject to EWS review, and if identified, communicate such information to the Chief of Police via the Chain of Command.

- 6 - Personnel assigned to the Internal Affairs Bureau (IAB) shall monitor all formal and informal allegations of employee misconduct received by their office for behavior or performance that is subject to EWS review, and if identified, communicate such information to the Chief of Police.
- 7 - Personnel assigned to the Support Services Division Report Review Detail shall forward to the Chief of Police copies of all reports pertaining to:
 - (a) Obstruction/resisting arrests cases (i.e., Penal Code §§148, 69, etc.)
- 8 - Administrative reports regarding use of force shall be forwarded to the Chief of Police as directed in General Order U-2.

Management of Program Records

- 9 - The Office of the Chief of Police shall be responsible for aggregation and administrative management of information, data and records associated with the EWS program.
 - (a) The administrative assistant assigned to the Office of the Chief of Police shall be responsible for preparing a quarterly report summarizing information and activities associated with the EWS program for use in administrative review.
- 10 - Information, data and records associated with the EWS program are used for personnel purposes. Accordingly, they are confidential personnel files and not public records.
- 11 - Documents, data and records shall be maintained by the Office of the Chief of Police for a period of two (2) years.
- 12 - Access to EWS records shall be restricted to the supervisor, commander and/or

* Entire text is revised.

BERKELEY POLICE DEPARTMENT

DATE ISSUED: March 17, 2008

GENERAL ORDER E-13

manager involved in the monitoring of a particular employee, subject to the approval of the Chief of Police.

- (a) An individual employee may be granted access to EWS records that pertain to him/her.

Administrative Review Board

- 13 - The Chief of Police will convene a quarterly Review Board comprised of all Division Commanders to review program records to determine if initiation of the EWS Program is recommended.
- 14 - Upon consideration of the Review Board's recommendation, the Chief of Police may direct an employee to participate in the EWS program.

Initiation of EWS Program

- 15 - Upon the direction of the Chief of Police, an informal counseling meeting will be held that may include:
 - (a) The subject employee;
 - (b) The employee's supervisor;
 - (c) An Internal Affairs Bureau sergeant;
 - (d) The employee's Lieutenant; and,
 - (e) The employee's Division Commander, who shall preside over the meeting.
- 16 - Unless impractical, the counseling meeting shall be held during the employee's regularly scheduled working hours.
 - (a) If the meeting cannot be scheduled during the employee's regularly scheduled working hours, personnel participating while off-duty shall be compensated with compensatory time (minimum time as may be authorized by the employee's MOU) or, with Division Commander approval, allowed to flex an equal amount of time within that same work week.
- 17 - The subject employee may have one fellow employee accompany him/her to the counseling meeting.
 - (a) The accompanying employee's presence is allowed to offer general support to the subject employee, not to be an active participant in the counseling meeting.

- 18 - As in general supervisor counseling meetings, the employee shall be informed of

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BERKELEY POLICE DEPARTMENT

DATE ISSUED: March 17, 2008

GENERAL ORDER E-13

the behavioral and/or performance concern(s) at issue, and he/she shall be allowed an opportunity to offer a response.

- 19 - The subject employee may be given information regarding the City of Berkeley Employee Assistance Program.
- 20 - No formal document will be generated referencing this meeting, and the meeting shall not be deemed a punitive or disciplinary proceeding against the employee. There shall be no permanent record of the meeting.

References: General Orders P-26, P-28, R-3 and U-2

* Entire text is revised.

Who Writes the Rules for Cops?

After years of high-profile shootings, policing in America is under more scrutiny than at any time in our history. Meanwhile, one company—which sells policy handbooks to police departments across the country—seems determined to give officers cover.

Story by Rowan Moore Gerety | Photographs by Matthew Porter

Feb 2, 2022

This article appeared in the March 2022 issue of Esquire

Nicholas Pimentel, a twenty-seven-year-old restaurant cook, was driving his pickup truck home from a bar in Ceres, California, when police pulled him over for a traffic stop. But Pimentel didn't stop, instead leading the cops on a high-speed chase, which ended when police blocked his path around the corner from his house. His truck spun out. After Ceres police officer Ross Bays rammed the driver's side with his patrol car, body-cam footage from another officer shows Pimentel's engine continuing to rev and the truck's wheels spinning in place as it was stuck between Bays's cruiser and a parked car. Bays fired his gun into the vehicle at Pimentel, then another officer did, too.

Pimentel died that night with twelve gunshot wounds.

Ten months later, Carmen "Spencer" Mendez, fifteen, was a passenger in a black Lexus that led Ceres police on a chase following reports that one of the occupants had been seen with a gun at a local park. The same officer, Ross Bays, sped through the almond orchards that surround Ceres before pulling off the road behind the Lexus as it slowed. On the body-cam recording of the incident, Mendez, an athletic ninth grader who loved football, tumbles out in a barrel roll, somersaults to his feet, and takes off into an orchard at a sprint. Bays opens his door as his cruiser comes to a stop. In the video, a tattoo of a Blue Lives Matter flag is visible on Bays's left forearm as he raises his weapon.

Three seconds after exiting the vehicle, he fires sixteen rounds without warning, then shouts, "Get on the ground, get on the ground!" The video isn't clear, but in a later interview with the Ceres PD's internal-affairs department, Bays said he saw Mendez carrying a gun as he ran away and that he feared a potential ambush or even hostage situation. "As he starts running away from me, he's creating distance between us far beyond my ability to stop this threat," he said.

Mendez was pronounced dead at the scene. An unloaded revolver was found near his body.

Police shootings are usually followed by two separate investigations: an internal-affairs review to determine whether officers violated department policies and a criminal investigation in which prosecutors decide whether they have violated the law. In both the Pimentel and Mendez cases, the district attorney's office declined to seek an indictment of Bays, ruling that both shootings were justified under the Supreme Court

standard set forth in the 1989 case *Graham v. Connor*: “from the perspective of a reasonable officer on the scene.”

Inside the Ceres Police Department, successive internal-affairs investigations exonerated Bays based on the department’s policies on vehicular chases and use of force. Bays’s body camera was off when he fired at Pimentel; in the footage from another officer’s camera, it’s difficult to make out whether the truck actually moved, but Bays told internal-affairs investigators that Pimentel was steering toward him and that he “made eye contact,” which Bays interpreted as a threat.

In the Mendez case, the investigators concluded that Bays fired “fearing that Carmen Mendez could circle back under the cover of the orchard to ambush and kill him, coupled with the fact that Carmen Mendez was running in the general direction of a nearby farmhouse where he could potentially harm an innocent bystander.” The police chief, Rick Collins, told *The Ceres Courier* that shooting someone in the back was “not necessarily” against police policy.

Which was astonishing.

Astonishing then, and even more so now, almost two years after the murder of George Floyd, at this tense and consequential moment in the history of the republic, when the very existence of the system of law enforcement that holds together a civil society is being questioned. In many cities, the movement to reconsider the role of police and their methods has risen to a cry for seismic police reforms or, in some places, for defunding the police entirely.

But in fact, reform is slow, and not much is happening. Reforms mean change. Reforms mean rules that govern when cops can draw their gun, when they can’t, what they have to report every time their weapon leaves the holster.

Reforms mean accountability.

Every police department has a policy manual, a written code of conduct that governs its officers, including rules of engagement that spell out when an officer can or cannot use lethal force. These manuals are updated from time to time—to reflect changes in state law, or Supreme Court rulings in cases involving police conduct, or technological innovations like body cams and Tasers. Lots of reasons.

When crafting policy in the first place, police departments can go one of two ways: They can require that officers do only what is required by law in any given situation, or they can go above and beyond what the law requires, writing so-called bright-line rules that make clear what an officer can and can’t do.

For example, if the law stipulates that an officer can fire at a suspect who’s running away if the officer fears for his or her life, and the policy stops there, a lot falls to the officer’s discretion. So a department might try to write policy that spells out what it means to

fear for your life, and it might write rules requiring that the officer issue a verbal warning or try using a dog before resorting to a gun.

Chief Collins? He was absolutely correct. The Ceres Police Department bought its manual from a company called Lexipol, which has made a cottage industry of writing manuals that are widely recognized as being police friendly, marketing them using taglines like “Is Your Use of Force Policy Properly Protecting You?” Lexipol says it creates policies that mirror the law rather than factors like, say, public opinion or the research demonstrating that more rules governing the use of force result in fewer people being dead. The company writes “legally defensible” policies, it says, that “mitigate risk.”

The risk, that is, to the police department, not necessarily the risk of shooting someone in the first place.

When the Pimentel and Mendez families sued the city, the lawyer who represented Ceres in both cases was a private defense attorney named Bruce Praet, who has built his legal career on representing police officers and departments accused of breaking the law, including many fatal shootings. (Praet is a former police officer himself.) Together, the settlements to the two families totaled more than \$4 million—more than a quarter of the Ceres Police Department’s annual budget. But much of that would be paid by the city’s insurance, and the settlements avoided the possibility of messy trials or even larger jury awards. Two young men in one small town had been killed by a single officer within a year, but the police department could go on as though nothing had happened. Ross Bays retired to Idaho.

Lexipol provides policy manuals to thirty-five hundred of the eighteen thousand police departments in the United States. That’s almost one in five police departments in this country that operate under Lexipol guidelines.

One cofounder of Lexipol?

Bruce Praet.

In the months after Spencer Mendez was killed, his mother, Stephanie Beidleman, who installs displays at grocery chains and big-box stores, returned again and again to the footage of her son’s last moments.

“I freeze-framed every pixel of that video,” she says, desperate for some understanding of the sequence that left her youngest, four months past his fifteenth birthday, bleeding out in an almond orchard. Police said they recovered a weapon near where Spencer was shot, but Beidleman couldn’t make sense of it. The report of someone holding a firearm at the park described a suspect dressed in black, not a white top and red pants, like Spencer was wearing.

“My son was running away from him, not toward him,” she says, referring to Bays. “Away from him.”

Bays said he feared Spencer could double back and ambush him. Another potential threat came from the people who remained in the car, all of them just as near to Bays, with a clear line of sight if they wanted to do him harm. When Bays began firing without shouting a warning, Spencer was close to fifty feet away on the opposite side of the vehicle, running into the orchard.

Bays stepped out into the open, giving up the protection of his SUV and its ballistic doors, and fired round after round. And only then did he say, "Get on the ground."

Why didn't he use the dog?

That's the question—one of the endless questions—Beidleman asks herself over and over. She'd been out to that orchard the day Spencer was killed and gotten as far as the caution tape, then sat on the side of the road for four or five hours. She couldn't help but think, *The officer had choices*. There was a trained police dog in the back seat of Bays's SUV. Why not send the dog after Spencer instead of just gunning him down? The dog might have hurt her baby. Might have bitten him hard. But at least her baby might still be alive.

Founded as a spin-off of Praet's legal practice in 2003, Lexipol has become the dominant player in police policymaking nationwide. The company's pitch to police departments is alluringly simple: For a flat fee based on a department's number of officers—often running from thousands to tens of thousands of dollars—it will write a "customizable, reliable, and regularly updated" code of conduct that complies with legal standards while, Lexipol says, minimizing liability. Lexipol says its clients face fewer lawsuits in cases when an officer is accused of unnecessary shootings and resolve them with smaller payouts; many municipal insurers and risk pools subsidize subscriptions to Lexipol, sometimes paying 100 percent of the fee. Ceres's Lexipol subscription, for example, is paid for through its premiums to the Central San Joaquin Valley Risk Management Authority.

Neither Praet nor Lexipol responded to multiple interview requests for this story. The city of Ceres declined to comment on the Mendez and Pimentel shootings, as well as on the city's relationship with Lexipol and Praet. This article is based on interviews with more than sixty people, including law enforcement and elected officials, legal scholars, policy and risk-management experts, insurers, and Lexipol customers and former employees, as well as family members of people injured or killed by police represented by Praet, their attorneys, and Praet's siblings and former classmates. In addition, I reviewed numerous federal cases in which Praet served as an attorney; contracts, manuals, and individual policies from dozens of Lexipol subscribers; Lexipol trainings, marketing materials, and correspondence with police agencies; and minutes and video from public meetings discussing the company's offerings.

Lexipol has positioned itself as a simple solution to a longstanding problem: Policy manuals are supposed to function as a department's bible for operations, but they take time and money to produce and can get "severely outdated" over time, as one of Lexipol's marketing refrains says. Drafting new policy can be a daunting process, and

most places don't have a public body whose job it is to do it. (Joseph Marshall, who spent more than a decade on the civilian police commission in San Francisco, compares drafting police-policy language to "getting a bill through Congress.")

That's partly why, historically, many police departments crib policies from other cities. When Jim Burch, now the president of the nonprofit National Police Foundation, was assigned to write policy for his suburban Maryland department in the 1980s, a supervisor dropped three thick manuals on his desk. "Here's Los Angeles, here's Baltimore, and here's Fairfax County," he said. "Just find their policies, pick one that you think is best, and put our name on top."

But that approach has risks: Choose the wrong department to copy, Burch says, and you could wind up on the wrong side of recent case law. When Lexipol takes on a police department as a client and writes its policy manual, the company also acts as the steward of the basic manual going forward, sending out revisions for the department to review and adopt, just like Microsoft auto-updating your software.

All for a fraction of a single officer's salary.

Nearly half of the eighteen thousand distinct law-enforcement agencies in the country employ ten officers or fewer. Beyond the basics, there is little coherence in police policies from town to town when it comes to definitions, data collection, procedure, or much else. Bill Bratton, who served as police commissioner in Boston and New York and chief of police in Los Angeles, compares the U. S. police-policy landscape to the Tower of Babel. "The great weakness of American policing is that we have so few national policies," he says—even on something as basic as tallying the annual number of fatal police shootings.

"You have all these agencies looking for what works," says Chuck Wexler, who runs the Police Executive Research Forum, a think tank established in 1976 to foster "professionalism in policing," including reducing the use of force. "If you look at the commitment we make relative to other countries, it's minuscule."

That makes outsourcing to Lexipol an attractive option for many departments. A policy manual can run four hundred pages or more, full of regulations meant to comply not only with case law but with insurance requirements—policies on sexual harassment, sick leave, lactation breaks, social media.

Once a policy is in place, Lexipol makes it easy for departments to keep it current. In Santa Maria, California, a Lexipol customer, the official responsible for training once emailed a Lexipol rep asking whether he could simply accept automatic policy updates without further modification: "Do I need to do anything after that, other than putting it into 'approved'?"

Lexipol has sometimes resisted and spoken out against reforms intended to increase police accountability. In 2017, when the International Association of Chiefs of Police released the National Consensus Policy on Use of Force—a new framework to help

agencies reduce police violence—Praet responded by writing a blog post for Lexipol. His headline: “National Consensus Policy on Use of Force Should Not Trigger Changes to Agency Policies.” He cautioned against requiring de-escalation, a method for reducing use of force by giving clear instructions, avoiding physical confrontation, or waiting it out while a suspect calms down. Praet wrote, “While ‘de-escalation’ has become the latest buzzword and is conceptually advisable, agencies must exercise extreme caution when mandating action with the use of inflexible ‘shalls.’” Meaning that if, in order to decrease the likelihood of violent encounters, a department’s policy requires or prohibits certain behavior on the part of its officers (those “inflexible ‘shalls’”)—and then an officer is accused of violating the policy—a department’s legal exposure increases. Lexipol’s answer is to—as much as possible—avoid *requiring* police to de-escalate, thus leaving such matters to an officer’s discretion and judgment.

This kind of thinking is aimed at minimizing liability, not making policing better, according to former Sacramento police chief Rick Braziel, who says that relying on Lexipol can make departments complacent. “Lexipol makes sure that all the legal mandates are in there—all the stuff’s in there to say that I’m doing it legally,” says Braziel, who has reviewed Lexipol policies as a consultant to police departments on use of force. “They don’t have in there, though, that you’re doing it correctly, morally, or ethically. You’re just doing it legally.”

Three years ago, in early 2019, lawmakers in California were drafting AB 392, known as the California Act to Save Lives, a bill that would revise use-of-force standards for police across the state. When it was first introduced, in February of that year, AB 392 included language that would have required officers to consider whether deadly force was “necessary,” and to rely on tactics like creating distance or taking cover to avoid shooting.

Necessary, in that early version of the bill, meant that an officer saw “no reasonable alternative to the use of deadly force.” By the time the bill passed that summer, it still limited deadly force to situations where it was “necessary,” but that meant only that an officer “reasonably believes” it necessary. Language about seeing “no reasonable alternative” to deadly force was gone. Where there had originally been two references to the Supreme Court’s “objective reasonableness” standard, there were now five. The legal bar for shooting someone was getting lower, not higher.

After the bill passed, Praet gave a webinar for Lexipol subscribers in which he took some credit for this result. “When we were dealing with legislators, one of the last things that we, law enforcement, threw in was a qualifier in that paragraph (b), which says, ‘As set forth below.’ ‘As set forth below,’ you’ll now see, is exactly *Graham v. Connor*,” he said.

In other words, he explained, “the new standard is the exact same thing we’ve had for the last fifty years.”

After a while, Praet asked the class, “You notice a theme here? That we retained all of the *reasonable*?” Lexipol had pecked and scratched at the bill’s language, the way a

lobbyist might, and in the end the bill scaled back the requirement that deadly force be used only when necessary, period.

This kind of hedging is a hallmark of Lexipol policies: “Our secret sauce, so to speak, is rarely, if ever, will you see the word *shall* in our policies,” Praet said. Instead, Lexipol policies are peppered with *should* and *may*, their edges smoothed by dependent clauses laying out broad caveats: *If reasonably safe and feasible . . . To the extent that it is reasonably practical . . .*

“If an agency ill-advisedly said, ‘You *shall* or *shall not* based on certain circumstances,’ yeah, you’d be hanging out there on a very thin limb,” Praet said. Don’t introduce any bright-line rules that the law doesn’t force you to.

Some police-department policies voluntarily use a higher standard than what the law requires. In New York City, for example, the NYPD said in 1972 that officers could no longer shoot into moving vehicles to avoid being run over—they’d have to get out of the way instead. Other departments banned choke holds long before the wave of state laws passed after Eric Garner and George Floyd were killed.

“The good news,” Praet said, “is here at Lexipol, our policies mirror the law.” He assured those watching the webinar that the company was “one hundred miles ahead of this,” referring to AB 392. He added, “Those of you not with Lexipol, you’ll just have to sign up.”

Fred Smith, a professor of constitutional law at Emory University’s law school, says this approach does not necessarily lead to better policing. He zeroed in on Lexipol’s claims of providing “legally defensible” policies that “mitigate risk.” “I think for most cities, the question is, How do we let police officers act to the full extent of what the Supreme Court allows without running into liability? So the incentive structure is that that would be the question Lexipol is answering,” he says. “And if that’s the question, that’s not going to lead to safety with justice.”

He adds, “As a society, we’re asking a question that’s not a legal question anymore; we’re asking police departments to act *better* than the Supreme Court allows.”

A few months after Praet’s webinar, as AB 392 took effect, Lexipol updated police policy manuals across California to reflect the new use-of-force guidelines, though as Praet had proudly told his audience, they weren’t really new at all.

The youngest of four children, Bruce Praet was raised outside Deerfield, Illinois, until his family moved to Phoenix, where his father built an auto-transmissions business. Growing up, family members say, Praet dreamed of being a veterinarian. In high school, his brother Jim recalls, he volunteered for the Maricopa County Sheriff’s Department through his Boy Scout troop and ended up on a detail responsible for identifying dead bodies at the scenes of murders and fatal car accidents.

Phone calls from the sheriff's department came in at all hours, and Praet brought home grisly photos he arranged in scrapbooks. "Whatever he gets into, he takes it full bore," Jim says. "I dropped out in Cub Scouts; Bruce went on to be an Eagle Scout."

After high school, Praet moved to California to live with his eldest sister and signed up as a police cadet while studying for his associate's degree in administration of justice at Saddleback Junior College. He finished at the top of his academy class. When, in 1973, California lowered the minimum age for officers from twenty-one to eighteen, Laguna Beach hired Praet as one of the youngest police officers in the state.

The following year, Praet found a job that would combine two of his teenage ambitions—animal care and law enforcement—as a police canine handler in nearby Orange, where he still lives. Other officers kenneled their dogs at work, but he brought his partner home each night. When the dog died, Praet's sister Carole recalls, the chief didn't understand why he was so upset over a "stupid dog."

According to a 1994 *New York Times* story about police officers who became lawyers, Praet recounted two occasions on which he was sued in the eleven years he served on the force. First, "by the family of a kidnapping suspect he had shot, and by a bank robbery suspect he had detained, questioned, and photographed as she loitered in a bank that had recently been robbed," the *Times* reported.

"I know how an officer feels when he has to trust a bunch of lawyers to defend him after all he did was defend himself," Praet told the reporter for that story. "I know what it feels like from the moment he pulls the trigger. I've been there, and it's something to be avoided."

Praet, at least, had an attorney he trusted: Michael Stone, who would later win acquittals on all but one federal charge for one of the four LAPD officers who beat Rodney King. It was Stone who encouraged Praet to go to law school and who hired him as a clerk. Soon after, Praet defended police for the LAPD's union and then served as an attorney for the city of Orange, where he had spent most of his career in law enforcement.

In 1987, Praet joined with two other attorneys to launch Ferguson, Praet & Sherman, a firm that defends police in civil matters and management in personnel cases, where he still works. (It remains a separate entity from Lexipol.) He developed a reputation as an aggressive, capable attorney.

Then a few years later, in 1993, after a setback in court, Praet had an idea.

Praet was representing the city of Perris, California. A bystander had been killed as police chased a truck that ran a stop sign, and the bystander's family sued the city. State law gave towns immunity from damages stemming from car chases as long as they had adequate "vehicular pursuit" policies. But in this case the dead man's family claimed the policy was too vague to be covered by the law—specifically, it didn't spell out when police were allowed to give chase. On that issue, the family won.

Praet began offering his services to towns and cities, writing vehicular-pursuit policies that would better shield them from liability. Soon he was drafting entire police policy manuals, which he printed in three-ring binders and marketed to small Central Valley police agencies that didn't have the staff or expertise to draft complex documents in-house.

"The idea was, well, if we write these policies and give them to a law-enforcement officer, then, when [the department] gets sued, they're insulated from civil damages," says Ingrid Eagly, the faculty director of the criminal-justice program at UCLA's law school, who has coauthored two papers on Lexipol's role in police policymaking, one of them titled "Lexipol's Fight Against Police Reform." "His practice then really started to grow from there. Now everyone wanted to have this policy—and I think that's sort of the core idea behind all of the policies."

In 2000, a mutual friend introduced Praet to Dan Merkle, a businessman and fellow Eagle Scout who came up with the name Lexipol and signed on as the company's CEO. The third cofounder was another police officer turned lawyer, Gordon Graham—also renowned as a speaker and trainer on risk management. Graham had developed safety trainings for the California Highway Patrol and consulted with clients in industries ranging from commercial real estate to auto-racing operations, according to his website. He brought experience and a network that extended beyond law enforcement to the world of insurance.

With Praet's policy manual as a template, the trio hired a team of engineers to develop a software platform that would allow subscribers to customize their policies. Policy language was color coded according to the basis for the underlying legal reasoning: red for federal law, orange for state statute, yellow for best practices.

To develop new policies and refine them with customers, Merkle told me, Lexipol brought in retired California cops. The company later replicated this strategy as it expanded across the country, employing retired police executives to work with their peers and former colleagues. Lexipol executives spoke at risk-management conferences and offered discounts that municipal insurers could pass on to their customers. Jason McMahon, a risk-management director who provides liability coverage for a pool of about one hundred local governments at Midwest Public Risk, says part of Lexipol's appeal lies in the importance of a good paper trail: "I don't know that a parking lot's safer because we can document that we put salt down to melt the ice. But I'll tell you, if someone slips and falls, you're a lot better off if you can show them you put salt down."

Merkle, who served as Lexipol CEO until 2012, sometimes described Praet's vision for the company in the same way. At a 2009 meeting of the commission that certifies police training materials in California, Merkle explained that the idea for Lexipol went back to a trend Praet noticed among plaintiffs' attorneys. "If they couldn't win on the facts of a case against an agency, they would go after their training records, their policy manuals, their procedure records," Merkle said. "Agencies who had good shootings"—justifiable according to the rules—"were being compromised because their administrative tasks were not up-to-date." In other words, it wasn't the shootings that were a problem but

the paperwork. Merkle says Praet's plan for Lexipol was to "take away that tactic"—write policies with fewer rules, and in the eyes of a jury, more shootings would be good shootings.

By all accounts, Praet drives a hard bargain on behalf of the cities that hire him. John Burris, a Bay Area civil-rights lawyer who has faced Praet in multiple cases, describes him as a "true believer" and a "lowball guy, as a matter of practice."

Ron Thomas, a retired Orange County sheriff's deputy, met Praet in 2011, weeks after Thomas's son Kelly was beaten into a coma by officers in Fullerton, California, and died of his injuries. Kelly, who had schizophrenia and lived on and off the streets for years, had had dozens of encounters with police. As Thomas recalls, Praet invited him to lunch with the city manager before Thomas had even decided to file a lawsuit. It was an awkward encounter. Thomas heard nothing he considered a true apology, but he agreed to a second meeting in Praet's law office. Thomas found him arrogant, and when he didn't accept Praet's offer totaling \$900,000, he says, Praet replied, "Come on, your son was no rocket scientist."

The case ultimately settled for \$4.9 million.

Lexipol was acquired by a private-equity company in 2014; Praet retained an ownership interest and a seat on the board. Through a merger with Praetorian Digital, a "leading content and learning platform," Lexipol brought on a sales team with expertise in software as a service and digital trade publications like Police1.com. It introduced tiered pricing for different sections of its standard police manual and began charging departments for help applying for state and federal grants that could pay for—among other things—a subscription to Lexipol policies.

The overlap between Praet's law firm and Lexipol has continued. All eighteen California cities where Praet has worked on at least three federal lawsuits are current Lexipol customers, and his law firm's "client alerts" sometimes refer to the advantages of a Lexipol subscription.

No city has given Praet more business than Fresno, where he has litigated twenty-six federal civil-rights cases on behalf of the police department since 2005. One person who has gotten to study those case records in detail is Roger Clark, who worked as an expert witness for two different families that sued Fresno in connection with police shootings. In the second case, Praet represented the city; in preparation for his deposition in the case, Clark reviewed fifty-one police shootings in Fresno, including the internal-investigation files. Of the fifty-one, he concluded, sixteen people who were shot were unarmed, and nine were fleeing. In no case did Clark find that a Fresno police officer was disciplined for a shooting in which someone was injured or killed. The vast majority were deemed "within policy."

(Praet challenged the report, arguing that Clark had relied on sealed documents from the first case that he wasn't supposed to use. Praet's challenge was successful: Clark was

sanctioned by the judge for using the sealed information, and the jury never saw his report.)

Clark's report did not mention Lexipol, but he told me that Lexipol's most important policy contribution was "not so much what it says as what it doesn't say." Fresno didn't prohibit shooting at moving vehicles; it advised that it's "rarely effective and can be hazardous." Nor did it outline what is known as a use-of-force continuum, a system that encourages de-escalation and instructs officers to use the least force possible. Its policy on electronic control devices like Tasers asked officers only to consider things like "whether verbal commands, other options, or tactics may be more effective" before giving multiple shocks.

In a 2016 Lexipol webinar called "Still Clinging to a Use of Force Continuum or Labeling Force Levels? You're at Risk!" Praet underscored his belief that a use-of-force continuum is "hogwash," presenting his interpretation of Supreme Court case law on the subject: "I don't care if you run him over with your police car. I don't care if you smack him with your baton, choke him out, tase him, bite him, shoot him. One question: Was it objectively reasonable under the totality of the circumstances presented at the time?" The question is not whether a life needed to be taken. The question is only whether a policy can be written to justify it.

Lexipol's leaders aren't elected. They aren't required to disclose who drafts their policy language or justify the choices they make on the page. And while Lexipol's direct sales are to police departments, in a way we are all customers. Praet has spent his career firmly on the side of law enforcement. And in the years since the very public killing of George Floyd in Minneapolis, at an American moment that has seemed ripe for a wholesale reassessment of the role of policing in society, Bruce Praet and the company he cofounded stand not only as a barrier to reform but as a bulwark for the status quo.

I contacted several plaintiffs' attorneys who had litigated against Praet and was surprised to find that they had no idea of Praet's involvement in Lexipol. The same was true of Miguel Arias, a Fresno city-council member who has taken issue with the legal approach advocated by Praet and police leadership. (Fresno's current mayor is its former police chief.) It's a strategy Arias describes as "demean the victim of the use of force, and then double down on the city's policies," avoiding settlements and policy changes on the grounds that admitting blame would only invite more litigation.

"In my view, the most important question is, Has that legal strategy saved lives? And the answer is no. Has it prevented more shootings and use-of-force incidents? No. It has protected the system from reforming itself, which has led to more cases, and then more litigation," says Arias, who was elected in 2018.

Fresno has provided \$49 million in new funding for the police department over the past three years. Arias says the vast majority has gone to litigation, salary increases, and cost-of-living adjustments negotiated with the union, rather than putting additional officers on the street.

Arias says he hadn't been aware of Praet's stake in Lexipol until I called him. Reflecting on recent cases, he says that if he had known that fact, "that would have been enough for me to insist on a different counsel." He explains why: "Sometimes the perception of a conflict is just as undermining as a legal conflict is, especially when you're recommending a strategy on a multimillion-dollar case that's about to go to trial."

To this day, Spencer Mendez's mother, Stephanie Beidleman, says no one from the city of Ceres has ever contacted her about her son's death. There was no letter, no knock at the door, no return of his clothing. There's no Lexipol policy at all for how to deal with grieving families.