



**Testimony of Kimberly McCullough, Policy Director
Concerning Portland City Council Item No. 871
August 3, 2017**

Mayor Wheeler and Council Members,

The American Civil Liberties Union of Oregon¹ appreciates your consideration of our testimony concerning Item No. 871, an ordinance which would adopt new Post Deadly Force Procedures for Portland Police Bureau and authorize legal proceedings to determine whether requiring officers to provide statements in connection with an administrative deadly force investigation would preclude criminal prosecution.

We submit this testimony to express concern about this ordinance as drafted, and to urge you to either reconsider its adoption altogether or amend the ordinance before moving forward. We make this suggestion while appreciating the gravity of the tension presented when the City considers the constitutional, civil and public rights at stake when police officers use deadly force against members of the public they are sworn to serve.

On the one hand, we are longstanding and fierce advocates for the protections provided by the Fifth Amendment of the United States Constitution and Article I, section 12 of the Oregon Constitution, both for members of the public and law enforcement. It was because of this fact that we submitted an *amicus curiae* brief in *State v. Soriano*, 68 Or App 642 (1984) supporting the rights of a defendant held in contempt for refusing to testify in criminal proceedings.

On the other hand, a prompt administrative investigation into deadly force incidents is crucial for police accountability. Already this year, the City of Portland has seen multiple instances of deadly or serious harm at the hands of police officers, including the taking of the lives of two young men of color, Quanice Hayes and Terrell Johnson. The losses of those lives are tragedies for both their families and for our community. The public should not have to endure these tragedies without adequate investigatory procedures and full accountability if and when misconduct has occurred.

We believe, however, that these competing concerns can be adequately addressed by simply keeping administrative and criminal investigations wholly separate. Portland's Independent Police Review of the Portland City Auditor's Office has already provided

¹ The American Civil Liberties Union of Oregon (ACLU of Oregon) is a nonpartisan, nonprofit organization dedicated to preservation and enhancement of civil liberties and civil rights, with more than 23,000 members in the City of Portland and over 44,000 members in the State of Oregon.

helpful legal analysis to this body outlining how separate investigations may occur without violating constitutional rights, and the National Lawyers Guild is submitting a separate memo with similar analysis and suggestions. We urge the City to carefully review these memos and pass an ordinance allowing for separate, but concurrent investigations as they suggest.²

It is a standard best practice for employers to implement internal policies and processes by which to ensure their employees are conducting themselves in their jobs appropriately. It is also a standard best practice to investigate employees, including collecting statements from them, when it is believed that internal policies may have been breached. The same is true when a potential broken rule results in the loss of life of another at the hands of a police officer.

Such investigations allow the employer to improve their policies and change their procedures to prevent future harm. And, if need be, such investigations allow the employer to fairly train, discipline or remove employees when harm could have been avoided and/or misconduct occurred.

The City of Portland and Portland Police Bureau (PPB) must be able to conduct an internal assessment of its employees and officers. The public needs a police bureau committed to ongoing improvement, transparency and the protection of civilian lives—even when those civilians are suspected of criminal action. When an officer causes harm to the public, prompt and independent scrutiny of personnel and policy concerns must occur to ensure future harm can be avoided and necessary changes are made.

Police officers are professionals. Professionals of all types—lawyers, doctors, engineers—have professional standards and employment policies that must be followed. Additionally, employees of all types must answer to their employer when they fail in their duties. Insulating police officers from professional standards or significantly delaying employer scrutiny only serves to promote public harm and distrust in the system. Police officers who breach PPB policies or standards should not be given special treatment that the rest of the hard-working public does not enjoy.

We were dismayed to read the Multnomah County District Attorney's (DA's) assertion that criminal investigations may not be kept independent from the police bureau's internal investigation given the close relationship between the two agencies. While we disagree

² Because we generally agree with both of these carefully-crafted memos, we will not provide additional constitutional analysis in this testimony beyond stating that (a) *Soriano* is clearly distinguishable from the facts and circumstances related to fully separated criminal and administrative investigations into deadly force by law enforcement, and (b) we agree with the court in *State v. Beugli*, 126 Or App 290, 294 (1994), that use and derivative use immunity—not transactional immunity—is the proper remedy when the right against self-incrimination is violated, absent a legislative grant of further immunity.

with the DA office's legal analysis, it was more troubling for us to see an elected office willing to create roadblocks rather than offer solutions to rebuild the public's trust in our law enforcement bodies.

It is the DA's responsibility to vigorously advocate for the public in cases of potential criminal misconduct by law enforcement. Rather than pushing for a less-accountable system, we hope that the DA's office will instead work with the City and PPB to ensure complete separation of administrative and criminal investigations. And if an officer claims transactional immunity when a truly independent criminal investigation has occurred, we hope that the DA will oppose such a claim in court.

In conclusion, the ACLU of Oregon believes that the PPB personnel investigation and any criminal investigation can occur separately, and simultaneously, without infringing upon a police officer's constitutional rights.

We urge you to reconsider or amend this ordinance, and not delay in adopting policy to allow for separate internal investigations to move forward with prompt collection of involved officers' statements. Rather than waiting for a court to give a green light, this policy should take effect as soon as possible. Failing to do so further risks the community's faith in its elected leaders' commitment to police accountability and breaks promises made to the public about the removal of the 48-hour rule.