



**To:** Andrew Myerberg, OPA Director  
**CC:** Mark Grba and Grainne Perkins, OPA Assistant Directors  
**From:** Lynn Erickson, OIG Public Safety Auditor/Investigator  
**Date:** March 3, 2021  
**Re:** 2020OPA-0515

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**PARTIAL CERTIFICATION:**

This case centered around OPA's receipt of approximately twenty complaints alleging that the driver of an unmarked police vehicle behaved recklessly on August 12, 2020, when he accelerated towards a group of 6-8 people standing on the sidewalk outside a public park, placing them at risk for physical harm. Some complaints also alleged that the driver intentionally attempted to strike pedestrians with the vehicle when he drove up onto the sidewalk. Further, there were numerous alleged unprofessional comments made by the driver and the other occupants of the vehicle, both during and after the vehicle was driven onto the sidewalk.

Based on OPA's response (undated) to OIG's February 20, 2021 memo directing additional investigation, OIG is certifying 2020OPA-0515 as timely. OIG is not certifying the investigation as thorough or objective. OIG provided OPA with the opportunity to resolve evidentiary deficiencies related to the elements of thoroughness and objectivity. OIG appreciates OPA's written response, but as stated in the February 20, 2021 OIG memo, OPA was on notice that not resolving the identified deficiencies could impact OIG's ability to fully certify the investigation. Therefore, no further investigation is being requested at this time. To provide OPA with additional clarity, the primary issues impacting certification are outlined below (this summary is not exhaustive). This detailed feedback is being offered to OPA so that our offices can continue to focus on issues relevant to public trust.

Thoroughness

At intake, numerous complaints referred to a second incident related to this issue wherein SPD officers allegedly engaged in further misconduct. However, there is no reference by OPA in the IAPro file to this allegation, how it was resolved, nor were any of the people who submitted complaints interviewed. Per ordinance, during an investigation, OPA shall include "the approach to addressing each allegation of possible policy violation or misconduct" and "if OPA is unable to investigate an allegation.....the case file should indicate that this intentional decision was made." In this case, OPA did not respond to OIG's February 20, 2021 inquiry on the matter. The concern of missed allegations during an investigation is not new and has been raised previously by OIG. It has also resulted in other partial certifications.



In the OIG February 20, 2021 memo, OPA was asked to upload a copy of the underlying video evidence relied upon by OPA during the investigation and summarized in their report, as it was missing from the file. OPA's subsequent response indicated "the video was deleted from Twitch before OPA had an opportunity to download it for posterity." Per Ordinance, criteria OIG should consider in reviewing investigations include "whether all material evidence was timely collected" and "whether applicable OPA procedures were followed and the intake and investigation were conducted in accordance with the OPA Manual." As noted in prior partial certifications, it is required by both the ordinance and the OPA Manual that perishable evidence be prioritized and preserved by OPA.

OIG's memo also referenced the fact that this investigation did not collect or address information directly relevant to a key underlying element of one of the policy violations under investigation. The specific area of deficiency was enumerated for OPA in the memo, and it relates to the need for additional fact finding to assess the risk surrounding the driver of the vehicle's actions. Here, the policy violation at issue is 13.030-POL, 3, which states "emergency driving shall be modified or terminated...when the totality of the circumstances indicates the risk of continuing the emergency driving outweighs the need."

For the incident at issue, the driver articulated that he drove onto the sidewalk towards a group of pedestrians to pursue a subject who was fleeing on foot. Thus, a key element of the allegation under investigation is to gather information related to both the need to pursue a fleeing suspect on foot in a vehicle, versus the safety risk posed by driving up onto a sidewalk directly towards a group of pedestrians to do so. To be clear, OIG's directed additional investigation on the issue of the risk posed by the Named Employee's maneuver included not only the risk posed to the pedestrians, but also to the Subject the vehicle was pursuing, as well as to the officers and the vehicle itself. In addition to pedestrians on the sidewalk, there were several physical objects the vehicle had to navigate around (a telephone pole, a bus stop sign and a bus stop), and Body Worn Video depicts an officer stating "watch it" as the driver swerves sharply around one of those objects. OPA did not summarize or otherwise evaluate this evidence, nor did they include any lines of questioning about it during their interviews with the Named Employees.

However, in response to OIG's directed additional investigation on the issue of assessing that risk, OPA articulated "(A)nalysis of the facts as they pertain to an allegation are not the domain of the investigative staff but rather the OPA Director." It is unclear to OIG how OPA can take the position that the collection and analysis of facts as they pertain to an allegation under investigation are not the domain of an investigator. The collection of pertinent and complete facts by an investigator is directly relevant to the OPA Director's ability to reach fair and consistent findings. Per Ordinance, criteria OIG should consider in reviewing investigations include "whether applicable OPA procedures were followed and the intake and investigation were conducted in accordance with the OPA Manual." In the



OPA manual, the following actions during investigations are required (emphasis has been added):

- “Check the Complaint Summary and evidence gathered and review the SPD Manual policy sections identified in the complaint, along with the specific violations alleged for each named employee *so the Investigator is familiar with what each policy requires*” (p. 24).
- *Identify the primary and any secondary issues involved and the elements that would need to be established to prove or disprove each allegation*” (p. 24).
- “Specific and sometimes direct questions must be asked *in order to address the elements present in each allegation*” (p. 30).
- “*It is the responsibility of the Investigator to collect all available information so that the OPA Director and the Chief of Police can make findings based on facts discovered during a complete, objective and thorough investigation*” (p. 31)
- “At the conclusion of the investigation, *the value and importance of each piece of evidence must be weighed and described in the Case Summary*” (p. 34).
- “Once all steps in the investigation have been completed, relevant and material evidence is summarized in the Case Summary.... *start with the allegations and elements within each and list the testimonial, documentary or physical evidence that speaks to that issue* (p. 35).

In lieu of conducting additional investigation as requested by OIG, OPA has asserted that they adequately assessed risk during their investigation and that the driver of the vehicle was sufficiently questioned on this topic. OPA indicates the most notable example is when the Named Employee was asked during his interview “Would you say there was a risk in driving on the sidewalk?” For the record, the Named Employee’s response to this question was “in this situation, based on everything that I saw in front of me and what I was doing, I think this was, basically, the same kind of risk I would have in parking a vehicle”.<sup>1</sup>

### Objectivity

In the February 20, 2021 memo, OIG referenced the fact that in the “Video & Photo Evidence Review” section of the Report of Investigation, the summary of Body Worn Video evidence included qualitative statements, in lieu of objective descriptions of what can be seen and heard on the video. One example OIG provided to OPA was that when the Named Employee(s) can be heard yelling to a community member “hey buddy, get a job buddy”, “you look homeless”, “you coward”, “whoop” and laughing, the summary of the video evidence states only that the Named Employee “mocked an individual”. In another summary of evidentiary video in the Report of Investigation it states a Named Employee “engaged in sarcastic commentary” but again, does not contain an objective description of the behavior or language at issue. This underlying evidence is directly relevant to a potential policy violation of Professionalism, which was under investigation. Per ordinance, criteria OIG should consider in reviewing investigations includes “whether the written summary and analysis are objective and accurately reflect the evidence”. OPA’s response to

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<sup>1</sup> The Named Employee’s response was not included or otherwise summarized in OPA’s Report of Investigation.



OIG's request to correct this subjective depiction of evidence was to explain "(w)hile the body of the Report of Investigation will contain the elements of a piece of evidence that are the greatest importance, it must be emphasized that OPA cannot reproduce every element of the evidence within the report." A potential violation of SPD's Professionalism policy is under investigation. Therefore, when conducting a summary of the underlying video evidence related to that allegation, it is unclear how OPA can objectively argue that what can be seen and heard on that video is not of "the greatest importance".

At intake, OPA was provided with links to video of the alleged misconduct. This included both an edited, and an unedited verbal exchange between one of the Named Employees and a member of the public. In the February 20, 2021 memo, OIG directed additional investigation related to the fact that OPA did not appear to have made any efforts to collect, assess or otherwise rely upon the content of the unedited video of that conversation. During the interview of the Named Employee captured on the video, he also pointed out to OPA that the version of the Twitter video he was shown was "fairly heavily edited" and that he had seen the original. However, OPA still did not include the original version as evidence for their investigation, nor did they address the fact that the original contains additional statements that could be considered unprofessional (i.e., asking the videographer "don't you have anything better to do?", saying "that's sad....you need a hobby other than riding a unicycle and bothering cops" and when the videographer asked the Named Employee if he was bothering him, responding "yeah...cuz it's kind of annoying talking to you").

OPA's response to OIG's request for additional investigation was to decline further action and claim "(A)lthough it is apparent that this is not the original video, it is unclear what additional evidentiary value would be gained from the original". Secondly, OPA asserted "the Twitter video is arguably of greater evidentiary value". Thus, while this evidentiary deficiency was initially identified as related to the thoroughness of the investigation, OPA's response has now cast additional doubt on the objectivity element of this investigation in that there appears to be intentionality related to their decision to not include it in the record.

Respectfully,

*Lynn Erickson*

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