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March 1, 2022

To: The Honorable William C. Smith, Jr.
Chair, Judicial Proceedings Committee

From: Brian E. Frosh
Attorney General

Re: Senate Bill 866 (Baltimore Police Department – Consent Decree – Exceptions to State Law): **Concern**

Senate Bill 866 specifically addresses the Federal Consent Decree with the Baltimore City Police Department (BPD) and provides that the United States District Court for the District of Maryland shall determine if “any provision or requirement with this section is in conflict or otherwise inconsistent with a provision of the consent decree” between Baltimore and the Department of Justice. It also provides that the federal court may determine the resolution in the event of a conflict. Because the legislation and the consent decree do not conflict, there is no need for this provision. And should the legislature wish to provide one, it must guarantee notice and the ability to participate to the Office of the Attorney General, which this bill does not.

There is no conflict between the Baltimore consent decree and the statute. During the formative months after the passage of the original bill (SB 600 (2021)), the Independent Investigations Division (IID) of the Office of the Attorney General met numerous times with BPD, city solicitors, and the Department of Justice to determine whether any provision in the bill conflicts with the consent decree.¹ The Department of Justice, along with all of the aforementioned parties, found no such conflict. Moreover, since SB 600 (2021) went into effect on October 1, 2021, BPD had two qualifying incidents where civilians were fatality shot by officers. The provisions under the consent decree have not encumbered the IID’s investigation into either of these matters, nor has the state law encumbered BPD’s ability to fulfill its own obligations under the consent decree. In short, none of the parties was able to find a conflict in theory, nor has there been a conflict in practice.

¹ These meetings, in turn, led to a September 30, 2021, “Maryland Attorney General Independent Investigations Division, Maryland State Police, and the Police Department of Baltimore City Memorandum of Understanding.” See attached.

Even if the General Assembly does believe that such a remedy is necessary, the current bill does not provide adequate protections for the State's interests. Senate Bill 866 fails to provide a requirement that BPD or the City of Baltimore notify the IID if they intend to argue to the court that a portion of SB600 should be invalidated, nor does it provide the IID the ability to participate in any such court hearing. As a result, if this statute were enacted as written, portions of SB600 could be invalidated without any notice. Such a system is neither fair nor what the legislature intended in crafting the bill.

Encl: Maryland Attorney General Independent Investigations Division, Maryland State Police, and the Police Department of Baltimore City Memorandum of Understanding

cc: Sponsor

**MARYLAND ATTORNEY GENERAL INDEPENDENT INVESTIGATIONS
DIVISION, MARYLAND STATE POLICE, AND THE POLICE DEPARTMENT
OF BALTIMORE CITY MEMORANDUM OF UNDERSTANDING**

This Memorandum of Understanding (the “agreement” or “MOU”) is made this 30th day of September, 2021, between the Maryland Office of the Attorney General (“OAG”), the Maryland Department of State Police (“MSP”), and the Police Department of Baltimore City (“BPD”).

I. Introduction

WHEREAS, the Maryland General Assembly, in Senate Bill 600, passed a law mandating an Independent Investigations Division (“IID”) within the OAG to investigate police-involved fatalities in the State of Maryland, and whereas the Mayor and City Council of Baltimore (the “City”) and BPD are under a federal consent decree (the “Consent Decree”), which also addresses the investigation of BPD officer-involved fatalities, the parties have come to an agreement as to how the IID will conduct investigations involving officers of the BPD.

The IID was created as a joint collaborative division between the OAG and MSP for the purpose of investigating alleged or potential police involved deaths of civilians and other crimes related to police misconduct that are discovered during such an investigation. It is undisputed that a BPD officer falls into the definition of a “police officer” covered by this statute. The parties acknowledge that under Maryland Annotated Code, State Government Article, § 6-106.2, the IID will be required to investigate incidents covered by the statute once the bill takes effect on October 1, 2021.

The parties are aware that BPD is under a federal Consent Decree. The Consent Decree was entered on January 12, 2017, in the U.S. District Court for the District of Maryland under Civil Action No. 17-JKB-0099. The Consent Decree does not have an enumerated termination date but ends “Upon the Court’s determination that the City and BPD have achieved Full and Effective Compliance with this Agreement as defined below and have maintained such compliance for at least one year.” Any party to the Consent Decree may move to show this compliance after the Consent Decree has been in place for at least five years. Therefore, it is clear that Senate Bill 600 will take effect while the Consent Decree is still in place and the statute and Consent Decree will coexist for an undetermined amount of time.

The parties further acknowledge that the Consent Decree addresses the criminal investigation of BPD officer-involved deaths and therefore overlaps with Senate Bill 600. The parties have entered into this agreement in an effort to fully comply with both Senate Bill 600 and the Consent Decree.

II. Definitions

1. The “**Independent Investigations Division**” or “**IID**” refers to the division created by Senate Bill 600 consisting of both OAG and MSP personnel.
2. The “**Consent Decree**” refers to the consent decree dated January 12, 2017, and entered as an Order on April 17, 2017, in the case of *U.S. v. Police Department of Baltimore City, et. al.*, in the U.S. District Court for the District of Maryland under Civil Action No. 17-JKB-0099.
3. “**Officer-Involved Death**” means an alleged or potential death of an individual resulting from an action or an omission of a law enforcement officer while the law enforcement officer is on duty or while the law enforcement officer is off duty but performing activities that are within the scope of his or her law enforcement duties. The following are examples of, but not limited to, Officer-Involved Deaths: shootings that are fatal or result in the likelihood of death, use of force incidents that are fatal or result in the likelihood of death, deaths occurring while an individual is in police custody, and vehicle pursuits by law enforcement that result in death or the likelihood of death.

III. Agreement

1. The parties agree that alleged or potential incidents involving the death of a person caused by a BPD officer fall within the parameters of Senate Bill 600 and must be investigated by the IID.
2. The parties acknowledge that BPD has established policies to investigate the death of a person caused by a BPD officer and that some of these policies have been or will be reviewed and/or approved by the various entities and the U.S. District Court for the District of Maryland involved in implementing and overseeing the Consent Decree. The parties agree that to the extent it is consistent with State Law, the IID will give deference to these BPD policies.
3. The parties agree that cases of Officer-Involved Deaths involving BPD are controlled by this MOU, and that, accordingly, those cases are not subject to the IID protocols concerning Notification, Media, and Evidence Collection unless the protocols, or a portion of the protocols, are adopted in this MOU. The IID protocols for States Attorneys’ Offices will continue to apply to all BPD cases.
4. The parties agree that BPD will notify the IID immediately upon learning of an Officer-Involved Death in the City of Baltimore. This notification should be made to the MSP Duty Officer, at 410-653-4200. As part of notification, BPD will provide a point of contact for the incident. If BPD is uncertain whether an incident qualifies as an Officer-Involved Death, BPD will contact MSP at the above number. The IID will respond to the point of contact to inform BPD

whether it will send IID personnel to the scene. If the IID cannot reach the BPD point of contact, it will call BPD Communications at 410-396-2284. BPD will conduct any other notifications it deems appropriate according to its normal procedures.

5. The parties agree that both IID and BPD personnel shall respond to the scene of an Officer-Involved Death in the City of Baltimore as soon as they deem appropriate. BPD may begin its investigation upon arrival and is not required to wait for IID or MSP personnel to arrive at the scene before taking actions. The parties will each designate an on-scene supervisor, who will work cooperatively to lead the investigation. The parties agree that the IID and BPD will make every effort to work together during the investigation. As soon as the IID and MSP arrive at the scene of an Officer-Involved Death, they will be integrated into the decision-making structure.
6. BPD and the IID will each identify a primary detective or investigator for the case, who will coordinate with each other about investigative steps, both on-scene and subsequently. The parties agree that BPD investigators will conduct the investigations pursuant to BPD's approved procedures. During these investigations, BPD will allow IID investigators to fully participate in the investigation. BPD agrees to fully cooperate with IID investigators during the investigation and to include them in all facets of the investigation. BPD further agrees that it will make every effort to follow recommendations provided by IID investigators.
7. IID and BPD investigators will cooperate and communicate with each fully during an investigation. It is the intent of the parties that this cooperation and communication will facilitate agreement for most investigative decisions. To the extent there is a disagreement regarding how a particular issue should be handled at the scene or subsequently while both the IID and the BPD are investigating, the parties agree to make every effort to resolve the issue in the most efficient manner possible in a manner consistent with Senate Bill 600 and the Consent Decree. To this end, the primary investigators or detectives assigned by the IID and BPD for the case will confer and attempt to resolve any disagreement. If they are unable to resolve a matter, they will refer it to the IID Chief and the Deputy Commissioner Police Integrity Bureau who will confer and try to resolve the disagreement. If a solution cannot be reached, the parties agree that the IID Chief will make the final decision as to the aspect of the investigation that is in dispute. In this regard, the IID agrees to be respectful of BPD policies and the Consent Decree and make every effort to not make any decisions that would lead to a situation in which BPD will not be in conformance with its policies or with the Consent Decree.

8. BPD agrees to include IID personnel in its notification to the family members of the person involved in the incident. If such inclusion is not possible for timeliness or public safety reasons, BPD will provide the family with the contact information of the IID and provide the IID with the contact information of the involved family.
9. BPD will be responsible for the processing of physical evidence at the scene or scenes. BPD's Forensic Science & Evidence Services Division ("BPD-ESD") will process the scene in accordance with its established standard operating procedures in collaboration in BPD's on-scene lead investigator and under the direction of the joint on-scene command team composed of BPD and IID personnel. To avoid spoliation of any evidence, BPD-ESD shall fully complete its processing of any crime scene or evidence that it begins to process or analyze at a crime scene or subsequently in BPD-ESD facilities. BPD-ESD shall deliver all crime scene evidence to BPD's Evidence Management Unit ("BPD-EMU"). The IID may submit written requests for (i) analysis of crime scene evidence by BPD, or (ii) in the extreme case described in Section 19, below where the IID fully takes over the investigation and becomes the sole investigative agency involved in the matter, transfers of evidence to MSP's Forensic Sciences Division ("MSP-FSD"). BPD agrees to either conduct the analysis requested by the IID or transfer the evidence to MSP-FSD so that it may conduct its own analysis. Throughout the investigation, each of the IID and BPD will give orders to their respective personnel and make requests through their respective chains of command.
10. BPD may take "public safety statements" pursuant to paragraph 362 of the Consent Decree and the PIB manual. BPD and the IID may also take non-compelled statements of officers or other personnel. BPD may take compelled statements of officers or other personnel only pursuant to the procedures set forth in paragraphs 360-362 of the Consent Decree, and it will implement procedures to prevent IID personnel from exposure to those compelled statements or any evidence derived from them.
11. If BPD or IID believes that it is appropriate to offer immunity to an officer—even limited immunity—such immunity must be agreed to by both parties before being taken to the SAO for approval.
12. Each of IID and BPD may conduct media communications at the scene or thereafter if it so chooses. Each of the IID and BPD will make reasonable attempts to inform the other's personnel about the contents of all media communication prior to public release, with the understanding that the IID's mandate of independence may require confidentiality on some occasions. Each of IID and BPD will make reasonable efforts to incorporate any suggestions

made by the other's personnel regarding media communications. The IID will have communications personnel respond to the scene and may make statements either at the scene or subsequently.

13. The parties agree that the IID may release the name of the involved officers within 48 hours of the incident, though that period may be extended if there is a specific reason to believe that an officer's safety is at risk. If BPD wishes to release the name of the officer itself prior to the IID doing so, it may, after notification to the IID.
14. In accordance with the goals of the Consent Decree and to promote transparency, the parties agree that BPD may release body camera footage in accordance with BPD Policy 607 that currently provides for release of body camera footage within seven (7) days of an incident after consulting with the IID. There may be situations where more than seven (7) days are necessary, including if investigators need more time to complete witness interviews, if there are technical delays caused by the need to redact the identities of civilian witnesses, or to allow family members to view the video before it is released to the public.
15. BPD will provide copies to the IID of any part of the file, or the complete file, upon request of IID personnel, and will make it a practice throughout the investigation of sharing information with the IID while the investigation is ongoing. BPD will provide copies of any video, photographic, or audio files to the IID upon request. BPD will allow IID personnel access to any non-duplicative evidence upon written request at a time and location agreeable to the parties. To the extent that case files, reports, or evidence are maintained electronically, BPD will give IID personnel access to or copies of the electronically stored reports, files, and evidence. As a general matter, the criminal investigation of cases under this MOU will proceed as joint investigations, and the IID will offer reciprocal cooperation and access to its evidence, raw data, and factual information to BPD, with the exception of files IID believes are necessary to keep confidential in order to preserve the independence of the investigation. In those instances where the IID is withholding files from BPD, it will inform BPD that some information has been withheld. Where the IID withholds any evidence or information from BPD, it will be responsible for disclosing such evidence or information under *Brady/Giglio*.
16. In every investigation covered by this agreement, each of BPD and the IID will conduct a conflict check to determine if any BPD or IID personnel involved in the investigation has any actual, potential, or perceived conflicts of interest that might undermine public confidence in the impartiality and independence of the

investigation. Each of the IID and BPD will conduct this conflict-of-interest inquiry as soon as practical.

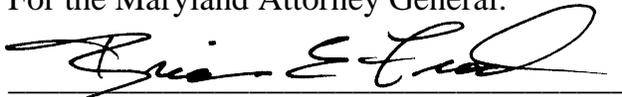
17. Each of the IID and BPD will promptly report the results of the conflict-of-interest inquiry to the other. BPD will defer to the IID on decisions regarding the results of the conflict of interests vetting procedure. If, however, BPD determines that the risk of a potential conflict of interest is present, BPD may remove BPD personnel from the investigation on its own.
18. The parties agree that IID personnel have the right to use grand jury proceedings during an investigation if they determine it is necessary. If the IID wishes to have a BPD officer appear before the grand jury, BPD agrees it will assist in procuring the officer's appearance at the grand jury.
19. In extreme cases in which the Attorney General, at the recommendation of IID personnel, determines that BPD's investigation in a particular case no longer maintains the level of impartiality required by Senate Bill 600, the IID will request that its personnel become the sole investigative agency involved in the investigation and BPD's criminal investigation of that case will cease. The IID acknowledges that this scenario is unlikely given the current level of oversight of BPD, but the IID reserves this right to comply with its statutory obligations. If the IID believes that this situation is occurring, notification will be made by the Director of the IID or the Attorney General directly to the BPD Commissioner. If BPD and IID can develop safeguards to put in place in a particular case to the satisfaction of the Director of the IID, the case may proceed with the involvement of the BPD. If the IID Chief is still not satisfied, the IID will then be the sole investigator in that particular case. If this situation occurs, BPD will be required to notify and seek input from the U.S. Department of Justice and the Consent Decree Monitoring Team. The IID will consult with and attempt to follow any recommendations provided by these entities.
20. The parties agree that the procedures in this MOU will govern criminal investigations involving both the IID and BPD. The parties agree that a criminal investigation will not be considered complete until both BPD and IID personnel agree that the case has been finalized and no further investigation is necessary. At that point, all of BPD's relevant reports will be provided to the IID, so that the IID may complete its report as required by Senate Bill 600. The IID will then forward that report to the State's Attorney's Office, as required by law. The IID will release its report, with appropriate redactions for confidentiality, within 30 days of a final judgment of all defendants in a prosecuted case, or within 30 days of a determination by the SAO or other relevant prosecutorial entity that they are declining to prosecute.

IV. Termination

This agreement will remain in effect for one year, or earlier if changes to State law require modifications, at which point the parties will review and re-evaluate the agreement and may mutually agree to continue, terminate, or modify the agreement. The agreement may be modified at any time with the agreement of all three parties.

IN WITNESS WHEREFORE, the undersigned Representatives hereby agree on behalf of their respective agencies, to the ratification of this agreement.

For the Maryland Attorney General:



Brian E. Frosh
Maryland Attorney General

Date: September 30, 2021

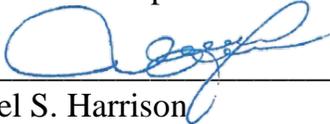
For the Maryland Department of State Police:



Colonel Woodrow W. Jones III
Superintendent

Date: September 30, 2021

For the Police Department of Baltimore City:



Michael S. Harrison
Commissioner

Date: September 30, 2021