



## MEMORANDUM

TO: Mayor and Council Members

FROM: Spencer Cronk, City Manager *sc*

DATE: April 17, 2020

SUBJECT: Investigation into Anonymous Complaints Alleging Use of Racist Language in the Austin Police Department and Next Steps

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The purpose of this Memorandum is to provide City Council with the results of an investigation I initiated on November 15, 2019. I hired San Antonio lawyer, Lisa Tatum, to look into 1) allegations of racist language and a homophobic incident raised by anonymous complaints to the Office of Police Oversight in October 2019; and 2) a list of disciplinary examples raised by former Commander Jason Dusterhoft during his arbitration hearing in October 2019 (to demonstrate that he was treated more harshly than others.). The attached report, "Austin Police Department Independent Investigation Fact Investigation," presents Ms. Tatum's findings and recommendations.

During Ms. Tatum's conversations with officers, one of the themes that emerged questioned the sincerity of City leadership to effectuate the change needed to ensure the Department addresses issues in order to become better. It is my commitment to the City Council and the Austin community that action will be taken to ensure the Austin Police Department addresses the issues in a meaningful way. City Council, through its [Resolution 20191205-066](#), has already set the stage for this work. The City of Austin is committed to ensuring that our workplace is safe for all our employees, and that our workforce and services reflect the values of equity and excellence in public service that we expect across our organization. I have confidence that Chief Brian Manley will take on the leadership challenge that lies ahead, as he has demonstrated with significant events in the recent past.

In the near term, I have asked Assistant City Manager Rey Arellano to work with Chief Manley to determine what immediate actions can be taken with regard to the report recommendations, and then merge any remaining recommendations with the efforts already underway related to Resolution 20191205-066. I will provide City Council an update on the overall plan to address the report by May 1, 2020.

cc: Executive Team  
Chief Brian Manley, Austin Police Department

Attachment: Austin Police Department Independent Investigation Fact Investigation

Austin Police Department  
Independent Investigation  
Fact Investigation

April 16, 2020

*LM TATUM, PLLC®*

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THE TATUM LAW PRACTICE

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# Austin Police Department Independent Investigation - Fact Investigation

April 16, 2020

## I. Executive Summary of Complaints for Investigation and Scope of Work

At the request of the City Manager of the City of Austin (City), Texas, LM Tatum, PLLC (Tatum Law) was engaged by the City Attorney's Office to review and assess the validity of certain allegations, listed below in the order received, specifically:

- (1) an anonymous complaint filed with the Office of Police Oversight against Chief Manley and Assistant Chief Newsom on October 30, 2019, regarding the use of racist language, alleging Assistance Chief Justin Newsom for at least a decade had been using the word "nigger" to describe African Americans. His conduct was evidenced by text exchanges about which Chief Manley was aware;
- (2) an anonymous complaint filed with the Office of Police Oversight on October 30, 2019, regarding an anti-gay environment, alleging Chief Manley supported the anti-gay mindset of Assistant Chief Gay in advocating the use of gay conversion therapy;
- (3) allegations raised by Commander Jason Dusterhoft during his arbitration hearing through Arbitration Exhibit A#16 which lists twelve (12) bulleted instances of criminal or Austin Police Department violations, which he states he reported to Assistant City Manager Rey Arellano;
- (4) an amendment to the anonymous complaint filed with the Office of Police Oversight on November 7, 2019, alleging Assistant Chief Newsom was notified of the original complaint about racist behavior filed against him before an investigation was initiated, enabling him to retire receiving his full retirement pay; and
- (5) a complaint filed with the Office of Police Oversight on December 11, 2019, by Commander Dusterhoft alleging failure to comply with subpoenas issued to Chief Manley, Chief of Staff Gay, Assistant Chief Newsom and Assistant Chief Chacon for testimony and/or production of documents related to his arbitration hearing.

### Scope of Work for Independent Investigation Complaints

The purpose of this investigation is to (1) determine whether the allegations raised can be substantiated and (2) provide legal advice to the City as it relates to the allegations raised and the information learned in the course of conducting an independent fact investigation of the allegations of misconduct raised against members of the Austin Police Department (APD or Department). It was also contemplated that some information Tatum Law may receive may not be within its scope of work.

## II. Background Timeline and Related Policies

Commander Jason Dusterhoft's arbitration hearing regarding his indefinite suspension began on September 24, 2019, during which Exhibit A#16 was entered into evidence. The exhibit lists in bullet point format several statements alleging police misconduct which Commander Dusterhoft asserted were brought to the attention of Assistant City Manager Rey Arellano concerning Chief Manley. There are seven (7) allegations and five (5) examples of alleged disparate treatment and/or attempted retaliation. The Austin Police Association sent a letter to City Manager Cronk dated October 29, 2019, requesting an outside investigation into Assistant City Manager

Rey Arellano and Police Chief Brian Manley's actions, knowledge and response to Commander Dusterhoft's alleged reports of misconduct outlined in the exhibit.

The next day, October 30, 2019, two complaints were filed anonymously through the Office of Police Oversight (OPO). One complaint, Complaint 1, alleged former Austin Police Department Assistant Chief Justin Newsom, historically used racist language and sent text messages in which he used the word "nigger" to describe African-Americans. The complaint states that Assistant Chief Newsom believed someone was in possession of some of his text exchanges and went to Chief Manley to report his concern. The complaint further alleges Chief Manley did not report this conduct for investigation or review, and neither did any of the Assistant Chiefs, all of whom were aware of Assistant Chief Newsom's use of the extremely derogatory term and failed to report it for investigation or review. The second complaint, Complaint 2, alleged Chief Manley (A) knew about and agreed to keep secret both Assistant Chief Newsom's alleged use of racist language and Assistant Chief Troy Gay's alleged homophobic sentiments and (B) supported an anti-gay mindset, by advocating for Christian gay conversion.

On November 7, 2019, news of the anonymous complaint and the substance of the allegations were subsequently made public.<sup>1</sup> On November 15, 2019, Austin City Manager Spencer Cronk announced through a press release, the City's intention to hire an outside party to investigate the allegations of misconduct made against leaders in the Department. Along with the two anonymous complaints, the City also requested investigation of Exhibit A#16, which was offered into evidence in the hearing of Commander Jason Dusterhoft, Complaint (3). The exhibit contained several allegations of violation of Departmental Policy and criminal activity. The City hired Tatum Law to conduct the independent investigation on the same day.

On December 9, 2019, the City, through the OPO, referred to Tatum Law, an amendment to Complaint 1. The amended complaint, filed on November 7, 2019, added the allegation that Assistant Chief Newsom was notified of the complaint of racism filed against him and was given an opportunity to be honorably discharged from the Department and receive full retirement avoiding an investigation into his alleged misconduct, Complaint 4.

On December 16, 2019, the City through the OPO delivered to Tatum Law another complaint. Commander Jason Dusterhoft filed a complaint on December 11, 2019, Complaint 5, with the OPO alleging Chief Brian Manley, Assistant Chief Troy Gay, and Assistant Chief Justin Newsom failed to comply with a subpoena for testimony and/or records related to Commander Dusterhoft's arbitration hearing.

### The Anonymous Complaint Process

The function of the Office of Police Oversight is to promote an atmosphere of earned trust between the Austin Police Department and the communities it serves. The Texas legislature contemplated the need for checks and balances in the state's law enforcement community. A law was established that permits the investigation of police officers when an anonymous complaint is filed, so long as the complaint has been received by a departmental employee who certifies in writing and under oath that the complaint was anonymous.<sup>2</sup> It is through this investigative process that the City Manager and the Chief of Police decided to engage an independent investigator, which the City of Austin City Council approved.

The City established the Office of Police Oversight (OPO) through which an individual may thank an Austin police officer, serve on the Community Police Review Commission and/or submit a complaint. Submission of

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<sup>1</sup> Russell Falcon, *Anonymous complaint to City of Austin alleges former APD assistant chief used "n word" to refer to African-Americans*, KXAN, November 7, 2019 at 8:14 PM CST

<sup>2</sup> Texas Local Government Code Chapter 143.123

complaints may be accomplished online, on the telephone, in person or by mail. A complaint may be filed anonymously. A procedure is in place through which complaints are independently reviewed by an OPO Complaint Specialist and then moved through a formal process for action.<sup>3</sup> It was through this process that the two anonymous complaints, Complaints 1 and 2, were filed. The process seems to work well as it led to this independent investigation.

### Investigation of Potential Misconduct

As potential misconduct is reviewed by the Department or the OPO, policies and procedures have been adopted to guide how an investigation should proceed and how and what remedies or corrective actions may be implemented. These policies and procedures are pursuant to state law, city policy and the Agreement Between the City of Austin and the Austin Police Association contract, which is often referred to as the “Meet and Confer Agreement”. The Meet and Confer Agreement has provisions which allow for civilian oversight to include the OPO. This process is designed to further assure independent and objective review of policies and procedures and to assure the “timely, fair, impartial, and objective administrative review of complaints against police officers, while protecting the individual rights of officers and civilians”<sup>4</sup>. Article 16 of the Meet and Confer Agreement also places a time limitation on the implementation of remedies through Civilian Oversight, as defined in the Meet and Confer Agreement. That limitation is six months or one hundred eighty (180) days.<sup>5</sup> Under this agreement, there are no circumstances in which the Chief of Police may take disciplinary action against an officer after the expiration of the time limitation. This limitation applies even if the investigation is diligently conducted and takes longer than six months to come to a conclusion.

Administrative Policies and procedures allow for a degree of discretion in investigations which, when used appropriately, enables leadership to address employment concerns and policy violations as part of a scale of disciplinary options based upon the facts at hand. When used inappropriately, a violation of policy may be overlooked, left unattended or disregarded until 180 days have passed barring the more strict consequences from consideration or recommendation when addressing behavior in a complaint. An argument can be made that inappropriate use of discretion and the time limitation can lead to a complete avoidance of a review or an investigation and the potential consequences for misconduct. Misuse of the same policies can also lead to a higher standard of scrutiny being used and adverse employment action for some officers and not others.

### III. Methodology for Independent Investigation

Tatum Law received and reviewed Complaints 1, 2 and 3 on November 17, 2019. On November 21, 2019, Lisa Tatum met with City Attorney Anne Morgan and City Manager Spencer Cronk in Austin, Texas, to discuss in greater detail the scope of work, the concerns of the City Manager’s Office and of City Council. The City’s sense of urgency and the desire for a complete investigation were also discussed, along with the scheduling of interviews. An opportunity presented itself at this meeting, and the first interview was also conducted on the same day.

On November 26, 2019, Tatum Law submitted its first request to the City for supporting documents to aid the investigation. The request included the list of all personnel assigned to the executive floor from the date of Chief

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<sup>3</sup> [www.atxpoliceoversight.org](http://www.atxpoliceoversight.org)

<sup>4</sup> Agreement Between the City of Austin and the Austin Police Association Article 16 Civilian Oversight of the Austin Police Department, Section 1. Civilian Oversight, Subsection (b)(1)

<sup>5</sup> Agreement Between the City of Austin and the Austin Police Association Article 16 Civilian Oversight of the Austin Police Department, Section 12 Remedies

Art Acevedo's departure, in November 2016, to present. After receiving a request to expedite the investigation, Tatum Law conducted its first round of interviews with available and known key personnel on December 5-6, 2019. On December 7, 2019, the City provided to Tatum Law a list of all personnel assigned to the executive floor for the past two years. The second round of interviews in Austin was scheduled and began on December 11-12, 2019. Subsequent rounds of interviews were held after the winter holidays on January 13-14, 2020, January 28-30, 2020, February 6, 2020, and March 10, 20, and 26, 2020. Interviews were held with all personnel assigned to executive floor identified by the City and with other individuals, as leads developed through interviews or documents, identifying other sources of information relevant to the investigation. Tatum Law met with and interviewed members of the City, sworn and unsworn, members of the Department, and individuals. Interviews were conducted primarily in person with a limited number of exceptions. Assistant Chief Newsom and Commander Dusterhoft were interviewed through written questions. One of the anonymous complainants was also interviewed through written questions.

As information was gathered and the identity of other witnesses with relevant knowledge was discovered, more interviews were conducted. Many of those interviewed expressed a desire to share information they believed was relevant to the investigation, but were unwilling to do so unless their identities remained confidential. Tatum Law, though making no promises or guarantees, committed to maintaining in confidence their identity to the extent the law, the ethical rules that govern Texas attorneys and the circumstances would allow for those with whom we met. Consequently, several other in-person interviews were conducted and more information was gathered.

Additional information was also produced by members of the public, current employees of the City of Austin, and current and former members of the Austin Police Department, who initiated contact with Tatum Law directly. Tatum Law conducted a number of these interviews by telephone, as we were contacted or by scheduled telephone appointments, for convenience in light of the travel distance between LM Tatum, PLLC San Antonio office and the individuals' physical location. Tatum Law also conducted several follow up interviews with witnesses by telephone or written correspondence. With the increased spread of COVID-19, interviews conducted at March 20 and 26, 2020, were accomplished by telephone, as a precautionary measure to minimize individual exposure to the virus.

In addition to conducting interviews with individuals who were believed to have knowledge of the allegations raised, Tatum Law conducted a document review, requesting documents and records we believed would further inform us about the allegations raised or lead to other information about the claims made. Tatum Law made several document requests over the course of its investigation. The City of Austin Law Department facilitated obtaining and providing our office with those responsive documents.

There were several occasions when Tatum Law learned about the existence of documents and those documents could not be located. As part of the investigation, a series of document requests were made working with the City of Austin and the Austin Police Department. We were told by complainants and witnesses that certain documents were seen, delivered and, in some instances signed. It was their understanding that those documents were placed in case files or personnel records where such records are to be maintained in compliance with policy and statute. Some of those documents could not be located and, in our opinion, should have been able to be retrieved for review. Other documents Tatum Law learned about are documents generated and maintained in the course of regular business operations. Some of those documents were also not able to be produced. On the occasions when such documents were not produced, no explanation was provided as to the absence of a record or document. Tatum Law cannot say whether a document in question was lost, damaged, destroyed, destroyed pursuant to a record retention policy or otherwise. The documents produced, voluntarily or pursuant to the document requests, were reviewed and are mentioned in this report as appropriate.

Requested documents included copies of policies such as the Department's mobile phone policies in an effort to secure any relevant text messages as alleged in the anonymous complaint. Certain documents as well as certain policies and procedures were requested of the Austin Police Department and the City of Austin as well as from other individuals for review. As part of the document request, for example, Tatum Law asked on November 26, 2019, for a copy of "any and all paper documents, emails, voicemail files, internet posts or comments, texts messages, images, photos and screenshots of AC Newsom making any reference to or his use of racist, homophobic, derogatory and intolerant language". With the assistance of the City of Austin's Law Department, Tatum Law received support from the City's Information Security Officer, Digital Forensics Unit. AC Newsom's office computer hard drive was duplicated and secured for a file parameter search. The parameter search was directed with the assistance of the City Attorney which consisted of eight key words: "nigger", "negro one", "dumb", "stupid f\*\*\*king", "conversion therapy", "anti-gay", "antigay", "anti gay". The parameter was then filtered by the date range of January 1, 2015 to December 31, 2019. In addition to the keyword search, forensics also conducted a manual analysis of the content to include metadata. In addition to conducting interviews and reviewing certain Department policies and procedures, Tatum Law requested a number of documents from the City and the Department as well as from other individuals for review.

As this independent investigation progressed, we were challenged by some limitations that an independent investigation of this kind carries, specifically the inability to issue orders to obtain access to officers' mobile phone data. On February 11, 2020, Tatum Law requested the assistance of Internal Affairs, through a referral from the City Manager and the Chief of Police, to conduct certain interviews, review certain mobile phone records and continue to work on certain aspects of the investigation where Internal Affairs' authority had become necessary to overcome the independent investigation limitations regarding order to produce phone and other documentation pursuant to Department policy. On February 18, 2020, Tatum Law's request was granted and we were connected with a Commander in Internal Affairs. Our work with the Commander began promptly and interviews were scheduled for and conducted on March 10, 2020.

Through the assistance of Internal Affairs, Tatum Law was able to review data from a phone already in custody and obtain data from a second phone for review as well. Requests for phone data and other evidence were made with the understanding that individuals with such information in their possession may have discarded that information as soon as the allegations became public knowledge or had ample time to do so before Tatum Law was able to create an avenue in accordance with the proper procedures to obtain such information that may have existed. Because no text or phone data was included in the documents provided by the City in response to the document request, Tatum Law chose to continue to pursue the procedural avenues available to the best of its ability, even with the passage of time, out of an exercise in due diligence.

Similarly, with Internal Affairs' help, Tatum Law met with two individuals who had been identified as having specific knowledge about the anonymous complaints, Complaints 1, 2 and 4. It was important to Tatum Law that these individuals, who were classified by the City Manager and Chief of Police as witnesses and not subjects of an Internal Affairs investigation, were interviewed pursuant to Internal Affairs case management, with the authority to issue Do Not Discuss Orders and Orders to produce evidence and testimony in accordance with General Orders, which are the policies and procedures of APD.

As indicated previously, Tatum Law made several document requests over the course of its investigation. The City Law Department facilitated with production of responsive documents. This document gathering consisted in part of: (1) issuing a litigation hold notification, which notices staff to preserve and not destroy records, information or other data related to the investigation; (2) asking individuals for responsive records after making them aware of the records request; and (3) the use of technology personnel to review systems and devices for responsive data and records.

#### **IV. Independent Investigation Overview and Determinations Summary**

Tatum Law interviewed over 58 witnesses, having had more than 74 different conversations, to include all Assistant Chiefs, Executive Lieutenants and civilian (unsworn) personnel assigned to the APD executive floor over the last two years. Tatum Law interviewed and had conversations with current and former members of the Austin Police Department, employees of the City, and a former member of the City Council.

Over the course these conversations, we observed two subjects of concern. First, there is a very high level of fear of retaliation among active duty officers and unsworn staff. This fear was consistent through all interviews whether the individual being interviewed was personally fearful or was referred to generally by officers and APD staff. This concern was further evidenced by the press conference at Austin City Hall on January 14, 2020 by the Austin Justice Coalition<sup>6</sup>, at which the public was made aware that officers, who had agreed to sit for an interview with Tatum Law, were reporting to Chas Moore of the Austin Justice Coalition that they were being retaliated against for participating in the investigation process.

The second consistent subject of concern is the extremely low degree of expectation, based upon past experience, that this independent investigation, or any investigation into the Department, will result in a substantive report, in the provision of any details learned or discovered or in disclosure of “the truth”.

The greatest challenges faced during this investigation were (1) the obvious and significant lack of basic information provided by all complainants in their respective complaints – a lack of names of persons involved or with knowledge, locations of events, dates and times and (2) the quiet resistance, when it presented itself, from those interviewed in the form of evasiveness, misdirection and deflection. The absence of this information meant Tatum Law had to spend considerable time compiling background information in order to establish basic facts. Our investigation determined that some of the events identified in these allegations occurred during the tenures of both Chief Art Acevedo and Chief Brian Manley and date back at least six to seven years from the date of the anonymous complaints.

#### Allegations of AC Newsom’s Use of Racist Language on filed October 30, 2019, Complaint 1

##### AC Newsom Use of Racist Language in Text Messages in Violation of Policy

Tatum Law reached out to the author of the first anonymous complaint, Complaint 1. We were able to interview this complainant via written questions, who reported both having received reports of the racist language used verbally and in text messages, and also having seen the actual text messages and/or personally heard the racist language by AC Newsom. Other than the representations of the anonymous complainant, we have not been able to corroborate the specific facts as alleged in Complaint 1. Tatum Law did receive reports that AC Newsom has used inappropriate language or made blatantly biased statements, but none matched the specific allegations. Several individuals interviewed indicated they were not surprised by the fact that these allegations were raised. There are those who believe the alleged behavior to be true, based upon past accounts and the close circle of colleagues known to associate with AC Newsom who have reputations for making such comments. Others reported being surprised to hear the accusations and even more shocked and dismayed to learn of AC Newsom’s abrupt departure from APD when this claim became public. Tatum Law is not able to establish the allegations in Complaint 1 as true or not true. It is important to note that the investigation found screen shots were shared on

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<sup>6</sup> Austin Sanders, *Retaliation Reported Against Some participating in APD Racism Investigation*, The Austin Chronicle, January 15, 2020

the executive floor regarding the racist language; however, these screenshots were not of an actual text message, but a recitation or copy of Complaint 1 allegations.

Allegations that Chief Manley Knew about AC Newsom’s Use of Racist Behavior and Violated Policy by Failing to Report the Behavior for Investigation as Did Other Assistant Chiefs

Tatum Law was able to establish through the interviews with executive floor staff, sworn or unsworn, that on or about September 24, 2019, AC Newsom was on standby pursuant to a subpoena by Former Commander Dusterhoft, to testify at his arbitration hearing. AC Newsom told Chief Manley that he was concerned about his text history becoming public at the arbitration, so much so, AC Newsom stated to Chief Manley if the texts became public he would leave the Department. There was not discussion regarding the nature of the text messages. Chief Manley did not ask about the text messages. Chief Manley advised AC Newsom to speak to the Law Department if he had concerns about his testimony. AC Newsom was not called to testify.

On October 7, 2019, Chief Manley received an email about AC Newsom’s use of the derogatory term “nigger” in text messages to refer to African Americans. This complainant sent a copy of the email to the press, OPO and City Hall. Chief Manley referred a revised version of the email to OPO for review. In the next weeks, many of the Assistant Chiefs discussed AC Newsom’s concerns about the text messages with AC Newsom directly and with each other. Many understood that AC Newsom had shared his concerns with Chief Manley. The Assistant Chiefs also observed AC Newsom’s physical demeanor, which also demonstrated his concern.

Then sometime prior to October 28<sup>th</sup> when Chief Manley left for vacation, Chief Manley instructed Chief Gay to contact OPO to follow up on the October 7, 2019 email. On October 30, 2019, two anonymous complaints were sent to OPO, Complaints 1 and 2. AC Newsom’s self-report, the email complaint and Complaint 1 suggest that AC Newsom was in violation of policy with sufficient information to review or investigate AC Newsom’s behavior. Chief Manley did not send these allegations for review or investigation.

Complaint 1 also alleges that all of the Assistant Chiefs knew about AC Newsom’s behavior along with all of the unsworn personnel assigned to the executive floor. During the interviews, no Assistant Chiefs reported seeing, receiving or sending a text message authored by AC Newsom using the derogatory term “nigger”. None of the executive floor civilian staff members reported seeing, receiving or sending a text message of this nature either. Neither did any of the executive floor staff report the use of such language being spoken or heard. No one reported AC Newsom’s alleged behavior for investigation or review.

Allegation of Derogatory Comments and Homophobic Sentiments filed October 30, 2019, Complaint 2

Tatum Law was not successful in communicating with the author of Complaint 2, though efforts were made to do so in order to obtain additional information or background to assist with the investigation.

AC Newsom Used Racist Language in Violation of Policy and the Behavior Was Known and Not Reported

Other than the allegations stated in Complaint 2, about which we received no confirmation by the complainant, Tatum Law elicited no witness testimony accounting for any use of the derogatory term “nigger” as alleged. There are some indicia that AC Newsom may have used this derogatory term or other racist language in the course of his career, but nothing specifically along the lines of the behavior alleged in the complaint.

### Chief Manley Knew of AC Newsom's Use of Derogatory Racist Comments and Agreed with AC Newsom to Keep the Behavior Secret in Violation of Policy

Chief Manley, as discussed above, was advised by AC Newsom, as early as September 24, 2019, of a text message history AC Newsom found alarming enough for him to be willing to leave the Department. The following month, on October 7, 2019, Chief Manley received an email complaint alleging AC Newsom's use of derogatory racist language in official text messages. Before any action was taken on the email by the Department or OPO, Chief Manley received notification from AC Gay of an anonymous complaint, Complaint 1, filed with the OPO on October 30, 2019, making similar allegations and complaining that Chief Manley and other Assistant Chiefs were aware of AC Newsom's conduct and no one had reported his behavior for investigation or review.

Tatum Law found no evidence of an agreement between Chief Manley and AC Newsom. Chief Manley denies such an agreement ever existed. AC Newsom, though he declined an in-person interview or interview through written questions, provided a written statement in which he denies all the allegations against him. We received no witness testimony to substantiate the claim as alleged or to support the denials made.

### Chief Manley Knew of AC Gay's Anti-Gay Mindset and Agreed to Keep Such Knowledge a Secret in Violation of Policy

While conducting interviews, Tatum Law did learn from a confidential witness, AC Gay referred to someone using an anti-gay slur some years ago while having lunch at a regional burger restaurant. With respect to the complaint as alleged, regarding Christian gay conversion therapy, no witnesses came forward reporting hearing this statement when said, or reporting any other homophobic statement which would have been an expression of an anti-gay mindset.

Tatum Law did not learn of any information or evidence to suggest or establish that Chief Manley entered into an agreement with AC Newsom or anyone else to keep the alleged behavior secret.

### Allegations Raised in Exhibit A#16, Complaint 3

Exhibit A#16 from Commander Jason Dusterhoft's arbitration hearing raised a number of allegations, few of which, as described in the exhibit, provided details as to date, time or names of individuals that would more readily enable Tatum Law to investigate whether the allegations raised are true. We were able to communicate directly with Dusterhoft via electronic mail. Commander Dusterhoft declined an in-person or telephone interview. He did agree to respond to written questions. Tatum Law made the following determinations regarding Exhibit A#16:

1. A Commander Who Falsified Timesheets – Direction to Dusterhoft to Not Report to IA or SIU

Tatum Law will take up items 1-3 of Exhibit A#16 in one discussion below.

2. A Sergeant Falsified Timesheets and a Commander's Untruthfulness Not Reported to IA or SIU

Tatum Law will take up items 1-3 of Exhibit A#16 in one discussion below.

3. A Sergeant Falsified Timesheets and Direction Not to Report to IA or SIU

Based upon the information gathered, Tatum Law understands these first three items listed in Exhibit A#16, are part of a larger episode of overtime concerns regarding part-time work performed by officers for Capital Metro. The allegations were that officers were logging part-time work while actually on duty for the Austin Police Department and, consequently "double dipping". According to Chief Manley, the allegations were investigated.

Some acts were substantiated and led to discipline, other acts were not substantiated and led to no officer discipline, and all resulted in the need to clarify APD policy. The clarification in policy, based upon the interviews, was made by the City of Austin and the Austin Police Department in negotiation with the Austin Police Association.

#### 4. Reported Concerns about DNA Division and Direction Not to Report to IA or SIU

Tatum Law was able to establish that Commander Dusterhoft did make his concerns about Director of the Forensic Division and the operation of the Forensic Division Lab known to Chief Manley. It is unclear what action was specifically taken but Chief Manley did report that concerns were reviewed and that the issues, which involve personnel, have been resolved. Tatum Law was also able to learn that the Office of the City Manager continues to work to address the operations of the Forensic Lab and provides updates on its work to the City Council.

#### 5. Unprofessional Conduct Toward an Assistant Chief by a Director

Tatum Law was able to establish that Commander Dusterhoft did complain to Chief Manley about Director Alice Thomas' behavior regarding her alleged belittling of and unprofessional conduct toward a Commander. This complaint was reported by Dusterhoft to have been delivered to Chief Manley via email to include an accounting of the incident from a Commander. Chief Manley advised Tatum Law that he has on a number of occasions counseled Director Thomas on her behavior. Director Thomas, who oversees both Finance Services and APD Human Resources (also known as Organizational Resources Management), acknowledges that she has received counseling from Chief Manley on several occasions. Tatum Law learned of no referrals by Chief Manley to the City Human Resources Department or to APD Human Resources, which Director Thomas oversees. There is no record of any other disciplinary action regarding this particular incident.

Tatum Law did become aware of some other allegations of inappropriate statements toward personnel, to include statements directed at APD Human Resources staff, which Tatum Law referred to the City of Austin Human Resources Department and Legal Department for review and investigation. The referred allegations are outside of our scope of work and should be handled according to City policy and relevant law.

#### 6. Unequal Treatment of Jason Dusterhoft by Chief Manley – Dusterhoft Reassignment

Commander Dusterhoft provided some clarification of his claim of unequal treatment in his response to written questions. He cited several occasions during which he claims Chief Manley treated him differently. In his clarification, no dates, times or other witnesses were identified. From the information that was provided, neither witness interviews nor our document review produced any specific references of Commander Dusterhoft being treated differently. Witness testimony did not reveal any instances of unequal treatment or mistreatment by Chief Manley.

#### 7. Unequal Treatment of Jason Dusterhoft by Chief Manley – Comments about Dusterhoft's Person or Personal Information

Commander Dusterhoft complained that Chief Manley made fun of his physical person, his change in personal status and his health. Tatum Law found no evidence of Jason Dusterhoft being made fun of in such a way. There was no documentation provided to demonstrate such treatment, nor any record of a complaint filed on account of any such behavior. Accounts from those interviewed indicate that it was not unusual for the two of them to joke around in a form of officer banter without malice. Interviews indicate that Chief Manly did not comment on or mock Commander Dusterhoft's personal life or medical history.

#### 8. Chief of Staff Troy Gay Letter of Reprimand and Not Demoted

Tatum Law was able to confirm Commander Dusterhoft's statement that AC Gay did receive a Letter of Reprimand regarding the management of Occupy Austin, along with the other managers involved, after a disciplinary tribunal was conducted by Chief Acevedo. It is accurate to state that AC Gay was not demoted as a result of the conduct for which he was disciplined. This incident was confirmed by the independent testimony of AC Gay, Chief Manley and other former and current APD personnel. This incident is also evidence by a Letter of Reprimand.

#### 9. AC McIlvain Letter of Reprimand and Traffic Ticket and Not Demoted

Tatum Law was able to confirm Commander Dusterhoft's statement that AC McIlvain received a Letter of Reprimand regarding his being found traveling at a high rate of speed, 92 mph, while traveling in a City issued vehicle on MoPac with his son, a minor child, on the way to a game in Waco, Texas. He also received a traffic ticket from the officer who conducted the traffic stop. It is accurate to state that AC McIlvain was not demoted as a result of his conduct. This incident was covered by the media and was acknowledged by AC McIlvain and Chief Manley. This instance is also evidenced by a Letter of Reprimand dated March 27, 2017.

#### 10. AC Ockletree's Dishonesty and Not Terminated

Tatum Law was able to establish AC Ockletree was the subject of an investigation involving similar facts as the investigation into Items 1-3 above, the allocation of officer time and work for Capital Metro. The allegations were of insubordination and neglect of duty. According to witness testimony there were also allegations of dishonesty. The investigation was closed administratively without a determination being made.

#### 11. A Commander Who Improperly Delegated Authority Issued a Letter of Reprimand and Promoted

Tatum Law identified the Commander in this instance as a current Assistant Chief. Tatum Law was able to confirm that the Assistant Chief received a Letter of Reprimand regarding the delegation of her duties of reviewing Use of Force reports to a subordinate. It is our understanding there was no violation of policy but a lack of clarity in the policy, which required policy revision. Upon being made aware of the issue, the Assistant Chief resumed the reviewing responsibility. The Assistant Chief confirmed being presented with a Letter of Reprimand and the policy was revised.

#### 12. Dusterhoft Demoted for Non-Policy Violations

Unlike the items listed before this one, there are no allegations raised in this enumerated item. Here Commander Dusterhoft makes a statement that he was demoted while other officers who committed non-policy violations were not demoted and were even promoted. There are no specific allegations to investigate here.

#### The Amendment to Complaint 1 to Include AC Newsom Was Warned about Anonymous Complaint Filed Against Him, Affording Him Time to be Honorably Discharged and Draw Full Leave Pay on Retirement, Complaint 4

On December 9, 2019, the OPO advised Tatum Law of an amendment to Complaint 1 filed on November 7, 2019 to add an allegation that AC Newsom had been tipped off that a complaint was officially filed against him. The amendment specified that details of the complaint were shared with AC Newsom, prior to initiation of an investigation which afforded him the opportunity to retire from the Department prior to any formal investigation

being initiated. Under policy, without a formal investigation having been initiated, AC Newsom could retire separating honorably from the Department and receiving full retirement to include sick leave.

Tatum Law was able to establish that AC Newsom was unofficially notified of the complaint by someone with knowledge about the anonymous complaint filed against him. In his written statement AC Newsom advises that he received notice of “the anonymous email containing unsubstantiated claims” and chose to retire earlier than he had planned, in his effort to look out for the best interest of the Department. Newsom also states that had there been an “official complaint” he would have delayed his retirement until the investigation was complete and that he would have been exonerated. During our interviews, Austin Police Association President Ken Casaday commented on the fact that everyone wants to know who “snitched” to AC Newsom about the complaint filed against him. Casaday reported to Lisa Tatum that he is the one who told AC Newsom about the complaint. The timing of Casaday’s notice has not been confirmed.

Allegations Chief Manley, AC Gay and AC Newsom Failed to Comply With a Lawful Subpoena for Production, filed on December 11, 2019 – Dusterhoft Arbitration, Complaint 5

On December 16, 2019, the Office of Police Oversight forwarded to Tatum Law a complaint filed by Commander Jason Dusterhoft on December 11, 2019, Complaint 5, alleging on September 24, 2019, Chief Brian Manley, AC Chief Gay and AC Newsom failed to comply with lawful subpoenas for records and/or testimony related to Commander Dusterhoft’s arbitration hearing.

These three officers, along with a fourth officer for which there is no complaint, were served with a Subpoena Duces Tecum, a subpoena to appear to testify and to produce documentation. The subpoenas were to appear at the arbitration hearing of Jason Dusterhoft on September 24-27, 2019. According to the arbitration hearing record, Chief Brian Manley was the only one called to testify. Chief Manley was subpoenaed to both testify and turn over records. He mistakenly believed he complied with the subpoena for September 24-27, 2019 when he provided the requested documents to the City’s Public Information on August 8, 2019.

**V. Factual Investigation, Detailed**

**A. Allegations of AC Newsom’s Racist Language filed October 30, 2019, Complaint 1**

The Office of Police Oversight received an anonymous complaint, Complaint 1, alleging Assistant Chief Justin Newsom had engaged in misconduct through the use of racist language in both official communications and his everyday language. In the complaint the anonymous complainant provides some specific instances in which the word “nigger” is used. These specific instances do not indicate when or where these events occurred. Nor are there details as to who may have been involved or witnessed said events. The anonymous complaint received by the OPO reads:

“I have been advised allegedly that AC Newsom, on a continuous [sic] basis for at least the last decade, has used the word “nigger” to describe African Americans. I have been advised that AC Newsom, went to Chief Manley explaining that someone may have possession of text exchanges where he was using “nigger” in the conversation. Chief Manley asked if it was possible that someone did in fact have screenshots of these conversations and AC Newsome [sic] said yes. Allegedly everyone on the executive floor (to include officers, Assistant Chiefs, Chief of Staff and administrative staff) knew about this conversation between Chief Manley and AC Newsom. All Assistant Chiefs were made aware of AC Newsom using the extremely derogatory term “nigger” and failed to report it for investigation or review.

- Specifically while advising President ██████ landed in Austin AC Newsom stated “Negro one down”.
- When describing Council woman ██████ AC Newsom stated “She is a dumb nigger but a nice

lady” •When talking about Chief ██████ AC Newsom stated “[Chief] is a nigger but he is our nigger”

- When on a Special Response Team deployment AC Newsom called Officer ██████ and Officer ██████ “Stupid fucking niggers”. This was in front of other SRT personnel and SRT supervisors. It has also been alleged that AC Newsom was involved in a family violence altercation with ██████, a current city employee. On one occurrence [sic] a Park Ranger had to step in to deal with the altercation. I ask that all of these allegations be investigated.”

### **1. Chief Manley’s and the Assistant Chiefs’ Knowledge of Racist Language in AC Newsom’s Text Messages and Violation of Policy for Failure to Report for Investigation**

Chief Manley met with Tatum Law and acknowledged having a conversation with AC Newsom where AC Newsom advised the Chief he was made aware of the existence of text messages that may be used against AC Newsom should he testify at Commander Jason Dusterhoft’s arbitration hearing. This conversation took place immediately before the Dusterhoft arbitration which began September 24, 2019. AC Newsom advised the Chief someone sent him a screenshot of a text message AC Newsom sent “a while back” and that its content was concerning enough that, should information about the text message become public, AC Newsom would leave the Department. Chief Manley asked if the situation was “serious” and AC Newsom advised him “yes” it was serious. The Chief reported he did not ask AC Newsom the nature of the texts but did tell AC Newsom to take his concerns to the Legal Department. While Chief Manley denied knowing the nature of the text messages, he admitted he assumed the text messages involved allegations of infidelity or related to sexual behavior given the nature of the Dusterhoft arbitration. Chief Manley did advise that AC Newsom told him should the information about the text messages become public AC Newsom would resign from the department.

Chief Manley further described an emailed correspondence received by on October 7, 2019, on which the City Manager, Spencer Cronk, the Office of Police Oversight and Reporter Tony Plohetski of the Austin American-Statesman and KVUE were copied. The subject line of the correspondence read “Alarming Concerns” and alleged AC Newsom had engaged in racist behavior.

On the same date Chief Manley received the email, he forwarded the correspondence to OPO and copied the City Manager and Assistant City Manager Rey Arrellano, even though they were copied on the original email. The sender appeared to be an individual named Mark Spaulding. Chief Manley advised Tatum Law that he could not establish if Mark Spaulding was a real person. Emphasizing his concern about the allegations raised in the email, Chief Manley asked the OPO to contact the complainant to try to obtain copies of the text messages or identify who shared the text messages. According to the Office of Police Oversight, correspondence was sent on October 8, 2019, in an effort to follow up as requested by Chief Manley. According to Tatum Law’s understanding of policy (a) OPO is prohibited from conducting an investigation and (b) complaints against the Chief of Police and the Chief’s executive staff are outside the purview of the OPO. On October 24, 2019, Chief Manley made AC Gay aware of the October 7, 2019 email and its allegations prior to his leaving for vacation. He asked AC Gay to follow up with the Office of Police Oversight to find out if that office learned any new information. No other action was taken with respect to the October 7, 2019 complaint emailed to Chief Manley. The October 7, 2019 email reads:

Chief Manley,

I wanted to contact you and express my great concern about the racist behavior of one of your officers, Assistant Chief Justin Newsome.

I have seen screen shots of text messages in which he referred to other Austin police officers as "stupid fucking niggers" as well as heard second hand that he makes such statements regularly in the presence of other police officers.

I find this completely outrageous and offensive, and completely inappropriate for any police officer, let alone an assistant chief.

You seem to be a man of integrity, and I cannot imagine you would condone or approve of this sort of behavior and the blatant racism from Chief Newsome.

I am contacting you to ensure you are aware of this behavior and can look into it and take the appropriate action. It is my understanding his bias and beliefs are well known amongst your department.

I do not wish to be contacted out of fear of retaliation. I can only hope you will do the right thing and not ignore this or sweep it under the rug.

Mark

Tatum Law attempted to reach out to the sender at the email address provided in the October 7, 2019 correspondence in an effort to gather information. Our efforts were not successful. We received no response to our request for direct communication with the individual or individuals identified as Mark Spaulding. Chief Manley further described his discussions and events regarding AC Newsom and the text messages in his interview with Tatum Law. It was not until October 30, 2019, that he learned the substance of the text messages AC Newsom reported in September before Dusterhoft's arbitration began. He learned about the nature of the text messages when he was notified by AC Gay on October 30, 2019, of the anonymous allegations filed with OPO earlier the same day. At the time the Chief learned about the text messages he was out of the country on vacation and attended to the matter telephonically with AC Gay. Later that evening, AC Newsom retired from the Department.

AC Gay, who is an Assistant Chief and Chief of Staff for Chief Manley, was made aware of the September conversation in the course of routine business operations. AC Gay acknowledged learning from Chief Manley that AC Newsom would leave the Department should the nature of the text messages be discovered. AC Gay found AC Newsom's willingness to leave under such circumstances surprising. AC Gay was directed to follow up on the October 7, 2019 email received by Chief Manley and referred to the OPO, prior to Chief Manley leaving for vacation at the end of October, but was previously unaware of any allegations against AC Newsom. AC Gay acknowledged he became aware of the allegations contained in anonymous complaint filed with the OPO on October 30, 2019, on the day it was filed through a call from Farah Muscadin, the Director of the Office of Police Oversight, notifying him of the filing and the allegations in complaint in his role as acting Chief of Police. He, in turn, contacted Chief Manley to relay the information from the OPO Director.

There are other Assistant Chiefs and executive staff who were also aware of the conversation about the text messages between Chief Manley and AC Newsom. Based upon the investigation interviews, we estimate 20% of the executive floor knew of the alleged existence of the text messages and that AC Newsom seemed troubled by the fact that someone knew about them and how that individual may use these text messages to embarrass him or harm him. By several accounts, AC Newsom openly discussed his concerns over these text messages with individual Assistant Chiefs or in various sized groups. AC Newsom also discussed this matter with unsworn staff or discussed his concerns about the text messages within the hearing of those working on the executive floor. Only one person claimed to know the content or the subject matter of the text messages was racist in nature. That person claimed to learn about the text messages after the Dusterhoft arbitration went into recess and based the knowledge upon circulating rumors and gossip. Those, with knowledge from the conversations with AC

Newsom, advised (a) they know AC Newsom had spoken to Chief Manley about the text messages and (b) AC Newsom did not share the nature of the text messages. He only shared that he was concerned that the text message material would be made known and that the content was embarrassing or did not reflect well on AC Newsom. AC Newsom told several of his fellow Assistant Chiefs that he would leave the Department if the text messages became public.

Prior to a lawsuit being filed against AC Newsom, he had agreed to meet with Tatum Law. Under advice of legal counsel, that meeting was cancelled. Tatum Law made several subsequent attempts to interview AC Newsom in person or by written questions, to which no responses were received. During the course of this investigation, the legal claims individually against AC Newsom have been dropped. In response to Tatum Law's last requests for an interview, AC Newsom, through his legal counsel, provided a written statement. In his statement, AC Newsom denies making the comments alleged in the anonymous complaint. AC Newsom also states he does not know what may have motivated someone to make such accusations and wonders whether the intention behind the allegations was to create the resulting consequences to include the cancellation of cadet classes.

The Office of Police Oversight acknowledged receipt of the October 7, 2019 email as a courtesy copy to [policeoversight@austintexas.gov](mailto:policeoversight@austintexas.gov). According to Director Muscadin, typically, when the OPO receives such an email correspondence, it is standard procedure to inform the recipient about the office and to provide them with information on how to file a complaint with the office. The OPO is prohibited from soliciting complaints. In this case, the same process was followed. She acknowledged Chief Manley also forwarded the correspondence to OPO, after removing Mr. Spaulding and the reporter, who was also copied, and adding Assistant City Manager Rey Arellano, requesting assistance in contacting Mark Spaulding. Director Muscadin advised that she and AC Gay did discuss this complaint at some point. She recalled AC Gay mentioning he and Chief Manley would determine how they would handle the complaint internally. Director Muscadin reported that Chief Manley followed up with her on October 24, 2019. She advised him that OPO had sent the email on how to file a complaint and had not heard back.

Tatum Law was able to establish that Chief Manley had reason to inquire as to AC Newsom's conduct based on a self-report of text messages that were troublesome, about which AC Newsom indicated he would leave the Department if they became public, and two separate allegations of racist text messages and comments occurring about one month apart. The October 7, 2019, email received by Chief Manley alleging similar facts to those later alleged in the October 30, 2019 complaint about AC Newsom's use of the derogatory term "nigger" in text messages to refer to African Americans provided sufficient information to suggest that AC Newsom was in violation of policy for review or investigation. Chief Manley did not send these allegations for review or investigation.

Tatum Law also established that a number of Assistant Chiefs were aware of AC Newsom's concerns over the text messages and that AC Newsom spoke to Chief Manley about those concerns. Some Assistant Chiefs understood from AC Newsom directly that if the content of the text messages became known he would separate from the Department. No one who knew about AC Newsom's concerns reported AC Newsom's alleged behavior for investigation or review.

## **2. AC Newsom's Use of Racist Language in Text Messages and Violation of Policy**

One of the most obvious questions that Tatum Law and many others have asked is, "where are the text messages?" We do not know the answer to that question. It was a standard question in the interviews and no one stated they personally saw, received, or were in position of a text message as described in the complaints. In an investigation of allegations or regular, systemic and documented racial derogatory comments, an investigator would expect some evidence of allegations, even if it is evidence that is subject to debate. Tatum Law has requested such

evidence from numerous sources, but has not received and has not obtained the text messages or images of the text messages as alleged. Neither have we been able to establish that these alleged text messages did not exist. Complainant 1 reported having personally seen the text messages on the mobile phone of a fellow officer who was included in the text string communication. Complainant 1 advised that the text messages could not be provided to us because the officer who shared them did not want to be identified. We recognize that from the date of Complaint 1 and the publication of the allegations of AC Newsom's use of racist language, significant time passed before our engagement. This passage of time would certainly afford someone, if the allegations are true, the opportunity to dispose of any texts messages or images evidencing such activity.

Without being presented with any copies of the text messages or any other evidence of the alleged text messages at the beginning of the investigation, the first two steps Tatum Law took were (1) to identify those who may be involved or have knowledge of the alleged text messages and (2) to determine whether and how Tatum Law may gain access to the Department's mobile devices or information storage where these messages may be found. So documents were requested and interviews began. Documents were produced and reviewed as the interviews were being conducted.

Upon review of certain requested documents, none of which contained the alleged text messages, Tatum Law began to think about alternative means of document production allowed for by an independent investigation, the City or the Department. Tatum Law took the position that Texas Local Government Code, as it applies to the City, authorizes the investigation of police officers, pursuant to Section 143.312, and permits an interrogation based on a complaint from an anonymous complainant if the police department employee who receives the anonymous complaint certifies in writing under oath that the anonymous complaint received was in fact anonymous. This certification requirement would apply to the October 7, 2019 email from Mark Spaulding, which had not been referred for investigation or review, but one could also argue the same certification requirement applies to the October 30, 2019 anonymous complaint. In addition to hiring an independent investigator, the law and Department policy also affords the Chief of Police the opportunity to send the allegations to Internal Affairs for investigation, if Chief Manley were to so choose.

Additionally, "The Agreement Between the City of Austin and The Austin Police Association" (the "Meet and Confer Contract") effective November 15, 2018 also provides guidance for an Independent Investigation, pursuant to Article 16, Civilian Oversight of the Austin Police Department, Section 5, which states "the Chief of Police and the City Manager retain all management rights to authorize an Independent Investigation concerning police conduct." The Meet and Confer Contract also affords the compelling of testimony under Article 17, Protected Rights of Officers, Section 3. Although there is no legal or administrative requirement to appear before or present evidence involved in a Citizen Oversight investigation, an officer can be compelled to appear before, or present evidence to, any Independent Investigation authorized by the Chief of Police or the City Manager. Under these provisions, the officers remain subject to orders or subpoenas to appear and provide testimony or evidence in such investigations. Tatum Law interprets this as the ability to compel testimony or evidence and on February 11, 2019, Tatum Law requested assistance from the City Manager with an Internal Affairs referral in order to interview two individuals who Tatum Law believed may have personal knowledge about the existence of the alleged text messages and to assess two mobile phones as well as the phone data.

Interviews were conducted on March 10, 2020, and two mobile phones were reviewed with the assistance of Internal Affairs soon after. The individuals interviewed were identified through prior interviews and communications with Complainant 1 as individuals who were currently employed with either the Department or the City and likely to have information or evidence. The two phones that were examined were telephones over which Internal Affairs had authority to issue orders. With no one claiming to have seen, received or participated

in the text communications where AC Newsom is alleged of having used derogatory language, we had to rely on whatever evidence could be gathered even though nearly six months passed since the allegations were filed.

Complaint 1 alleged that AC Newsom used racist language over the period of at least ten (10) years, which includes his use of the word “nigger” in reference to African Americans and at least one occasion, as asserted by the complainant, the word “nigger” was used in front of SRT personnel and SRT supervisors.

Efforts were made by Tatum Law, through additional interviews and document requests, to identify the SRT personnel and SRT supervisors referenced. We requested a list of all SRT supervisors and personnel through the Chief of Staff on January 13, 2020. Tatum Law was advised the request would be a challenge. We learned from AC Gay that the SRT assignments are ancillary and were told it may be difficult to identify this information. An ancillary assignment, as we understand it, is an extra duty assignment, similar to an extra-curricular activity in school like band, cheerleading or football. Because it is not an assignment an officer reports to daily, tracking when an officer reported to SRT would be difficult. Tatum Law continued to ask questions in an effort to learn more about and understand how the enrollment and membership is maintained for SRT.

In communication with the author of Complaint 1, Complainant 1, Tatum Law was able to obtain greater detail as to when the alleged behavior took place. Tatum Law was also able to gain more information about the circumstances during which AC Newsom’s used racist language or the word “nigger”. Responsive to written questions, Complainant 1 reported having personal knowledge of all the claims alleged in this complaint stating, “The person who showed me was in the text thread and did not want to send them to me out of fear of retaliation because they were on the thread and did not report it, which I do not blame him.” When Tatum Law asked Complainant 1 why he/she decided to report the behavior as alleged, the response from Complainant 1 was “Everyone has feared retaliation from Justin or 5th floor staff, which has been documented over the years. With Newsom quickly rising in the department no one felt comfortable notifying anyone knowing he would get away with it. Which he did despite several complaints which proves my point.”

According to Complainant 1, AC Newsom’s close friends, some of whom are still employed with the Austin Police Department, all know about this behavior, did not condone it and have felt helpless to do anything about it for fear of being targeted. Complainant 1 advised the anonymous report process afforded the opportunity to report the racist behavior without fear of retaliation. Complainant 1 claims the actual text messages occurred several years ago, and that, when the text messages were seen, the texts were viewed on a phone belonging to someone who was included in the string of text communications. Complainant 1 made it clear that the use of racist language by AC Newsom was verbal as well as in text communications complained about. Complainant 1 also stated that the three of the statements AC Newsom made were directed to Commander Pat Connor.

With assistance of the Austin Police Department and the City of Austin, Tatum Law believed it should be possible to narrow the timeframes for the presidential visit, the term of the Councilwoman, and the occasions when certain officers were deployed with SRT as referenced in the complaint in order to better identify individuals who may know about AC Newsom’s use of racist language or may have been involved. The initial information we were provided led to more questions than answers. The first set of documents we received contained information that was outdated, such as a “current roster” that was not current, or was without a context for our understanding. Using the alternate method of document gathering, Tatum Law was subsequently able to narrow down the timeframes as expected. This more specific information meant that we could more specifically target when the alleged text messages would have been sent.

During this round of interviews with current employees of both the City and the Department and conversations with others previously with the Austin Police Department, Tatum Law learned that a number of individuals were not surprised to hear of the allegations raised by this complaint. By several accounts, AC Newsom’s use of racist

language was well known throughout the Department as was the use of such language by other officers who were known to be close friends with AC Newsom and used such language openly and often. Officers and staff seemed most comfortable during their interviews when discussing individuals who are no longer with the Department, but were known to use racist language or conduct themselves in a similar manner.

Tatum Law met with Commander Connor and asked him about his knowledge of the alleged text messages and whether he had any knowledge about AC Newsom's use of racist language. Commander Connor denied having any such knowledge of the details of the anonymous complaint, to include ever seeing or possessing the text messages, as alleged in Complaint 1. Commander Connor also denied being a part of the text message string or communicating such information with anyone. He permitted Tatum Law, in cooperation with Internal Affairs, to review his mobile telephone in support of his claims that he had nothing to hide.

Chief Manley reported he was unaware of AC Newsom using such language on the executive floor or elsewhere. No Assistant Chiefs reported being witness to or being aware of any such behavior by AC Newsom. Not one, sworn or unsworn, member of the executive floor reported hearing racist language, seeing a racist text message or receiving any reports of AC Newsom using the word "nigger" or any other racist language. All Assistant Chiefs and all other members of the executive floor expressed intolerance for the use of such language and advised that such language was a violation of policy that would not have been tolerated. However, Tatum Law consistently heard from those interviewed, including active and separated officers, that to report actions such as those alleged against AC Newsom, translates to exposure for retaliation by leadership and/or a circle of AC Newsom's powerful friends. At the conclusion of the collaboration with Internal Affairs, we learned there were no reports leading to any investigation or review of AC Newsom's alleged use of racist language by Chief Manley, Internal Affairs or OPO.

#### **B. Allegation of AC Newsom's Use of Derogatory Comments and AC Gay's Homophobic Sentiments filed October 30, 2019, Complaint 2**

On October 30, 2019, the Office of Police Oversight received a second anonymous complaint alleging AC Newsom and Chief Manley had engaged in misconduct. The anonymous complaint received by the Office of Police Oversight reads:

"An assistant chief admitted to chief manly [*sic*] that he has made numerous derogatory comments about African Americans prior to the Dusterhoft arbitration. Manly [*sic*] agreed to keep it a secret as long as it did not come out in the arbitration, for the good of the department. Chief manly [*sic*] has also supported Assistant Chief Gay in forcing his [REDACTED] to attend Christian gay conversion therapy. There was also a fear that this anti-gay mindset would come out in the Dusterhoft arbitration, but if it didn't it would remain a secret for the good of the department."

Tatum Law was not able to establish communication with the author of Complaint 2. Tatum Law did reach out to Complainant 1 in an effort to gain additional information regarding this second complaint. Complainant 1 was not aware of these allegations and advised that Complaint 2 was not sent by Complainant 1.

##### **1. Chief Manley's Knowledge of AC Newsom's Use of Derogatory Comments, and Agreement to Keep the Knowledge Secret in Violation of Policy for Failure to Report for Investigation**

The information gathered and facts learned investigating Complaint 1, applies to Complaint 2. Specifically in response to Complaint 2, Chief Manley reported to Tatum Law that he had not heard AC Newsom make any derogatory comments about African Americans nor had he received any such reports. Chief Manley denies making any agreement with AC Newsom to keep the nature of the text messages, and/or the use of a derogatory term a secret and to keep the same information out of the Dusterhoft arbitration hearing, for the betterment of the

Department. Chief Manley emphasized the importance of the process and following policy during his interview with Tatum Law. He advised he did not interfere with the arbitration process for the Dusterhoft arbitration. He re-urged his position of not interfering by referencing his directive to AC Newsom to visit with the Legal Department regarding AC Newsom's concerns about testifying and the information AC Newsom had regarding the text messages as an example of his disengagement in the arbitration process. AC Newsom, through his written statement, also denies the allegations asserted in Complaint 2.

## **2. Chief Manley's Knowledge of AC Gay's Use of Homophobic Language, Fostering of a Homophobic Mindset, and Agreement to Keep the Knowledge Secret in Violation of Policy for Failure to Report for Investigation**

Chief Manley expressed concern over the allegations raised about AC Gay because unlike the other allegations, this segment of Complaint 2 addressed an officer's personal and family life not the officer's professional life. The Chief found it alarming that the complaint process, particularly an anonymous process, could involve an officer's personal life and family without necessarily being related to work performance. Other Assistant Chiefs also raised this concern during their interviews with Tatum Law.

When specifically questioned about AC Gay's alleged anti-gay mindset, Chief Manley responded the allegations are not true. He denies having a homophobic mindset or using homophobic language. He states that he has never fostered or encouraged any anti-gay thoughts or expressions. He denies any such communication took place between him and AC Gay. Chief Manley advised Tatum Law AC Gay never shared the information alleged or anything like it with him. When asked if he had knowledge and agreed to cover it up, Chief Manley denies the assertion stating it never happened.

Assistant Chief Troy Gay met with Tatum Law and, first, expressed his frustration and offense at the accusations made. He shared with Tatum Law some of what he and his family were experiencing due to public discussion of his personal and family life. AC Gay denied all of the allegations raised, and advised he is a member of the Austin Lesbian and Gay Police Officers Association.

Not one Assistant Chief or a sworn or unsworn member of the executive floor reported hearing any homophobic language, seeing a racist text message or receiving any reports of AC Gay expressing an anti-gay mindset. Some reported hearing the rumor about the allegations. Some were aware of AC Gay's involvement with the LBGT community through police association membership or had seen his support of the LBGT community on display in his office. All Assistant Chiefs and all other members of the executive floor expressed an intolerance for homophobic behavior and advised that such behavior was a violation of policy that would not only not have been tolerated, but that it is behavior which would have been reported if it persisted.

In the course of the investigation, Tatum Law did receive one report regarding AC Gay's alleged homophobic mindset. On one occasion, according to a confidential witness, AC Gay referred to someone, while at a regional restaurant during lunch, by stating, "He's a fagot." Tatum Law was not able to establish details as to the date on or location at which this statement was reportedly made. Through the interviews on this subject, several individuals raised concerns about the Department's Senior Chaplain, Rick Randall, who is unsworn, asserting that, in his role as an APD reverend, he refuses to perform gay marriages and often makes sexist comments.

Tatum Law did not learn of any information or evidence to suggest that Chief Manley entered into an agreement to keep the alleged behavior secret, particularly from becoming known during the Dusterhoft arbitration. Chief Manley denies any such agreement and any such behavior taking place. AC Gay denies the allegations in addition to finding the accusation offensive. And, AC Newsom, as previously stated, denies the allegations raised by the anonymous complaints as well.

Tatum Law found no evidence to support the allegations of homophobia or anti-gay sentiment being agreed to or encouraged by Chief Manley as alleged in Complaint 2 filed on October 30, 2019. We found no evidence to substantiate the claim that Chief Manley knew of a homophobic mindset and agreed to keep AC Newsom's derogatory comments a secret as alleged as true or untrue.

As above, no evidence was found to establish the allegations of racist behavior as true or establish the facts alleged as not true. AC Newsom told Chief Manley about the suspected text message history and on October 7, 2019, Chief Manley received a complaint alleging AC Newsom's use of derogatory language in racist text messages only to subsequently, learn of a second complaint, making similar factual allegations. Tatum Law did not learn of any information or evidence to establish that Chief Manley entered into an agreement with AC Newsom or anyone else to keep the alleged racist behavior a secret. AC Newsom's disclosure and the October 7, 2019 complaint appear to provide enough information for Chief Manley to choose to investigate as allowed under Departmental processes.

### **C. Allegations Raised in Exhibit A#16 of the Jason Dusterhoft Arbitration, Complaint 3**

During Jason Dusterhoft's arbitration, he offered testimony on October 24, 2019, about several instances in which he believed demonstrated Chief Manley's unequal treatment of him. Dusterhoft cited multiple occasions where other officers had violated policy or committed criminal acts that had gone without investigation or discipline. In his testimony, he referred to notes which were admitted into evidence as Exhibit A#16 on the final day of his arbitration hearing. The exhibit consisted of a bullet point list representing the "criminal and policy violations" Mr. Dusterhoft alleged to have reported to Assistant City Manager Rey Arellano while in the presence of Chief Manley. Tatum Law was charged, as part of its scope of work, with investigating the validity of the allegations raised in Exhibit A#16, Complaint 3. Similar to Complaints 1 and 2, each summary provided in this Exhibit was lacking in details as to date, time, place and the names of the persons involved.

As part of the gathering of information to assess Complaint 3, Tatum Law was in communication with Jason Dusterhoft. He declined to be interviewed but he did agree to response to written questions via email. Though he was unwilling to answer any questions that were not directly related to his complaint, he did respond to written questions related to Exhibit A#16 and his complaint alleging APD's failure to respond to his subpoenas (Complaint 5, which will be discussed later in the report). Jason Dusterhoft indicated he could have provided more detailed information if he had been able to access his APD files and email. His responses provide information beyond Exhibit A#16 and the arbitration transcript and other responsive documents delivered by the City provided to Tatum.

#### **1. A Commander Who Falsified Timesheets – Direction to Dusterhoft to Not Report to IA or SIU**

Dusterhoft claims that he went to Chief Manley about a Commander he supervised who he believed warranted review. The allegation reads,

I went to Chief Manley concerning a Commander who I supervised and showed detailed documentation that myself and Lt. Connor at the time was falsifying his timesheets. This was found out through investigations first by Commander Connor (a Lieutenant at the time on the 5<sup>th</sup> floor). I was told by Chief Manley to talk with the Commander and not have Internal Affairs or SIU to look into the issue thereby directing me to cover up the obvious policy violation which could be criminal as well. This documentation is still in Commander Connors possession from my understanding and he is now over Internal Affairs.

This is by a preponderance of the evidence TAMPERING WITH EVIDENCE under Tex. Penal Code 37.09 which is a 3rd Degree Felony.

Interviews suggest the events regarding falsified or fraudulent timesheets occurred during Chief Acevedo's tenure and Chief Manley's tenure as Chief of Staff and, possibly, Chief Manley's tenure. The documents provided were insufficient to establish with certainty the identity of the Commander involved as the subject of the investigation. There were no responsive records related to falsified or fraudulent timesheets that may have assisted in determining whether this instance occurred, was investigated or referred, or was referred to Chief Manley prior to the alleged disclosure to Assistant City Manager Arrellano.

Commander Connor was interviewed by Tatum Law and he identified the person involved in the allegations. Commander Connor advised he followed the direction of Commander Dusterhoft and accessed the accused Commander's access badge information, timesheets, computer logins, his overtime schedule for Capital Metro, and other information in his efforts to track the Commander's coming and goings to determine if the accused Commander was falsifying his timesheets.

Commander Dusterhoft provided responses to written questions on March 20, 2020. In his accounting, both Commanders Connor and Dusterhoft worked together, on self-initiated investigations into what they believed were instances of officer misconduct. He confirmed the identity of the subject and stated he could provide additional information if he could access his APD records. When asked when was this instance of misconduct reported to Chief Manley, Dusterhoft responded stating that Commander Pat Connor should be able to provide the answer to that question since he had no access to APD records. No other persons interviewed, who had heard about timesheet falsification involving a Commander, were able to recall any details on the subject and claimed to have no personal knowledge.

## 2. A Sergeant Falsified Timesheets and a Commander's Untruthfulness Not Reported to IA or SIU

This second allegation claims Dusterhoft brought evidence to Chief Manley of a Sergeant who lied on his official timesheet requesting an investigation which the Chief denied. The allegation reads,

I went to Chief Manley about an investigation on a Sergeant who was shown to be lying on his official timesheet after being asked to review the initial review of a possible IA case. This case had a statement by a Commander that was being considered to be an AC for APO at that immediate time. After reading the case I pointed out several issues that led me to believe this Commander was not being truthful. Chief Manley agreed but no investigation was initiated and the Commander was not considered for an AC position and I was told to not pursue with SIU or IA concerning the Commander.

No responsive documents were located by the City and the Department that could help establish with certainty the identity of the Sergeant involved as the subject of the investigation. Tatum Law was provided with no records related to whether this instance occurred, was investigated or reviewed, or was referred to Chief Manley prior to the alleged disclosure to Assistant City Manager Arrellano.

Commander Dusterhoft provided responses to written questions on March 20, 2020. Here, again, by Dusterhoft's account, Commanders Connor and Dusterhoft worked together, to investigate what they believed were instances of officer misconduct. Commander Dusterhoft's responses identified the Sergeant involved and, here also, Commander Connor accessed the accused Sergeant's access badge information, timesheets, computer logins, his overtime schedule for Capital Metro, and other information in his efforts to track the accused Sergeant's coming and goings and evidence the accused Sergeant falsifying his timesheets. Dusterhoft stated he could provide additional information if he could access his APD records. When we asked when this instance of misconduct was reported to Chief Manley, Dusterhoft responded stating that Commander Pat Connor should be able to provide

the answer to that question. According to his written responses, Commander Connor was the supervisor of the Public Information Office and conducted this investigation under Jason Dusterhoft's direction. Once Chief Manley was informed, date unknown, he stated Chief Manley assigned the investigation into the allegations to an Executive Lieutenant. Commander Dusterhoft also reported that the Public Information Office, was removed from his command and brought underneath Chief Manley's purview.

The accused Sergeant was also interviewed by Tatum Law. Based upon the information gathered, Lieutenant Connor requested of, then, Chief of Staff Manley that the accused Sergeant' conduct be reviewed in light of his and Dusterhoft's concerns about alleged "double dipping". The accused Sergeant came to his interview with Tatum Law prepared to discuss all aspects of this allegation. He advised us that he fully cooperated and had done nothing wrong. Further, there were no findings of wrongdoing and the investigation concluded.

According to the interview with Chief Manley, this instance involved the accused Commander, an unknown Sergeant and Dusterhoft. It is unclear whether the subject of the review was under Dusterhoft's command and the same individual in the first allegation based upon conversations with Chief Manley. This incident was reported by Chief Manley to be part of a larger episode of overtime concerns regarding part-time work performed by officers for Capital Metro, based upon those interviewed and having personal knowledge. Chief Manley advised there was an Internal Affairs investigation into "time allocation". The allegations were that officers were logging time for Capital Metro while actually on duty for the Austin Police Department and consequently "double dipping".

According to Chief Manley, the allegations were investigated, were not substantiated and led to no officer discipline but did result in the need to clarify APD policy. It is Tatum Law's understanding, based upon the interviews, the Austin Police Association participated in discussions to negotiate with the City and the Department.

No other persons interviewed, who had heard about timesheet falsification involving a commander, were able to recall any details on the subject and claimed to have no personal knowledge.

### 3. A Sergeant Falsified Timesheets and Direction Not to Report to IA or SIU

Similar to the first two allegations raised by Exhibit A#16, the allegations here read,

I went to Chief Manley about a Sergeant appearing to be intentionally lying on his time sheet and through an investigation by Lieutenant Connor at the time and another Lieutenant who worked for the Chiefs, it was shown that an Internal Affairs and criminal case should be initiated. Chief Manley personally intervened and stopped an investigation moving forward because of his personal relationship with the Sergeant. This cover up stopped a criminal investigation and internal affairs investigation from occurring. Documentation from the investigation should still be in Commander Connors and Lt. Eve Stephens possession. This is by a preponderance of the evidence TAMPERING WITH EVIDENCE under Tex. Penal Code 37.09 which is a 3rd Degree Felony.

Of the documents requested and those provided, there were no records that shed light on whether this instance occurred, was investigated or reviewed, or if it was referred to Chief Manley by Commander Dusterhoft prior to the alleged disclosure to Assistant City Manager Arrellano.

In his written responses, Commander Dusterhoft explained the Sergeant involved in this allegation was now a Commander, who he believed provided a false statement to Internal Affairs. Commander Dusterhoft stated he was asked by Chief Manley to review an Internal Investigation, and, upon completing his review, he determined accused Commander had been dishonest in providing a statement to Internal Affairs. After briefing Chief Manley

on his findings, Commander Dusterhoft reports that Chief Manley agreed with his determination but later asked him to sign off on the case with no finding of wrongdoing. According to Dusterhoft, this occurred during the timeframe when the accused Commander was being considered for promotion to Assistant Chief. The allegation against the accused Commander was investigated and sustained on March 16, 2015. The accused Commander was disciplined for his action, receiving an oral reprimand.

These first three allegations, without specific name references, are so factually similar that the individuals interviewed were unclear in their own individual recollection as to which allegation involved whom. This is another illustration of the challenges Tatum Law faced in conducting this investigation.

Our investigation clarified that items 1-3, these first three items listed in Exhibit A#16, are part of a larger episode of overtime concerns regarding part-time work performed for Capital Metro by officers. The allegations were investigated, some were substantiated, and some were not substantiated. Coming out of the investigations, it was determined that APD policy needed to be clarified. The clarification in policy, based upon the interviews, was made by the City of Austin and the Austin Police Department in negotiation with the Austin Police Association.

#### 4. Reported Concerns about Forensic Division/DNA Lab and Direction Not to Report to IA or SIU

The fourth allegation raised by Dusterhoft's exhibit involves the Forensic Division/DNA Lab and challenges Dusterhoft was facing in managing this division. He alleges that Chief Manley directed him to "stand down". The allegation reads,

I informed Chief Manley numerous times while I was an Assistant Chief over the Forensic Division/DNA lab that the Director was undermining my attempt at reform and performing extremely poorly which ultimately led to the uncovering of the DNA problems at APO. I was able to confirm this through a direct report to the Director. I had documented numerous issues with the way the Director was handling the DNA division and was told to stand down by Chief Manley thus intentionally covering up what was really occurring in the Forensic division. Eventually, it was confirmed how mismanaged the Forensic Division had been by the Director. I feel if I was able to pursue holding the Director accountable I could have uncovered the numerous issues that were facing the Forensic Division while I was still supervising the unit.

Dusterhoft alleged he informed Chief Manley on a number of occasions that the Forensic Division/DNA Lab was in need of reform. Discussions with personnel and our investigation revealed that there were significant issues in the recent past involving the Forensic Division/DNA Lab, much of which were covered by the media<sup>7</sup>. According to Chief Manley, this matter was addressed. He described some of the concerns as a clash of personalities between the Director of the Forensic Division and Commander Dusterhoft, who was supervising the division. Chief Manley advised that leadership did report that there were issues about people in the division but that there were no issues with evidence. Media coverage<sup>8</sup> and updates, as recent as February of 2019, provided to City Council from the City Manager's Office<sup>9</sup> suggest there was subsequently much more involved. The information gathered was sufficient to address the purposes of this report.

Commander Dusterhoft's written responses report that this incident occurred in the last few months of Director's tenure with the Austin Police Department. By his account, he presented a number of concerns to Chief Manley several months prior to Director's departure and was advised by Chief Manley "to leave it alone". Dusterhoft's

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<sup>7</sup> Austin Monitor, *The implosion of Austin's crime law* \_ A timeline (2017)

<sup>8</sup>Shawna Reding, *Austin police's troubled DNA lab* \_ Cases could return to court, KVUE.com, September 12, 2018

<sup>9</sup> City Manager DNA Memo Update 2019, Assistant City Manager Rey Arrellano, City of Austin

concerns include mismanagement and the Director's direct attempts to undermine his efforts to reform the Forensic Division.

Most of the individuals interviewed only know of concerns with the Forensic Division through secondhand knowledge or from the press coverage. Though documents were requested, we were advised there were no responsive documents that would shed light on these allegations, whether or not the alleged events occurred, were investigated or reviewed. Based upon witness testimony, Tatum Law was able to establish that (1) Commander Dusterhoft did complain about the Director and the Forensic Division to Chief Manley and (2) concerns regarding the Forensic Division were addressed. Tatum Law did not learn any more specific information about this complaint or how it was resolved.

Documents evidence that the Office of the City Manager continues to work to address the operations of the Forensic Division and provides updates on its work to the City of Austin City Council.

#### 5. Unprofessional Conduct Toward an Assistant Chief by a Director

A Commander under Dusterhoft's supervision was reportedly verbally abused, belittled and treated extremely unprofessionally by Director Alice Thomas of the Finance Department of APD. Dusterhoft alleged he was denied his request to investigate the behavior by Chief Manley as stated below.

When one of the Commanders I supervised was belittled and treated extremely unprofessionally by Director Alice Suter/Thomas I brought this to Chief Manley's attention verbally. I felt that it was unprofessional and a policy violation and asked Chief Manley to look into the matter since she reported directly to Chief Manley. I made numerous requests to have Chief Manley review the issue but he refused to look into the abusive behavior. I then asked the Commander to write me an email stating what occurred and forwarded it to Chief Manley. Chief Manley then called me into his office and asked why I had put that in an email (Chief Manley was visibly upset that it was now documented). Instead of filing a complaint with Internal Affairs for unprofessional conduct he had a talk with the Commander many weeks later. Manley knew of the director treating many Commanders and other civilians extremely unprofessionally numerous times but refused to address the policy violations thus thwarting a review into her professional misconduct.

Dusterhoft advised in his answers to written questions that he had no access to APD email or records to provide greater detail, and stated such information should be located on the APD server's and Chief Manley's email. Dusterhoft reported that Chief Manley called him into his office, directed him to document the incident and Chief Manley would take care of it. In his allegations, Commander Dusterhoft complains that almost all Commanders and civilian staff working under Director Thomas were treated unprofessionally by her.

In the course of our investigation, Tatum Law learned that most of the personnel interviewed, past and present, view Director Thomas as a no nonsense person, who comes across as being curt, blunt and tough. Many accounts state that she is not well liked. This sentiment was predominantly shared in the context of the fact that she is in charge of the money and does not let officers spend it freely or loosely. Several other reports documented encounters with her, where inappropriate statements were made referencing race, religion and body image. Such statements were individually focused on personnel under her supervision. Reports from the executive floor, Human Resources and the Law Department have all advised that Director Thomas has received verbal reprimands and counseling with respect to how she addresses and speaks to others. Chief Manley advised he has spoken to her personally on a few occasions. Director Thomas, during her interview, acknowledged she has had a few conversations with Chief Manley regarding her conduct as reported. All individuals interviewed from the

executive floor expressed the same impressions of Director Thomas that she can often come across as insensitive and abrupt but that they take no real offense to her demeanor.

Tatum Law, through interviews and its document review, learned that Dusterhoft had been disciplined for abusing the Department issued purchasing card, a ProCard. He made inappropriate purchases using Department funds in violation of policy when he purchased clothing for himself during a business trip. Tatum Law also learned of other accounts that suggested the professional relationship between Dusterhoft and Director Thomas may have been strained.

In conducting interviews on this allegation, Tatum Law learned of reported behavior worthy of review. This office received a report that there may be several accounts of inappropriate behavior based upon race, religion and body image. We also reviewed documents provided related to this report. Tatum Law referred the complaints to the Human Resources Department through the Law Department since this allegation is not within the scope of Tatum Law's work. There are policies and procedures in place internally and by state and federal law as to how such allegations are to be handled. It was appropriate for this office to make the referral to the correct and responsible department. Tatum Law cannot and will not speak to the alleged facts or validity of the allegations and expects the referral review process will run its due course, in compliance with policy and the City's procedures.

#### 6. Unequal Treatment of Jason Dusterhoft by Chief Manley – Dusterhoft Reassignment

Dusterhoft claims,

Chief Manley told me several times that he knew he treated me differently, he said that in front of Executive Staff members many times. This could not be any more obviously apparent than during my reassignment and in this current investigation.

Dusterhoft, in response to written questions, reported occasions when he claims Chief Manley treated him differently, such as: (1) when he attended National Night Out; (2) when Chief Manley ceased designating Dusterhoft as an acting Chief in Chief Manley's absence; (3) when he purchased items for personal use while attending FBINA training; and (4) when he was rebuked for using ten (10) hours of sick leave in one day instead of eight hours for a day, on one occasion when Dusterhoft put in for sick leave. Additionally, Dusterhoft states that on more than one occasion Chief Manley has stated "I know I treat you differently". The information provided was testimonial in nature and there were no specific references provided to any documentation in support of the allegations. Dusterhoft advised, through his responses, that this behavior took place during executive staff meetings, meetings with Commanders as well as other conversations. No specifics as to dates, locations or potential witnesses were provided.

Chief Manley, in his interview, denied treating Dusterhoft differently and stands by his position that he disciplined Dusterhoft appropriately for his conduct. In interviews with the Executive Staff, there were consistent reports that Chief Manley treated all staff professionally and did not treat any one individual differently from another. Many others interviewed, who were not assigned to the executive floor, account that they were not in proximity by their assignment to speak regarding this allegation. Most of the staff on the executive floor commented on Dusterhoft's demotion, when asked about these allegations, stating it was appropriate for Chief Manley to address Dusterhoft's behavior in accordance with policy which resulted in his demotion and subsequent termination. Documentation exists regarding Dusterhoft's indefinite suspension, termination and the subsequent arbitration hearing, on which a decision was delivered on December 27, 2019, upholding his termination.

The allegation of unequal treatment could not be substantiated as true. No witness interviews and no documents reviewed, produced any references of Dusterhoft being treated differently than officers.

## 7. Unequal Treatment of Jason Dusterhoft by Chief Manley – Comments about Dusterhoft’s Person or Personal Information

Continuing his argument that Chief Manley treated him differently from others, Exhibit A#16 at the seventh bullet point states,

Manley told me several times that he knew he treated me differently. He made fun of me about my weight, my pending divorce, two cancer scares and many times this was in front of ES, civilians and Commanders.

In response to written questions, Dusterhoft explained that Chief Manley made fun of his weight by (1) stating he needed new uniforms because of weight gain and (2) poking him in the stomach when he would make “derogatory remarks” about his weight. Regarding his family status, Dusterhoft complains that Chief Manley stated his wife was “going to take me to the cleaners” and that he deserved it. This behavior is alleged to have taken place in front of executive staff, Commanders and Assistant Chiefs. With respect to comments made about his cancer scares, he reports there were no witnesses to these comments. Chief Manley is reported to have made comments to the effect that Dusterhoft was burning sick leave and overreacting.

Through the interview process, Tatum Law learned that Dusterhoft and Chief Manley have worked together since they were in the police academy. According to Chief Manley and others, it was not unusual for the two of them to joke around in a form of officer banter. Many describe Dusterhoft as a jokester who frequently fished for a compliment. He would often make fun of himself as a way to lighten the mood of the room, in a self-deprecating manner. No one Tatum Law interviewed stated they heard Chief Manley ever joke about Commander Dusterhoft’s personal life in any way and no one stated they perceived the joking and the banter as anything other than well intended levity. Chief Manley denied ever making jokes about or fun of Dusterhoft’s cancer scares or his divorce, advising this allegation first came up when Dusterhoft was demoted and then later terminated. Most of the executive floor shared the sentiment that this allegation was raised out of anger or resentment because of the demotion or termination.

No responsive documents were located by the City and the Department that could help establish whether this alleged behavior was ever complained about to anyone. Tatum Law was provided with no records related to whether this instance occurred or was investigated or reviewed prior to the alleged disclosure to Assistant City Manager Arrellano. This allegation of disparate treatment and comments about making fun of Dusterhoft’s person or personal information could not be substantiated as true.

Exhibit A#16 seems to outline the allegations in bullets 1-7 as complaints and the subsequently listed items as examples of how Dusterhoft claims he has been treated differently. Exhibit A#16 references examples of what we understand Dusterhoft claims to be instances of disparate treatment and/or attempts at retaliation, after he brought the criminal and policy violations to the attention of Assistant City Manager Rey Arrellano. We will address these instances as we have addressed the ones above.

## 8. Chief of Staff Troy Gay’s Letter of Reprimand

Dusterhoft states,

Chief of Staff Troy Gay was given a Letter of Reprimand for his behavior/policy violation and not demoted.

Dusterhoft seems to suggest that a Letter of Reprimand may have been inappropriate for the behavior at issue though he provides no such details. During an interview with AC Gay, we were advised that he did in fact receive a Letter of Reprimand along with another officer over an incident that transpired during Occupy Austin. AC Gay was leading the Intelligence Center at the time and was working on a joint mission with another division. He advised Tatum Law that we should be able to obtain a copy through our investigative processes and, if not, he would provide a copy. In a subsequent interview, following up to obtain a copy of the reprimand letter, AC Gay advised Tatum Law that the reprimand may have been oral because it was the APD's first disciplinary tribunal and that he had no copy to produce. During his interview, Chief Manley advised Tatum Law that the events on which the reprimand was based took place during Occupy Austin "did not go as they should have". Consequently, Chief Acevedo held a tribunal and, based upon the tribunal findings, a Letter of Reprimand was issued to AC Gay and the other managers involved.

No Letter of Reprimand and no responsive documents were located by the City and the Department that could help establish the veracity of this allegation. Upon further investigation, Tatum Law learned much more. The mission during Occupy Austin involved undercover officer work and dragon sleeves, a device used by protestors, also known as lockboxes. This incident became known to the public and was covered by The Austin Chronicle, on September 7, 2012, when the undercover officers were identified in Houston, after dragon sleeves they designed were used in "Occupy the Port".<sup>10</sup> A Letter of Reprimand was issued to the four managers involved, including AC Gay, for failure to maintain clear command and properly transmit important operational information. Each manager, according to the reprimand, accepted responsibility for how events transpired. Though we were not able to locate records within APD, we were able to learn this information and obtain a copy of the Letter of Reprimand through media coverage and with the cooperation of current and former APD personnel who were involved and participated in this investigative process. AC Gay's reprimand did not include a demotion. It was determined that while serious operational missteps occurred, no ill intent or violation of policy or law was found. All four managers received formal counseling.

#### 9. AC Chris McIlvain's Letter of Reprimand

AC McIlvain made the news when he was observed speeding in his police issued vehicle on his way to a sporting event in Waco with his young son in the vehicle with him. He was clocked at a rate of 92 mph on MoPac. Reports from the media indicated AC McIlvain was issued a warning citation. Dusterhoft, citing a web link to the Austin Statement, alleges,

Assistant Chief Chris Mcilvain [sic] was given a Letter of Reprimand and IA investigation for speeding with his child in a city vehicle going to a sporting event which made all the news channels texas [sic] wide and was not demoted even though it made every news station.

This event received media coverage to include the release of the video from the responding officer's body cam. Some dialog can be heard on the video, which was covered by local news.<sup>11</sup>

Chief Manley advised Tatum Law that, after being made aware of this incident, AC McIlvain was called into his office and that both a traffic ticket and a Letter of Reprimand were issued. The City assisted in securing a copy of the municipal court file for review however; no Letter of Reprimand was located. AC McIlvain was issued an Austin Citation<sup>12</sup> for speeding on a state highway. Interestingly enough, the citation alleges his speed to have

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<sup>10</sup> Jordan Smith, *APD Infiltrates Occupy: Undercover cops revealed in Houston – Acevedo promises review*, The Austin Chronicle, September 7, 2012

<sup>11</sup> Calily Bien, *Video: APD assistant chief going 92 mph dodges speeding ticket*, KXAN Video March 28, 2017 at 1:48 PM CDT

<sup>12</sup> Austin Citation, Ticket Number E16340640, Austin Municipal Court

been at 80 mph as opposed to the 92 mph report that made the news. McIlvain paid his fine early and successfully completed his deferred disposition resulting in a dismissal of the charge on July 28, 2017.

In discussion with AC McIlvain, who is now separated from APD and is currently working for the City, we learned that he was unaware of how fast he was going until the officer told him the rate of speed shown on the radar equipment. He stated Chief Manley asked him to apologize to the public and he refused to do so. His position is that an apology was inappropriate. AC McIlvain acknowledged that he received a traffic citation, accepted responsibility and received a written reprimand for his conduct. He advised the written reprimand should be on file with Internal Affairs. Internal Affairs, at our request conducted a document review and was able to locate AC McIlvain's Letter of Reprimand issued in this instance. AC McIlvain's reprimand did not include a demotion.

#### 10. AC Ockletree's Dishonesty while under Investigation

In his third example, Dusterhoft alleges,

Chief Manley knew Assistant Chief Ockletree lied in an internal affairs investigation and verbally told all the Assistant Chiefs that he knew for a fact the Assistant Chief lied. Chief Manley also told the Assistant Chief personally that he knew he lied to Internal Affairs in the investigation of a Commander. Chief Manley personally knew of dishonesty at the highest level and covered it up and failed to initiate an Internal Affairs case thereby thwarting an investigation. Chief Manley has terminated numerous officers and civilians who have covered up dishonesty or been accused of dishonesty. This can be corroborated by all Assistant Chiefs at the time of the incident. Yet that AC was not demoted.

According to an interview with Chief Manley, this incident occurred during Chief Acevedo's tenure. By his recollection, he may have already become Chief of Staff to Chief Acevedo but he was not involved in these conversations. No other member of the executive floor had any personal knowledge or second hand knowledge of this event. With the assistance of the Law Department and Internal Affairs, Tatum Law was afforded an opportunity to review records.

The records revealed on November 18, 2015, an investigation was initiated alleging insubordination and neglect of duty. The allegation also include a suspicion of dishonesty regarding investigations related to work performed for Capital Metro by APD officers and work/time allocations. The 180-day rule timeline, a deadline to enact any discipline above an oral reprimand, was April 9, 2016. The assigned investigating officer completed the investigation on December 17, 2015. The case was closed administratively on April 12, 2016, days after 180 days had passed. AC Ockletree retired from the Austin Police Department on April 31, 2016.

#### 11. Delegation of Authority to Review Use of Force Cases

The last example Dusterhoft provided is one involving the review of Use of Force cases. The allegations read in relevant part,

A Commander intentionally did not review hundreds of use of force videos and reports and delegated it against policy to her operations Lieutenant for a year. If a sergeant would have done this delegation to his corporal he would have been fired or demoted. Even though this was a gross policy violation no IA case was initiated by Executive Staff which was aware of it. Chief Manley was supposedly very upset about this but failed to investigate and later promoted the Commander to AC.

In Dusterhoft's written responses, he identified the Commander involved and went on to state that, "If a sergeant would have done this delegation to his corporal he would have been fired or demoted." His complaint was not

only that it was a violation of policy but also that Chief Manley failed to investigate and later promoted the accused Commander to Assistant Chief. Dusterhoft clarified his concerns when he provided information advising which officers were demoted for similar misconduct while the accused Commander promoted to Assistant Chief.

The Assistant Chief involved sat with Tatum Law for an interview. The Assistant Chief advised of the delegation of the secondary responsibility of video and report review to another and explained misunderstanding that such a delegation was permissible and was an acceptable practice. The Assistant Chief reported upon learning that was not the case, delegation immediately stopped. The Assistant Chief received a Letter of Reprimand, signed the letter and requested a copy. The Assistant Chief was told a copy would be provided later but this did not happen. The Assistant Chief advised us that if Tatum Law was not provided with a copy, pursuant to our document request, efforts would be made to try to locate the Letter of Reprimand.

No responsive documents were located by the City or the Department that could help establish whether a Letter of Reprimand was issued to the Assistant Chief for this incident. Tatum Law requested the Assistant Chief's assistance in trying to locate a copy and reported back to us that when an inquiry was made of AC Gay how to obtain a copy and was told that if Tatum Law wanted a copy to get it from AC Newsom's computer or the executive floor's printer history. Tatum Law requested the assistance first of the Law Department and then of Internal Affairs to locate this document. The Law Department assisted with a search of AC Newsom's computer and confirmed for Tatum Law that the executive floor printer memory capacity was insufficient to store a copy of the Assistant Chief's reprimand with ongoing use. No such document or related records could be found by either the Law Department or Internal Affairs.

Chief Manley, during his interview, stated he was aware of this instance and advised that there were others who had also delegated this responsibility to a subordinate. The policy for reviewing incidents of Use of Force, Response to Resistance Inquiries, was consequently reviewed by the Policy Review Committee on November 16, 2017. Changes were reviewed and approved by Chief Manley on December 5, 2017, and again on October 19, 2018. He acknowledged a Letter of Reprimand was issued.

## 12. Demotion for Non-policy Violations

Unlike the items listed above in Exhibit A#16, Dusterhoft makes no new allegations in this bulleted item. He makes a declarative statement indicating he was demoted while other officers who committed non-policy violations were not demoted or may have even been promoted. There are no specific allegations to investigate here.

### **D. Complaint 1 Amended to Include AC Newsom's Notice of Complaint 1 Filed Against Him Affording Him Time to Retire and Draw Full Leave Pay, Complaint 4**

On November 7, 2019, Complainant 1 contacted the Office of Police Oversight and officially amended Complaint 1 to further allege that AC Newsom was "tipped off" that an investigation into his behavior was forthcoming, and the advance warning permitted AC Newsom to be honorably discharged and to allow him to sell back his sick time. The amended language reads:

I made this complaint and it was accepted on 10/30/2019 12:36pm and my complaint return email from this office stated I would be contacted in "2 to 4 business days". It has been 6 business days with not one reply to this serious allegation.

I now officially amend my complaint that AC Newsom was tipped off that an investigation was officially filed against him and was allowed to leave honorably and with full sick sell back time. I ask that a review of the timeline of when Office of Police Oversight was notified of the complaint, when was Chief Manley

or Acting Chief Gay notified of the complaint and at what time the same afternoon of the complaint was AC Newsom's paperwork turned in for retirement. Who signed off on AC Newsom getting an honorable discharge and allowed for full sick sell back time?

Where is the investigation on AC Manley and his staff (and others on the floor) knowing about this disgusting behavior by now retired AC Newsom?

I have also now hear[sic] there was a previous complaint approximately a month ago that is similar to this complaint yet nothing was done with this complaint as well?

The question of whether AC Newsom was “tipped off” is a recurring question Tatum Law frequently encountered throughout the investigation. Of those interviewed, 17.5% asked whether AC Newsom had been told or stated they suspected someone told AC Newsom about the allegations before an investigation could ensue. This percentage was higher among sworn officers, 22.5%. The Assistant Chiefs, among the first interviews, were concerned about this for a variety of reasons. The most common sentiment was that, as leadership, (a) they were prepared to stand together and weather the storm of scrutiny as to whatever the mysterious text messages presented, good or bad, but that instead they went home with thoughts of support for their colleague and came to work the next day to news of his sudden departure and no explanation, and (b) they were left holding the dirty laundry while AC Newsom walked away with his “bust out check” and full benefits. There was a shared suspicion of AC Newsom’s guilt among 30% of those on the executive floor, which was higher than the sentiment of all sworn officers at 14.2% and of all those interviewed at 22%. Several Assistant Chiefs commented on the damage and impact the accusations of racism alone were already having on the Department and the community. Interviews with other witnesses, particularly other active and separated sworn employees, consistently shared their concern over AC Newsom’s departure with full benefits and no review of the allegations raised against him. There seemed to be an understanding of policy; however, the feeling of betrayal and an abuse of the system were quite prevalent. Frustration was expressed by some 20% of the executive floor with the fact that apparently no questions were asked of AC Newsom about the text messages. Who received the text messages and why had the text messages caused such concern? What did the text messages say? When were the text messages sent? If questions were asked, the answers apparently were not shared or acted upon back when AC Newsom was talking about them.

When Tatum Law interviewed Chief Manley, AC Gay, Farah Muscadin of the OPO and Bassil Ally of the City’s Law Department, we noted these individuals were most directly involved in the initial communications about the first anonymous complaint, Complaint 1, filed on October 30, 2019, and we began to work to establish a timeline of events. Based upon the interviews conducted and the documents available for review, Tatum Law was able to establish the following timeline<sup>13</sup>:

|                    |   |
|--------------------|---|
| September 23, 2019 | Chief Manley: AC Newsom reports about the text messages that may be used in the Dusterhoft arbitration. The subject of the text messages was not discussed, but AC Newsom indicates he would leave the Department if the messages became public. Chief Manley advises AC Newsom to talk to the City Law Department regarding his concerns.<br>BA: Day before Dusterhoft Arbitration begins AC Newsom goes to B.Ally to advise Ally something may come up at trial during AC Newsom’s testimony. |
|--------------------|---|

<sup>13</sup> This timeline is comprised of information and/or telephone logs and call history provided by Chief Manley and AC Gay of the Austin Police Department, Farah Muscadin of the Office of Police Oversight and Bassil Ally of the Law Department and City Attorney Anne Morgan.

|                                     |   |
|-------------------------------------|---|
|                                     | AC Newsom does not tell Ally the nature of the concern when asked by Ally. Ally says he will address it at trial if whatever it is comes up.  |
| September 24, 2019                  | BA: Dusterhoft Arbitration Begins and The Rule is Invoked – This action removes all other witnesses from the hearing space and all witnesses are admonished they are not to talk to one another or others, except the attorneys, about their testimony until the proceeding is over.  |
|                                     | TG: Chief Manley and AC Gay discuss the text messages AC Newsom sent and his concern that someone was going to bring them up when AC Newsom testified. Chief Manley told AC Gay they were bad enough that AC Newsom would retire and that he told AC Newsom to talk to B. Ally who was handling the arbitration for the City. |
| October 7, 2019                     | Chief Manley received an email raising “Alarming Concerns” about AC Newsom using racist language in text messages specifically referencing the term “niggers”.  |
|                                     | Chief Manley sends the email to OPO for processing according to policy.   |
| October 8, 2019                     | OPO tries to contact the author of the email, even though the sender requests no contact, and provides information regarding how complaints are handled.  |
| October 22-24, 2019                 | BA: Recess in Dusterhoft Arbitration.   |
| October 24, 2019                    | BA: Dusterhoft Arbitration Hearing ends.  |
|                                     | TG: Chief Manley asked AC Gay about the October 7, 2019 email regarding AC Newsom. Chief provided a copy of the emailed complaint to AC Gay and informed him of the Chief’s request for OPO follow up.  |
| October 25, 2019                    | TG: AC Gay advises Chief Manley that an investigation should begin based upon AC Newsom’s admission the texts were bad, and the complaint contained specifics about racial comments made. Chief advises AC Gay he will decide after his vacation.   |
| October 28, 2019 – November 1, 2019 | Chief Manley is on vacation.  |
| October 30, 2019                    | BA: <b>Anonymous Complaint 1 filed at 12:36 p.m.</b>  |
|                                     | The bi-weekly Internal Affairs briefing with Executive Staff was held. Complaints 1 and 2, filed on this day, were not discussed at this briefing.  |
|                                     | FM: Call to AC Gay at 5:11 p.m. to advise of Complaint 1. Complaint 2 was not discussed because of the allegations related to AC Gay.   |
|                                     | TG: At 5:11 p.m. Call from OPO Director Muscadin to AC Gay – Notification of Complaint 1 received.  |
|                                     | TG: At 5:20 p.m. AC Gay calls ACM Arellano to advise of Complaint 1.  |

|                  |   |
|------------------|---|
|                  | FM: At 5:28 p.m. Incoming Call to F. Muscadin from AC Gay on procedure for Complaint 1.   |
|                  | TG: At 5:35 p.m. AC Gay receives first text and call from Chief Manley.   |
|                  | BA: In the evening, AC Gay Call to B. Ally for guidance on procedure for Complaint 1 against the Chief.   |
|                  | At 6:08 p.m. Incoming Call to F. Muscadin from AC Gay with update on conversation with Chief Manley and discussion on procedure.  |
|                  | TG: At 6:15 p.m. AC Gay calls B. Ally for guidance; hold for call waiting - it is AC Newsom calling AC Gay.   |
|                  | BA: Call to AC Gay from AC Newsom while AC Gay is on the phone with B. Ally. Ally admonishes AC Gay NOT to mention Complaint 1 to AC Newsom until the procedures are followed to certify Complaint 1.   |
|                  | BA: AC Gay takes AC Newsom's call. AC Newsom called to announce <b>intent to retire and inquire about his eligibility for benefits upon retirement.</b>   |
|                  | TG: At 6:21 p.m. AC Newsom calls AC Gay and advises AC Gay he is retiring. He reports his keys and paperwork are on AC Gay's desk and inquires about his benefits. During this conversation, AC Newsom offered a statement to the effect that the allegations made were not all true. |
|                  | TG: At 6:24 p.m. AC Gay calls B. Ally back and notifies him AC Newsom retired and discusses AC Newsom's benefits.   |
|                  | FM: At 6:27 p.m. Incoming Call to Director Muscadin from AC Gay on AC Newsom's retirement.  |
|                  | Employees assigned to the executive floor saw AC Newsom on the floor as they departed around 6:30 p.m. and all seemed to be business as usual.  |
|                  | FM: At 6:37 p.m. Overlapping Calls from F. Muscadin to AC Gay and from AC Gay to Director Muscadin on complaint process and next steps.   |
|                  | TG: Several more calls with Chief and OPO on complaint process and next steps.  |
| October 31, 2019 | TG: At 7:21 a.m. AC Newsom texted his fellow AC's, via group text, to announce retirement.  |
|                  | TG: AC Gay called meeting of AC's to announce AC Newsom's retirement and sent email to Command Staff on the same.   |
|                  | TG: At 7:45 a.m. AC Gay follow up call in the morning to B. Ally on assessment of Newsom's eligibility to receive full leave pay because AC Newsom said he would not retire if no benefits.   |
|                  | FM: At 8:47 a.m. Incoming Call from B. Ally to Director Muscadin.   |

|                  |  |
|------------------|--|
|                  | BA: B. Ally visits City Attorney Anne Morgan to discuss AC Newsom's eligibility to receive his full leave pay.   |
|                  | TG: At 9:55 a.m. B. Ally called colleagues to include A. Morgan about AC Newsom's benefits.  |
|                  | TG: At 10:01a.m. AC Gay called AC Newsom to advise he would receive his benefits.  |
|                  | FM: After a 1:00 p.m. meeting, F. Muscadin informed Assistant City Manager Rey Arrellano of the complaints OPO received against Chief Manley and other Assistant Chiefs.   |
| November 1, 2019 | FM: After 9:30 regular meeting with City Manager, Director Muscadin discusses Complaints 1 and 2 with City Manager Cronk. At 4:36 p.m., text sent to President Casaday of APA requesting a call back to clarify policy and procedures of the OPO for the complaints. |
|                  | FM: At 6:44 p.m. Incoming Call for Director Muscadin from K. Casaday.  |

In developing this timeline, it is clear that there was concern about AC Newsom finding out about the allegations raised against him prior to formal processing of Complaint 1. According to Mr. Ally, his concern was to avoid a situation where AC Newsom retired or resigned and there was some question about whether a formal investigation was properly initiated. Mr. Ally believed AC Newsom was calling AC Gay for a reason. He wanted to assure that AC Newsom was not told about the complaint until a copy of the complaint was delivered from the OPO and AC Gay could have AC Newsom personally served with the complaint.

AC Gay advised that at some point during the series of telephone calls between AC Gay and Director Muscadin on October 30, 2019, that a call came in on Ms. Muscadin's line from Austin Police Association President, Kenneth Casaday. Ms. Muscadin reported she did not take the call when it came in, and did not subsequently speak to Casaday until November 1, 2019 when she spoke with him in order to confirm the fact that the OPO did not share information about the anonymous complaints with anyone outside of the standard policy and procedures. AC Gay reported he did not communicate with President Casaday about Complaint 1 on October 30, 2019.

After AC Gay was advised by AC Newsom of his retirement the evening of October 30, 2019, discussions began on his request for confirmation of his benefits. Attorney Ally visited with City Attorney Anne Morgan on the morning of October 31, 2019, prior to the City Council meeting, in order to (1) connect her with the OPO should Mr. Ally be deemed a witness in this matter and (2) continue the legal assessment regarding AC Newsom's eligibility to take his sick leave payout since he retired prior to a formal investigation being initiated.

While these individuals worked to begin to address the serious complaint against the Chief of Police and AC Newsom, AC Newsom was apparently made aware of the allegations against him and the likelihood that an investigation would soon be initiated. Based upon the information Tatum Law learned through the interviews, AC Newsom would have become aware of the allegations filed against him between the filing of Complaint 1 at 12:36 p.m. on October 30, 2019, and the early evening hours of the same day. By AC Gay's account, AC Newsom completed the required separation paperwork, his retirement paperwork, and left the keys to his assigned APD vehicle with his paperwork on AC Gay's office desk before leaving the executive floor for the last time at approximately 6:30 p.m.; but, before making his retirement official, AC Newsom confirmed that no formal

investigation had been initiated against him with AC Gay. AC Newsom's Employee Notice of Separation was dated October 28, 2019 to be effective October 30, 2019.

Lisa Tatum met with APA President Casaday, a Detective with the Department. In discussions with Detective Casaday, he commented on the fact that everyone in the Department keeps talking about "who snitched" and told AC Newsom about the complaint against him (Complaint 1), alleging racist behavior using text messages, enabling him to retire with a significant amount of accumulated leave pay. Detective Casaday acknowledged he became aware of Complaint 1 against AC Newsom and admitted he told AC Newsom about the anonymous complaint. Detective Casaday did not state how or when he became aware of Complaint 1 or exactly when he discussed Complaint 1 with AC Newsom. However, the consequence of the notification allowed AC Newsom to make the decision to leave the Department before an investigation could be initiated, making AC Newsom eligible to receive his full leave pay upon retirement.

It is our understanding that AC Newsom's intent to retire was conditioned upon his ability to collect his leave pay. Upon confirmation that AC Newsom was eligible to receive his leave pay, as AC Newsom indicated in his written statement, he submitted his separation paperwork, which was on the same day the complaint was filed.

AC Newsom, in his statement, states,

I was retiring by the end of 2019, but upon receiving notice of an anonymous email containing unsubstantiated claims, I chose to retire a few weeks early believing that doing so would be best, not just for myself, but also for the Department. Certainly, had there been an official complaint, I would have delayed my retirement until the investigation was complete and I had been exonerated. However, before retiring early, I first verified with Chief Gay and Chief Manley, who in turn, verified with the City of Austin legal department, that there was no official complaint.

Complaint 1 was amended on November 7, 2019, to include an assertion that AC Newsom had been tipped off that an investigation was officially filed against him. Our investigation determined that AC Newsom was likely advised of the complaint filing on October 30, 2019, the day the Complaint 1 was filed. Although Austin Police Association President Ken Casaday claimed he told AC Newsom of the complaint, OPO did not advise Casaday of the filing until November 1, 2019, so it is unclear, based upon the telephone logs and the limited distribution of the complaints, how Detective Casaday would have had knowledge of the Complaint in order to notify AC Newsom. Notwithstanding a confirmation of who provided the notice, the result of being made aware of the complaint allowed AC Newsom to submit the paperwork required to retire from the Department prior to the initiation of any formal investigation. Under policy, without a formal complaint being filed and a formal investigation being initiated, AC Newsom could retire separating honorably from the Department and receive full retirement to include sick leave.

#### **E. Allegations Chief Manley, AC Gay and AC Newsom Failed to Comply with a Lawful Subpoena for Testimony and Production– Dusterhoft Arbitration, Complaint 5**

On December 16, 2019, the Office of Police Oversight forwarded to Tatum Law a complaint filed by Jason Dusterhoft, Complaint 5, which was submitted to OPO on December 11, 2019. An excerpt of his complaint follows below.

I believe that damaging information is contained in the text messages demanded by the subpoena. This damaging information could be towards my case or the recent accusation that former AC Newsom, Chief of Staff Troy Gay and Chief Manley may have had regarding possible racist behavior.... These lawful subpoenas were delivered.... To this day these subpoenas have not been complied with. I request that Chief

Manley, Chief of Staff Gay and former Assistant Chief Newsom comply and send any text messages per the subpoena immediatly[sic]. I ask that City Manager Spencer Cronk and the independent investigator be informed of this request and the dishonest malicious refusal to comply with these subpoenas. This was to hide information pursuant to Chapter 143 of the Local Government Code. I believe the intent was to deprive my attorneys and I of critical exculpatory information that would assist in my arbitration. This complaint also asks that the city attorney that received Chief Manley and possible others text messages be investigated as well. I ask that the Independent Investigator hired by the City of Austin be made aware of this complaint.

Complaint 5 provided attachments – subpoenas for AC Chacon, AC Newsom, AC Gay and Chief Manley and was filed after the departure of AC Newsom from APD. Additionally, he does not complain that AC Chacon failed to comply with a subpoena. Dusterhoft complains that AC Newsom, AC Gay and Chief Manley failed to comply with properly served and lawful subpoenas. He and his legal counsel sought testimony and records. Part of the request was for the text messages referenced in his complaint above. Commander Dusterhoft reports that no text messages were turned over to his counsel during the arbitration and that his request remains outstanding.

According to the arbitration hearing record, Chief Manley is the only one of the four officers called to testify. We were unable to determine, based upon the record, whether AC Gay or AC Newsom produced any or all of the documents requested by subpoena through Dusterhoft’s attorney. Chief Manley was subpoenaed to both testify and turn over records. Chief Manley when asked on cross-examination acknowledged that he did not bring documents with him to the hearing to produce to Dusterhoft’s attorney. In his testimony, he explained he mistakenly believed he complied with the subpoena for September 24-27, 2019 when he turned over the same requested documents to the City’s Public Information Office pursuant to an Open Records Request made by the same attorney on August 8, 2019. There was some discussion with Dusterhoft’s attorney during cross-examination bringing into question whether the records were released in the Open Records Request process. Compliance with a subpoena is determined during the proceeding for which the subpoena is issued. Failure to comply can result in a finding of contempt, which may be a fine, confinement or both, by the court from which a subpoena is issued or, in this case, may result in some other consequence depending upon the arbitration rules governing the hearing. There is no indication that Dusterhoft’s attorney complained of noncompliance in reviewing the transcript of the hearing. No action was taken against Chief Manley during the arbitration hearing. There is no record of arbitrator inquiry into the request for document production and there is no record of an arbitrator determination of failure to comply.

## **F. Review of Certain Administrative Policies/General Orders**

The following Administrative Policies and General Orders are critical in the determinations in this independent investigation. These policies provide an understanding of the timing when a complaint becomes a formal investigation, the timeline when remedies are affected by the 180-day rule or how the information from a Department mobile device is retained.

### **The Office of Police Oversight Complaint Process**

In the instance of this independent investigation, complaints were filed online with the OPO. In submitting a complaint online, a complainant must submit a description of what happened, the date and time of the occurrence and the location of the event. Optional information may also be provided such as identifying officers involved, witnesses to the occurrence and the complainant’s contact information. You may submit a complaint anonymously if the complaint has been certified by the recipient employee in compliance with the law. The OPO submittal process generates an acknowledgement when a submission is received that includes a date and time

stamp. The complaints are independently reviewed by the OPO and moved through the process to be investigated by Internal Affairs. The OPO, in compliance with the Meet and Confer Agreement, does not have the authority to gather evidence, interview witnesses or otherwise independently investigate a complaint or other information of police misconduct.<sup>14</sup>

In accordance with the Texas Government Code, pursuant to Chapter 143, and the Meet and Confer Agreement<sup>15</sup>, the Chief of Police and the City Manager retain all management rights to authorize an Independent Investigation concerning police conduct. The Office of Police Oversight may also make a recommendation that an Independent Investigator is warranted.

### The 180-day Rule

As potential misconduct is reviewed, disciplinary action may not be taken on any act having occurred earlier than 180 days preceding the date of discipline, with the exception of an extension of the disciplinary deadline being an agreement between the officer and the Chief of Police.<sup>16</sup> This limitation applies even if the investigation is diligently conducted and takes longer than six months to come to a conclusion.

### **G. Internal Affairs Investigation – Mobile Phones and Mobile Phone Records Review**

In an effort to understand the City’s and the Department’s policies regarding mobile phones, Tatum Law requested, “[a] copy of the policy for the management of phone logs for mobile phones or similar devices used by officers to include how the phone logs are reviewed for calls and other communications relevant to investigations of officer conduct.” The City began the issuance of City phones to officers on September 30, 2018. The City Law Department provided Austin Police Department’s General Orders 1004: Department Owned Cell Phones, which effective on June 13, 2019, as requested. Tatum Law’s request for phone access seemed to be a question of first impression with this relatively new policy. Additionally, some of the facts as alleged, as we understand them, pre-date the Department’s policy on Department issued mobile phone and likely also involve personally owned mobile devices. Text messages, as referenced in Complaint 1, were narrowed down significantly through Tatum Law’s research and with the aid of Internal Affairs. We were able to reasonably establish the time windows during which two of the alleged statements in a text message were most likely to have been made. They are:

1. President Obama’ Austin Visit: March 11, 2016;
2. SRT Deployment Times:
  - a) Texas Relays of March 27-28, 2015,
  - b) Texas Relays of April 1-2, 2016,
  - c) Texas Relays of March 31, 2017-April 1, 2017,
  - d) July 18-21, 2016: 2016 Republican National Convention in Cleveland, OH.
  - e) January 18-21, 2017: 2017 Presidential Inauguration in Washington DC,
  - f) On or about September 1-18, 2017: Hurricane Harvey in Houston, Texas,

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<sup>14</sup> Agreement Between The City of Austin and The Austin Police Association (2018), Article 16, Section 3

<sup>15</sup> Agreement Between The City of Austin and The Austin Police Association (2018), Article 16, Section 5

<sup>16</sup> Agreement Between the City of Austin and the Austin Police Association Article 18 Disciplinary Actions, Demotions & Appeals, Section 8 Extending Disciplinary Deadline by Agreement

- g) MAGA Rally on January 13, 2018,
- h) Impeach Trump Rally on January 20, 2018,
- i) March for Our Lives on March 24, 2018,
- j) Rally to End Family Separation on June 30, 2018,
- k) Westboro Baptist Church on July 8, 2018,
- l) Free Alex Jones Rally on September 22, 2018,
- m) Domain on Riverside/City Hall on August 8, 2019,
- n) ALEC Conference on August 14, 2019, and
- o) POTUS visit on November 20, 2019.

As we considered the likely timeframes, Tatum Law considered whether to seek a review of each mobile phone belonging to members of the executive floor, but decided such broad action would be tantamount to a fishing expedition while, perhaps, infringing upon personal privacy rights. Further, such a canvass would not be the best use of resources in light of the circumstances. Tatum Law decided it would only pursue the phone records, assuming they still existed, for any mobile phone it could connect more directly to the allegation in question.

Once the City Manager and the Chief of Police made a referral to Internal Affairs, Tatum Law gained access to mobile phones it identified, in compliance with the Meet and Confer Agreement and APD policy. With the assistance of Internal Affairs, Tatum Law reviewed two mobile telephones for the text messages as alleged and any other content reflective of the racist statements as alleged in Complaint 1. The timing of Tatum Law's ability to gain access to mobile telephones was far from ideal. One hundred thirty five (135) days passed between Complaint 1 being filed with the OPO and Tatum Law gaining access to the second mobile phone for review. Recognizing this investigation involves (1) looking into the operations of local law enforcement, (2) interviewing those who by profession interview others and (3) looking for evidence in the possession of those who seek out and find evidence for a living, the expectation that there would be text message evidence to be found as early as October 31, 2019, would be considered, by many, aspirational at best.

Data was gathered through the standard procedures followed by Internal Affairs. A review of the gathered data was conducted by a Digital Forensics Detective and the report was submitted to the IA officer assigned to the investigation and delivered to Tatum Law for review. Lisa Tatum met with Internal Affairs and reviewed the data gathered. As anticipated, little remained on the phones to review though there was evidence of high usage for text messages, SMS messages, chats, emails, and images. Remnants of metadata is largely what remained. The findings, a lack of evidence of the text messages as alleged, are consistent with either (a) there is no evidence because there was no evidence to find or (b) if there had been evidence, it had been removed. A review of the two phones provided no additional information in order to better determine whether the allegations of Complaint 1 are true.

## **H. Impact of Complaint 1's Publication**

Among the first inquiries made by Tatum Law was whether City leadership had sent a representative to personally reach out to the individuals specifically named in the alleged racist text messages that were published publicly by the press or in social media. When asked, the City of Austin responded that it had not done so but expected that it would at some point. In interviews with those specifically named, Tatum Law learned that only former Councilwoman Houston received a call from City leadership. Chief Manley was reported to have reached out to some but not all of those individuals named. Though the decision not to reach out may have been well contemplated, the absence of a communicated response from City leadership to those who found themselves in the public eye left them with a sense of disregard. Public perception and that of those under APD employ seems to be that of abandonment and a lack of caring.

There were some members of the Austin Police Department who reached out, as individuals, to express personal concern for those who found themselves and their families not only in the public's eye but in the midst of a controversial firestorm. Three of those individuals are still active with APD and wake up each morning, report to work and protect and serve the community of Austin, Texas, in the roles to which they are assigned. Those who know them and others who are watching from afar report they do so with less enthusiasm and less excitement than before. During this investigation, Tatum Law often heard about the APD family, the sense of community established between academy classes, units, divisions and teams. We heard accounts of how officers take care of each other. We found less evidence of such caring, encouragement or protection than we expected when it came to those who woke up one day to find their name in the news through no fault of their own and with little or nothing to do with circumstances which created the publicity. There were more individual accounts reaching out to AC Newsom than to the others mentioned in the alleged text messages.

The Department may wish to consider a response protocol for such occurrences. Such a protocol could address (1) the Office of Police Oversight's complaint process, to include publication of formal complaints, and (2) any other instance of publication such as formal and social media. One strong criticism was drawn by the appearance that named officers and civilian staff were left alone, with no protection - support, direction or protection from press, water cooler gossip or just general inquiries from colleagues on how the City or the Department planned to handle the matter, and that absence of leadership sent ripples through the officer ranks of disenfranchisement and anger. The failure to notify, embrace or otherwise protect current and former members of APD left many to conclude that the high level of leadership made it clear it would be taking care of itself and not everyone in the Department. Establishing a protocol could also address and maintain governmental and public relations recognizing the fact that individuals will likely not remain with the Department or with the City for the entirety of their career. Acknowledgment of an individual's contributions and worthiness in light of their service may go far with maintaining and sustaining relationships.

The most frequently expressed frustrations were about the timeline Chief Manley circulated on November 8, 2019, and how this series of events caused a setback for the Department. Officers stated while Chief Manley wanted to set the record straight he failed to tell the world that such racist behavior, whenever encountered and found to be true, was unacceptable and would not be tolerated. The absence of such a statement resonated with many officers as indicia that there will be more of the same. The sentiment articulated seemed to say, "The brass will take care of itself and the rest of us will just be out here." Officers in supervisory positions found themselves with officers within their command who were: questioning the last transfer that was denied; doubting the reasons provided for why they were passed over as number two by number eight for promotion; and wary of their fellow officers' truthfulness and acceptance of their ethnicity, race or other diversity. The allegations and the coverage they received have strained the fabric of the Department and have significantly stressed the Department's ability, through its officers on the frontline, ability to police, protect and serve the Austin community as a whole.

## **I. Shared Public Concerns**

When Tatum Law's hire was made public and mentioned by the press, several calls and correspondences came in to our office from members of the public wanting to visit with us about their concerns. Some of those concerns were about the allegations we were hired to investigate. Still others were about personal experiences with the Austin Police Department and/or the City of Austin. While Tatum Law worked to quickly get a more complete understanding of the depth and breadth of its seemingly limited charge, we returned calls to those who contacted us in an order to schedule interviews and learn more information. There were some who subsequently decided not to share information with Tatum Law for whatever reason. Some concerns we reviewed were referred to the City of Austin in order to be connected with the appropriate department for immediate handling. Information not related to our scope of work was gathered and noted for information share with the City at later time. Those

who called with information related to our scope were invited to interview and participate in our investigation process. Many public members, to include active and separated officers, did accept our offer. The information gathered is incorporated in this report.

## **J. Interviews with Personnel, Current and Past**

### **1. Executive Personnel**

Tatum Law met with and interviewed each person who was assigned to the executive floor at the time Complaints 1 and 2 were filed on October 30, 2019. Because the Complaints did not allege specific timeframes except for the references to Chief Manley's tenure, Tatum Law requested the identity of all individuals assigned to the executive floor as of Chief Acevedo's last day at APD. AC Gay advised us that it was the decision of the executive team to provide Tatum Law with a list of everyone on the executive floor since AC Newsom joined the executive team, which was approximately two years prior. Interviews were then scheduled with the individuals assigned to the executive floor within the past two years.

The executive floor interviews revealed there is a relatively high level of confusion and concern over how the Meet and Confer Agreement is interpreted. It is unclear to many of the Assistant Chiefs whether the higher ranking officers are equally protected under the negotiated terms and conditions. Many are concerned that, because of their higher profile, role and responsibilities, they are subject to greater exposure to public allegations or ridicule because of policy exceptions in the Meet and Confer Agreement as they have been explained to them. An incident of media attention, such as the amount this matter has received, has increased this concern. Tatum Law noticed there seems to be an increased awareness of the public nature of how complaints received through the Office of Police Oversight (OPO) are posted on the OPO website for the world to see, once a formal complaint has been filed against an officer, even before a determination is made. An argument could be made on the public's behalf that such a publication may further assure officer compliance with policies and procedures. It is not Tatum Law's intent with this discussion to assess the existing policies and procedures of the Austin Police Department, the Office of Police Oversight or the City of Austin. It is our intention to mention certain aspects of the policies and procedures as we encountered them in the course of this investigation. It seems it would be quite helpful to all involved, on all levels of rank, if the City of Austin, the Austin Police Department and Austin Police Association could together provide officers with clarity as to this concern.

### **2. Other Personnel**

In discussions with executive floor personnel, Tatum Law learned about other individuals who may have knowledge about the allegations raised in Complaints 1-5. The individuals identified were contacted and invited to meet with Tatum Law as part of its investigation. Most of the persons we contacted felt they may have relevant knowledge and wished to be of assistance; however, they were concerned about their professional security. There was a desire to share information they believed was relevant to the investigation, but some were unwilling to do so unless their identities and our meetings remained confidential. It was reported through several individuals that participating in our investigation could lead to becoming the subject of an investigation, the loss of a promotion or assignment, receiving pushback from fellow officers and supervisors or some other form of retaliation.

Permitting anonymity became necessary in order to obtain a flow of information valuable to this independent investigation conducted by Tatum Law and the work the City of Austin City Council intends to pursue once this investigation is complete. Tatum Law, though making no promises or guarantees, committed to maintaining in confidence their identities to the extent the law, the ethical rules that govern Texas attorneys and the circumstances would allow. Consequently, several other interviews were conducted and more information was gathered. Over

20 conversations were had with individuals who did not want to be identified as having met with any member of our team.

In reviewing what we have learned through all of these conversations, there have been reports of complaints, raced-based or otherwise, made against officers to include the executive staff that have been seemingly placed on hold or otherwise delayed and even swept under the rug or otherwise disregarded. It has been shared that on more than one occasion multiple complaints were made about a certain individual's behavior. Some accounts led only to informal verbal counseling repeatedly. Other accounts advise that the complaint goes under review and then seems to disappear without redress. Still others are discounted and never acted upon. Officer testimony, from all races, ages and ranks, suggests the outcome depends upon both the subject and the audience. Some officers complain that the outcome may have been different if the information actually made it to the Chief of Police. Still other officers are doubtful anything will change.

Through all of these interviews it became clear that issues of race lie just below the surface. Some of those issues arose coming out of these filings. Many officers reported these concerns to have been present for decades stating no one talks about them or wants to address them. Reports came to us, from different ranks, races and genders, advising of the fact that the racist and sexist name calling and use of derogatory terms associated with race and sex persists. Anecdotal history indicated that even members of the executive staff over the years had been known to use racist and sexist language, particularly when around the lower ranks or other subordinates. There was a high level of frustration expressed because complaints of discrimination are often known to fall on deaf ears, sit in files without action in excess of 180 days, then are discounted or disregarded. It was reported by several that regardless of how a complaint within the Department is initiated, via direct report, an executive officer or even Internal Affairs, there is rarely an outcome about which a complainant is confident that their concerns were investigated fairly; and, it is not unusual for the outcome to provide little to no redress, if misconduct is found.

Administrative Procedures related to complaints and discipline are just as subject to noncompliance as they are to compliance. Whether it is about a grievance or misconduct there is an overwhelming sentiment among officers, at or previously involved with the Austin Police Department, and regardless of rank, that an officer, or even civilian staff member, who wishes to right a wrong, complain about improper conduct, or participate in an investigation such as this one, must be prepared in the present climate and culture to face almost certain retaliation, and not necessarily from Chief Manley, directly or solely. The wariness has been frequently attributed to networks of officers within the Department and is dependent upon the circumstances and the network of officers involved. These accounts of retaliation span almost thirty years of officer careers up to and as recently as February 2020.

## **VI. Observations and Recommendations**

The investigation had to be completed and numerous micro-conclusions had to be reached before Tatum Law could be in the position to state any overall observations or recommendations about the five complaints we were charged to investigate. Referring to the conclusions as micro-conclusions is not to deem any conclusions reached as diminished in comparison to others. It is to say that before there could be a more holistic assessment of the Austin Police Department from our investigatory perspective, these other determinations had to be made. Now that the factual allegations have been investigated, the City and the Department can address any violations of policy or other misconduct deemed to have occurred to the extent that policies and procedures will allow.

The policies that should be considered by the City in its review of possible actions moving forward are the 180-day Rule and the application of the Meet and Confer Agreement to high ranking officers. Even though the complaints were filed recently, most of the allegations raised in Complaints 1-5 were reported to have occurred more than one hundred eighty (180) days ago. For example, Complaint 1, the first anonymous complaint likely

contains several dates of occurrence based upon what Tatum Law has been able to ascertain. At least two of the events cited in Complaint 1 occurred more than 180 days ago, a fact under the 180-day Rule that will impact any disciplinary options the City may consider.

The application of the Meet and Confer Agreement to the Chief of Police position, is a unique from an employment perspective position from other offices because the Chief is hired by the City Manager with the approval of City Council to run the entire Department. The City may likely have greater opportunities to take the action it deems appropriate beyond General Orders and the Meet and Confer Agreement, specific to Chief Manley's actions taken or not taken relative to all of these complaints. In considering actions now and moving forward, there are several overall observations Tatum Law would encourage the City Council to consider.

The City Manager and his office, along with City Council, made a commitment to investigate the anonymous allegations filed on October 30, 2019, and with that commitment expressed concern about the organizational culture of the Austin Police Department. In addition to the factual determinations from the investigation stated above, this discussion will share with you what we have observed and our recommendations based upon those observations.

Tatum Law's conversations with officers, revealed several concerns: (1) fear of retaliation; (2) doubt there would be a substantive report from which the truth could be learned; and (3) questioning of the sincerity of City leadership to effectuate the change needed to ensure the Department addresses issues in order to become better.

As interviews were conducted, APD personnel, of all rank and position, current and former, were more than willing to discuss the potentially related action of other officers who are no longer with the Department, and for which there would be little to no repercussions for sharing with an outsider/independent investigator. It is understandable when you consider the articulated level of fear of retaliation by peers and superiors. About half of the officers and staff willing to participate in this investigation were only willing to do with anonymity. The concern for fear of retaliation is palpable.

Unexpectedly, Tatum Law has discovered that most of the persons interviewed found the idea refreshing that an independent investigation might be conducted and result in the sharing of anything substantive. Unfortunately, the hopefulness seemed to be tempered by a historical pattern of the City not taking any action to make situations in need of repair better. Not being from Austin, Texas, this indicated to us that the City Manager and City Council have an opportunity coming out of this investigation to effectuate change in a climate that, though veiled behind fear and doubt, is hopeful and ready to see change happen.

It seems the question now is "Who is ready and brave enough to refine and redirect in order to form a better Department and improve its relationship with the community?" This is the opportunity we observed.

Our review also identified areas of opportunity where we encountered challenges: (a) file management/record retention; (b) personnel management and training; (c) unconscious bias, and racial and cultural sensitivity and awareness training and (d) policy development to address property and use of property/equipment. It is our expectation that, City leadership can identify actions to seize these opportunities to improve and better position the Austin Police Department going forward.

As mentioned above Tatum Law made a series of document requests throughout this investigative process. With the leadership of the City's General Counsel, documents were sought after, located and produced for our review. Some of the documents that could not be located, in our opinion, should have been able to be retrieved for review. Some of those documents were discovered in a subsequent search in collaboration with Internal Affairs. Other

documents were located by Tatum Law by asking individuals interviewed if they were in possession of a copy and would provide us a copy. We learned that some documents that should be maintained are not maintained. An example is the Letter of Reprimand of a Commander regarding Use of Force review, who should have been provided with a signed copy and the signed copy should have been in the personnel file. Since the reprimand was part of a larger policy and/or performance review, then there should be a copy in the review file or an IA file. Another example is AC Gay's Letter of Reprimand. Neither the Law Department nor Internal Affairs were able to locate this document. Tatum Law learned several managers were issued Letters of Reprimand for the same incident and we were able to obtain a copy of the letter from someone else involved in the reprimand process.

In discussions, we learned that sometimes an officer will be of the understanding that he/she is being formally disciplined and sign off on reprimand paperwork; but, subsequently, there is no documentation to be located in a personnel or IA file evidencing the discipline. In the meantime, there may be another officer who conducted him/herself similarly and has a permanent record in their personnel file or in an IA file. The lack of consistent record maintenance seems to lend credibility to the argument that, with all of the afforded discretion, discretion is still abused as so many officers shared in their experiences. With consistent and uniform file maintenance and compliant record retention, the Department or the City could conduct audits that would allow for data-gathering in addition to assuring disciplinary compliance. Tracking would enable the Department to more readily see trends and identify patterns, permitting for Department fitness checks on officer discipline in this example.

The frustration experienced with learning about and gathering SRT data is another example. By the reports we received in speaking to witnesses, it is entirely unclear how records are kept and maintained for SRT. It seemed to Tatum Law that such a significant team deploying into high profile as well as dangerous settings for officers or the public, would have well-maintained records of both deployments and its members, especially its leadership. We requested, among other things, a current roster of SRT supervisors. The roster produced, which appeared to us to be the current roster, was outdated by several years. The Law Department, who was helping to seek current information with the assistance of the executive floor, received little and disjointed information until we asked for direct assistance from Internal Affairs. The information then came quickly as did the responses to our questions.

As the Independent Investigator, this experience suggests that either (1) file management needs to be better maintained and personnel need to be reminded of the internal record retention policies as well as the records requirements for governmental entities or (2) a great deal of effort was expended to merely give the appearance of cooperation with an independent investigator. It is not our inclination to presume the worst. So, Tatum Law encourages APD to seize the opportunity and rise to the challenge of better file management and file maintenance to more accurately reflect the Department's consistent and uniform adherence to policies and procedures of the Department, the City and the law as it purports. Being able to consistently demonstrate these practices ensures compliance and makes it more difficult for someone to attack Department operations and practices in the manner repeatedly complained of during our interviews.

In discussing the file management and record keeping, it is important to consider the types of records we have been discussing. Most of the records involved in our investigation were related to discipline and the investigation of officer misconduct. Unique to police departments is the dual track that exists for handling officer conduct. The pathway is singular for civilian personal but dual for officers. Within APD there is an HR department to handle personnel matters. And, then there is also personnel management through the chain of command through to Internal Affairs as structured, primarily, by law and the Meet and Confer Agreement for officers. In the human resources arena, which much of the general public understands, complaints about fellow employees, grievance

and situations of racial or sexual discrimination are handled by the HR department. The policies and procedures are clear for reporting and investigation of these various complaints. The incidences of concern are to be handled uniformly and equally regardless of which employees may be involved.

It is our understanding that complaints filed within APD which would proceed through a human resources department of another entity, other than law enforcement, are more likely to be handled through Internal Affairs or be handled by the commanding officer internally, and not through APD Human Resources. Understanding that General Orders govern most law enforcement activity, along with the Meet and Confer Agreement, it raises the question of the appropriateness to have officers, specifically trained in police investigation, handle employment and labor concerns which are highly regulated by state and federal law without employment or labor law training or the support of someone in human resources or who is employment law trained. With the resources of the City's Human Resources Department and the APD Human Resources, this is an area rich with opportunity to improve how employment issues are processed, assessed and addressed.

As demonstrated by the interviews conducted during the investigation, the discretion within internal policies allows for a complaint about misconduct, for example, to be handled by the supervising officer, an Assistant Chief, the Chief of Police or Internal Affairs. So one chain of command may handle an issue within the ranks with an oral reprimand, while another may pass the same issue on to the Chief of Police who may formally counsel the officer or yet another may refer that same issue to Internal Affairs resulting in a written reprimand. This breadth of potential outcomes can lead to officers being treated differently due to an absence of consistent treatment for the same conduct. It is no surprise that because of the varying "process" by which misconduct or other officer behavior can be addressed that outcomes differ. The variance may be unintended for the most part but without a standard process and a way to track outcomes, whether intentional or not, it can also inadvertently enable cronyism, favoritism, and disparity. It is between the APD Human Resources Department management and oversight of promotions and the Department's disciplinary oversight and personnel management that officers express concern about the ability to promote and transfer. There appears to be two distinct tracks of personnel management without sufficient coordination to ensure and affirm all officers are being treated equally while at the same enabling officer discretion and minimizing opportunities to abuse that same discretion.

Shifting the focus slightly, away from the complaints we investigated and toward the City Council's concerns about the Department's organizational culture. As the allegations in Complaints 1 and 2 became publicly known the question has become "Is there a racist culture in APD?" We listened to many anecdotes illustrating inappropriate comments over the years through which APD personnel expressed concern about racist behavior, but also sexist behavior, and dissimilar treatment in the handling of officer discipline and those who may be served by APD chaplain services with the denial of marital services to same sex couples. There are some real cultural issues that are in need of attention. The City's efforts to learn and understand these issues will require more than what this report and investigation can provide. Tatum Law does offer the City this starting point to begin cultural correction, consider restructuring how APD handles certain complaints and grievances as it relates to complaints about officers. When a complaint is filed about an officer's conduct, whether racial discrimination, a protected class or harassment, consider an overlay of human resources skillsets and employment law through process and policy requirements. This could further assure uniform application of policy, greater consistency in handling and predictability of appropriate outcomes. A review or audit of personnel files and investigations could further enable the Department, as well as the City, to monitor compliance and see trends as they occur.

It is Tatum Law's understanding from conversations with the City's Human Resources Department that changes to policy are being developed to address issues of discrimination, harassment, sexual harassment and retaliation,

specific to supervisor responsibility. It is also our understanding that all sexual harassment complaints pursuant to anticipated policy changes are to be investigated by the City's Human Resources Department. This is not a challenge unique to APD. This is an existing challenge for police departments across the country and departments are addressing it differently. Models and consulting services do exist for police departments interested in addressing this challenge with policies and procedures that have been proven effective. We encourage APD and the City to discover ways that may best fit the Department through such resources.

During the interviews, we heard from an Assistant Chief, a Commander and a supervising officer about their concern over a lack of management training. As these allegations became dining table discussion throughout the community, these officers became painfully aware that they were not as well-equipped as they would have like to have been to help and lead those under their command. Officers felt ill-prepared to address the issues of race, mistrust and betrayal that arose, and arose suddenly, within their ranks. Tatum Law did not inquire as to the type of management training that is provided to supervising officers. The subject is outside of our scope of work. It may be useful to visit with Department supervisors to learn from them what they feel is needed, particularly after these more recent events. In considering training, there are a number of training opportunities to educate APD about unconscious bias as well as racial and cultural sensitivity and awareness.

Together, records management, personnel management and personnel training may go a long way in navigating the Department in a culture correction that leads to healthier officer and community relations. With a toolkit like this, the City and the Department can address much of the inherent challenge of dual management of personnel issues while moving away from what we understand to be the unhealthy entrenchment of some toward a greater consciousness of roles and responsibilities as it relates to personnel and business operations. In addressing issues of race, it is difficult to see what cannot be seen and is often more difficult to get recognition from those who do not want to see. A concerted effort at comprehensive training for all members of the Department, including the incoming classes at the academy, may be another good start.

The City and City leadership recognize the value of being racially and culturally aware. This is reflected in the work that began in 2015 with Undoing Racism Austin, a program developed through City Mayor's Task Force on Institutional Racism and Systemic Inequities. Tatum Law was advised by the City Human Resources Department that the City had developed curriculum and began training employees in a citywide effort to address Implicit Bias. It is our understanding that in October of last year, a contract was awarded to International Training Consortium, Inc. (Consortium) to develop training specific to the City and City employees incorporating the report from City Mayor's Task Force on Institutional Racism and Systemic Inequities and the City's Strategic Direction 2023 in addition to working with City Affinity Groups and the City's Equity Office and Human Resources Department. The City may wish to consider the partnering opportunities with Consortium to assist the Department with bias training, recognizing the unique demands on and needs of law enforcement. Again, models and consulting services exist that are customized to police departments and their law enforcement culture.

Lastly, with the relative newness of the City's mobile phone issuance and related policies, it may be time to turn some attention to the development, revision and implementation of policies governing computers and other communication equipment and systems considered property of the Austin Police Department or the City of Austin as well as the Department's policies for Use of City Information Systems. In light of the allegations in Complaint 1, it may be appropriate to implement an Electronic Communications Code of Conduct as well as a review of the Department's Social Media Policy and Off-Duty Social Media Policy. The Department and the City may have other policies that speak to this type of activity; however, we are not aware of them. Though a communications

codes of conduct may seem unnecessary, the conduct alleged speaks plainly to the need and enforcement of such a code as does the many reports the use of racist language in the ranks below Assistant Chief.

## **VII. Conclusion**

Lisa Tatum frequently described this task as like “being named an honorary detective who was assigned to investigate an outdoor crime scene after it had already rained heavily - twice”. And, at this investigation’s conclusion, we can say we have gathered a great deal of information and have a significantly increased knowledge about the culture at APD, but have not gleaned a large number of answers to the questions asked at the start of this investigation. As is frequently the case with lawsuits and other disputes, the truth often lies somewhere in the middle (between nothing happened and things happened just as they were alleged to have happened). No one may ever know all of the details about what really happened and we cannot say we know the whole truth as it relates to several of the allegations contained in the pages above. Some unknown factual information has become known and several facts have been confirmed. The cumulative discussion has clearly identified areas of concern and areas where there can be improvement. What is clear from a factual perspective is the cultural history of APD provided the foundation of mistrust that led to the filing of these anonymous complaints. The complainant clearly had no confidence that the alleged racial issues would be addressed as required by the existing policies and procedures even after a self-report and an emailed outcry of racial communications. The Department has an opportunity to demonstrate its commitment to correcting cultural issues, by publicly addressing the failure to investigate or report these racial allegations although specific facts described in the complaint cannot be proved or disproved.

Whether the apparent disparity exists out of bias based upon race, gender, ethnicity, religion, ability or out of some relationship, the reports we received are of the type that can be addressed through a combination of education, training, restructure and in some instance, perhaps, re-assignment and removal depending upon what is learned during a City led assessment of the concerns about the Austin Police Department’s work culture. There are, like many other industries, some very unique aspects to a police department. Those distinct facets exist by the specific purpose they serve, the way the organization is designed and fits together, the people who answer the call to service and the way they serve others. This uniqueness cannot and should not be disregarded. With that said, the City and City Council as it assesses the Department and its functions, can engage a variety of resources, many of which are customized to help police departments in becoming the best law enforcement agency it can be.

It is not appropriate to get into many details we have learned in the course of this investigation within this report as such information is outside the scope of our work, and not necessarily relevant to the discussion at hand. Tatum Law will share information as the City of Austin, through the City Manager and City Council, directs so that this knowledge may be shared with any subsequent investigation, audit, and other review. If conscious or unconscious bias is at play when assessing officer conduct and thus impacting an officer’s career or if discretion is being exercised to show favor to some or to punish another for having a different perspective, a data-driven review of disciplinary history may prove useful in identifying trends, just as an audit may identify actors. A review of the trends in promotions and transfers may be another. Looking to the Department’s relationship with the community, data on APD saturations, stops and detentions may be another place to look as it relates to policing practices. Now is the time to identify what other information will be useful to the City, City leadership and the Department to better learn about the challenges that have presented themselves in these last six months to a year. Armed with information and a commitment to ensure complaints of bias are taken seriously with internal and external investigations as needed, the City’s mission of Undoing Racism Austin can continue with a more focused directionality as it relates to the Austin Police Department.