

April 4, 2016

Via Email and U.S. Mail

Loretta Lynch
United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Criminal Section, PHB
Washington, DC 20530-0001

Vanita Gupta
Assistant Attorney General for the Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue NW, Room 1145
Washington, DC 20530-0001

Dear Attorney General Lynch and Assistant Attorney General Gupta:

On January 29th, 2016 the ACLU of Northern California called on the Department of Justice to open a pattern and practice civil rights investigation of the San Francisco Police Department (SFPD). The San Francisco Board of Supervisors and other community groups made similar requests. We submitted with our request the details of a number of matters of grave concern, ranging from a pattern of questionable deadly force incidents to widespread evidence of biased-based policing practices to systemic failures in the discipline and accountability systems (A copy of our January 29th letter is attached).

However, three days after our request, DOJ made the decision to grant the alternative request of the Mayor and Police Chief and commence a COPS Office Collaborative Reform review of the SFPD instead. While disappointed in that decision, the ACLU has appreciated the public comments in the weeks that followed from both COPS Office Director Ron Davis and his Collaborative Reform leader, Chief Noble Wray, that **the possibility of a "pattern and practice" investigation remained open and could—and would- be reevaluated if subsequent events warranted.**

Those events have now occurred and we are writing again to renew our request and detail why we are convinced, under these circumstances, that a pattern and practice investigation by the Civil Rights Division is necessary. While the ACLU has great respect for the COPS Office under the leadership of Director Davis, the actions—and many inactions—of the SFPD demonstrate why we believe that this process is inadequate to the task of generating, implementing and monitoring the changes that are necessary to bring this Department up to 21st Century Policing standards.

SFPD's Lack of Transparency Even During This Collaborative Reform Process

As your materials emphasize, "The purpose of (Collaborative Review) is to improve trust between agencies and the communities they serve by providing a means to organizational transformation. . . [A]gencies selected to participate must demonstrate a commitment to . . . undertake significant reforms." (See October 2015 COPS Office Collaborative Reform Initiative information sheet.) This would seem to require an on-going organizational commitment to rebuilding community trust where it has been damaged—as it has been quite severely in San Francisco—and an open recognition of the need for truly transformative change.

If an agency remains in fundamental denial about the existence, scope or nature of its problems, the Collaborative Reform process cannot fix it. For the process to work, it requires a partnership—a true collaboration—between the COPS team and the department and between the department and the community. And for partnerships to work, they must be rooted in truly open communication about department practices and problems—even if they are embarrassing in the short-term. That's why the President's Task Force on 21st Century Policing placed such a high priority on maximum transparency.

Yet, even after all the scandals and severe problems in recent years and after SFPD presumably made representations to DOJ that led you to believe it would be fully committed to the Collaborative Reform process, for the last seven months the SFPD has kept from the public a new exposure of the scope of racist and homophobic attitudes in its ranks. Our prior letter briefly described the scandal that was brought to light by federal investigators in March 2015 where at least eight members of the department—including supervisors and at least one field training officer—had exchanged horrifically racist and homophobic text messages. And now, just days ago, it has been revealed that other wholly unrelated officers (including one supervisor) felt perfectly free to continue to make explicitly racist and homophobic remarks in text messages to one another and to even mock public concern about the earlier scandal. **The Department knew about this second round of text messages in August of last year. Yet, the public was not informed until last week—and only then by the District Attorney.** (<http://www.sfgate.com/bayarea/article/Was-SFPD-s-latest-racist-texts-scandal-hidden-7223604.php>)

A dispute has broken out over whether it was sufficient for the SFPD to provide 44,000 pages of text messages with information related to an underlying criminal investigation to the District Attorney's office or if they should have specifically informed the District Attorney that evidence of biased text messages had been found in this material. A police department truly concerned about its Brady obligations and in ensuring that the biases of these officers had not affected prior prosecutions would have seemingly made sure their colleagues in the District Attorney's Office were made aware of this sort of information.

That would be a moot point if the SFPD had—as it should have—clearly informed the **public** about the existence of these new racist and homophobic texts as soon as they were uncovered. If the department wanted to deter other officers from engaging in this sort of conduct now involving multiple officers, in varying ranks, in different parts of the department, they would have immediately brought this discovery to the attention of all the members of the department. It could have been used as a moment to condemn again this practice in the strongest terms possible and to set forth steps that were being taken to deal with this recurrent problem that clearly has gone well beyond “a few bad apples.” And, if they wanted to earn the public's trust rather than leave them relying on already outdated prior assurances that the prior

racist and homophobic text scandal was limited and not indicative of broader problems, they would have publicly and immediately confronted the situation rather than kept it under wraps. This transparency would have been fully compliant with state law as long as the names of the individual officers subject to discipline were kept confidential. Instead the public and public officials (including apparently the Mayor) and SFPD officers were all kept in the dark for seven months that these abhorrent views and attitudes were still being expressed inside the department.

The SFPD's choice to keep this information to themselves speaks volumes about the SFPD's commitment to the reform process and to the very low priority it places on earning back public trust. The comments by Chief Suhr after this new scandal was exposed provides little assurance that the department is prepared to deal with the pervasive and systemic racism that has been uncovered. The Chief said:

["As with any big organization, you're going to have people who are not as you would have them be. As soon as I found out about it, I took swift action. I think all the men and women who serve this department know I give no quarter to this kind of thing. The message from the top has been clear. This level of intolerance will not be tolerated." Chief Greg Suhr in "New Rash of Bigoted Texts by S.F. Police," *San Francisco Chronicle*, April 1, 2016.

Of course, a police executive can't be sending any "message" down through the ranks if racist conduct is kept secret, and the men and women who serve in the department – and the public – are kept in the dark. What is needed are concrete steps being taken to attack this problem at its root, not further attempts to minimize it as isolated incidents. By now, the "few bad apples in any large barrel" explanation is yet another example of institutional denial in the SFPD which, at this point, even the Mayor no longer buys--"These officers seem to feel they could talk this way and get away with it. That tells me there's some culture going on here." ("SFPD's Latest Racist Text Scandal: Who Knew What and When?", *KQED*, April 1, 2016.)¹

Acts of explicit bias like the texts cannot be remedied with more implicit bias training and policy reforms. When officers do things they know are wrong, they do so because, from experience, they expect to get away with it and because they know that, generally, the organizational culture will protect them from serious consequences. Far too much serious misconduct has been exposed in SFPD in recent years to conclude anything but that the current organizational culture is deeply flawed. **Best intentions and considerable expertise notwithstanding, a COPS Office Collaborative Review process alone will not change the culture in a lasting way if the leadership of the department fails to recognize and publicly acknowledge the nature of the problem.**

Key Failures of Prior SFPD Collaborative Reform Efforts

As we explained in our January 29th letter, the heart of the problem in the SFPD lies in widespread failures of the discipline and accountability systems. We said then that the

¹ When the SFPD was discussing with the COPS Office and DOJ the possibility of a collaborative review of their agency, did they share with you what they had known for months and had failed to tell the community they serve -- that the exchange of racist and homophobic texts was more widespread than had been reported? Wouldn't that have been relevant information for you to consider in making your initial decision whether or not to pursue a pattern and practice investigation instead and in understanding their relative commitment to the process? If they *did not* share that information freely with you then, won't the credibility of this important and collaborative reform process be undermined if agencies are allowed to play "hide the ball" even from your Department without consequence?

department's Early Intervention System (EIS)—that the ACLU worked collaboratively with the SFPD for many years to help create—was not being fully implemented as designed and required by policy. Data has recently been finally released showing it is even worse than we suspected.

SFPD has been tracking EIS data for years and, like in most departments, a relatively small portion of the officers are responsible for most of the uses of force and complaints of misconduct. As a result, the department knows exactly who their "outlier" officers are and how their behavior patterns compare very unfavorably with other officers in the same assignments. Yet, with very rare exceptions, SFPD does nothing at all with this information. They do not even use it for the most minimal forms of non-punitive supervisory interventions—like simple supervisory conversations with the officer or counseling. In 2015, out of more than 360 officers automatically flagged by EIS—mostly for disproportionate uses of force and/or misconduct complaints—only 6, **less than 2%**, received any supervisory intervention at all. The data shows a shockingly low number and minuscule rate of interventions for several years now, with the highest number of interventions in any given year being only 11 (in a department with more than 2,000 officers).

Why is there so little, if any, supervision of the most "high risk" officers? The big picture answer is that SFPD organizational culture clearly prioritizes neither close supervision nor accountability. The damning devil in the detail is revealed in the SFPD Professional Standards Division's flow chart describing the system's operation. The flow chart shows that the SFPD gives flagged officers' direct supervisors complete authority to decide whether or not to intervene at all. Of course, sometimes supervisors are part of the problem. Sometimes they are simply indifferent or poor supervisors. Either way, the EIS flags the outliers and, with rare exception, the supervisors and management simply ignore the warning signs.

This is not a new problem. The last comprehensive "collaborative review" of the SFPD was undertaken with the Police Executives Research Forum (PERF). One of the most important recommendations in the 2008 PERF organizational assessment of the SFPD was to fix this very problem in the implementation of the EIS. PERF made clear that line supervisors should not have the final say on whether or not any interventions took place when the system was flashing warning signals about certain officers. That recommendation was inexplicably not implemented. As of 2014, SFPD knew who the nine specific supervisors who had officers under their command flagged by EIS more than 20 times over a five-year period. Yet, SFPD lets even these supervisors decide on their own whether or not to intervene when EIS flags officers under their command.

When this problem was recently exposed in the press, unnamed police sources claimed there were flaws in the design of the EIS. Yet, the very detailed policy governing the EIS has for several years specifically required the command staff to perform semi-annual audits of the system and continually make recommendations for improving it. If it was broken, why did no one in the department suggest it needed to be fixed?

The SFPD has not lacked access to expert resources to better inform their policies and training. In addition to the PERF collaborative review completed just a few years ago, many of the key SFPD General Orders impacting police community relations are the direct result of collaborations with the ACLU or other community organizations. The problem is the department does not consistently hold officers accountable to their policy standards and police management is not held accountable for actually following through on the policy commitments it makes.

The ACLU is confident the COPS Office's various subject matter experts will be able to identify specific areas where existing policies, training and systems can be improved ... on paper at least. **However, we see no reason to believe that the lack of will to change the accountability-avoidant culture in SFPD has been, or will be, overcome by this particular collaborative reform effort. Without the potential enforcement power behind a pattern and practice investigation, why will this time be any different than the many prior rounds of attempted reforms?**

Deep Community-Based Skepticism

As your COPS team will confirm, at their three "listening sessions" there was overwhelming community-based skepticism expressed that the SFPD could be adequately reformed through the voluntary COPS Office Collaborative Review process. The "dog and pony show" claims from some in the community may have been unfair to the sincere efforts of your staff and team of experts, but the community concern about the lack of "teeth" in the review—the absence of a "stick" of possible enforcement from the Civil Rights Division—was not only understandable but completely justified given the SFPD's track record.

We are aware of DOJ's ability and demonstrated willingness to change course in these situations when that is necessary and justified. And, just like you halted a pending COPS Office collaborative review to initiate a "pattern and practice" investigation in Baltimore, we believe the same course of action is called for here. (<http://www.pbs.org/wgbh/frontline/article/why-the-san-francisco-police-review-wont-force-reform/>) It may have taken the death of Freddie Gray and the community's reaction to it to make the decision. We would hope that it would not take another officer-involved shooting death of a young man of color (such as Mario Woods) to convince DOJ to initiate a pattern and practice investigation in San Francisco.

Sincerely,

/s/ Alan L. Schlosser
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Senior Counsel
ACLU of Northern California

cc. Director Ronald Davis, COPS Office
Chief Noble Wray, COPS National Policing Practices and Accountability Division
Brian J. Stretch, United States Attorney for the Northern District of California
Steven Rosenbaum, Chief of Special Litigation Section, U.S. Department of Justice