



Stephen J. Connolly
Executive Director

TO: Board of Supervisors
FROM: Stephen J. Connolly
DATE: May 21, 2014
RE: OIR Activity Report

I. Department of Justice: Investigation Update

In late 2008, the federal Department of Justice initiated an investigation into the Orange County jail system. That investigation remains open. However, on March 26 of this year, the process reached a significant milestone that, in many respects, seems favorable to the County. This was the posting online of the first public and formal findings from the DOJ's review. Several positive comments, along with the relatively narrow scope of lingering concerns, were encouraging signals that emerged from that document.

Meanwhile, as for the specific issues that remain, the County has begun the process of addressing these and is hopeful of achieving a positive resolution. Within the March 26 letter, the DOJ indicated its intention to conduct an additional "limited assessment" before the end of the year in order to gauge the County's response to pending items. It also said, "If the County can demonstrate that it has implemented sufficient remedial measures, we expect to formally close this matter."

In collaboration with the Health Care Agency, the Sheriff's Department is working to meet the remaining challenges. OIR has been actively involved in the various compliance initiatives that have occurred since 2008, and is monitoring the final stages as well. Should the process reach its anticipated conclusion in several months, it would constitute an important accomplishment for a jail system that has made great strides in recent years.

Background:

The notorious death of inmate John Chamberlain in 2006 had, of course, initiated scrutiny into the Department at the local level, including a special Grand Jury investigation by the District Attorney's Office. Those proceedings revealed significant

cultural issues and a troubling lack of accountability. In the fall of 2007 and the spring of 2008, two other inmate deaths following force incidents contributed to the growing level of concern and helped prompt the federal intervention.¹

The DOJ's authority stemmed from a variety of statutes, and gave it wide latitude to review *all* aspects of County jail operations – not simply the well-publicized incidents mentioned above and practices directly related to them. In addition to the use of force, for example, the investigation, once initiated, could and did incorporate other broad categories. These included housing conditions, environmental health and safety, and medical and mental health services.

Once the investigation began, the stakes were high for the County on a number of levels. To the extent that real deficiencies existed within custody operations – and they did – there were formidable challenges associated with fixing them.

County officials were aware that one potential outcome of the DOJ's review was legal action designed to remediate constitutional shortcomings. As with other jurisdictions facing a similar process, this could have taken the form of a “consent decree” that imposed a series of formal and elaborate corrective measures. It also could have entailed ceding control of jail operations to outside monitors for a period of several years.

Fortunately, the Sheriff's Department and other County entities – including, most notably, the Health Care Agency – chose a constructive and collaborative approach with the DOJ from the outset. This cooperation has taken many forms, beginning with the basic but important step of timely, efficient production of many thousands of documents requested by DOJ monitors. Substantively, the County has been responsive to the various, wide-ranging concerns that monitors have raised intermittently throughout the several years of interaction.

Many of the remedial measures sought by the DOJ have dovetailed with initiatives the Sheriff's Department has introduced under Sheriff Hutchens. Recent years have also seen a dramatic improvement in the effectiveness of communication and cooperation between the Department and its partners from HCA. In short, the DOJ investigation has provided motivation, direction, and a measuring stick for progress that has occurred on several fronts.

Timeline:

OIR has reported to your Board periodically regarding the progress of the DOJ investigation. Among the key events have been the following:

¹ This period, of course, also coincided with the federal indictment and resignation of Sheriff Carona.

- December, 2008: DOJ initiates investigation via a letter addressed to Sheriff’s Department, County Counsel, and CEO.
- January, 2009: DOJ requests thousands of documents relating to facilities issues, medical and mental health care, use of force, and other concerns.
- April, 2009: DOJ conducts an initial site visit of the Orange County Jail system. The team, consisting of DOJ attorneys and expert consultants, spends a week touring individual jails, conducting interviews, and reviewing documents
- May, 2009: DOJ sends a letter to the Sheriff’s Department expressing concern about specific use of force issues about which it had become aware. It cites Taser use and use of the “prone position” for controlling inmates as particular concerns. OCSD addresses both subjects and provides updates to DOJ.
- May-December 2009: OCSD continues with a variety of relevant reform programs and policy revisions while awaiting further word from DOJ.
- January, 2010: On a visit to Washington, D.C., Sheriff Hutchens meets with newly appointed Civil Rights Division Chief Tom Perez to provide updates on OCSD reforms and invite a further exchange with the investigative team.
- April, 2010: OCSD, on its own initiative, sends documentary materials to DOJ in Washington that reflect responsive measures taken by the Department’s Custody Division since spring of 2009.
- September 27-30, 2010: DOJ’s investigative team returns to Orange County. This visit gives OCSD and HCA the opportunity to showcase several advances and reforms. During the “exit interview” that ended the visit, the DOJ team praises the new S.A.F.E. Division established by Sheriff Hutchens to improve internal review processes. Among identified concerns are questions about the accessibility of the inmate grievance process, which OIR subsequently works with the Department to re-design.
- 2011 and 2012: During a stretch of minimum additional contact from DOJ, the County continues with relevant reform initiatives within the jails. Prominent among these are facilities improvements related to disability rights, continued refinement of review protocols for use of force, included a modified policy for the carotid control hold, and a further structural overhaul of Correctional Medical and Mental Health services so as to better integrate with Department operations and facilitate patient care
- April, 2013: The DOJ sends a monitoring team to conduct a third on-site visit. At the exit interview, the team commends the County for its continued progress, citing enhanced use of force protocols and impressively low rates in inmate

suicides and medical deaths. The team also identifies new specific concerns and suggested improvements.

- April, 2013 to present: The Sheriff's Department and HCA continue collaboration on remaining items, which vary in complexity and required resources.
- March, 2014: The DOJ contacts Orange County officials with a status update, including six remaining "areas of concern." These include:
 - a. The carotid control hold, which is allowed under OCSD policy and which the DOJ considers problematically dangerous as a force option.
 - b. The gaps in current OCSD "weapons control" protocols, which theoretically limit accountability for the use of different force options (such as the Taser) in the absence of rigorous documentation requirements.
 - c. The potential for "poor supervision" of inmates within certain units because of structural limitations and staffing shortages.
 - d. The need for enhanced privacy at intake, for its own sake and as a means of promoting thorough, accurate medical screenings.
 - e. The need for adjustments in housing and medical protocols so as to better respond to chronic care issues in the inmate population.
 - f. The need for a greater range of mental health treatment and housing options, so as to become more responsive to varying levels of wellness.

In the weeks since the DOJ provided the County with an advance copy of its public report, the Sheriff's Department and HCA have renewed their efforts to address these points and provide the monitors with updates and an action plan. Further correspondence is ongoing.

Conclusion:

The length of time – more than five years – prior to an initial public report by the DOJ was unusual. Perhaps, though, it reflected the federal recognition that the County jail system was moving in positive directions under new leadership. In many respects, the investigation has been a constructive backdrop for reform to take place. It has offered focus and guidance, as well as an affirmation of real progress when and where it has occurred.

Presumably, the DOJ's process is entering its final phase. Improvements in policy, accountability, coordination, and internal review have already affected inmate care and safety in tangible ways. Moreover, the remaining concerns are limited and relevant reforms are attainable. And the conclusion of the DOJ's formal investigation, when it does occur, will constitute a significant benchmark.

It will not, however, end the need for the County to remain vigilant and forward-thinking in its approach to the jail system. The impacts of state prisoner realignment, for example, are relatively new, and reflective of ways in which the County's challenges will continue to evolve. This is true for both law enforcement and medical care issues within the custody environment. Meanwhile, the inherent dynamics between inmates and law enforcement mean that force incidents and allegations of misconduct will continue to warrant careful and thorough scrutiny.

Fortunately, the last several years have established a strong foundation for ongoing adaptation, improvement, and reform. The Sheriff's Department continues to take a pro-active approach to its internal review processes. Earlier this month, for example, a "Custody Use of Force Review Committee" completed a large-scale evaluation of selected and collective force incidents.² It produced findings and recommendations for training and policy changes that address recurring risk scenarios and performance issues identified in the Committee's study of past cases.

OIR will continue to work with the Department on these internal review initiatives as it builds on recent advances, and will report back to your Board when the DOJ investigation is finalized.

II. Discipline Process: 2014 Cases and Complaints

OIR continues to track misconduct allegations against Department personnel. In the first four months of 2014, the Department opened 45 new Internal Affairs investigations. This corresponds very closely to last year's pace, when 130 new cases were initiated. Of the new matters, 31 began internally, while 14 were the result of citizen complaints. 37 concern on-duty behavior, while 8 related to allegations of off-duty misconduct. 5 of the allegations relate to potentially criminal behavior, and are being investigated accordingly.³

Among the notable cases from the last few months are the following:

- *Three deputies were investigated after their involvement in a questionable use of force incident in the jails. An inmate in a wheelchair became angry during his dayroom period, and a deputy made the decision to return him to his cell against his will. He then decided to take the wheelchair from the inmate rather than allowing him to have it in his cell – where he could*

² OIR had the opportunity to participate in this Committee, which included representatives from various ranks within the Custody Division, as well as Training, SAFE, and County Counsel.

³ Interestingly, three of the cases were also opened after referrals from the Department's Risk Management Unit. Legal complaints against the County have become an additional way for the Department to learn about and assess (or re-assess) potential misconduct or procedural shortcomings.

potentially “use it as a weapon.” A struggle and use of force ensued. Although the force was determined to be in policy based on the aggressive actions of the inmate, the Department found that the decision-making and lack of regard for the inmate’s medical condition had been poor. The lead deputy received a significant suspension, and the other involved deputies got lesser discipline.

- *A deputy at one of the jails repeatedly adjusted his own schedule without permission – working through his meal period and then leaving the facility before the end of his shift. In spite of being warned about the behavior, he persisted in doing it, and the Department opened a misconduct investigation. Based on a past disciplinary history and his lack of compliance, he received a significant suspension.*
- *A deputy’s alleged untruthfulness to the Grand Jury during an investigation from several years ago came to light in the context of another case in which he was a potential witness. The Department received access to evidence, previously sealed, that established the specific details of the statements and proved that the misconduct had occurred. OIR has recommended discharge; the final discipline is pending.*
- *A supervisor’s romantic relationship with another Department employee came to light because of allegations of misconduct that led to a criminal investigation. Though no charges were filed after a review by the District Attorney’s Office, and while the original relationship had not violated Department policy⁴, certain actions and decisions by the supervisor while on-duty were determined to merit a disciplinary response. OIR concurred with the sustained finding of misconduct; the final outcome of the case is pending.*
- *Two deputies allegedly failed to provide a prosecutor with a report that clarified the circumstances of an arrest. The suspect provided a text message that seemed to establish a motivation – that the deputies were intentionally undermining the case in order to cultivate the suspect as a confidential informant. The District Attorney’s Office brought the matter to the Department’s attention after dropping the charges in the interest of justice, and an investigation ensued. Though the deputies’ explanations suggested poor judgment and decision-making, as opposed to willful misconduct, the actions of one in particular constituted a significant lapse in performance that warranted discipline as well as further training. The final outcome is pending.*

⁴ The parties were not in a direct supervisor-subordinate relationship in their respective assignments.

Racial Profiling Allegation

A high-ranking official at a local university contacted the Department earlier this year to complain about a traffic stop that he had been involved with as a passenger. He asserted that there had been “racial profiling” involved in the deputy’s decision to stop the car. Both the complainant and driver of the vehicle were African-American; the complainant alleged that any Vehicle Code violation was marginal at best, and that the deputy’s real motivation for the stop was improper harassment or unjustified suspicion based on race.

The Department interviewed all parties, and had the opportunity to review video evidence from the deputy’s patrol vehicle recording system. The recordings established that the deputy did have probable cause to stop the car for a speeding violation. Moreover, the deputy claimed not to have been aware of the driver’s race when he made the decision to pull the car over.

Everyone’s version of the subsequent encounter is essentially the same: there were moments of tension, especially when the deputy became frustrated with the passenger’s attempts to be heard, but it remained relatively mild. The dialogue did not revolve around – or include – racial references by either side. Ultimately, the deputy exercised his discretion and decided not to issue a citation.

This last fact, as interpreted by the complainant, reflects the challenges involved in racial profiling cases. The issues are inherently sensitive, and many incidents turn on differences in perception as opposed to factual disputes. The choice not to give a ticket could obviously be argued as “proof” that the deputy was not trying to harass or mistreat the citizens. However, also plausible is the complainant’s assertion that the deputy, having been challenged as to the stop’s legitimacy, refrained from further action out of recognition that he was in the wrong.⁵

When so much depends on subjective interpretation, or on the thoughts and motivations that might lie behind actions that are objectively reasonable, it becomes very difficult to prove that biased or discriminatory policing has occurred. Profiling allegations can – and often do – result in hard feelings on both sides. Even in the face of a thorough investigation and the existence of evidence to the contrary, complainants can remain genuinely convinced they have been mistreated. Meanwhile, accused officers can be genuinely offended by the allegation, and dissatisfied by any outcome short of complete exoneration.

Fortunately, the Sheriff’s Department does not generate a significant volume of racial profiling incidents. In the past twelve months of citizen complaints, only five had a

⁵ Similarly, the complainant noted as problematic the fact that deputy inquired as to whether the driver was on probation or parole. Many officers ask this question on car stops as a matter of routine, since, among other things, it helps dictate the parameters of their right to search. Obviously, though, the practice also has the potential to be insulting or offensive, and in some contexts lends itself to a perception of racial bias.

profiling component. Though one of those led to discipline for the involved officer, it was not because of discrimination; that component to the case was not sustained.

Perhaps the best a conscientious law enforcement agency can do is to ensure that training is updated, investigations are thorough, evidence is carefully evaluated, and dialogue that bridges the “perception gap” occurs whenever possible. Many departments, including OCSD, also keep records of citizen complaints; these could reveal potential patterns of behavior that merit further attention, even when the outcome of a given case is inconclusive.

Citizen Complaints

OIR also monitors the Department’s citizen complaint review process – which tracks the intake and initial assessment of public feedback. So far in 2014, 55 new complaints have been entered into the system. The cities in South County that are patrolled by the Department generated 60% of the complaints, while the rest were distributed among North Operations and other units.

OIR’s access to the Department’s new computer database allows it to monitor these complaints as their evaluation is unfolding, and to interact with individual city chiefs and captains with questions and recommendations. The database also provides opportunities to look for trends and study aggregate information. (For example, the pace of new citizen complaints at the start of this year is up by a significant percentage, compared to the last few months of 2013.)

A handful of cases have been through the initial screening process and then referred to Internal Affairs for formal review⁶, and several others are still pending. Most, however, have been resolved either with a finding that no misconduct occurred, or that training or counseling is sufficient to address identified performance issues. “Discourtesy” or “rudeness” or “unprofessional conduct” is at the heart of 23 of the year’s complaint allegations, while others deal with more significant potential misconduct such as improper detention or arrest, harassment, or inappropriate use of force.

OIR’s goal in this process is to make sure that each case receives an appropriate review and subsequent response. While a percentage of the complaints are clearly invalid, most of them offer the Department a useful opportunity to assess and adjust deputy performance, even if the deficiencies or performance lapses at issue are not at the level of a formal policy violation. OCSD has improved in recent years in terms of timely, thorough review, as well as in taking more complete advantage of these opportunities for improvement.

⁶Additionally, some citizen allegations were referred directly to Internal Affairs for formal investigation because of their severity or other circumstances. These are in addition to the 55 complaints listed above.

III. Conclusion

Thank you for your attention to this memorandum. Please feel free to contact me at your convenience regarding these contents or other matters related to my responsibilities.

Best regards,

Stephen J. Connolly
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