



Stephen J. Connolly
Executive Director

TO: Board of Supervisors
FROM: Stephen J. Connolly, Office of Independent Review
RE: OCSD Cases relating to BOS meetings
DATE: April 23, 2009

Introduction:

I am aware of this Board's interest in several matters that involve the actions of Sheriff's Department personnel at recent Board meetings. The following issues and/or allegations have emerged from meetings that occurred on November 18, 2008, and January 13, 2009:

- The series of text messages written by Department personnel on County-issued devices during the November 18 meeting, which contained unprofessional and/or demeaning references.
- The unusually large dedication of resources, including some twenty-six officers, deployed by the Department for the January 13 meeting.
- The actions of Department personnel at the January 13 meeting in contacting or otherwise singling out the members of a particular group that opposes the Sheriff's position on concealed weapons permits.
- The actions of Department personnel at the January 13 meeting in utilizing the Hall of Administration's security cameras to "zoom in on" and digitally record individual Supervisors and/or their work materials.

The last of these matters was the subject of a formal request from Chair Bates to me, dated January 22, that was copied to all District offices. That memorandum asked that I monitor the Sheriff's Department's investigation in keeping with my usual protocols and to report my findings and assessments to this Board. Please consider this Report a response to that request, as well as an update regarding the related issues of interest and concern.

OIR's Review Protocols

Pursuant to the County Ordinance passed by this Board in February of 2008, the Office of Independent Review ("OIR") provides full-time independent civilian oversight of the Orange County Sheriff's Department. The particulars of OIR's role, and the nature of the OIR's relationship with OCSD and this Board, are set forth in the Ordinance and are further developed in a memorandum to the Board that I produced in October of 2008, shortly after beginning my tenure with OIR. However, I would like to reiterate some of the key features as background to this first substantive report.

OIR does not conduct its own investigations. However, in my capacity as Executive Director of OIR, I have the opportunity to monitor the Department's response to all critical incidents and allegations of officer misconduct. I am able to advise the Department in its initial assessment and "routing" of particular issues, to track investigations as they unfold, to evaluate completed investigations for thoroughness and legitimacy, and to recommend outcomes to Department decision-makers. Though I have no power to force the Department to take a particular action, my access to the relevant materials and my ability to report my impressions to this Board and to the public help ensure that OIR's perspective gets a fair hearing.

Over the course of the past several weeks, I have monitored the Department's handling of the issues listed above. What follows is a description of the results of each inquiry, including the Department's corrective actions where applicable and my own assessment of the Department's response.

Issue # 1: Text Messages

Summary of Department response and OIR's assessments:

The text message episode reflected very poorly on the Department. The Sheriff chose not to initiate a formal administrative investigation, but recognized that remedial action was necessary. She personally admonished the involved parties and ordered the development of new Department policy that expressly addresses the conduct at issue. OIR found this to be a reasonable response under the prevailing circumstances.

Analysis:

During the November 18 meeting of this Board, a discussion of the Sheriff's policy regarding permits for the carrying of concealed weapons attracted a large crowd, much of which was opposed to the Sheriff's relatively restrictive approach to the issuance of such permits. Public comments on the subject extended for hours. During the meeting, observers noted that uniformed members of the Department were checking and/or sending "text messages" or e-mails on electronic devices as they sat in the audience.

These messages – sent on County-issued communications equipment during work hours by Department members – became the subject of a Public Records Act request. The Department produced them in compliance with the Act, and many of them were ultimately shared with the news media in January, as the contention about the “CCW” issue continued.

There is no question that the messages reflected poorly on the Department in a variety of ways. At best, they constituted an egregious misuse of County property, and at worst they were hurtful to individual people and hostile to the process itself. They unquestionably added to the rancor accompanying an issue that was already a divisive one.

Apart from the embarrassment and public criticism engendered by the dissemination of the messages, the conduct warranted an internal response from the Sheriff. However, this response was already underway before the public notoriety developed in January. The Sheriff herself became aware of the offending messages (which she had neither written nor received) when they were being compiled, and a few weeks before they were ultimately made public.

The Department did not initiate a formal investigation for purposes of the fact-gathering—the identity of the involved parties and the nature of the misconduct was readily apparent from the messages themselves. Instead, the Sheriff chose to address this issue immediately by formally and personally admonishing the involved parties, and by directing that a policy specifically covering text messaging be added to the Department’s Manual. A copy of that new policy language, which has been distributed Department-wide, is attached. (The relevant sections – 212.4.3-5 – concern “Text Messaging.”) The new policy clarifies the Department’s expectations regarding the use of electronic communications, and provides a direct basis for sanctioning similar conduct in the future.

OIR concurred with this handling of the issue. While formal discipline of involved personnel was a potential option, the decision to handle the matter without that step was a reasonable one in the overall context of the Department’s response. The goals of internal review were achieved in the following ways:

- Accountability for the involved parties (who received significantly more public exposure and criticism than in the average misconduct case, and whom the Sheriff admonished formally)
- Correction of the problematic behavior
- Reform.

Issue # 2: Deployment of Resources on 1-13

Summary of Department response and OIR's assessments:

The Department reacted to intense criticism of its “heavy-handed” security presence by conducting a formal review. It invited OIR to attend and participate. The review determined that justification for heightened security measures did exist, and that the operations plan reflected sincere concerns. No evidence suggests an intentional effort to intimidate the Sheriff’s political opponents or to chill the exercise of speech rights; on the contrary, the stated goal of the plan was to maintain a safe and orderly environment for the Board meeting, and the plan included language that expressly cited the importance of the relevant constitutional rights. Nonetheless, the negative public reaction caused the Department – appropriately – to revisit some of the consequences of its deployment choices. It identified problems that could easily be rectified for the sake of comparable future situations.

Analysis:

Along with its efforts to address specific allegations of misconduct in relation to the actions of Department personnel at the January 13 Board meeting, Department executives also convened a special “Command Staff Review” to look at broader questions relating to the OCSD plan for providing security that day. The emphasis of the Review was an evaluation of the operation plan’s justification, scope and execution.

The panel was comprised of three Assistant Sheriffs who were not directly involved in the event. I also had the opportunity to attend and to offer my perspective as an independent outsider. The panel relied on a binder of materials that included the Incident Action Plan (“IAP”), memos, e-mails, historical documents, and news articles. The lieutenant who had coordinated the event also made himself available to answer questions as they arose.

The panel eventually made the following findings, with OIR concurrence.

- 1. A reasonable basis existed for the Department’s decision to heighten its staffing and security levels for the January 13 meeting.***
- 2. The Incident Action Plan was reasonable in its fundamentals.***
- 3. There were unintended – but preventable – negative consequences to some of the tactical and operational decisions.***

The Department's Security Bureau routinely evaluates the agenda for upcoming Board meetings and heightens its preparations when items seem likely to attract a larger or more contentious crowd than usual. The January 13 agenda item involving the Sheriff's CCW policy was such an issue.¹ Furthermore, in the days before the meeting, the Security Bureau Commander became aware that the CCW issue, and its importance to the gun rights movement in general, had attracted the attention of the "open carry" movement of guns rights activists. He believed in the real possibility that opponents of the Sheriff's policy would attend the meeting with unloaded firearms as part of the "open carry" strategy of protest.

This concern seems to have been based on rumor and informed speculation rather than on hard evidence. However, the evidence suggests that it was sincere on his part.²

The use of more than twenty officers was clearly extraordinary, but the Security Bureau Commander had a specific "operational need" for each, according to his statements at the Command Staff Review. There is no evidence to suggest that the Sheriff or any subordinates intended to use the presence of Department personnel to chill or intimidate political opponents or to otherwise impinge on the exercise of recognized rights. Indeed, the express goal of the plan was to "maintain public safety, safeguard the citizens of Orange County, and protect the rights of all persons."

The plan does reflect an overt awareness of relevant First and Second Amendment issues and an explicit interest in preserving the rights of attendees. Contacts were meant to be discreet, and the emphasis was on "compliance rather than enforcement" in the event that individuals did have firearms on the grounds of the Hall of Administration.

That being said, a consciousness of and sensitivity to public perception should inform the Department's decision-making, especially in the context of an event like a Board of Supervisors meeting. There is unquestioned merit to the claims that the show of force – particularly by personnel working for the Sheriff who was the subject of potential protest – tended to "send a message" that inhibited free speech.

It is admittedly difficult to balance security and other values with perfect precision. However, the Command Staff Review identified specific aspects of the deployment that contributed to the tension in ways that could have been avoided without compromising security.

¹ The anticipated crowd for the swearing-in ceremony of Supervisors Nguyen and Campbell, and the possibility of demonstrations by OCEA members as part of the ongoing budget crisis, also contributed to the sense that increased planning was warranted.

² Several facts support this conclusion, including the following: his consultation with County Counsel (which led to signs being posted in the front lobby of the Hall that expressly prohibited "unloaded firearms"), his cautionary e-mail to the five Board offices in the week before the meeting, his enlisting of assistance from the Santa Ana Police Department, and his inclusion of weapons-related components to the operations plan.

- The use of uniformed SWAT personnel in the lobby area was not the best fit. While there is no evidence to suggest that the officers were *deliberately* intimidating or threatening, the team’s demeanor and mindset puts an overt emphasis on “command presence” and operational advantage. Given that the SWAT officers were apparently chosen for their availability as much as for their specialized training, a lower key approach would have been both desirable and easily attainable. With this in mind, the Board of Review members recommended possible adjustments for the future – including fewer officers, different officers, and/or the staging of a response team off-site that would be available and present only if necessary.
- The use of undercover personnel as members of the plainclothes observation teams ended up creating a security issue for the officers themselves. When the recording of the meeting by surveillance cameras became a source of contention, the presence of the officers became one rationale for the Department’s reluctance to provide a full copy of the tape to the Board of Supervisors. The point was a valid one, but it also raises the question of whether involving undercover officers in this IAP was an unnecessary risk to them in the first place.
- The decision to end the operation and release OCSO personnel from their assignments was a logical one, once it had become apparent that the identified security hazards were not materializing. As it occurred, though, the “mass exodus” amounted to an unintentionally dramatic display of Department resources that could easily have been (and was) interpreted by onlookers as a gratuitous show of force. Similarly, the departure of numerous OCSO personnel from inside the meeting room when the Sheriff herself left reinforced the perceptions of some that the deployment was politically motivated. While many of these individuals were senior-level managers who were present to observe rather than to provide security, an awareness of possible perceptions is advisable.
- Better communication with the individual Board offices in advance of such a deployment would arguably help blunt some of the concern and potential misunderstandings that arose. New protocols will help ensure that such communication occurs.

Issue # 3: Contacts with Individual Citizens

Summary of Department's response and OIR's assessments:

After some prompting by OIR, the Department showed due diligence in attempting to identify and get statements from potential complainants. Four people who attended the meeting were ultimately interviewed about their concerns. These interviews and additional investigative efforts revealed no violations of law or Department policy; in fact, three of the complainants described the specific nature of their own interactions as “respectful,” “polite,” and/or “low-key.” On the other hand, all shared an understandable concern over being “singled-out” due to their affiliation with a group that opposes the Sheriff's policy on concealed weapons. Better communication may have alleviated some of the negative perceptions.

Analysis:

The complaints of harassment or discrimination by Department members against individual attendees during the January 13 meeting are difficult to separate from the overall context of the deployment issues described above. The perceptions of the complainants were shaped, at least in part, by their suspicions about the real motivation for the elaborate security measures as a whole. That being said, the complaints warranted attention and internal review. It was worthwhile for Department executives to ensure that specific interactions were legal and courteous and appropriate to the circumstances, and to take remedial action if the facts revealed policy violations or other shortcomings in officer performance.

Initially, the Department was slow to respond to the allegations that emerged through the news media and word of mouth. Because the complainants did not contact the Department directly or complain formally, some Department officials took the position that internal review was not necessary. However, OIR encouraged the Department to move forward with an investigation based on the well-publicized allegations and the high profile of the controversy as a whole.

To its credit, the Department was willing to break with its usual protocols for initiating a case, and it devoted appropriate resources to pursuing available leads. This included contacting individual District offices of this Board to solicit contact information for any constituent who may have been involved in one of these encounters.

The collected evidence indicates that there were at four contacts initiated by Department personnel with individual attendees inside the meeting room. The contacts were brief and were focused on obtaining assurance that the parties in question were not armed. The testimony is consistent that the encounters went smoothly; in each instance, the officers

were quickly satisfied – thanks to the cooperation of each relevant person – that objects of concern (e.g. bulges on waistbands, contents of a backpack) were not firearms.³

The investigation confirmed that, with one exception, the people who were contacted were also wearing large buttons that identified them as members or supporters of a group that opposed the Sheriff’s position on concealed weapons permits. This contributed to their stated concern that they were targeted for political as opposed to security-based reasons. The encounters reinforced, and presumably were reinforced by, the perspective of these and other attendees about the Sheriff’s Department presence and deployment choices for the meeting as a whole.

It is difficult to prove or disprove the internal motivation behind any particular action. However, the involved Department personnel stated that they had objective reasons for making the inquiries that they did, and the contacts were meant to be brief, non-intrusive, and consensual. If the buttons attracted the attention of the Department’s security personnel and heightened the focus of the officers – as seems likely – the significance of that is open to interpretation. The evidence, however, does not support a finding that this was a function of a desire to intimidate as opposed to sensitivity to the mission-specific security concerns.

Issue # 4: Video Surveillance

Summary of Department’s response and OIR’s assessments:

The Department conducted a thorough investigation to address the various concerns raised by the recording that occurred during the meeting. Beyond the troubling footage from the cameras themselves, there is no evidence to support the allegation that the operator of the security camera was “spying” on individual Board members in an effort to gain improper access to their work materials during the meeting on January 13. Instead, the first-time camera operator explained the different offending segments variously, and consistently asserted that he was acting on his own and had no malicious intent. Nonetheless, the Department determined that his poor judgment and his encroachment on the privacy of the Supervisors constituted misconduct. He received a low-level disciplinary sanction, and OIR concurred with this result. Additionally, the Department has revised its security protocols for within the Hall of Administration to help prevent a future recurrence of this incident.

³ One complainant described being followed into the restroom by someone in plain clothes whom she assumed to be a deputy. While the complainant understandably considered this to be carrying surveillance operations to an uncomfortable extreme, the Department’s investigation suggests that this specific episode was instead a combination of coincidence and perception.

Analysis:

In the course of responding to a Public Records Act request, Department personnel reviewed a digital recording that had been created by an OCSD officer during the Board meeting of January 13. Contained within several hours of footage were five individual sections that were brief but troubling. These passages came from two cameras that were operated by the same deputy.⁴ Lasting less than two minutes in total, the segments focused on three different supervisors and “zoomed in” on their work materials (papers, computer screens, and mobile phone).

The Sheriff herself quickly became aware of the issue, initiated a personnel investigation, and notified the individual members of this Board about the existence of the footage.⁵

OIR had the opportunity to monitor the ensuing investigation in keeping with its usual protocols. OIR reviewed the recordings, worked with investigators as the case was unfolding, assessed the final investigation for completeness, made recommendations about follow-up questioning, and met with Department decision-makers about the final outcome. OIR concurred with the Department’s ultimate handling of the case.

The investigation revealed that the officer in question had been assigned to the Hall of Administration that day as part of the additional security provided by the Department. Using security cameras that have been in place at the Hall for several years, he recorded from approximately 8:40 AM until noon that day. His assignment was to monitor the public inside the meeting room, look for signs of handguns or suspicious bulges, and communicate with deployed personnel inside the meeting room as necessary. He later said he also intended to capture on video – for evidentiary purposes – any disturbances that may have arisen.

The officer had never worked the camera system; it is usually manned by Sheriff’s Special Officers who are regularly assigned to the Hall of Administration. This lack of familiarity figured prominently in his explanation of the “zooming” activity, much of which was purportedly motivated by his desire to test the capabilities of the equipment. While the individual explanations of each clip were occasionally confusing or slightly convoluted, any lack of definitive answers or persuasive responses seemed more the product of a lack of specific memory than an attempt to deceive. (As he mentioned, the assignment proved to be unremarkable from a security perspective. He took no notes, had no access to the recordings themselves, and said that – until the controversy subsequently emerged – did not think further about them once he left the meeting.) Viewed on the whole, the recordings have long stretches of other experimental zooming

⁴ The existence of relevant footage from the second camera, which contained one additional clip, came to the attention of Department management several weeks later as the investigation unfolded.

⁵The concern and indignation felt by individual Board members upon learning about the surveillance became compounded when a dispute arose between the Board and the Sheriff’s Department about control over the recordings. The legalities of this issue are outside the scope of this Report.

and roving that are consistent with his overall characterization of the project, and perhaps reflect a diminishing sense of urgency about security as the meeting continued.

What are unequivocal and persuasive are the officer's repeated assertions that he lacked any type of secret motive or intent to use the camera system to "spy" on any or all of the Supervisors. This supports the finding that the most serious potential allegations are not sustained.

At the same time, the "close up" focus on individual Supervisors and their work materials was operationally unnecessary, intrusive, and disrespectful – however neutral the thought process behind it may have been. It perpetuated and intensified a contentious period in the Department's relationships with individual Board members and large segments of the interested public. As such, it constituted a lack of judgment that rose to the level of a policy violation in the view of Department decision-makers. In determining the discipline, the Department appropriately weighed the officer's exemplary performance history and absence of malice, and issued a low-level penalty.

Importantly, the Department has also taken affirmative steps to prevent the recurrence of such an event in conjunction with its security responsibilities in the Hall of Administration. In February, it issued new protocols that expressly forbid the manipulation of the camera system "to monitor the documents and/or activity of any board member," and to require documented approval of a Department supervisor before an employee other than the usual assigned personnel is allowed to operate the cameras during a meeting. An excerpted portion of the revised "post orders" used by the OCSB Security Bureau is attached.

Conclusion:

It is instructive to assess these matters from multiple perspectives: in terms of process as well as substance, and in terms of individual resolutions as well as a collective dynamic.

One of OIR's core responsibilities is to ensure that the Department's internal review process takes allegations of misconduct seriously. Ideally, the Department will be conscientious and rigorous in its identification of issues and in the investigations that ensue. It will see challenges as an occasion to assess possible misconduct, achieve accountability, and promote the betterment of the organization. With regard to these cases, the Department worked with OIR and pushed past initial impulses toward defensiveness and narrowness of focus. It initiated investigations based on public concern, even in the absence of a formal complaint, and opened the scope of the investigations to look not just at technical issues of misconduct but broader questions of possible reform. The Department cooperated fully with OIR in terms of both notification and access.

Substantively, the Department's investigations were, for the most part, thorough and effective. The Department showed due diligence in locating witnesses, acquiring and

reviewing non-testimonial evidence, and conducting interviews with relevant personnel. At OIR's request, further investigation occurred in two of the four cases, and more than one involved individual was re-interviewed to ensure that all key questions were addressed. The "Board of Review" did a thoughtful job of evaluating the deployment decisions for the January 13 meeting, and invited OIR to monitor its deliberative process. The emphasis on corrective action was also a noteworthy feature of the Department's review, as reflected in the attached exhibits.

OIR concurred with the individual resolutions of each case. Just as OIR does not conduct its own investigations, it is not the function of OIR to substitute its judgment for that of the Department's executives. Instead, OIR works to ensure that the outcome is principled and consistent with the Department's own established guidelines. In each of these cases, OIR also had the opportunity to consult with Department decision-makers and offer its input and recommendations. OIR believes that each case disposition was fair and reasonable under all the relevant circumstances.

Finally, the collective impression that these cases create is one that many participants and observers find frustrating and regrettable. Indisputable missteps by Department members (such as disdainful text messages) fueled suspicions and impaired trust to the point that the "benefit of the doubt" was lost. This caused other of the Department's decisions and actions to be judged harshly and to receive a level of attention that has overshadowed some of the other important initiatives and reforms that are ongoing.

Ideally, this report will help provide clarification and resolution as to the four matters it covers. I welcome any further opportunity to answer this Board's questions.

Best regards,

Stephen J. Connolly
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