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Agenda No. 19  
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October 5, 2018

TO: SUPERVISOR SHEILA KUEHL, Chair  
SUPERVISOR HILDA L. SOLIS  
SUPERVISOR MARK RIDLEY-THOMAS  
SUPERVISOR JANICE HAHN  
SUPERVISOR KATHRYN BARGER

FROM: MARY C. WICKHAM  
County Counsel

A handwritten signature in black ink, appearing to read "Mary C. Wickham", is written over the printed name and title.

RE: **Impacts of the Initiative Amending the Los Angeles County  
Sheriff Civilian Oversight Commission Ordinance**

**Purpose of Memorandum**

This is to report back on the impact of the initiative to amend the Sheriff Civilian Oversight Commission ("COC") ordinance in Title 3 of the Los Angeles County Code ("Initiative") requested on September 11, 2018. As you may recall, the Initiative would authorize the COC to develop a plan to reduce the County's jail population and prepare a feasibility study on reinvesting jail-system costs towards alternatives to incarceration for your Board's consideration; issue subpoenas to investigate complaints against the Los Angeles County Sheriff's Department ("LASD"); and review and audit the Office of Inspector General's ("OIG") handling and resolution of complaints against the LASD.

Our office and the Chief Executive Office ("CEO") collaborated on this report, in consultation with the OIG, the COC, the Office of Diversion and Re-Entry ("ODR"), and the LASD. Below is a summary of the impact passage of the Initiative would have.

**Summary**

As an initial matter, the current COC model, relies on the collaboration among the LASD, the COC, and the OIG. Based on feedback from

the Departments that work within that model, the LASD, the COC, and the OIG, it is working successfully to achieve the goals of effective and transparent oversight. Were the Initiative to pass, the potential impacts on the County would include:

- Creating potential conflicts between the COC and LASD if the COC subpoenas confidential records;
- Increasing County costs due to the expansion of staffing, resources, and funding for the COC and OIG;
- Duplicating work such as investigating and studying alternatives to incarceration, currently performed by the Office of Diversion and Re-entry ("ODR"); and
- Creating reports and studies that the Board is not required to adopt, but may consider.

#### **Background of the Initiative**

The Initiative proposes to amend the COC ordinance in Title 3 of the County's Code to authorize the COC to:

- Develop a plan for your Board's consideration<sup>1</sup> to identify existing and potential alternatives to arrest and incarceration, including prevention, diversion, and mental health treatment for individuals facing nonviolent convictions and who have mental health or substance use disorders;
- Assess the feasibility of redirecting any savings from jail population reductions and the \$3.5 billion budgeted for the jail construction into expanding alternatives to incarceration;
- Use its staff to investigate, audit, and monitor the OIG's handling and resolution of all citizen and inmate complaints against the LASD; and
- Issue subpoenas to facilitate its LASD investigations.

In February 2018, the proponents of the Initiative filed an intention to circulate an initiative petition with the County Registrar-Recorder/County

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<sup>1</sup> The COC serves only in an advisory capacity to your Board. Los Angeles County Code section 3.79.030(J).

Clerk ("Registrar").<sup>2</sup> Our office thereafter prepared a true and impartial title and summary stating the purpose of the Initiative.<sup>3</sup> In early March 2018, the Initiative proponents began gathering signatures, and on July 30, 2018, they submitted the signatures to the Registrar for verification. On September 11, 2018, the Registrar verified that the petition had secured a sufficient number of signatures for your Board's action.

Once the petition was certified as sufficient, your Board had the option to: (1) adopt the ordinance as set forth in the Initiative, unaltered, at the meeting on September 11, 2018, or within 10 days of that meeting; (2) submit the ordinance, unaltered, to the voters for the March 3, 2020, election; or (3) order County agencies to report back on the impacts of the Initiative within 30 days of the September 11, 2018, meeting.<sup>4</sup> Your Board ordered a report back on the impacts of the Initiative on the County, the COC, the OIG's oversight role, and the County's operations, staffing, and budget. This document is that report back.

### **The COC's Current Model**

Your Board created the OIG in 2014 as an independent entity to oversee the LASD.<sup>5</sup> In January 2016, your Board created the COC as a Brown Act body to improve public transparency and accountability concerning the LASD. The OIG is the COC's investigative arm and is authorized to undertake inquiries, audits, and monitoring of the LASD at the request of your Board, the COC, the Sheriff, or on its own initiative.<sup>6</sup> The OIG also has authority to investigate specific incidents involving LASD personnel under prescribed circumstances.<sup>7</sup>

The OIG ordinance expressly states that the LASD and all other County departments shall promptly supply any information or records requested by the OIG, including confidential peace officer personnel records.<sup>8</sup> Moreover, in December 2015, the Inspector General ("IG") and the LASD executed a memorandum of agreement ("MOA") that establishes a protocol for the IG's

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<sup>2</sup> The initiative process allows residents to propose amendments to local laws and circulate a petition to gather signatures from registered voters to show support for the initiative. Elections Code section 9100 et seq.

<sup>3</sup> The Elections Code section 9105 requires County Counsel's summary to be circulated with the petition during the signature-gathering process.

<sup>4</sup> Elections Code section 9118.

<sup>5</sup> Los Angeles County Code section 6.44.190.

<sup>6</sup> *Id.*, at subsection H; Los Angeles County Code sections 3.79.030(B), 3.79.130.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, at subsection J.



accessing peace officer personnel information to ensure confidentiality.<sup>9</sup> Because the OIG is not a Brown Act body, its access to these records will not jeopardize their confidentiality because it does not have to conduct open meetings. This further enhances the OIG's investigative capacity.

In contrast, the COC is a Brown Act body whose meetings must be open to the public. It cannot meet in closed session because it does not have final decision-making authority. Thus, if the COC had access to peace officer personnel and other confidential records, the confidentiality of those documents would be jeopardized by the open-meeting requirement. This could lead to civil, criminal, and administrative liability. Given these concerns, your Board did not delegate its authority to access confidential records to the COC, but rather vested it solely with the OIG pursuant to the terms of the MOA and OIG ordinance.

The COC has not taken an official stance on the Initiative. However, the OIG believes the current investigative model works well, making the Initiative unnecessary. As discussed above, the OIG ordinance, the COC ordinance, and the MOA authorize the OIG to conduct investigations on behalf of the COC. This authority includes granting the OIG access to confidential LASD records. The MOA sets forth the procedures for providing LASD records to the OIG, which include safeguards for protecting confidential records. The LASD has been cooperative in granting the OIG access to these and other records. Moreover, County departments – including County Counsel, the Public Defender, the District Attorney, and the Department of Health Services – have been fully cooperative with the OIG to support its oversight efforts. Moreover, a recent State statute (Senate Bill ("SB") 1421), discussed further below, will make certain peace officer records open to the public under the California Public Records Act ("PRA"), meaning the COC will not need a subpoena to access those records.

Under the foregoing authority, the OIG, as an independent investigative body, reports to the COC and provides information about the LASD that the COC can use to advise your Board and advocate for change. To this end, the collaboration between the OIG and COC (as well as the LASD) has been instrumental in effectuating reform in such areas as body cameras, compliance with the Prison Rape Elimination Act, and identification of secret societies within the LASD.

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<sup>9</sup> The IG (the head of the OIG) serves as special counsel to the Board and to the COC and has an attorney-client relationship with both. See *Id.*, at subsection I.

## **Impact of the Initiative**

### **1. *Access to Confidential LASD Records***

The Initiative would grant subpoena power to the COC purportedly to provide greater access to confidential LASD documents. However, the COC will likely encounter significant obstacles if it tries to subpoena either peace officer personnel files or documents related to ongoing criminal investigations. Furthermore, SB 1421 will make certain peace officer personnel files open to the public in a PRA request, thereby rendering the grant of subpoena power to the COC under the Initiative less necessary.

#### *Peace Officer Personnel Files*

Even with subpoena power, the COC is unlikely to obtain access to peace officer personnel files not covered by SB 1421. Information contained in such files is confidential and protected from disclosure under the Penal and Evidence Codes.<sup>10</sup> A party seeking such personnel files, such as the COC, is required to file a motion in court specifically identifying the proceeding in which the records are sought, the specific records sought, and affidavits showing "good cause" for the disclosure of the records. These motions are generally referred to as "*Pitchess* motions."

Because the COC is legally required to comply with *Pitchess* procedures to obtain peace officer personnel files not covered by SB 1421, it would have to file a *Pitchess* motion establishing good cause every time it seeks to review such records. Once the motion is filed, the court would then determine which records the COC could review. Accordingly, even with subpoena power, the COC may not necessarily gain access to all the files it seeks.

#### Senate Bill 1421

A recently passed State law will eliminate the need for the COC to have subpoena power in certain circumstances. On September 30, 2018, Governor Brown signed into law Senate Bill 1421, which changes a law enforcement agency's disclosure requirements under the PRA for investigations into officer-involved shootings, major uses of force, and founded investigations of dishonesty and sexual assault. The law permits the agency to delay disclosure for up to 18 months if it can demonstrate with specific facts that disclosure would interfere with an ongoing criminal investigation or prosecution. Accordingly, the COC will not need a subpoena to access records related to these types of

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<sup>10</sup> See Penal Code § 832.7, and Evidence Code § 1043, et seq.



incidents. It will have access to this information to the same extent as the public under the PRA.

### *Ongoing Criminal Investigations*

The COC also likely cannot use subpoena power to access documents or information concerning ongoing criminal investigations. Government Code section 25303 states that your Board “shall supervise the official conduct of all county officers,” including the Sheriff. Your Board has delegated some of this oversight responsibility to the COC. However, this oversight responsibility is not unlimited. Section 25303 specifically states that your Board may not obstruct the investigative function of the Sheriff. As an agent of your Board, this limitation applies equally to the COC.

Allowing the COC to access ongoing criminal investigations would arguably obstruct the Sheriff’s investigative function. Because it is a Brown Act body that cannot conduct business in closed session, the COC’s discussion of an ongoing criminal investigation would be done in open session. This could compromise the integrity of such an investigation and, therefore, interfere with the Sheriff’s investigative function. As such, the COC likely could not access these documents even pursuant to a subpoena.

### **2. *Conflicts Among the COC, LASD, and Your Board***

If the COC seeks access to LASD’s confidential documents by way of a subpoena, it will likely be challenged in court in one of three ways. First, either the peace officer whose records are sought or the LASD could file a motion to quash the subpoena in court. Second, the LASD could object to the subpoena, which would require the COC to file a motion with the court to compel the LASD to produce the documents. The COC would require legal counsel and a court would decide which, if any, records should be provided pursuant to the subpoena. Third, if the LASD ignores the COC’s subpoena, your Board could notify the Superior Court, which could then order the Sheriff to court to resolve the matter.<sup>11</sup> All of these scenarios would put the COC, your Board’s advisory body, and LASD on opposite sides of legal proceedings that could create an ongoing conflict and potentially increase the County’s legal fees.

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<sup>11</sup> It is unclear whether the COC, rather than your Board, could use the Initiative’s subpoena power to request that the Superior Court issue an order to bring the Sheriff to court under Government Code sections 25173-25175.

### ***3. Unnecessary Cost Increases***

The fiscal impact of the Initiative will depend on how the COC exercises its new authority. If the COC issues a large number of subpoenas, conducts investigations beyond what it and the OIG can currently perform, or requires additional investigative support, the costs to the County will significantly increase. For instance, the OIG likely will have to severely curtail its oversight efforts to accommodate the COC's new authority unless your Board provides additional staff to the OIG to accommodate the projected increased workload. The OIG believes the Initiative's additional investigative work and analysis would be conducted by OIG inspectors, monitors, and deputy inspectors general.

In general, the proposed increase in COC authority likely will increase the workload of the COC, the OIG, and the LASD. Moreover, if the Initiative passes, policy decisions made by your Board, the COC, and the OIG will affect staffing plans, and therefore, costs. Such policy decisions could include how the COC would implement its expanded authority; whether your Board will grant additional authority to, or place new restrictions on, the COC; the division of work between the COC and the OIG; the ability of the LASD to provide timely responses to COC requests; and potential other changes in State law that could affect access to confidential records. Additional support from County Counsel and other County departments also may become necessary if the COC's authority is expanded.

### ***4. Duplication of Efforts***

The Initiative would have the COC study the feasibility of community based alternatives to incarcerations for the homeless, mentally ill, and substance use disorder population. The ODR currently implements criminal justice diversion and re-entry into the community for those who are homeless, have mental health and/or substance use disorders. The goals of the ODR include decreasing the number of inmates with these conditions in the County's jails, reducing recidivism, and improving the health outcomes of persons with the most serious underlying health needs. Thus ODR programs are duplicative with the Initiative's directive to the COC to create an action plan and study the feasibility of community-based alternatives to incarceration.

The ODR's current programs include the Misdemeanor Incompetent to Stand Trial - Community Based Restoration ("MIST-CBR"), which diverts individuals facing misdemeanor charges who are found incompetent to stand trial into community-based settings to be restored to competency. Since October 2016, the MIST-CBR has successfully moved 766 clients with mental health disorders from the County's jails to community-based treatment. A similar program exists for those charged with a felony, modeled

after the MIST-CBR, which is funded by the Department of State Hospitals, and has served over 50 individuals since July 2018.

Further, the ODR Housing program serves individuals who are incarcerated in the County jail, homeless, and/or have a mental health disorder. This program helps people transition to interim housing upon release from incarceration and connects them with permanent supportive housing. Since August 2016, 1,262 homeless clients have been served by ODR Housing. Recently, at your Board's direction, the ODR has prioritized diverting pregnant women from the jails to the community with supportive services and housing provided by ODR.

The Law Enforcement Assisted Diversion is another community diversion program that aims to reduce recidivism and increase public safety by providing those at high risk to repeat narcotics or prostitution offenses with housing, mental health and substance use treatment, and supportive services.

All of the ODR's community-based programs serve those who are homeless and have a serious mental health disorder. The cost of these programs is between \$25,000-\$35,000 per person, per year. Over the next 9 to 12 months, the ODR will explore the number of justice-involved individuals who could potentially be diverted from incarceration and into ODR programs. At that time, the ODR will be able to make further cost estimates.

From the ODR's perspective, the Initiative authorizes the COC to engage in efforts that are duplicative of those that the ODR is currently taking to create alternatives to incarcerations for the targeted populations. The ODR is willing to work with the COC on its current efforts to divert and improve re-entry into the community. However, the ODR believes that granting the COC authority to engage in such efforts on its own would be inefficient and unnecessarily costly to the County.

If you have questions concerning this matter, please contact me, Senior Assistant County Counsel Judy W. Whitehurst at (213) 974-1921, or Senior Deputy County Counsel Gina Eachus at (213) 974-1832.

MCW:GE:eb

c:     Honorable Jim McDonnell, Sheriff  
       Sachi A. Hamai, Chief Executive Officer  
       Celia Zavala, Executive Officer, Board of Supervisors  
       Brian Williams, Executive Director Civilian Oversight Commission  
       Judge Peter Espinoza, Director of the Office of Diversion and Re-Entry  
       Max Huntsman, Inspector General