

Michael R. Bromwich
202 429 8167
mbromwich@steptoe.com

Steptoe

1330 Connecticut Avenue, NW
Washington, DC 20036
Washington, DC 20036-1795
202 429 3000 main
www.steptoel.com

October 6, 2022

BY EMAIL AND FEDERAL EXPRESS

Honorable Kristen Clarke
Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania, NW
Washington, DC 20530

Steven Rosenbaum
Chief, Special Litigation Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Re: Review of Draft Findings Report

Dear Ms. Clarke and Mr. Rosenbaum:

As you know, we represent the City of Phoenix and the Phoenix Police Department (PPD) in connection with the pattern-or-practice civil rights investigation announced by Attorney General Garland on August 5, 2021. Based on recent discussions with members of the DOJ Phoenix investigative team and with Mr. Rosenbaum, we are aware that, despite the hard work of the team, the Phoenix pattern-or-practice investigation is not near its completion. Even so, we want to raise at this time the issue of obtaining meaningful access, once the investigation is complete, to any draft findings report produced, as well as a reasonable opportunity to review any such report and point out any factual errors it contains.

This is an extremely important issue that has far-reaching consequences. Based on our discussions with personnel from other cities involved in prior DOJ pattern-or-practice investigations, and discussions with former Special Litigation Section personnel, we understand that in many cases a draft of the findings report has not been shared in advance with the police

department or government officials in the jurisdiction being investigated. And that in those cases in which a draft has been shared, the police department and city officials have had no more than 24-48 hours to review the draft report and provide feedback. We view the practice of not providing a meaningful opportunity to review and provide factual corrections to the draft findings report to be inconsistent with the values of transparency and collaboration that lie at the core of DOJ's pattern-or-practice program.

We have been advised that when asked about this practice of limited or no ability to review a draft findings report, DOJ lawyers have cited three reasons: 1) established historical practice; 2) concern about potential leaks of the draft report; and 3) concern that the optics of providing the PD and city officials with a draft of the report might suggest to members of the community that the PD and city officials were able to exercise undue influence on its content. We believe that none of these reasons—either individually or taken together—outweighs the legitimate interests of the PD and the city in ensuring that the facts contained in the report are accurate.

First, the mere existence of a past historical practice is not a substantive justification for that practice. We do not believe such a justification exists. Second, we believe the concern about potential leaks is unwarranted or at a minimum exaggerated but in any event can be addressed by various means, including limiting the circulation of the draft report and, if necessary, requiring every person from PPD or the City who has access to the report to sign a non-disclosure agreement or some alternative pledge of confidentiality. Third, the concern about the optics of sharing a draft can be easily addressed by clearly explaining the purpose of the review—to eliminate factual errors, not to change findings or conclusions.

On the other hand, sharing a draft of the Findings Report would have multiple advantages for PPD, the City of Phoenix, and DOJ. It would further promote cooperation and collaboration between the parties. It would almost certainly promote trust between the parties, which is so important for the stages of the process that may follow the issuance of the report. Equally important, it would avoid needless errors of fact appearing in the final, public version of the Findings Report. Such errors appearing in past findings reports have needlessly damaged the relationship between DOJ and the jurisdiction and its police department. They have also needlessly increased the skepticism among the rank-and-file members of the police department more broadly about the fairness and legitimacy of the process at the very point when buy-in from the rank-and-file is most important.

The practice of sharing investigative reports is not a novel practice in the Department. We began the practice more than 25 years ago when I served as the Department's Inspector General (IG). That practice has continued at the OIG for the past three decades. Within the past three years, I have reviewed draft OIG reports on behalf of individual clients and have had ample time to submit proposed factual corrections. To my knowledge, this practice has neither resulted in leaks nor led the media or any public audience to doubt the independence or objectivity of the IG's reports.

Letter to Ms. Clarke and Mr. Rosenbaum

October 6, 2022

Page 3 of 3

As you may know, my law firm employed the same practice as recently as this past January when I shared a report my firm prepared on corruption in the Baltimore Police Department. In that case, we shared a draft with the Baltimore City Solicitor, the Baltimore Police Department, the independent monitor—and lawyers from the Special Litigation Section working on the Baltimore consent decree. We gave the City, the police department, the monitor, and DOJ ten days within which to provide factual corrections. A handful of factual errors were identified for us, including by DOJ, which we were able to correct before releasing the report publicly. There were no leaks, nor has there been any suggestion that the independence and objectivity of our work was compromised in any way. The process had numerous virtues and produced no negative consequences.

Therefore, we request that, in the spirit of cooperation and transparency the City of Phoenix and the Phoenix Police Department have demonstrated over the past 13 months, you agree to share a draft of any findings report with the City and the PD once the investigation is complete and a draft has been prepared. The review period should be limited in time (*e.g.*, 7-14 days) but long enough to provide a meaningful factual review. The review would be explicitly limited to identifying factual errors rather than making arguments about interpreting or drawing conclusions from those facts.

We know that the Department is interested in continuing to improve its handling of pattern-and-practice matters relating to law enforcement agencies at all stages of the process. We believe that agreeing to share drafts of your findings reports for the limited purpose of ensuring factual accuracy—with a limited but reasonable review period—will enhance DOJ's reputation for fairness, accuracy, and transparency.

We would welcome the opportunity to meet with you to discuss this further.

Respectfully,

A handwritten signature in black ink, appearing to read "Michael R. Bromwich". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

Michael R. Bromwich

cc: Honorable Vanita Gupta
Associate Attorney General