



POLICE DEPARTMENT

August 7, 2018

Honorable Bill de Blasio  
Mayor of the City of New York  
City Hall  
New York, NY 10007

Honorable Corey Johnson  
Speaker  
The New York City Council  
250 Broadway, 18<sup>th</sup> Floor  
New York, NY 10007

Honorable Mark G. Peters  
Commissioner  
Department of Investigation  
80 Maiden Lane  
New York, NY 10038

Honorable Philip K. Eure  
Inspector General  
Office of the Inspector General  
For the NYPD  
80 Maiden Lane  
New York, NY 10038

Dear Mayor de Blasio, Speaker Johnson, Commissioner Peters, and Inspector General Eure:

Pursuant to Local Law 70 and the New York City Charter, the New York City Police Department (“NYPD” or the “Department”) hereby submits its response to the April 30, 2018 report from the Office of the Inspector General for the NYPD (“OIG”) entitled “Ongoing Examination of Litigation Data Involving NYPD” (“the Report”).

## **I. INTRODUCTION**

In early 2015,<sup>1</sup> the NYPD created a new unit within the Department's Legal Bureau known as the Police Action Litigation Section ("PALS"). PALS is presently staffed with a robust, skilled team of over thirty-five uniform and civilian members, led by Department attorneys, all of whom work full time to reduce the volume of cases against NYPD officers, improve the quality of resulting litigation data, and analyze that data to improve officer performance. These efforts lead to highly desirable and beneficial results. Litigation costs shrink for the City. At the same time, officers are encouraged to engage in positive and lawful interactions with members of the public without fear of entanglement in baseless litigation. Adjustments to policy and training based on insight gained from merit-based claims enhance the performance and effectiveness of the Department. Equally important, the reduction in the volume of litigation, along with the Department's improved performance, gains the public's trust and respect, thereby advancing the goals of Neighborhood Policing – to collaboratively solve problems with community members, drive down crime and enhance public safety.

On April 30, 2018, the Office of the Inspector General ("OIG") for the NYPD issued a report purporting to describe how the NYPD analyzes litigation data to adjust policy and training, identify officers in need of intervention and reduce the number of lawsuits filed against the City and individual officers. While the Department thanks the OIG for its effort, for the reasons set forth below, the report is seriously flawed, focusing on primarily unreliable information, employing unsophisticated methodology and recommending the adoption of curative measures the NYPD has employed for years.

More importantly, the Report fails to mention some of the most salient outcomes of the Department's efforts in this area: in 2017, the number of lawsuits against the NYPD or its officers decreased 24.5% from the previous year, the number of police action lawsuits – actions claiming that an officer violated an individual's rights – decreased by a remarkable 31%, and the number of lawsuits against NYPD

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<sup>1</sup> To be clear, the NYPD's work in this area began in 2013 with a predecessor command, the Legal Bureau's Risk Assessment Unit, before OIG existed or focused on NYPD's efforts to conduct litigation data analysis.

officers that were resolved without any payment of taxpayer dollars increased by 28%.<sup>2</sup> In addition, the Report also fails to acknowledge that with respect to CCRB allegations against officers, the overall rate of substantiated allegations dipped to only 20%, while excessive force allegations, an area specifically highlighted by OIG, are down for the fourth year in a row.<sup>3</sup>

These impressive results are not a product of happenstance. They are due to sustained effort by PALS and their ongoing collaboration with attorneys and staff of two other hard-working and effective city agencies -- the Office of the Comptroller (“the Comptroller’s Office”) and the New York City Law Department (“the Law Department”). In accomplishing its mission, PALS works hand-in-hand with these agencies to identify, collect and analyze all available evidence in connection with police action cases with the goal of ensuring that these cases are decided, and taxpayer dollars expended, based on the merits of a claim. Focusing on the merits of a claim as opposed to concentrating, as OIG does, on mere allegations that may or may not be evidence-based, is a critical component of this work. In this way, the NYPD produces accurate, reliable analysis of litigation data while ensuring that any resultant adjustments to policy and/or practice are indeed warranted.

In general, OIG’s Report is flawed in three respects: its methodology is unsound; its conclusion that PALS does not inform or affect policy is incorrect, and its assumption that without inclusion in the RAILS system, litigation data is not routinely used to review officer performance, is demonstrably untrue.

## **II. THE INSPECTOR GENERAL’S METHODOLOGY IS FLAWED**

As noted above, since 2015, the NYPD, along with the Law Department and the Comptroller’s Office, has been working to ensure that claims and cases challenging police action are reviewed on the

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<sup>2</sup> The New York City Law Department accepts service of process on behalf of the City and is the custodian of all complaints brought in courts against the City and its employees, including the NYPD and its members. In assessing and defending those lawsuits, the Law Department generates certain litigation data, as does the Office of the Comptroller. Both agencies routinely share this data with the NYPD. The NYPD’s analysis of the litigation data shared by the Law Department and Comptroller form the basis for all figures reported here, as described further below.

<sup>3</sup> See 2017 CCRB Annual Report, available at [https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy\\_pdf/annual\\_bi-annual/2017\\_annual.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2017_annual.pdf).

merits. In January of 2015, then First Deputy Mayor Anthony E. Shorris, on behalf of the Mayor of the City of New York, issued a letter to the unions that represent uniformed members of the service. The letter detailed a series of measures to enhance the representation of police officers sued in connection with the performance of their duties. The purpose of the letter was to set forth the City's new policy to relieve unnecessary burdens on individual officers who are the subject of meritless allegations in civil police action lawsuits. The policy included a commitment to an enhanced defense of officers, authorizing the Law Department to hire additional staff to ensure that the cases brought against officers are "serious matters rather than frivolous suits brought for the benefit of attorneys rather than plaintiffs."<sup>4</sup> The policy also directed a serious pre-settlement review of claims, including the review of sworn testimony of claimants and interviews of officers, to ensure against the settlement of frivolous claims. Consistent with the increase in staffing at the Law Department, the NYPD dedicated additional personnel to PALS to ensure that the Department's ability to identify, preserve, analyze and produce evidence to the Law Department remained at an equivalent capacity to meet the agencies' mutual goals.

Prior to the issuance of their present Report, OIG issued an earlier report on the same topic in April of 2015. In their earlier report, titled "Using Data from Lawsuits and Legal Claims Involving NYPD to Improve Policing" ("2015 Litigation Data Report"), OIG acknowledged that case settlements may be driven by motivations other than the merits of the case, including to avoid the uncertainty of litigation outcomes or reduce expensive litigation costs. At the time, OIG explicitly recognized that, in order for litigation data to be reliable and beneficial, it needs to distinguish "bona fide low-value cases from those which were potentially meritless and settled to avoid costly litigation."<sup>5</sup> OIG further accepted that the NYPD's ability to generate litigation data and analysis is dependent, at least in part, upon obtaining data from other agencies, including the Law Department and the Comptroller.

It is unclear why OIG, in their present Report, now maintains that the analysis of mere allegations by PALS, without merits-based data from any other agency, is somehow a reliable methodology. Put

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<sup>4</sup> See Appendix A.

<sup>5</sup> 2015 Litigation Data Report at P. 14.

simply, OIG disregards both its own earlier investigation and report in this area as well as the ongoing commitment across these three City agencies to work together to assess the *merits* of claims. OIG now recommends that the NYPD develop and utilize litigation data based on mere allegations. Indeed, OIG adopts this questionable methodology in their present Report while simultaneously declaring that “the fact that a claim or lawsuit is filed and the way in which it is resolved are not necessarily proof of liability or improper conduct.”<sup>6</sup> In a later section of the Report, OIG includes a chart purporting to illustrate “Trends in Allegations of False Arrest” yet again concedes that “these figures are not conclusive as to the true incidence of excessive force, false arrests, and denials of rights over this time period in these precincts.”<sup>7</sup> This, of course, begs the question as to the inherent value and reliability of OIG findings and, by extension, the validity of some of their recommendations.

In pursuing this flawed methodology, OIG fails to appreciate fully that far more complex set of data points that can be extracted in connection with a merits-based assessment and defense of cases and claims – the type of data that was the subject of both its own 2015 recommendations and the Department’s 2015 response. Then and now, the NYPD maintains that meaningful litigation data can only be extracted and utilized effectively based on an evidenced-based legal review of claims and cases and not on mere allegations contained in notices of claims and complaints.

In their present Report, OIG states that the “NYPD can design its own methods” to analyze litigation data, suggesting that the Department has yet to do so. This statement is puzzling given the transparency afforded OIG and the information that NYPD provided to them during their present investigation. Indeed, OIG conducted multiple interviews with the Department attorney who oversees PALS and received voluminous NYPD documents related to this issue. The information provided made clear that the NYPD *has already* designed and employed its methods for analyzing litigation data.

Rather than geo-mapping allegations on the face of every claim or complaint as OIG suggests, the methodology utilized by PALS in analyzing enforcement action that results in litigation is dependent upon

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<sup>6</sup> OIG Report at P. 4.

<sup>7</sup> OIG Report at P. 18.

the nature of the review, study or project and is generally more complex and nuanced than OIG's. Commonly, PALS personnel review a broad array of quantitative and qualitative data and information from the underlying incident, the litigation itself, meetings with the subject officers' or commands, interviews of subject matter experts, conferral with other agencies such as the Law Department and Comptroller, and factual and legal research. In sum, OIG's recommended methodology is simply far less sophisticated than the methodology already employed by the NYPD in identifying patterns and trends driving police action litigation.

Through the joint effort with its two partner agencies, the NYPD is able to analyze information gleaned from police action lawsuits, as well as other types of lawsuits, to identify areas for improvement in policy, training and supervision and has made changes in those areas when warranted. In this context, instead of relying on unproven and unreliable allegations from civil lawsuits as OIG did, the NYPD carefully evaluates all available evidence and case outcomes in determining remedial action. Relying on unproven or unreliable allegations, and not this evidence-based information, logically results in questionable, ineffective and, at times, unfounded remedial efforts.

Aside from its reliance on mere allegations, OIG's analytical methodology is also opaque. For instance, in evaluating "trends" in the volume of lawsuits in certain patrol commands, it does not appear that OIG controlled for the time at which the alleged wrongful conduct occurred. Certain claims in federal and state court do not accrue at the time of the underlying incident. For example, claims filed in 2017 challenging an alleged wrongful conviction may stem from an incident that took place over twenty or more years ago. Accordingly, the incident date or date of occurrence is a more meaningful litigation data point than the date the case or claim was actually filed in court. Remediating a present practice or policy that was different from the one in place twenty years before when an incident occurred is simply illogical. Similarly, OIG does not appear to consider rates of police contact with the community, or crime trends on a command-by-command basis. Commands that have dramatically more enforcement-related contacts with the community are likely to have a higher litigation volume than commands that have fewer personnel, cover a smaller geographical area, or are otherwise lower in crime.

It further appears that in “geo-mapping” incident location, OIG misunderstands that the geographic location of an incident does not correlate to the assignment of the members of service taking police action. For example, OIG’s method concluded that there were increases in claims in the 25<sup>th</sup> Precinct during the time frame examined. This does not, however, lead to the conclusion that there may be an issue in 25<sup>th</sup> Precinct officers’ enforcement actions. The increase may well have come from incidents involving any number of units that operate within the geographical boundary of the 25<sup>th</sup> Precinct, including one or more of the Department’s Citywide units.<sup>8</sup> Different units have different missions, equipment and training and it is, therefore, critical to evaluate and understand these specific characteristics of the personnel involved in the incident at issue in a particular lawsuit, including when identifying significant patterns in litigation that warrant remediation.

For example, officers in the Emergency Services Unit (ESU) receive training on the deployment of specialized equipment that only ESU utilizes. If an ESU officer or a member of the public is injured as a result of the utilization of a piece of specialized equipment, litigation may result. In that instance, ESU’s presence and use of that particular piece of equipment during the incident is a far more significant data point than the fact that the incident took place within the confines of the 25 precinct. Understanding the proper use of the equipment, the manufacturer’s specifications for that use, and the Department’s training regarding its use would likely enhance an understanding of how the injury came about. In this way, PALS, in consultation with operational experts, can recommend measures to prevent future injuries and litigation, by for example, suggesting different equipment, training or altering its use in the field. The fact that the equipment may have caused injury *within the 25th Precinct* is fairly meaningless in such a case, because if

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<sup>8</sup> Other Units or Bureaus that are located within the geographical boundaries of the 25th Precinct include Police Service Area 5, which patrols nine New York City Housing Authority developments including the Abraham Lincoln Housing Development, the Robert Wagner Housing Development, the Jackie Robinson Housing Development, and the Morris Park Housing Development, and Transit District 3, which covers that portion of the transit system that passes through the 25<sup>th</sup> Precinct. In addition, the Narcotics Borough Manhattan North and other specialized units operate within the boundaries of the 25<sup>th</sup> Precinct as well as multiple units that operate Citywide, including but not limited to, the Emergency Services Unit, Strategic Response Group, and the Critical Response Command.

unchecked, the same result may occur the next time in the geographical confines of a different precinct, or even a different borough, given ESU's City-wide responsibility.

Moreover, recent data regarding the outcomes in cases in which notices of claim and allegations in complaints are carefully evaluated to determine their merit clearly demonstrate that OIG's methodology is questionable. As noted above, the NYPD, the Law Department and the Comptroller's Office, working together, strive to identify cases in which allegations of police misconduct are without merit based on the available evidence. These cases are then rigorously defended in Court by the Law Department's attorneys. This year to date, juries have found in favor of officers in federal police action cases in more than 80% of the record twenty-two cases tried by the Law Department's Special Federal Litigation Division in the Southern and Eastern Districts of New York. This impressive record of success in police action cases that are defended on the merits is powerful evidence that mere allegations in lawsuits are not akin to actual "police misconduct," nor are they independently relevant to mitigating future litigation risk. The fact that over 80% of plaintiffs whose cases proceeded to trial could not prove their allegations in federal court belies the validity of OIG's recommendation that PALS rely on those same allegations in informing policy or measuring officer performance.

### **III. PALS DIRECTLY INFORMS DEPARTMENT POLICY & TRAINING**

Contrary to the conclusion drawn by OIG, the work performed by PALS routinely leads to changes in Department policy and training. These changes stem from legal advice to the Department and its employees. Specifically, PALS provides legal advice to commands ranging from precincts or specialized units to larger divisions and parent commands such as the Training Bureau, which develops and implements suggested training changes, and the Office of Management and Planning (OMAP), which is charged with publishing Department-wide policy. PALS's recommendations are implemented in a number of ways, including through revisions to the NYPD's Patrol Guide, publication of Legal Bureau Bulletins,<sup>9</sup> training

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<sup>9</sup> Legal Bureau Bulletins are publications routinely issued by the NYPD Legal Bureau that apprise members of the service of new legal developments, including recent binding court decisions and statutory law, as well as remind members of the service of existing established law.



sessions, seminars and consultation with members in certain assignments or commands. Also contrary to the suggestion in the Report, and consistent with one of its recommendations, PALS directly communicates and shares their analysis and insights with command leadership to ensure that effective changes are made.

In their Report, OIG creates the misleading impression that NYPD refused to cooperate with their investigation into NYPD's analysis of litigation data, claiming that the Department wrongfully withheld information and refused to grant interviews with NYPD attorneys. OIG is incorrect.

The NYPD did provide substantial information to OIG about PALS development, analysis and use of litigation data and did consent to OIG interviews with PALS attorneys pursuant to and in furtherance of OIG's review. Indeed, OIG's narrative in this regard fails to acknowledge the numerous times that NYPD made Department attorneys, as well as other Department executives, available for interviews concerning litigation data and the integration of such data into other Department systems. In fact, OIG met with the executive attorney overseeing the PALS unit twice in 2017 and met with Risk Management attorneys and executives in 2016 and again in 2017. All of these interviews focused on litigation data and its related uses. In addition to making Department executives available for interviews, and contrary to the narrative put forth by OIG, NYPD also produced more than a hundred pages of sensitive information related to litigation data analysis and monitoring of officer performance.<sup>10</sup> Thus, OIG's narrative that NYPD has been uncooperative and non-compliant is hardly accurate as NYPD fully satisfied OIG's requests for litigation data to the extent possible.

#### **IV. LITIGATION DATA IS USED TO EVALUATE OFFICER PERFORMANCE**

In its Report, OIG maintains that the NYPD has missed an opportunity<sup>11</sup> to use lawsuits and claims against officers to monitor officer performance, simply because that information is not tracked in one particular database. Putting aside whether a particular database exists for purposes of tracking litigation

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<sup>10</sup> OIG's inquiry into the Department's litigation data analysis was inextricably linked to inquiries related to the Department's performance monitoring and early intervention systems. Thus, it would be difficult to delineate clearly which document productions OIG used for purposes of developing this Report.

<sup>11</sup> OIG Report at P.10.

data, the Department has not missed any such opportunity to monitor officer performance by examining his or her litigation history. As the NYPD explained in response to OIG's earlier 2015 Report on the subject of litigation data, the Department has an early intervention system in place to identify and track at-risk officers, known as the Performance Monitoring Program. Indeed, the NYPD's Performance Monitoring Program was described in the OIG's *own* 2015 Litigation Data Report. In its 2015 response, the NYPD elaborated by providing the following information:

“As of June 2011, the Department's Performance Analysis Section (which is now part of the newly created Risk Management Bureau) started incorporating litigation data as another performance indicator with respect to individual officers who were already in monitoring programs. Appreciating that a quantitative review of litigation data can have value in and of itself as a performance indicator, the Department implemented a Civil Lawsuit Monitoring Program in September 2013. The program utilizes basic litigation data to identify officers eligible for this program. The criteria are initially based solely on a quantitative analysis of the number and type of lawsuits filed against individual officers within a set time frame. Any officer fitting this criteria could be placed in one of the Performance Monitoring Programs after a further qualitative analysis of the lawsuits and the underlying events.”<sup>12</sup>

The entirety of NYPD's previous response is attached as Appendix B.

OIG now seems to equate the implementation of a database, known as RAILS, with NYPD's awareness of officers who are at risk and may require assistance. Yet even without the full implementation of RAILS to include litigation data, the NYPD is presently aware of such officers. The Performance Analysis Section has incorporated litigation data as a performance indicator since June 2011, specifically creating the Civil Lawsuit Monitoring program in September 2013. Civil Lawsuit Monitoring is a program that mandates additional evaluations, restricted work hours, and other remedial measures to improve the performance of any officer who has been placed into that program. The review of an officer for placement in Civil Lawsuit Monitoring is triggered by quantitative litigation data -- which is precisely what OIG presently recommends, despite repeated confirmation from NYPD that Civil Lawsuit Monitoring has been in place for almost five years.

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<sup>12</sup> NYPD's July 17, 2015 Response to OIG's April 2015 Report entitled "Using Data from Lawsuits and Legal Claims Involving NYPD to Improve Policing" at Page 4.

There are a variety of automated triggers for Civil Lawsuit Monitoring review including triggers related to frequency, subject matter and outcome of litigation. Meeting the threshold criteria for Civil Lawsuit Monitoring based on such data generates a more detailed legal analysis of each police action lawsuit where a member of service is a named defendant. That analysis is performed by PALS attorneys, with the assistance of the Law Department, and determines if the named defendant member of service was personally involved in the incident at issue, whether the Department and/or an agency such as CCRB previously investigated the incident and their findings, and/or whether there was suspicion of wrongdoing by the subject member, as well as a review and inter-agency attorney conferral about what drove the resolution of cases that have been settled or tried to an unfavorable verdict.

The Department's Performance Monitoring program consists of three levels: Level I, Level II, and Level III. Civil Lawsuit Monitoring is Level II Performance Monitoring, which carries with it significant ramifications for any member of service placed in this program. An officer on Level II Monitoring is more closely supervised for a minimum of eighteen months. The fact that litigation data can trigger a review that may place an officer on Level II Monitoring is indicative of how seriously the NYPD considers this information and that the Department takes action based on such information, once its reliability and significance for a particular officer's performance is carefully evaluated.

The Civil Lawsuit Review Committee (the Committee) is comprised of representatives from the offices of the First Deputy Commissioner; Deputy Commissioner, Legal Matters, who chairs the Committee; Chief of Personnel, Chief of Department, Deputy Commissioner, Equity and Inclusion, and Risk Management Bureau. The Committee meets regularly to take a tailored, focused, qualitative review of subject officer performance and litigation risk and determine whether or not to place a member of service in Level II Civil Lawsuit Monitoring. The Committee may also recommend that a member of service receive additional training in a particular area, a change of assignment or transfer, and/or a debriefing conversation to determine how best to effectively assist the member and achieve the overall goal of

improving performance and reducing future civil litigation.<sup>13</sup> Litigation data, combined with legal analysis performed by PALS attorneys, supports the Department's risk mitigation measures – to ensure officers with high litigation risk are provided with the supervision, training and other available tools to reduce that risk, including re-assignment when indicated.

As a result, the Department is very much aware of officers who may require intervention despite that lawsuit data is not presently entered into its Risk Analytics and Information Liability System (“RAILS”) database. Ultimately, RAILS, which is designed to use algorithms to identify and predict litigation risk, will be a significant, additional tool to develop information about patterns and trends in litigation, on an officer, command, or citywide basis. To be clear, however, the NYPD, Law Department and Comptroller's development of more meaningful litigation data for NYPD to utilize in RAILS will be the *additional* tool to assess and mitigate litigation risk. The same or similar work is already being performed on a daily basis through the combined efforts of three agencies, driving the dramatic decrease in new lawsuits challenging police action.

The NYPD continues to explore how to capture meaningful litigation data points on an officer-by-officer basis and incorporate that data into the RAILS system, taking into account limitations in human and technological resources. The Department has no objection to public ally releasing information about what types of data are entered into RAILS when that data becomes available, consistent with the Department's transparency in divulging how it utilizes litigation data now.

## V. CONCLUSION

The NYPD's evidence-based approach to remedial action makes far more sense than simply analyzing litigation volume on the basis of geographic incident location. In order for litigation data to be valuable, it must be derived from sources that are verifiable and credible. Such information is only attained

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<sup>13</sup> A debriefing may consist of a one on one discussion with a PALS attorney about the officer's individual litigation history, or with a uniform executive from the Risk Management Bureau to better understand the officer's operational experiences that may be high-risk. A debriefing may also consist of both, with a combination of attorney(s) and uniform supervisor(s) present.

from high quality, fact-driven investigations. Litigation data derived from simply reviewing a notice of claim or complaint on its face has little probative value. The NYPD previously explained the futility of OIG's present methodology in its 2015 Response to OIG's earlier report on litigation data.<sup>14</sup> Going forward, the NYPD will continue to assess claims and cases through high-quality, fact driven investigations, identifying significant patterns and trends in litigation and implementing appropriate corrective measures.

## **VI. NYPD'S RESPONSES TO OIG-NYPD'S RECOMMENDATIONS**

**Recommendation #1: NYPD should analyze Department-wide litigation patterns as well as observable patterns and trends within individual precincts and units in order to identify areas for improvement in Department policies, training, supervision, and tactics.**

**Implemented in part by NYPD prior to OIG's Report and Recommendation and Under Consideration in part.**

The NYPD presently analyzes observable patterns and trends within individual precincts and units in order to identify areas for improvement in Department policies, training, supervision, and tactics. The Department will consider whether analyzing Department-wide litigation patterns has added value given available resources and noting that the type of qualitative analysis of litigation data in which PALS presently engages is more reliable, effective and time consuming than mere collection of non-specific Department-wide data, such as notices of claims and allegations in complaints.

**Recommendation #2: NYPD should create internal reports that describe specific Department-wide and precinct or unit level patterns and trends in legal claims and should share these reports with command leadership.**

**Implemented in part by NYPD prior to OIG's Report and Recommendation and Under Consideration.**

As noted above, PALS already directly communicates and shares their analysis and insights with command leadership to ensure that effective changes are made. The NYPD will consider whether reducing every such consultations into a written report adds value to this practice.

**Recommendation #3: NYPD should regularly enter data about claims naming individual officers into its new Risk Assessment Information Liability Systems (RAILS), or comparable early intervention system, so that NYPD is aware of at-risk officers who may require assistance.**

**Under Consideration in part and Rejected in part.**

Regularly entering data into RAILS about claims naming individual officers is not effective as this type of data is not reliable. See above.

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<sup>14</sup> The Response is attached as Appendix B.

To be clear, the NYPD is already aware of at-risk officers who may require assistance by virtue of the NYPD's Civil Lawsuit Monitoring program. The Department therefore disagrees with OIG that entering data into RAILS is essential to maintaining or developing such awareness. As the NYPD informed OIG prior to the issuance of the Report, the Department has been carefully considering and evaluating how best to enter reliable data into RAILS and will continue to do so.

**Recommendation #4: NYPD should create public reports that do not violate rules of confidentiality, taking care to disclose only the number and general nature of claims filed against the Department as well as the current state of any interventions or policy changes.**

**Rejected.**

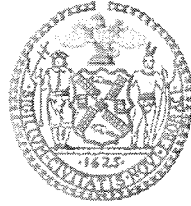
The Comptroller already publishes non-privileged litigation data in the form of its Annual Reports and Claimstat Reports, which are posted publicly on the internet, in addition to sharing data directly with the NYPD. The Law Department has similarly posted its inaugural report pursuant to Local Law No. 166 of 2017 on their agency's web page. Any non-privileged information the Department could similarly report would be superfluous, and the state of any interventions or policy changes stemming from attorney-client communications or attorney work product is clearly privileged information.

**Recommendation #5: NYPD should increase the number of employees focusing primarily on tracking litigation trends in order for NYPD to conduct proactive litigation analysis so that patterns and trends can be identified, tracked, and, where necessary, addressed.**

**Under Consideration.**

The NYPD routinely assesses staffing levels to provide services in conformance with its mission.

# APPENDIX A



OFFICE OF THE MAYOR  
THE CITY OF NEW YORK

ANTHONY E. SHORRIS  
FIRST DEPUTY MAYOR

January 30, 2015

Mr. Roy Richter  
President  
Captains' Endowment Association  
233 Broadway, Suite 1801  
New York, NY 10279

Mr. Michael Palladino  
President  
Detectives' Endowment Association, Inc.  
26 Thomas Street  
New York, NY 10007

Mr. Lou Turco  
President  
Lieutenants' Benevolent Association  
233 Broadway, Suite 1801  
New York, NY 10279

Mr. Edward Mullins  
President  
Sergeants Benevolent Association  
35 Worth Street, 2<sup>nd</sup> Floor  
New York, NY 10013

Dear Colleagues:

As you know, Mayor De Blasio is deeply committed to doing everything in his power to insure the safety and support the work of the members of service at every rank in the New York City Police Department. Under his leadership, the City has committed hundreds of millions of dollars in new resources towards the agency. However, there are other issues affecting the work of the Department that go beyond financial matters. Over the past few weeks, beginning at the Mayor's meeting with each of you and Commissioner Bratton on December 30, 2014, we have been discussing in various forums some of the issues of concern to the members of the Department, and your suggestions have been enormously helpful to us in understanding and addressing them. In this letter, I would like to focus the specific issues you have raised with us around the legal representation of members of service by the City.

In response to the concerns you have raised, the Mayor has directed us to make a number of changes. The City's Law Department will be undertaking a series of measures to enhance the representation of police officers sued in connection with the performance of their duties to relieve unnecessary burdens on individual officers against whom claims of misconduct have not been established. Toward that end, effective immediately, the Law Department is adopting the following policies:

- **Timely Notification.** No member of the Department should ever be surprised to find a suit has been filed or settled against them. Henceforth, the Law Department will promptly notify the NYPD of all civil cases filed against individual officers so that NYPD can, in turn, notify such officers. Further, consistent with sound legal practice, the Law

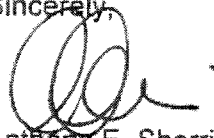


Department will promptly notify NYPD of any settlement of actions against individual officers.

- **Enhanced Defense of Officers.** Too often, as a result of limited resources, the Law Department has faced difficult choices about which cases should be defended in court, too often leaving cases settled that could be defended. Therefore, the Law Department will be authorized in the upcoming budget to hire thirty (30) additional attorneys and ten (10) paralegals to enhance its ability to defend claims brought against officers and the City. In addition, the Department will make every effort to depose complainants under oath to insure cases brought against them and the City are serious matters rather than frivolous suits brought for the benefit of attorneys rather than plaintiffs.
- **Evaluation of Claims Before Settlement.** The Law Department will undertake a pre-settlement review of claims sufficient to ensure against the settlement of frivolous claims, including the review of sworn testimony of claimants and interviews of officers.
- **Legal Representation.** You have told us that officers too often worry that the Law Department will not be there to defend them when cases arise. While this happens only very rarely, it is not right that members of the Department should have this concern when they are performing their duties appropriately. Therefore, in those cases where there are open investigations into whether a police officer acted contrary to law or NYPD policy, the Law Department will consult with the investigative body and review all available materials to assess the likelihood that a conflict will arise if it undertakes representation of the officer. If the Law Department determines that a conflict is unlikely, it will undertake full representation of the officer. If the attorneys feel they are unable to make such an assessment to a reasonable degree of certainty, the City will pay for counsel to represent that officer until and unless the officer is formally charged with engaging in conduct in violation of law or NYPD policy. Only in the event that the Law Department determines that it is very likely that the officer violated law or NYPD rules – or if the officer is uncooperative in the defense of the case – will the City will not represent the officer or pay for counsel.
- **Dismissal of Claims Against Individual Officers.** It will be the general policy of the Law Department to require dismissal of all claims against individual officers as part of the stipulation of settlement. Any exceptions to this policy must be approved by a senior supervisor of the Law Department.
- **Officer Contribution to Settlement.** The Law Department will not seek to have officers make a financial contribution towards the settlement of any cases in which no wrongdoing was found. Further, we will request the City Comptroller follow the same policy.
- **No Pay Cases.** Moving forward, if the Law Department concludes that a case brought against police officers regarding the performance of their duties utterly lacks merit, then that case will not be settled – even if an economic cost-benefit analysis suggests otherwise.
- **Education.** The NYPD will educate officers concerning these new policies.

I believe these changes are responsive to the concerns you have raised with us in our conversations, and I look forward to continuing that interaction moving forward. I remain grateful for your candor and commitment to an open and effective dialogue.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Shorris', written over the word 'Sincerely,'.

Anthony E. Shorris  
First Deputy Mayor

cc: Honorable Zachary Carter, Esq., Corporation Counsel  
Honorable William Bratton, Commissioner, NYPD  
Lawrence Byrne, Esq., Deputy Commissioner, NYPD

# APPENDIX B



POLICE DEPARTMENT

NEW YORK, N.Y. 10038

LAWRENCE BYRNE  
DEPUTY COMMISSIONER, LEGAL MATTERS

July 17, 2015

Honorable Bill de Blasio  
Mayor of the City of New York  
City Hall  
New York, NY 10007

Honorable Melissa Mark-Viverito  
Speaker  
The New York City Council  
250 Broadway, 18<sup>th</sup> Floor  
New York, NY 10007

Honorable Mark G. Peters  
Commissioner  
Department of Investigation  
80 Maiden Lane  
New York, NY 10038

Honorable Phil Eure  
Inspector General  
Office of the Inspector General – NYPD  
80 Maiden Lane  
New York, NY 10038

Dear Mayor de Blasio, Speaker Mark-Viverito, Commissioner Peters and Inspector General Eure:

Pursuant to Local Law 70 and the New York City Charter, the New York City Police Department (NYPD) hereby submits its response to the Office of Inspector General for the NYPD's (OIG-NYPD) April 2015 Report entitled "Using Data from Lawsuits and Legal Claims Involving NYPD to Improve Policing" (April Report). Prior to the release of the April Report, the NYPD was far along in working on several objectives that are related to the OIG's current recommendations. As such, the NYPD agrees with all of the recommendations in the OIG's April Report and which were already being implemented. Specifically, the OIG recommended: 1) the NYPD should perform a qualitative review of the most relevant data contained within legal claims and lawsuits against the NYPD; 2) the NYPD should create an interagency working group between the NYPD, the Comptroller's Office and the Law Department to improve their police-involved litigation data collection, coordination, and exchange; and 3) the NYPD should provide the public with details about the NYPD's early intervention system and its litigation data

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analysis team and solicit suggestions for further development. The NYPD is already in the process of implementing each of these recommendations. There are, however, certain barriers that exist that prevent the Department from adopting all aspects of some of the OIG's recommendations at this time. This response will include an explanation of those limitations and discuss other projects undertaken that relate to the OIG's recommendations.

### 1) Analysis of Litigation Data

With respect to the first recommendation that the NYPD perform a qualitative review of relevant data within legal claims and lawsuits filed involving police action, the NYPD agrees that analysis of litigation data can be a useful tool for enhancement of the NYPD's practices department-wide as well as in the review of officer performance. A quantitative and qualitative review of relevant litigation data can help law enforcement: (i) identify patterns and trends of police misconduct that warrant remediation; (ii) enhance the current Early Warning Systems already in place to identify at-risk officers; (iii) improve and positively shift Department culture overall; (iv) identify issues at both the officer and departmental level, in an effort to decrease both costs to the City<sup>1</sup> and legal claims/ lawsuits filed against the NYPD and (v) enhance the Department's reputation by improving the relationships between NYPD officers and the communities we serve.

In order for litigation data to be valuable, however, the data must be derived from sources that are verifiable, credible and must be attained from high quality, fact-driven investigations. Litigation data derived from simply reviewing a Notice of Claim or Complaint and information on its face without any investigation, for example, has little probative value. Data derived from settlement practices that are driven for reasons unrelated to the substance of the allegations is also of little if any probative value and needs to be discounted when analyzing litigation data.

As the April Report noted, the practice of collecting and analyzing a broad set of litigation data points remains a relatively new endeavor in law enforcement. In 1999, the United States Department of Justice<sup>2</sup> published a series of reports (1999 Report), that sought objective evidence to support whether there was an increased frequency in police use of excessive force<sup>3</sup> at the time, or whether the public's perception could be attributed to a misconception or misunderstanding of police use-of-force generally.<sup>4</sup> During preliminary studies, analysts used data obtained from civilian complaints and civil lawsuits but discovered that this analysis was "critically flawed." This flaw was attributed to the use of lawsuit data in *isolation*, i.e., as an exclusive means of analysis conducted without regard to the qualitative review (of police use of

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<sup>1</sup>The amount paid in a particular settlement is ultimately controlled by the Comptroller's office. However, the NYPD is dedicated to adopting best practices as between NYPD, the Comptroller's office and the Law Department moving forward, which we expect will likely lower settlement payouts (i.e., costs to the City's taxpayers) but more importantly, are likely to decrease the rate in which lawsuits are filed against the Department overall.

<sup>2</sup>Research Report, Nat'l Ins. of Justice & Bureau of Justice Statistics, "Use of Force by Police, Overview of National and Local Data," NCJ 176330 (Oct. 1999) ([6 studies], 30 pages).

<sup>3</sup>The OIG's April Report and the response of the NYPD is not limited to litigation data on use-of-force complaints, rather, it considers the use of data obtained from all legal claims and lawsuits against individual officers or the Department and City as a whole. However, the 1999 Report and its related studies are informative and still relevant today. For example, it remains true as a matter of fact that "[l]aw enforcement officers are authorized to use force in specified circumstances, are trained in the use of force, and typically face numerous circumstances during their careers when the use of force is appropriate." *Id.* at 5. Further, it was aptly noted that the "activities of the police often fall under public scrutiny nonetheless." *Id.*

<sup>4</sup>*See supra*, fn. 10. *Id.* at 5.

excessive force).<sup>5</sup> The use of such data is meaningless unless it is expanded to include additional information gathered from “all use-of-force incidents,” such as use-of-force reports, arrest records, injury reports, and medical records. Each source of information is relevant to measuring both the incidence of the problem and to provide an accurate perspective that would adequately address the issue.

Data that has been taken from sources that fail to account for whether a particular outcome was reached purely as a “business-decision” without regard to the merits of a case are devoid of any useful metrics in performing qualitative analysis and review. Such data includes frivolous lawsuits that contain weak or meritless assertions, even those asserted in good faith, and nuisance lawsuits that may be filed with an improper purpose,<sup>6</sup> in order to extort a settlement less than the defendant’s cost to defend. Settlement data is most limited in the context of early settlements, which indicates that minimal or no investigation of the allegations in the claims was conducted. When a case settles prior to completed discovery (or sworn statements, at a minimum), the outcome may be unrelated to an officer’s actual conduct or behavior. Criminal cases may also create limitations that devalue the use of litigation data. Internal prosecutorial policies or other resource constraints may lead to the dismissal of certain criminal charges that are unrelated to the strengths or weaknesses of the evidence in particular cases. Instances where a prosecution is declined or dismissed without regard to the legality of the underlying arrest may result in a civil claim against the arresting and or investigating officer(s). In these instances, the NYPD is often unable to obtain any useful data or address any legitimate concerns related to officer misconduct or other departmental issues.

Moreover, many other entities are exploiting litigation data that is unverified or gathered without sufficient investigation into the merits (as described above). The creation of so-called “police accountability” databases is one example of such exploitation. These databases contain information about police-action lawsuits without regard for truth, accuracy or verification of the allegations.<sup>7</sup> They also often do not reflect the outcomes of the suits or the merits. Our officers are rightfully concerned about the effects of the use of litigation data on their careers and reputations. When an officer is acting lawfully and in a manner that is consistent with department policy and procedures, fear of lawsuits should never deter officers from taking lawful actions.

Mayor de Blasio, Corporation Counsel Carter, and Commissioner Bratton recognized that the City’s prior business-oriented decisions to offer settlement agreements without either a satisfactory investigation into the merits of a case, or sometimes even in spite of evidence tending to dispute the strength of a plaintiffs’ allegations, encouraged the filing of frivolous lawsuits and resulted in adverse consequences that negatively impacted the Department’s

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<sup>5</sup> *Id.* at 10, 23.

<sup>6</sup> McMillian, Lance P., The Nuisance Settlement “Problem”: The Elusive Trust And a Clarifying Proposal, 31 Am. J. Trial Advoc. 221 (Fall 2007) (discussing many of the “misconceived perceptions” surrounding the concepts and theories underlying nuisance litigation and “so-called ‘nuisance settlement.’”)

<sup>7</sup> It has come to the attention of NYPD that at least some of these databases have not endeavored to identify and/or exclude lawsuit data it obtained where either: (i) a particular officer was dismissed entirely due to mistake; (ii) the case reached some other resolution favorable to the officer (e.g., trial verdicts, discovery, or successful motion practice); or when (iii) the prosecutor’s office declined to move forward with the prosecution of a criminal defendant. Moreover, information taken from so-called “bad cop” databases—which is used as a tool in criminal trials during cross-examination, where police officers frequently serve as witnesses—can have an adverse effect shifting the jury’s attention away from the defendant and instead, toward improperly attacking the credibility of a police officer.

reputation, the reputations and morale of individual officers, and trust within the community. Mayor de Blasio implemented significant changes to city policies and procedures to ensure that cases are defended and to discourage the settlement of frivolous claims. The Mayor (i) increased the size of the staff at the City's Law Department to enhance its ability to defend claims brought against officers and the City; (ii) changed the general city policy to require dismissal of all claims against individual officers as part of any stipulation of settlement; and (iii) implemented a "no pay" policy in instances where a case is brought against police officers regarding the performance of their duties that lacks merit even if an economic cost-benefit analysis suggests settlement might be more cost-effective in the short term.<sup>8</sup> These significant changes were well received by all of the police unions.

With respect to efforts to perform a qualitative analysis of relevant and trustworthy police-related litigation data, as the April Report noted, the Department had already begun to develop and implement an integrated database dedicated to utilizing litigation data it collects from the Comptroller's Office and the Law Department for use in the future. This database is intended to provide real time data regarding officer performance not only to the newly created Risk Management Bureau, which is responsible for department-wide risk mitigation and analysis, but to the officer's supervisors. This new bureau has over 150 personnel and is still growing.

The Department has used various sources of data to develop monitoring programs designed to assist members of service with personal problems or other negative behavior as early as the 1970's. In 2003, the Performance Monitoring programs used performance indicators such as civilian complaints, evaluations and a point system on the personnel record of the member to enlarge the Early Warning System. As of June 2011, the Department's Performance Analysis Section (which is now part of the newly-created Risk Management Bureau) started incorporating litigation data as another performance indicator with respect to individual officers who were already in monitoring programs. Appreciating that a quantitative review of litigation data can have value in and of itself as a performance indicator, the Department implemented a Civil Lawsuit Monitoring program in September 2013. This program utilizes basic litigation data to identify officers eligible for this program. The criteria are initially based solely on a quantitative analysis of the number and type of lawsuits filed against individual officers within a set time frame. Any officer fitting these criteria could be placed in one of the Performance Monitoring Programs after a further qualitative analysis off the lawsuits and the underlying events.

Additional uses of the litigation data include analyzing trends and patterns on a broader scale. The newly organized Risk Management Bureau has been dedicated to this task since 2014. As such, the Department remains committed to continuing and improving its already-existing "Early Warning Systems" as discussed in the April Report as well as expanding the analysis of the litigation data to improve Department's practices.

## **2. Interagency Communications**

With respect to the second recommendation that NYPD establish an interagency working group between the Comptroller's Office and the Law Department to improve the collection and analysis of police-involved litigation data, under Commissioner Bratton's leadership, and with the leadership of Corporation Counsel Carter and City Comptroller Stringer, the NYPD has

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<sup>8</sup> Letter from Anthony Shorris, First Deputy Maory to Roy Richert, President, Captain's Endowment Association et al (Jan. 30, 2015). Attached as Exhibit A

established effective lines of communication and inter-agency working groups to ensure that the parties involved can perform full investigations of the claims or lawsuits. Specifically: (i) NYPD has established an unprecedented open line of communication with the City Comptroller in an effort to assist in a thorough review of claims to determine which claims to settle and is working collaboratively toward identifying other patterns and trends that may need to be addressed citywide; (ii) NYPD has devoted more resources in support of the City Law Department's efforts to defend the NYPD and its members through establishment of a Police Action Litigation Section, devoted to gathering information, documents, and witnesses to assist in the defense and proper resolution of claims and lawsuits. This new unit within the NYPD Legal Bureau consists of over 25 very experienced and highly trained lawyers and investigators.

### **3) Transparency Regarding Litigation Data Analysis and Early Warning System**

We agree in principle with the third recommendation that NYPD make certain aspects of both its EIS and its litigation data analysis process more transparent. Specifically, OIG suggests NYPD disclose more about which performance indicators it tracks for officers and how the monitoring levels operate and recommends NYPD's litigation analysis team publish reports disclosing trends detected. NYPD is committed to transparency on these topics subject to legal limitations such as Civil Rights Law § 50-a that the April report notes, as well as the deliberative process privilege and other legal privileges. The legislative history of Civil Rights Law § 50-a<sup>9</sup> originally adopted and later amended, however, simply cannot be read in a manner that would allow the NYPD to fully adopt the OIG's recommendation. The statute was designed to prevent abusive exploitation of personally damaging information contained in officers' personnel records—perhaps most often in connection with a criminal defense attorney's FOIL application for purposes of general cross-examination of a police witness in a criminal prosecution. From the record, the legislature's objective went beyond precluding disclosure on behalf of defendants in pending criminal cases<sup>10</sup> and was extended to also prevent disclosure of officers' personnel records<sup>11</sup> *except* when a legitimate need for them has been demonstrated sufficiently to obtain a court order, generally upon a showing that they are actually relevant to an issue in a pending proceeding.<sup>12</sup> The original legislation and construction of its reach was sponsored and passed as a safeguard against potential harassment of officers through unlimited access to information contained in personnel files, explicitly in recognition of the fact “[i]t has become a matter of harassment (of police officers) that personnel records (are) constantly requested, scrutinized, reviewed and commented upon, sometimes publicly.”<sup>13</sup>

### **Conclusion**

The NYPD agrees that quality analysis of litigation data can improve the NYPD's reputation, officer morale, and police-community relations. Under the direction and leadership of Commissioner Bratton, the NYPD has been working cooperatively with the Law Department and the Comptroller's office to identify and exclude from analysis any litigation data that was derived from “nuisance” claims or lawsuits or “nuisance-value” settlements and are pleased with

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<sup>9</sup> See *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 154-55 (N.Y. 1999).

<sup>10</sup> See, Mem of Senator Padavan and Member of Assembly DeSalvio, Mem of Div of Criminal Justice Servs, Mem of Div of Budget and Mem of Div of State Police, Bill Jacket, L 1976, ch 413.

<sup>11</sup> *E.g.*, Freedom of Information Act requested pursuant to New York City local law, or Freedom of Information Law requested under federal law (FOIA and FOIL, respectively).

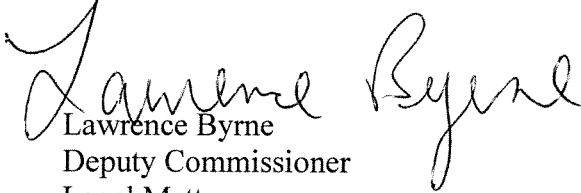
<sup>12</sup> *Id.* (emphasis supplied).

<sup>13</sup> See Mem of Police Conference of New York, Bill Jacket, L 1976, ch 413.



the progress to date. The NYPD is committed to: (i) using valuable litigation data as a measure for improving policing as well as other patterns and trends citywide; (ii) continuing to work with the Comptroller and the Law Department in the mutual objective of ensuring that claims and lawsuits are not resolved without a more substantive review that will provide valuable litigation metrics; (iii) greater transparency with the public, to the extent it does not conflict with our existing legal obligations or is otherwise contrary to applicable law; and (iv) rebuilding community trust, enhancing the NYPD's reputation as a law enforcement agency, and ensuring the safety of the public and our officers. We look forward to continuing to improve collaboration and cooperation between the Comptroller's Office and the Law Department to further these goals. We welcome the continued input from the OIG-NYPD and intend to work continue to work collaboratively with your Office and the Community as a whole to ensure the safety of the public and our Police Officers in every neighborhood throughout the City.

Very truly yours,

  
Lawrence Byrne  
Deputy Commissioner  
Legal Matters