

Joni Brown

From: Sharon Abrahamson [REDACTED]@rlslawyers.com>
Sent: Friday, March 26, 2021 3:01 PM
To: Shawny Williams
Cc: Angela Knight;Michael Rains
Subject: Lieutenant Fabio Rodriguez
Attachments: [2021.03.26](MLR to SW)Request for Skelly.pdf

Good afternoon Chief Williams. Attached is correspondence requesting a *Skelly* hearing on behalf of Lieutenant Rodriguez.

Sharon Abrahamson
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RLS RAINS LUCIA STERN ST. PHALLE & SILVER, PC

Michael L. Rains
Principal
MRains@RLSLawyers.com

March 26, 2021

VIA EMAIL [SHAWNY.WILLIAMS@CITYOFVALLEJO.NET] & U.S. MAIL

Shawny Williams, Chief of Police
Vallejo Police Department
111 Amador Street
Vallejo, CA 94590

Re: Vallejo Police Lieutenant Fabio Rodriguez *Skelly* Hearing Request

Dear Chief Williams:

I represent Vallejo Police Lieutenant Fabio Rodriguez relative to Internal Affairs Case #2020-10. I am writing to request a *Skelly* hearing on behalf of my client relative to the this case, which resulted in the issuance of a Notice of Intent to Impose a 40 hour suspension.

I will need some time to review the materials provided to Lieutenant Rodriguez and to consult with him prior to the hearing. Feel free to contact me so we can find a date that is mutually agreeable for the hearing or if you have any questions for me.

Very truly yours,

RAINS LUCIA STERN
ST. PHALLE & SILVER, PC



Michael L. Rains

Cc: Angela Knight, Executive Assistant to the Chief of Police
Lieutenant Fabio Rodriguez

RECEIVED

MAY 17 2021

CITY ATTORNEY'S OFFICE
CITY OF VALLEJO

May 10, 2021

CONFIDENTIAL

Shawny Williams
Chief of Police
Police Department
City of Vallejo
111 Amador Street
Vallejo, CA 94590

Dear Chief Williams:

Introduction

On April 1, 2021, Assistant Director of Human Resources Mark Love assigned me as the *Skelly* Officer in the City of Vallejo's ("City's") proposed disciplinary action of Lieutenant Fabio Rodriguez. The City proposes to discipline this employee through the imposition of a forty (40) hour suspension without pay.

The Skelly hearing ensures that the employee has been informed of the allegation(s) through a notice of intended disciplinary action, has received (or the opportunity to receive) the materials upon which the proposed action is based, has an opportunity to refute the allegations, and has an opportunity to mitigate the allegations or rehabilitate his standing with the City prior to the imposition of any actual disciplinary action.

The function of the Skelly Officer is to provide an objective review of the proposed discipline and the employee's response. The Skelly Officer makes a recommendation as to whether the disciplinary action should be sustained, modified in some specific way, or revoked.

Documents

I received from the City, and have reviewed, the following documents via email¹:

- March 23, 2021 Notice of Intent to Discipline
- Transcript of Lieutenant Rodriguez' interview, part 1
- Transcript of Lieutenant Rodriguez' interview, part 2
- Police Department Internal Affairs Investigation IA-2020-10, with 26 exhibits (A-Z)
- Audio recording of the August 3, 2020 internal affairs interview with Lieutenant Rodriguez²

The City had previously emailed this Skelly Officer the catalogue of the Police Department's Lexipol policies. The Notice of Intent to Discipline references various policies/policy sections that Lieutenant Rodriguez is alleged to have violated. On April 25, 2021, I emailed Assistant Director of Human Resources

¹ The City also sent the below materials, excluding the audio recording, by FedEx to the Skelly Officer. Unfortunately, those documents were not received by the Skelly Officer until 9:38 a.m., April 26, 2021. The materials received by email were reviewed and relied upon.

² I relied upon the transcript of the internal affairs investigative interview and did not listen to the audio recording.

a reprint of the various Police Department policies listed in the Notice of Intent to Discipline, asking that the City verify the text accuracy of the reprints from the Lexipol catalogue. On April 26, 2021, Assistant City Attorney Meera Bhatt emailed this Skelly Officer stating the policy reprints in my (Mr. Fox's) email are the complete list of the alleged violations and are the current text from those policies. Those various policies are reprinted in this letter.

Skelly Meeting

Assistant Director of Human Resources Mark Love arranged for a Zoom video conference call for me to hear from the employee and any employee representative(s). The Zoom meeting was conducted on April 26, 2021 beginning at approximately 5:00 p.m. (Eastern time) and ended at approximately 6:20 p.m. In attendance were:

- Marc Fox, consultant/Skelly Officer
- Fabio Rodriguez, Lieutenant
- Mike Rains, counsel for Mr. Rodriguez (Rains Lucia Stern St. Phalle & Silver)
- Meera Bhatt, Assistant City Attorney
- Mark Love, Assistant Director of Human Resources³

Summary of Skelly Meeting

Following introductions, Lieutenant Rodriguez' representative, Mike Rains, began the presentation. The following is a summary of his presentation:

- If you look at the personnel file, nothing but outstanding performance as a Sergeant or Lieutenant
- [REDACTED] years with the department
- First discipline
- Worked in heavy-duty assignments; tough assignments in a difficult city
- Employee is straight-arrow; doesn't violate policies or practices, doesn't cut corners
- Wants me (Skelly Officer) to think about the burden of proof
- The investigator and the Chief of Police didn't think about the burden of proof
- A resounding no that the allegations violate an established practice or policy
- The notice of intent to discipline alleges two main policy violations:
 - Policy 306 – officer-involved shootings and deaths
 - Policy 801 – property and evidence
- Mr. Rains has been a POST internal affairs instructor for thirty (30) years; "this case can never fly" as the City cannot show policy violations
- The best that the Chief of Police can say relates to Policy 306.5 –what does that first sentence mean? The District Attorney's Office takes no role in gathering/processing evidence.
- A District Attorney Investigator was at the scene (Walgreen's) with the Vallejo Police Department; the investigator was aware of the two [Vallejo Police Department] body cameras
- Mr. Rains asked the investigator (Andre) if he has ever been consulted on keeping evidence; the investigator replied no; the local agency does that and there is no right for the District Attorney to intervene on how the agency processes a crime scene

³ Zoom showed Mr. Love as a participant, but he neither spoke nor was seen during the Skelly meeting.

- Under Policy 306.7, no one was assigned to work exclusively under the directions of the City Attorney at the scene
- The City Attorney's Office Katelyn [Knight] was at the police department briefing, including discussion about evidence, including the windshield, and no one said anything

Lieutenant Rodriguez said there was never a specific conversation about the windshield, the briefing meeting discussion was about interviews of police department personnel

Mr. Rains continued:

- The City Attorney's Office representative was at the briefing
- In terms of Policy 801.3.1 – Property Booking Procedure – the vehicle was driven from where the incident occurred, parked at the [REDACTED] office, and was not booked into evidence/property
- In terms of Policy 801.6.1 – Responsibility of Other Personnel – nothing in this section signals that the Lieutenant doesn't have the authority to release property/evidence
- In terms of Policy 801.6.4 – Authority to Release Property – this section doesn't say that the Lieutenant cannot release unless they call the District Attorney or City Attorney Offices.
- Policy 801.6.5 says "shall" by the investigations division; Lieutenant Rodriguez conformed with that policy
- There is absolutely no policy violation

Mr. Rains continued as to practices:

- [REDACTED] initiated the request to replace the windshield
- There were three (3) other occasions just like this one:
 - See pages 18-19 of Lieutenant Rodriguez' transcript (Exhibit X), the first [oldest] incident is in 2008 and the most recent was in 2018
- [REDACTED] also talks about the same practice
- [REDACTED] has more experience in officer-involved shooting investigations than anyone still working at the Vallejo Police Department
- In terms of trajectory, [REDACTED] said there was no second point for trajectory as the subject was no longer at the scene
- Pointed to [REDACTED] interview where he spoke on why the truck wasn't seized as evidence and the [REDACTED] experiences (pages 14, 15 and 16 of Exhibit Y)
- [REDACTED] is a twenty (20) year veteran of the department
- Pointed to [REDACTED] interview where he spoke regarding any cause or concern in regards to the windshield (page 14 of Exhibit Z)

Mr. Rains concluded:

- No clear policy was violated
- Arguably, not even close to a policy violation
- Four (4) experienced, capable individuals spoke to "this is how we've done it"
- The District Attorney Investigator did not say anything
- [City Attorney's Office] Katelyn Knight not saying anything
- There's no way an arbitrator in this case will uphold this discipline
- City hasn't met its burden of proof

The following is a summary of Lieutenant Rodriguez' presentation:

- Speaking from the heart
- Has been with the Vallejo Police Department since age [REDACTED]
- Never done anything to bring disrespect or negativity to the agency
- Decision made that night and subsequent [day(s) regarding windshield replacement]
- Practices [consistent] to department and within industry (example – 2018 situation)
- Was lead investigator when McCarthy shot through windshield; vehicle was photographed and put back into service

During the Skelly meeting, I:

- Said I preferred to not hear about any contents within Lieutenant Rodriguez' personnel file as the Chief wrote in the Notice of Intent to Discipline that "you [Lieutenant Rodriguez] has been an exemplary employee without significant failures" and any contents within the personnel file that the Chief was relying upon for the proposed discipline would have been so stated in the Notice of Intent to Discipline
- told Lieutenant Rodriguez that even good employees can error, warranting discipline and not every action warrants a progressive disciplinary tract⁴
- asked what Lieutenant Rodriguez/Mr. Rains was looking for in terms of resolution

Mr. Rains replied "I don't think my client warrants any discipline."

Determinations/Findings:

The internal affairs investigation and the Notice of Intent to Discipline ask the following question:

"Did Lt. Rodriguez mishandle property/evidence from a crime scene that occurred on June 2, 2020, in relation to the Vallejo Police Investigation 20-06322, violating the Officer Involved Shootings & Deaths Policy, the Standards of Conduct Policy, and/or the Property and Evidence Policy in an incident involving the handling of a windshield from a City Police vehicle impacted by a weapon discharged by an on-duty Vallejo Police Officer, fatally wounding a suspect?"

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⁴ I gave the example of tardiness which would warrant a progressive disciplinary approach and workplace violence which would not warrant that same approach

It is my judgement that Lieutenant Rodriguez

- failed to “[c]onfer with other personnel of the department, officials of other city departments, or other public civic agencies on law enforcement problems⁵”,
- as a manager, viewed the June 2, 2020 shooting, and all follow-up actions – including the role of the City Attorney’s Office – myopically through the lens of the Officer-Involved Shooting and Death Policy (including the County of Solano Officer Involved Fatal Incident Protocol) and failed to take into account other Police Department and City interests, in particular that the officer-involved shooting and resulting death of an individual would undoubtedly lead to a tort claim and demand to preserve evidence/documents/etc.
- warrants corrective action regarding the above two points.

The Notice of Intent to Discipline lists six (6) policy violations:

1. Policy 306 – Officer-Involved Shootings and Deaths; section 306.5 Criminal Investigations

Section 306.5, Criminal Investigations, begins by stating that the District Attorney’s Office is responsible for the criminal investigation into the circumstances of any officer-involved shooting or death. The policy further describes obtaining voluntary statements, reports by involved Vallejo Police Department Officers (306.5.1), witness identification and interviews (306.5.2), and investigative personnel (306.5.3). The complete text of these policy sections is appended.

2. Policy 306 – Officer-Involved Shootings and Deaths; section 306.7 Civil Liability Response

A member of this department may be assigned to work exclusively under the direction of the legal counsel for the Department to assist in the preparation of materials deemed necessary in anticipation of potential civil litigation.

All materials generated in this capacity shall be considered attorney work product and may not be used for any other purpose. The civil liability response is not intended to interfere with any other investigation but shall be given reasonable access to all other investigations.

3. Policy 321 – Standards of Conduct, Section 321.2 Policy

The continued employment or appointment of every member of the Vallejo Police Department shall be based on conduct that reasonably conforms to the guidelines set forth herein. Failure to meet the guidelines set forth in this policy, whether on- or off-duty, may be cause for disciplinary action.

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⁵ From the Police Lieutenant classification specification’s Example of Duties

4. Section 321 – Standards of Conduct, Section 321.4 General Standards

Members shall conduct themselves, whether on- or off-duty, in accordance with the United States and California Constitutions and all applicable laws, ordinances and rules enacted or established pursuant to legal authority.

Members shall familiarize themselves with policies and procedures and are responsible for compliance with each. Members should seek clarification and guidance from supervisors in the event of any perceived ambiguity or uncertainty.

Discipline may be initiated for any good cause. This policy is not intended to cover every possible type of misconduct.

5. Section 321 – Standards of Conduct, Section 321.5.6 Efficiency

(a) Neglect of duty.

(b) Unsatisfactory work performance including, but not limited to, failure, incompetence, inefficiency or delay in performing and/or carrying out proper orders, work assignments or the instructions of supervisors without a reasonable and bona fide excuse.

(c) Concealing, attempting to conceal, removing or destroying defective or incompetent work.

(d) Unauthorized sleeping during on-duty time or assignments.

(e) Failure to notify the Department within 24 hours of any change in residence address, contact telephone numbers or legal marital status.

6. Section 801 – Property and Evidence, Section 801.6.4 Authority to Release Property

The Investigations Division shall authorize the disposition or release of all evidence and property coming into the care and custody of the Department.

The Notice of Intent to Discipline states the following, for which I agree with the sentiments and expressed statements except as described further below:

“As the investigator found, you “failed to provide proper foresight and direction to preserving the windshield for potential future examination in criminal or civil proceedings and had a duty as a risk manager representing the City of Vallejo.” [page 4 second to last paragraph, second sentence]

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“Similarly, your failure to coordinate with the City Attorney’s Office on the potential implications of the destruction of the windshield in the event of civil litigation...Furthermore, you failed to notify the captain to whom you report.” [page 5, first paragraph]

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“Taken together, your lack of consideration for the importance of preserving the windshield and your failure to coordinate with any of the other parties responsible for the investigation into the shooting or the potential litigation stemming from the shooting....these duties are especially important for individuals in a supervisory capacity, such as a Lieutenant...” [page 5 third paragraph]

Policy 306 – Officer-Involved Shootings and Deaths; section 306.5 Criminal Investigations

I am unable to sustain a finding that Lieutenant Rodriguez violated Policy 306.5 – Criminal Investigation. There is no evidence that Lieutenant Rodriguez interfered, impeded, prevented or otherwise disrupted the District Attorney Office’s responsibility and/or ability to interview Vallejo personnel.

As it relates to section 306.5.1, Reports by involved VPD Officers, this section appears moot as the suspect was deceased and the materials within the Skelly packet indicate no other suspect who “remain outstanding or subject to prosecution for related offenses.”

As it relates to section 306.5.2, Witness Identification and Interviews, the Skelly packet materials speak to a briefing meeting coordinated by Lieutenant Rodriguez and attended by a representative from the District Attorney’s Office, City Attorney’s Office and other relevant Vallejo Police Department personnel. No evidence is within the Skelly packet which finds that Lieutenant Rodriguez interfered, impeded, prevented or otherwise disrupted the identification of all persons present at the scene and in the immediate area (306.5.2(a)), the collection of witness statements (306.5.2(b)). There were no statements regarding any agency – whether it was the Vallejo Police Department, the Solano County District Attorney’s Office, or any other public agency, contacting the suspect’s known family and associates (306.5.3(c)).

Policy 306 – Officer-Involved Shootings and Deaths; section 306.7 Civil Liability Response

I am unable to sustain a finding that Lieutenant Rodriguez violated Policy 306.7 – Civil Liability Response. This policy section is limited in scope – it states that a member of the Vallejo Police Department may be assigned to work exclusively under the direction of legal counsel, materials generated are attorney work product, and the civil liability response is not intended to interfere with other investigations. None of these elements (assignment, attorney work product privilege, non-interference with other investigations) are described in the Skelly packet materials.

Policy 321 – Standards of Conduct; section 321.2 Policy and 321.4 General Standards

These policy sections related to both on- and off-duty conduct.⁶

The record reflects that Lieutenant Rodriguez had acknowledged receipt of the relevant Lexipol policies [Exhibit J]

- Policy 306 – Officer-Involved Shootings and Deaths was issued January 27, 2020 and acknowledged by Lieutenant Rodriguez on February 18, 2020

⁶ Nothing within the Skelly packet suggests any off-duty conduct by Lieutenant Rodriguez.

- Policy 321 – Standards of Conduct was issued on June 1, 2019 and acknowledged by Lieutenant Rodriguez on October 21, 2019
- Policy 801 – Property and Evidence was issued on January 27, 2020 and acknowledged by Lieutenant Rodriguez on February 11, 2020

I am unable to make a finding that Lieutenant Rodriguez needed clarification or guidance of “any perceived ambiguity or uncertainty” as he describes how he acted consistently with other shot-out windshields. [Clarified further, below.]

Policy 321 – Standards of Conduct, section 3215.6 Efficiency

I do sustain a finding that Lieutenant Rodriguez violated subpart (a) – Neglect of duty – and (b) unsatisfactory poor performance. It is my recommendation for corrective action, not disciplinary action.

The following two items are listed within the “Factual Basis for Recommended Action” of the Notice of Intent to Discipline:

- The June 2 Officer Involved Shooting resulted in large demonstrations in multiple Bay Area Counties, with a substantial focus on demonstrations in Vallejo. The protest and the shooting garnered national press coverage.
- Shortly after you authorized the destruction of the windshield, an attorney representing the family of the suspect filed a preservation order including a request for preservation of the windshield from Police Vehicle #118.⁷

For a number of years, I asked applicants for employment job-related questions with a request that the reply be in a STAR format – describing the Situation or Task at hand, the Actions the individual personally took, and the Results. This STAR format applies here, too:

- The Situation or Task is the officer-involved shooting
- The Actions are the briefing meeting, the collection of evidence that Lieutenant Rodriguez oversaw, the authority granted by the Lieutenant to remove vehicle 118 from the crime scene, the Lieutenant’s authorization to replace the windshield, and his failure to communicate that replacement decision with others

Results are broadly stated in the two bullet points from within the Factual Basis for Recommended Action; however, the Skelly packet fails to connect Lieutenant Rodriguez through his actions, or inactions, to these two bullet points. This “failure to connect” includes the internal affairs investigator’s conclusionary statement (page 13, second full paragraph) of:

⁷ The Skelly packet includes within Exhibit T the June 15, 2020 email from the attorney representing the family of the suspect. The email includes the request for preservation of evidence. The City Attorney’s Office sent an email to a number of individuals with the pre-litigation hold directive. A July 9, 2020 email from the family’s attorney restates the demand for preservation of evidence and gives notice of the intend to examine a drone and the truck as part of their upcoming litigation.

"The fact that Lt. Rodriguez failed to consult with outside resources that were available and the inability to have proper foresight in a role as a Police manager has resulted in a situation that has now reflected unfavorably upon the Vallejo Police Department. Even though past practice may dictate procedure, it does not necessarily mean current procedure and practice is correct based on past practice."

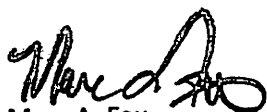
In terms of any "past practice", Lieutenant Rodriguez described three similar incidents of police vehicles being repaired following gunshots. The incidents occurred in 2008, 2013 or '14, and 2018. Others interviewed as part of this investigation relayed similar information. Nothing within the Skelly packet contradicts the accuracy of the employees' recollections, that any windshield was retained, or that any employee was disciplined. Given this lack of additional Skelly packet information, it may be reasonable to assume that if the employer has permitted a certain kind of conduct to go on among employees without doing anything about it, a later claim that employees are "on notice" that such conduct is unacceptable becomes difficult to sustain.

Thus, while I believe that Lieutenant Rodriguez neglected his duty and demonstrated unsatisfactory poor performance, the lack of Skelly packet documentation regarding any prior incident's disciplinary action (that is, a rebuttal to the employee's claim of "past practice") makes it untenable for me to now find such similar conduct as unacceptable (i.e., a policy violation).

Policy 801 – Property and Evidence, Section 801.6.4 Authority to Release Property

I am unable to sustain a finding that Lieutenant Rodriguez violated Policy 801.6. – Authority to Release Property for two reasons. This policy section does vest with the investigations division the authority to make decisions on the disposition or release of evidence and property. While I disagree with the Lieutenant's decision, it was a decision that he was authorized to make. On a finer technicality, the police truck in question was never entered as evidence and if never entered into the system as evidence then it could not be disposed/released from evidence.

Sincerely,



Marc A. Fox
Consultant/Skelly Officer

Attachments:

Policy 306 – Officer-Involved Shootings and Deaths; section 306.5 Criminal Investigations

Copy:

Mark Love, Assistant Director of Human Resources
Meera Bhatt, Assistant City Attorney

Policy 306 - Officer-Involved Shootings and Deaths

306.5 CRIMINAL INVESTIGATION

The District Attorney's Office is responsible for the criminal investigation into the circumstances of any officer-involved shooting or death.

If available, investigative personnel from this department may be assigned to partner with investigators from outside agencies or the District Attorney's Office to avoid duplicating efforts in related criminal investigations.

Once public safety issues have been addressed, criminal investigators should be given the opportunity to obtain a voluntary statement from involved officers and to complete their interviews. The following shall be considered for the involved officer:

- (a) VPD supervisors and Internal Affairs Unit personnel should not participate directly in any voluntary interview of VPD officers. This will not prohibit such personnel from monitoring interviews or providing the criminal investigators with topics for inquiry.
- (b) If requested, any involved officer will be afforded the opportunity to consult individually with a representative of his/her choosing or an attorney prior to speaking with criminal investigators (Government Code § 3303(i)). However, in order to maintain the integrity of each involved officer's statement, involved officers shall not consult or meet with a representative or an attorney collectively or in groups prior to being interviewed.
- (c) If any involved officer is physically, emotionally or otherwise not in a position to provide a voluntary statement when interviewed by criminal investigators, consideration should be given to allowing a reasonable period for the officer to schedule an alternate time for the interview.
- (d) Any voluntary statement provided by an involved officer will be made available for inclusion in any related investigation, including administrative investigations. However, no administratively coerced statement will be provided to any criminal investigators unless the officer consents.

306.5.1 REPORTS BY INVOLVED VPD OFFICERS

In the event that suspects remain outstanding or subject to prosecution for related offenses, this department shall retain the authority to require involved VPD officers to provide sufficient information for related criminal reports to facilitate the apprehension and prosecution of those individuals (Government Code § 3304(a)).

While the involved VPD officer may write the report, it is generally recommended that such reports be completed by assigned investigators, who should interview all involved officers as victims/ witnesses. Since the purpose of these reports will be to facilitate criminal prosecution, statements of involved officers should focus on evidence to establish the elements of criminal activities by suspects. Care should be taken not to duplicate information provided by involved officers in other reports.

Nothing in this section shall be construed to deprive an involved VPD officer of the right to consult with legal counsel prior to completing any such criminal report.

Reports related to the prosecution of criminal suspects will be processed according to normal procedures but should also be included for reference in the investigation of the officer-involved shooting or death.

306.5.2 WITNESS IDENTIFICATION AND INTERVIEWS

Because potential witnesses to an officer-involved shooting or death may become unavailable or the integrity of their statements compromised with the passage of time, a supervisor should take reasonable steps to promptly coordinate with criminal investigators to utilize available personnel for the following:

- (a) Identification of all persons present at the scene and in the immediate area.
 - 1. When feasible, a recorded statement should be obtained from those persons who claim not to have witnessed the incident but who were present at the time it occurred.
 - 2. Any potential witness who is unwilling or unable to remain available for a formal interview should not be detained absent reasonable suspicion to detain or probable cause to arrest. Without detaining the individual for the sole purpose of identification, officers should attempt to identify the witness prior to his/her departure.
- (b) Witnesses who are willing to provide a formal interview should be asked to meet at a suitable location where criminal investigators may obtain a recorded statement. Such witnesses, if willing, may be transported by a member of the Department.
 - 1. A written, verbal or recorded statement of consent should be obtained prior to transporting a witness. When the witness is a minor, consent should be obtained from the parent or guardian, if available, prior to transportation.
- (c) Promptly contacting the suspect's known family and associates to obtain any available and untainted background information about the suspect's activities and state of mind prior to the incident.

306.5.3 INVESTIGATIVE PERSONNEL

Once notified of an officer-involved shooting or death, it shall be the responsibility of the designated Investigations Division supervisor to assign appropriate investigative personnel to handle the investigation of related crimes. Department investigators will be assigned to work with investigators from the District Attorney's Office and may be assigned to separately handle the investigation of any related crimes not being investigated by the District Attorney's Office.

All related department reports, except administrative and/or privileged reports, will be forwarded maintained exclusively by members who are authorized such access. Administrative reports will be forwarded to the appropriate Division Commander.