



WASHINGTON COUNTY

Inter-Department Correspondence

DATE: February 14, 2019

TO: Sheriff Pat Garrett; US Jeff Mori; CD Fischer; CD Koch; Commanders MacGregor, Shaver, Jones, and Degman

FROM: Elmer M. Dickens, Senior Assistant County Counsel

SUBJECT: TNT / SERT

I have met with PPB, and their risk personnel, to discuss the issues of liability around police use of force as a result of the Flores-Haro decision. Based upon what I learned I believe that there are a number of issues that greatly increase the risk to your deputies, the County and Washington County taxpayers if they are involved in a use of force in the City of Portland.

The first issue is the Multnomah County DA's Office. The makeup of the Portland jury pool and the anti-police attitudes of many residents appears to have a large impact upon the DA's ability to successfully bring charges against suspects that are injured in police use of force cases. We saw that in the Flores-Haro case when Flores was allowed to enter a no-contest plea, without requiring him to provide a factual basis for the plea. A successful criminal prosecution with a guilty verdict would have effectively eliminated the opportunity for a later civil suit. In the case of Flores-Haro, he pled to reckless endangerment and menacing, which would have ended the civil case had he actually pled guilty instead of a no-contest plea. The Flores civil case later resulted in a 7 million dollar verdict against Washington County, in part because the jury in the civil case was not allowed to hear about his conviction and plea.

Secondly, the Multnomah County DA appears to be taking every police shooting to a grand jury, even a recent case where the medical examiner found that the cause of death was suicide based upon the statements and actions of the suspect and the suicide notes in his pockets. It is absolutely appropriate to take an officer involved shooting to a grand jury if there is a legitimate question about whether the use of force was a crime. Police officers are paid to use force, and even deadly force when it is justified. A policy of making *every* officer who uses deadly force become a criminal suspect in a grand jury proceeding is disturbing, because it means that the DA doesn't need to have facts that support a good faith belief that a crime was committed. Officers should not be made criminal suspects simply because they do their job. If the force appears to be reasonable under a totality of the circumstances and there are no facts that indicate a crime has been committed, it seems inappropriate to take that case to the grand jury.

The next issue is that there have been cases where the City would only indemnify the officers with a "reservation of rights." What that means in simple terms is that the City will hire the officer an attorney, but in the event that the officer is found to have violated the suspect's civil rights – the City will not pay for that attorney or for any judgment against the

officer and it will be solely the officer's responsibility. In other words, the City only pays if the City and the officers win at trial. That is hugely stressful for the officer who is at-risk of losing his or her personal assets while the case drags on for years until the case goes to trial. The City has done this to its own officers, and there is no reason to think that your deputies would be treated differently. Even if the City agreed to accept full liability for police use of force incidents pursuant to ORS chapter 402, there is a real question about when they might choose not to provide full indemnity and defense to the involved officers.

The final issue is the Portland Independent Review Commission. They have been very critical of police use of force and would likely investigate any police use of force in the City. The Commission has hired an outside auditor from California to review every police shooting that occurs in the City. Portland staff indicated that could happen even if the shooting was ours, not PPBs. The auditor they hired, Office of Independent Review (OIR), has recently released a report about recent Portland shootings. That review is very critical of the police tactics in virtually every case they review, even when the suspect is armed and fires a weapon. Their perspective appears to be that the police should retreat, find cover, and consider every alternative to using force every time they are confronted with a threat, no matter how imminent. That can and will have real impacts on pending use of force lawsuits. The most recent OIR report which was just released is very critical of recent Portland officer involved shootings, even those that are actively being litigated. That report will absolutely be helpful to the plaintiffs in any pending lawsuit against the City that was included in the report.

All of these risks are likely to significantly drive up the legal costs associated with any police use of force in the City and increase the risk of an adverse judgment in related civil suits. There are other risks, but these are enough to convince me that sending your deputies into Portland presents huge personal risks to those deputies, the County, and Washington County taxpayers who will ultimately have to foot the bill. At best, a deputy involved in shooting in Portland can expect a grand jury regardless of how clearly justified the force and a critical review of the shooting by the Independent Review Commission and OIR. The deputy could potentially be subjected to a criminal prosecution driven largely by local politics, subjected to a civil suit where the City refuses to indemnify and defend their actions or does so under a reservation of rights, and where the Independent Police Review Commission actually pays OIR to create a report that will be used against the officer in any civil suit.

The Portland Police Bureau has been a fantastic partner for many years, but these issues are much larger than PPB and beyond their control. There is no question that working collaboratively with all our law enforcement partners is the best outcome for public safety, but exposing your deputies, the County, and Washington County taxpayers to these known risks outweighs those benefits in my opinion. My recommendation is that Washington County deputies, including TNT, Mobile Field Force, and even Tri-Met deputies, not be sent into Portland due to these risks, except in true life safety incidents that overwhelm the capabilities of PPB and present extreme risk to life and safety.