HONOLULU POLICE COMMISSION
City and County of Honolulu
State of Hawaii
Minutes of the Regular Meeting
November 15, 2017

CALL TO ORDER
Chair Sword called the meeting to order at 2:00 p.m. on
Wednesday, November 15, 2017, in Conference Room A at the
Honolulu Police Department Alapai Headquarters

PRESENT
Max J. Sword, Chair
Cha Thompson, Vice-Chair (Exited at 4:37 p.m.)
Karen Chang, Member
Eddie Flores, Member (Exited at 4:19 p.m.)
Jerry Gibson, Member
Steven H. Levinson, Member
Loretta A. Sheehan, Member

Daniel W. S. Lawrence, Executive Officer
Richard Lewallen, Deputy Corporation Counsel
Erin Marie Yamashita, Secretary

ALSO PRESENT
Susan Ballard, Chief of Police
William R. Axt, Acting Deputy Chief
Alan K. Bluemke, Acting Deputy Chief
Jonathan A. Grems, Captain
John D. McCarthy, Captain
Lynne Uyema, Legal Advisor

ASCERTAINMENT
OF QUORUM
Counsel Lewallen ascertained that a quorum was present

CHIEF OF POLICE REPORT
Chief Ballard thanked commissioners for the opportunity to lead HPD into a new beginning and
leaving everything in the past and move forward. She also thanked Acting Deputy Chiefs Axt
and Bluemke for their work and introduced Jonathon Grems as the Administrative Operations
Deputy Chief and John McCarthy as the Field Operations Deputy Chief effective December 1,
2017.

Chief Ballard then provided commissioners with a presentation of her vision, “A New Beginning”
which was also provided to the Command Staff. She also informed commissioners she has met
with the Women’s Caucus to discuss domestic violence issues and that the organization of the
department will be evaluated. (A copy of the presentation is attached to the minutes.)
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CHIEF OF POLICE REPORT (Continued)
Prevent and Solve Crime – Take advantage of resources available when it comes to cyber crimes. Continue to work on domestic violence. Chief Ballard met with members of the Women’s Caucus and will meet again to discuss domestic violence issues and to look for ways to improve and reduce domestic violence incidents. Address elder abuse, fraud, and take care of vulnerable members of society. Review investigative units to see if there is a more efficient way to run operations, possibly re-creating the juvenile services division to address juvenile crimes and address problems.

The Criminal Investigative Unit (CIU) was one of the first units reviewed by Chief Ballard who considers the unit is a necessary one that collects intelligence HPD needs. There will be a new commander of CIU beginning December 1, 2017, who will review the entire operation and make recommendations.

Patrol staffing and strategies for patrol are under review. The research analyst is looking into possibly realigning beats, adding to beats, re-drawing beat lines, and knowing the minimum staffing required for community and HPD officers safety.

Homeless issues will continue to be problems and HPD will continue to work with other City departments and agencies.

Recruit and Retain Quality Employees – No shift-schedule changes, maintain the current 5/9 schedule (no 3/12 or 4/10 schedules). HPD’s Human Resources Division is working with the Department of Human Resources to review the hiring process, which currently takes approximately one year from application submission to job offer. The goal is to reduce the hiring time to six to seven months, review disqualification criteria, and fill vacancies.

Improve Organizational Efficiency – Review and research new or better ways to operate. Chief Ballard communicated to commanders that HPD cannot be satisfied with status quo. Commanders need to take calculated risks and move HPD forward and should make suggestions on ways to improve HPD. HPD may consider increasing online reporting for certain types of reports to allow officers to be available for immediate responses. Expedite investigations by PSO so officers and complainants receive a timely resolution. Evaluate the Crime Reporting System (CRS), which is a home-made system. HPD needs to have a system that is supported by a company with resources to manage the needs of a large police department.

Advance Use of Technology – Continue the pilot program of the body-worn cameras, which were well received by the City Council. Currently the cameras are being used in District 1 during the third watch and certain solo-bike units. There have been some issues but nothing insurmountable for the vendor being tested. The program is expensive, personnel and storage will be about $4 million per year as well as purchasing of equipment, which is estimated at $2.5 to $3 million per year (camera and supporting equipment needed).
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CHIEF OF POLICE REPORT (Continued)

Improve Training – Are recruits and officers being provided with proper training – need to know versus nice to know, enough report writing training, review and audit recruit curriculum and the annual recall training to make sure officers are receiving the training they need. Increase online training, making it more accessible for officers to receive training. Change to ethics and integrity training, which will be done department-wide. Chief Ballard will do the first training for the command staff during an upcoming command meeting. From that point on either Chief Ballard or one of the deputies will conduct the department-wide training.

Restore Community Trust – emphasize transparency and accountability by providing information as soon as it is available within legal bounds and collective bargaining agreements. Each district will set priorities for community needs because each district has different priorities/needs. Chief Ballard met with the SHOPO Honolulu Board and requested their assistance in reminding officers to be nice and to explain what will happen next and what will be done when responding to calls for service. It is important for officers to know they represent HPD and how they treat community members is a reflection upon HPD.Officers should also make reports and not just a sixty-series. Chief Ballard will serve as the spokesperson for major issues and Deputy Chief McCarthy will be the spokesperson for the majority of other things within the department. Continue programs such as the youth, citizens, and business police academies, coffee with a cop and town hall-type meetings. Chief Ballard would like to be available to the public for various events.

Questions from Commissioners
Vice-Chair Thompson asked what determined which districts would test the body cameras. Chief Ballard informed commissioners District 1, third watch was selected because there are a variety of cases, it is a busy district, and there will be a variety of videos to review.

Commissioner Gibson asked when the dashboard cameras would be tested to which Chief Ballard informed commissioners the dashboard cameras would be tested once a decision has been made on the body-worn cameras as transition to dash cameras would be fairly easy.

Commissioner Sheehan asked Chief Ballard if she would be changing the information shared with the commission during the chief’s report and explained previous chiefs had only provided information on traffic fatalities, arrests, and citations issued. Chief Ballard asked commissioners what they would like her to include in her report and would appreciate their forwarding their suggestions.

Commissioner Chang asked Chief Ballard what the goals and objectives were for using the body cameras and how the success rate would be determined. Chief Ballard informed commissioners the purpose of the body cameras is in response to the community’s request to improve trust and keep officers accountable and the public honest. Footage will also be used in reviewing any complaints against officers in which an officer was equipped with a body-worn camera.
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CHIEF OF POLICE REPORT (Continued)
Commissioner Chang also asked what HPD’s annual budget was and what percentage of the budget was for body-worn cameras. Chief Ballard informed commissioners the total budget this fiscal year is approximately $281 million ($242 million is for salaries, $38 million for current expense). The budget does not include anything for body-worn cameras and that equipment with a cost of $5,000 or more and will last more than five years is included in the Capital Improvement Project (CIP) budget, which is approximately $350,000. HPD is requesting additional funding for the body-worn cameras, so the program can operate properly.

Commissioner Sheehan wanted to know if a video is required for criminal prosecution, would the Prosecutor’s Office use some of their budget. Chief Ballard stated she could not respond to that question, and that prosecutors have the ability, with the test system, to be able to access any videos uploaded by officers. It then is their responsibility to take any necessary action, such as redaction, prior to providing the video to the defense attorney, and any cost would be the responsibility of the Prosecutor’s Office, not HPD.

Commissioner Sheehan asked if HPD could look at a system similar for the 911 call centers because 911 calls can occasionally be used in court when someone calls and is excited and/or hysterical and that there are certain hearsay exceptions. She wanted to know if HPD would consider a program where the Prosecutor’s Office could mine the 911 system to collect evidence that could be used by a prosecutor in court as a hearsay exception or as evidence of a crime. Chief Ballard informed commissioners the Prosecutor’s Office can currently request the information that could be provided to a prosecutor if they needed it for part of the case. Commissioner Sheehan said her understanding is that the procedure is only done for felonies and not misdemeanors. Chief Ballard responded that whatever the prosecutor requests, HPD tries to provide.

Commissioner Levinson said the body-worn camera has not cost HPD anything because it is a pilot project and he understands that Axon is making the equipment available to HPD in hopes that a long-term contract will result. He then wanted to know what the cost would be once HPD makes a decision to move forward. Chief Ballard estimated $4 million per year for storage costs and personnel.

Chair Sword requested Chief Ballard keep the commissioners informed because they want to help her and HPD be successful.

APPROVAL OF MINUTES
Commissioner Flores made a motion to approve the September 28, 2017, meeting minutes. Vice-Chair Thomson seconded the motion.

Discussion: Commissioner Levinson requested three changes and provided his requested changes (page 5: standard area of measure be corrected to standard measure of error; page 6: err to error; and page 7: forum to form).

Vote to approve: By a unanimous vote, the motion carried.
PUBLIC TESTIMONY
Ms. Lili Mattes
Ms. Mattes attended the meeting today to talk about her children kidnapped by the police in 2004. She has not seen her children for a long time and the HPD was very corrupt in the past. Her children were taken away by CPS and are now 23 years old. She has only seen them twice. God has shown her in her dreams how her children have grown up and she wants to see her children but cannot find them. She asked that the new chief help her find her children.

Ms. Mattes was also evicted from KPT, her credit cards and debit cards were stolen and when she reported it to the police there were no results, and the Kapolei police closed her case and will not open the door for her. Police will not make reports for her, walk away humbly, and say nothing.

Chair Sword thanked Ms. Mattes for attending the meeting and requested a member of HPD get Ms. Mattes information.

NEW BUSINESS
Commissioner Levinson explained he requested the administrative appeal of Officer Nguyen be placed on the agenda. He then made the following motion: The Police Commission instruct its attorneys in this matter, which is the Office of Corporation Counsel, to confess error in the Circuit Court on behalf of the Police Commission.

He explained that his motion is to instruct the attorneys to advise the Circuit Court that the Commission is now in agreement with Officer Nguyen’s request for legal representation in connection with the Puana v. Kealoha lawsuit and not to defend the action taken earlier by this Commission. Commissioner Levinson further explained that his motion is based on a Hawaii Supreme Court precedence and read excerpts from a decision he wrote, Chun vs. Board of Trustees of the Employees’ Retirement System of the State of Hawaii, dated March 25, 1998 located at 87 Haw. 152, 952 P. 2d 1215. It was a unanimous decision of the Hawaii Supreme Court.

Commissioner Levinson also explained the vote in Officer Nguyen’s case was four to deny and two to grant legal representation and said it is his understanding that one of those four votes may have changed her mind on the merits of the matter since. He also believes that the vote of the Chair was made in misunderstanding of what Officer Nguyen’s burden was in establishing his entitlement to legal representation. Officer Nguyen was not required to testify on his own behalf and would have been, in Commissioner Levinson’s view, a “damn fool” to testify in his own behalf and his testimony would have been irrelevant in any event and he was not required to present any evidence whatsoever other than the complaint against him.

Commissioner Levinson went on to say that what determines the outcome or should determine the outcome of a request for legal representation are the factual allegations of the complaint. If the complaint alleges acts done in the performance of duty as a police officer, the requesting officer is entitled to legal representation, whether the factual allegations are true or not and whether the officer’s conduct was lawful or not. It is clear to him (Commissioner Levinson) that Officer Nguyen more than met his burden based upon the allegations of the complaint.
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He added that a few weeks previous to the denial of Officer Nguyen's request for legal representation the Commission granted the request for legal representation to one of Officer Nguyen’s co-defendants in lawsuit, Officer Akagi. The allegations in the complaint against Officer Akagi were virtually identical to the allegations directed at Officer Nguyen and so the outcome should be the same.

Chair Sword then entertained a motion to take the matter into executive session to confer with Corporation Counsel on the issue and could come back out to the open session for the vote. Commissioner Levinson stated he did not see a reason for the Commission to go into executive session to which Commissioner Sheehan agreed.

Vice-Chair Thompson requested to address a comment made in Commissioner Levinson’s explanation and stated that if she is the female that changed her mind, she thinks she did at one time and it was because she was drowning when he (Commissioner Levinson) was providing his explanation and she wanted the Commission's counsel to provide an explanation. Vice-Chair Thompson said that her understanding was, that Officer Nguyen had passed the time that he had that would make it legal for Commissioners to grant counsel. She is for opening it up and wants to make sure she understands.

Chair Sword stated that because there are two new commissioners and for the purposes of discussion with counsel, the Commission have discussion in executive session and return to the open session for the vote.

Commissioner Flores stated the Corporation Counsel should also be given an opportunity to defend their recommendation because commissioners should listen to both sides. Commissioner Levinson explained that Commissioner Flores may not understand what the motion is and that Corporation Counsel is the Commission's lawyer and commissioners are the client and that commissioners decide what the Commission’s legal position is, if it is defensible it is Corporation Counsel's job to advocate it, whether Corporation Counsel likes it or not.

Chair Sword repeated his reason for discussion in executive session for the benefit of Commissioners Chang and Gibson. Commissioner Chang then asked if the purpose of discussion executive session is because Corporation Counsel had a different point of view to which Vice-Chair Thompson answered in the affirmative.

Chair Sword again entertained a motion to hold discussion in executive session. Commissioner Flores made a motion to discuss the matter in executive session. Vice-Chair Thompson seconded the motion.

Discussion: Vice-Chair Thompson wanted to know if the discussion would occur today to which Chair Sword indicated it would be discussed during the executive session today.

Vote: By a vote of 6 to 1 (Levinson), the motion by Commissioner Flores passed.
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Request from Birney B. Bervar, Esq. for Commissioner Sheehan's Recusal
Chair Sword asked if everyone has had a chance to review the letter from Mr. Bervar. He also asked Commissioner Sheehan if she had any comment/reply. Commissioner Sheehan said she had no problem with his request and will recuse herself.

Discussion of Performance Goals and Evaluation Criteria for the Chief of Police
As everyone was provided with previous job description and evaluation for the former chief, he would like to have comments from commissioners by the next meeting on December 6, 2017, because the next evaluation will be December 2018. Commissioner Levinson shared that he feels it may be useful to discuss with Chief Ballard as to what her job description is and in addition what her view is as to the important, relevant performance criteria.

Chair Sword agreed and said that he would like to have something to provide to Chief Ballard for discussion and come up with a plan.

Commissioners all agreed that there should be discussion with Chief Ballard. Commissioner Gibson pointed out that some of the criteria are subjective and that with the presentation given by Chief Ballard today, it looks like a lot could be incorporated into the job description and evaluation.

Commissioner Sheehan agreed with Commissioner Gibson and said she, too, has no problem re-examining how the Chief is evaluated and pointed out that the Charter requires the Commission to evaluate the Chief of Police at least annually, not just annually. Based on her experience Commissioner Sheehan stated that in the past the Commission has refused to do anything that was less than a year apart. She also stated that there is nothing wrong with the criteria and that in her view the problem was because the Commission absolutely refused to examine the problems that were going on in the Police Department and chose to rely upon the word of Chief Kealoha. She feels it was a fatal error and commissioners should examine more than a list of criteria as to how the Commission will proceed in the future and how commissioners will prevent mistakes.

Vice-Chair Thompson stated that in all fairness, Mr. Taketa is not here to defend himself, and that she does not feel that is what happened—that he refused to do anything. There are circumstances now over the last four or five years that she has seen that could have been improved but she believes things will be run differently now, perhaps better, and is appreciative of Chief Ballard. Vice-Chair Thompson also agrees with Commissioner Sheehan that outlines used by past commissioners should be considered and that more questions can be asked.

Commissioner Chang shared that she also read the materials provided to commissioners and shared that the most important thing for her, as a new commissioner, is to build trust with the Chief and Department. The current forms are useful but commissioners should be able to get Chief Ballard’s perspective as she has a new vision, mission, and priorities which could be very different from the previous chief. She also requested that Chief Ballard provide suggested changes to commissioners for consideration at a future meeting.
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Discussion of Performance Goals and Evaluation Criteria for the Chief of Police (Continued)
Commissioner Sheehan requested clarification that everyone was in agreement that they would
like Chief Ballard and the deputies to review the old competencies for discussion at a future
meeting. Chair Sword then requested the matter placed on the December 6, 2017, agenda due
to the anticipated lack of quorum for a meeting on December 20, 2017.

UNFINISHED BUSINESS
Proposed Amendments to Honolulu Police Commission Rule 10 and Rule 11
Commissioner Levinson requested Rule 10 and Rule 11 be taken in two pieces because there
is no controversy concerning proposed amendments to Commission Rule 10. The proposed
amendments to Rule 10 bring the rule into harmony with the recent amendments to the City
Charter and Corporation Counsel is on record with being fine with what is being proposed.

Commissioner Levinson then made a motion that Rule 10, as proposed, be put out for public
comment pursuant to Chapter 91. Vice-Chair Thompson seconded the motion.

Discussion: None

Vote: Unanimous

Rule 11
Commissioner Levinson again reviewed the actions he has taken as well as those of
Corporation Counsel over the last several months in the drafting a proposed Rule 11. He also
stated that at the last Commission meeting, he made a motion to place the Commission’s
(Commissioner Levinson’s) draft proposed Rule 11 out for public comment and it is his
understanding that Corporation Counsel would like to comment, particularly on the language
Corporation Counsel prefers.

Commissioner Levinson added that during their last discussion, a representative of Corporation
Counsel and he agreed it would be useful to undertake a global review of all of the
administrative rules of the Police Commission. He would, again, be willing to work with
Corporation Counsel if commissioners desired so and welcomed any other commissioner to
participate.

Corporation Counsel Donna Leong and Deputy Corporation Counsel Duane Pang introduced
themselves. Ms. Leong informed commissioners Mr. Pang would be summarizing the rationale
for the proposed amendments by COR to Rule 11-1(e) and 11-4(e), which were sent to
commissioners with a cover memo dated October 9, 2017. She also noted that the
amendments differ from the amendments proposed by Commissioner Levinson.

Counsel Pang clarified that COR reviewed proposed rule changes drafted by Commissioner
Levinson and sent to COR on June 30, 2017. It is also understood that another set of proposed
rule changes was subsequently drafted by Commissioner Levinson and was also submitted.
COR did review both proposals and sent the October 9, 2017, memo with comments and
suggestions.
Rule 11 (Continued)
As Commissioner Levinson stated there was no problem with Rule 10; however, COR did have suggestions to add Rule 11-1 (e) dealing with an officer’s request for legal representation. COR’s proposal deleted the language “course and scope of employment” which is in the current rules, to coincide with the statutory language “performance of an officer’s duty” and provided guidelines for interpretation of such language. Currently, the Rules do not have any guidelines or suggestions on interpretation.

Counsel Pang explained that in the past employment law was considered and the term “course and scope” was used and that Commissioner Levinson argued that the term might be too narrow. COR does not agree with Commissioner Levinson, but did review the issue again. COR found a case (Hua v. Board of Trustees of the Employees’ Retirement System) that interpreted the term “performance of employment.” That statutory term provided an explanation of what would be used to interpret the term, “performance of employment.”

Counsel Pang noted that guidelines are important to provide the officer notice as to when he/she will be in the performance of his/her duty and to be consistent with future commissioners who may need clarification as to what exactly is “performance of a police officer’s duty.” If the guidelines are included in the rules when they are adopted, is would be what everyone would refer to.

Counsel Pang also mentioned that Commissioner Levinson also pointed out there is no Supreme Court case that interprets performance of a police officer’s duty, but COR recommends the Commission adopt the proposals by COR and because the Commission is considered the expert administrative agency, normally the courts would give deference to the administrative agency.

Vice-Chair Thompson asked if the amendments would have to be adopted because the Supreme Court does not have any interpretation. Counsel Pang stated the Commission would have to adopt it and that, as Commissioner Levinson said, the Supreme Court has not provided an interpretation of the term, “performance of an officer’s duty” which caused some difficulty because COR uses the term “course and scope” and Commissioner Levinson disagreed with the use of “course and scope.”

Counsel Pang then explained the second proposed amendment, a new rule, Rule 11-4 (e). This arose with the controversy of whether hearings would be open or closed to the public. There were a number of discussions which included the historical fact that, probably, nobody has asked that the hearings be open until a few months ago. COR has provided a suggestion that the hearings be open to the public unless a police officer can show a strong countervailing reason to close the proceeding to the public and that making the determination and considering an officer’s wishes, whether commissioners believe that keeping the hearing open would interfere with his/her criminal investigation or prosecution, or whether there is a specific statue that requires the hearing to be closed. Counsel Pang stated that as mentioned previously for COR’s suggested Rule 11-1(e), officers would be put on notice that hearings will be open to the public unless specific findings.
Rule 11 (Continued)
A different standard was suggested by Commissioner Levinson who cited the Oahu Publication case in which the language is almost similar; however, COR believes the Oahu Publication case was a guideline for criminal cases. Since the Commission’s hearings are not criminal cases, COR felt that the standard developed in a civil matter should warrant closing the hearing. Counsel Pang provided other examples and that courts are very wary of protecting a criminal defendant’s Constitutional Rights and that a criminal defendant has an attorney representing him/her; however, when police officers appear before the Commission requesting legal counsel, they may or may not have an attorney.

Counsel Pang reviewed another suggestion by COR that when an officer is denied legal counsel by the Police Commission there is a 30 day appeal period to the Circuit Court. The 30-day appeal is in the HRS; however, mentioning it the Police Commission Rules would be more clear for the police officer and, again, provide notice to the officer.

Counsel Pang also cautioned commissioners about citing cases for standards because it shows and assumption that everyone is aware of exactly what the case stands for and that cases can be interpreted differently. COR’s suggestion to put the standards in plain language as opposed to referencing a case it would be clearer for commissioners and police officers as cases can always be overturned or amended which may not come to the Commission’s immediate attention and that language from the particular cases could be put into the Commission’s rules.

Chair Sword requested clarification from Counsel Pang that he is referring to Rule 11-1(e) and Rule 11-4(e), Counsel Pang answered in the affirmative.

Commissioner Sheehan shared her concern with COR’s suggestions to Rule 11-4(e) dealing with the closing of hearings to the public. She disagrees with the analysis and that two different concepts may be mixed up. Commissioner Sheehan stated the police officer has a right to an open/public hearing by virtue of the due process clause. Completely independent of that is that the public and the media have a right to an open contested case hearing. Corporation Counsel Leong interjected and stated that she begged to differ and that COR has reviewed quite a few cases on that particular point and that it really depends on the type of hearing conducted and the subject matter of the hearing.

Corporation Counsel Leong informed commissioners that she, Counsel Pang, and several other deputies have read the cases and that you have to parse it into what type of case—civil versus criminal and the type of matter about which a party has requested open or closed hearing.

Hearings held by the Commission are administrative and there are even fewer cases on point. What the courts have also looked at is whether traditionally the hearing has been open or closed. For this particular venue, hearings have been traditionally closed at the request of the officer, and it is for exactly the reason stated that the right to the openness of the hearing has been in favor of the officer and if the officer desires for the hearing to be closed a request is made and the hearing has been closed.

Corporation Counsel Leong explained that with regard to the public’s right to an open versus closed hearing, consideration on a case by case basis and the courts look at the type of hearing, traditionally what has happened, and the interest to be served.
Rule 11 (Continued)
Commissioner Sheehan does not disagree with the due process analysis; however, the public’s right to know what is going on and to attend the hearing concerns her. In trying to understand COR’s point of view, Commissioner Sheehan asked if COR felt that parsing is a policy matter based upon whether commissioners think the public should be able to watch, whether commissioners think it is a good thing, or as a policy matter. Corporation Counsel Leong responded that Commissioner Sheehan’s understanding is correct based upon legal precedence established by the courts considering all the different factors.

Commissioner Sheehan then stated that the policy being looked at, the public’s right to know, is whether the Commission, as an administrative body, is going to spend taxpayer dollars. Corporation Counsel Leong added that it is not only about the expenditure of taxpayer dollars, it is also the question under HRS 52-D (8) and (9) if the officer is entitled to legal representation provided by the City, in this case.

In considering everything, there are personnel issues invoked, the case law indicates that under HRS 52-D (8) and (9) there is a property interest that a police officer has in being provided legal representation by the City. Corporation Counsel Leong further stated that when you take away the potential property interest you have to have a hearing, and before you close the hearing there has to be an opportunity (under case law for all the different types of cases) for the public to be heard about whether the case should be open or closed. It is not that the public, which includes the media, has a right to an open hearing. They have the right to be heard as to whether the hearing should be open or closed, but the public does not have the right to an open hearing. In requests for legal representation, finding counsel in a civil or criminal case is covered by attorney-client privilege and should be treated confidentially.

For these reasons, balancing the interests and the cases reviewed at COR, it has been determined that the hearing be open unless there is a strong countervailing reason for it to be closed. The strong countervailing reason could be presented by the person representing officers or it could be closed on the basis that it would be against the officer’s interest. It could be closed because someone is trying to find legal counsel, which is a fundamental right to justice and being able to assert your case in a civil or criminal trial, and that sometimes officers do not appear with counsel and that a statement by the officer may prejudice the defense of the criminal or civil case.

Corporation Counsel Leong understands Commissioner Levinson’s opinion that the decision by the Commission should be made solely on the allegations in the complaint, but her opinion differs. She explained that before you take away a property interest of an individual, you should give that individual the right to be heard, which may need to be done in a closed session that could be done by finding a countervailing reason. That way an officer can ask for legal representation and the testimony of an officer can be held in confidence. The issue could also be considered a personnel matter, which is confidential and for the reasons mentioned by herself and Counsel Pang, that COR’s proposed draft for Rule 11-4(e) is the way to go.

Commissioner Levinson referred to an e-mail of September 22, 2017, to him Corporation Counsel Leong sent out her three arguments supporting COR’s language for openness provision of Rule 11 and COR’s version of Rule 11.
Rule 11 (Continued)
Commissioner Levinson said Corporation Counsel Leong’s e-mail stated it was intended to cover Fifth Amendment process in closed session; with respect to testimony, if presented at a hearing open to the public may impair criminal investigations or prosecutions, COR sought that language because it was intended to cover the Garrity Rights situation. Whether there was a specific statute or rule that mandates confidentiality, the observation was that was not an issue because it speaks for itself and, obviously, if there is a specific statute or rule that mandates confidentiality then it is confidential.

Commissioner Levinson continued to say that officers are entitled to legal representation at City and County expense either in a civil proceeding or criminal prosecution if they are being sued for acts done in the performance of duty as a police officer. What the officer is being sued for is what is alleged in the charging instrument which would be the complaint in the civil action and an indictment or a criminal complaint or information for a criminal matter. It is the allegations of that charging instrument which determines whether the officer is being sued for acts done in the performance of duty as a police officer.

Commissioner Levinson carried on to say the police officer has ought to have no interest whatsoever in presenting testimony further to what he is being sued for because what he is being sued for is speaks for itself because it is in the complaint, it is unambiguous, and it says what it says. Any concern that the officer might be forced to incriminate himself in giving testimony to the Commission in order to persuade commissioners to provide him legal representation is a misplaced worry and the officer should not be testifying at all.

Commissioner Sheehan explained that Garrity is not applicable to a request for legal counsel. Commissioner Levinson then added Garrity does not transfer to this and the police officer should not be testifying in any event. He then stated that it is with respect to those two matters that the Corporation Counsel’s suggested language differs from his (Commissioner Levinson's) suggested language. Commissioner Levinson explained that his suggested language comes from a 2014 Hawaii Supreme Court Decision involving a criminal case having to do with the access of the press to a phase of a criminal proceeding but the Supreme Court had already held, over a decade earlier, that administrative contested case hearings are open to the public (Freitas Case).

Commissioner Levinson continued and stated that in the Oahu Publications case the court set out a test regarding when an over-riding interest of a defendant outweighs the right of the public, including the press, to be present at the proceeding, and so he incorporated the language of the Hawaii Supreme Court.

Commissioner Levinson expressed concern with the first section that creates a formulaic test for when an act is done in performance of duty as a police officer. He explained that his concern arises out of the defective rule that the Commission has been required to operate under, that was promulgated in 2004, drafted by COR, and injected into whether an act was done in the performance of duty as a police officer, the construct of course and scope of employment. The term was imported from a Hawaii Supreme Court decision called Henderson, which has nothing to do with administrative law, contested case hearings, government, and a person’s right to legal representation.
Rule 11 (Continued)
Commissioner Levinson then explained the Henderson case and that it had to do with whether the company (Henderson) was vicariously liable for the negligent conduct of its truck driver when its truck driver ran somebody over. The Hawaii Supreme Court looked to the restatement of agency law to determine the circumstances under which an employer is vicariously liable for the negligent conduct of its employee and reasonably accepted aulus bolus the language of the restatement of agency with respect to when an act is engaged within scope of employment.

Commissioner Levinson further stated that “course and scope of employment” as a general matter computes in the context of worker’s compensation—a person is entitled to worker’s compensation if the injury or accident arose out of and in the course of employment or put differently occurred within the course and scope of employment. COR imported “course and scope of employment” analysis into performance of duty as a police officer rule and did not reveal the source of that importation, secretly gave commissioners memorandums during contested case hearings which expounded on Henderson analysis when the requesting police officer had no knowledge of that secret advice commissioners were receiving from COR.

For years the Commission, lacking attorneys on the Commission or attorneys who were paying attention simply accepted the construct (Henderson). It is because of the importation of an extraneous formula that computes in another context can wreak havoc on the proper functioning of a rule that concerns him with regard to importing any formula from another context into the Commission’s rule as to whether a police officer who requested legal counsel is entitled to legal representation for alleged acts done in the performance of duty as a police officer.

Commissioner Levinson is eager to get together with COR over the course of the next year and take a look at all of the Police Commission’s rules, including Rule 11, and make further changes to Rule 11 then. He also feels commissioners will have a number of suggestions to make because there are rules that require tinkering and there are subjects that ought to be covered by rule where there is no rule at all. COR will be hearing from the Commission again but as of now Commissioner Levinson feels that Rule 11 as proposed does the job with the understanding that an officer sued for acts done in the performance of duty means that the operative acts are the ones that are alleged in the complaint.

Because he is now experienced in reviewing requests for legal representation under Rule 11, Commissioner Levinson thinks it is very clear which alleged acts are alleged to have been done in the performance of duty as a police officer and which alleged acts are acts that don’t apply to police work at all. Commissioners are fully capable of passing on the requests without the importation of a formula from another context.

Corporation Counsel Leong asked commissioners to take a look at the Hua case cited for suggested guidelines for determining performance of duty because it is a 2006 case. She added that all COR is trying to do is to make the rule better and that is what COR’s proposed language seems to do. Corporation Counsel Leong said that under Rule 11-1(e) all COR is trying to do is provide the Commission with guidelines to decide whether the officer was performing his or her duty within the parameters of HRS 52-D (8) and (9).
Rule 11 (Continued)
Corporation Counsel Leong stated that even in Commissioner Levinson's statement, he is providing guidelines that are not included in his proposed rules. He is saying to consider complaint only, which is not in the rule and is a guideline. He also stated it is going to become clear what does and does not pertain to police work at all, which is another guideline. The language is not found in any case law reviewed; however, Hua was a case for a different administrative agency, the Employees' Retirement System, but it used and interpreted the same language, “performance of duty.” The language in COR's memo summarized what was gleaned from the Hua case and applied to the Commission's rules.

In Commissioner Levinson's arguing for not including any guidelines in the rules but using just express language of HRS 52-D (8) and (9), he is contradicting himself because he is applying guidelines that work for him.

COR's recommendation is to use COR's language for 11-1(e). In addressing 11-4(e), Corporation Counsel Leong explained the reason COR is saying that an officer should have a chance to say something about having an open or closed hearing because the matter is a personnel matter, and before you take a property interest away from anyone, you have to give that person an opportunity to be heard. To just say that it is on the complaint and not give the person an opportunity to be heard, it is COR's understanding that personnel employment law is violated.

Corporation Counsel Leong then informed commissioners that the deputies at COR are very experienced and she also acknowledged her e-mail to Commissioner Levinson and that between September 22 and October 9, 2017, the deputies became even more educated and the rules COR is proposing are correct in all the various areas of law and recommend commissioners adopt COR's suggested rules.

Commissioner Levinson stated that he not suggesting any guidelines at all. He then provided a hypothetical situation in which a police officer requested legal representation for a criminal case which charged him with abuse of a family or household member and the charging instrument alleged that on such and such a night he beat his wife up at home at 2:30 a.m. He then asked Corporation Counsel Leong if there was any question as to whether that is an alleged act done in the performance of duty as a police officer—he didn't think so.

Commissioner Sheehan, with regard to COR's wanting to give police officers the right to exclude the public and the media, feels that COR does not understand that the statutes says "If a police officer is sued for acts done in the performance of his duty..." and the complaint is totally false and wrong but if the charging document says an officer did certain acts, there is no need for the officer to explain. She explained that she feels there is an intellectual difference and that COR is thinking that they need to figure out if the officer did certain acts and that Commissioner Levinson is pointing out that if the charging document says so, the officer gets legal counsel, and there is no need for the officer to come or to testify or say anything because it is like a declaration action in insurance law.
Rule 11 (Continued)
Corporation Counsel Leong informed commissioners that she did think about what Commissioner Sheehan said, and what she is saying by following what is suggested commissioners would be giving the plaintiff's counsel the power to decide whether to provide legal representation to a police officer. She has recently seen such an action and knows exactly what is being done and all someone has to allege is that this officer is acting in his/her official capacity as a police officer. The City will then end up defending officers who have allegedly done something during an arrest and then it goes from making an arrest to some form of brutality. Corporation Counsel Leong provided an example of an officer using force during an arrest and the end result being a person ending up dead and asked commissioners if that action was conducted in the performance of an officer's duty. Both Commissioners Sheehan and Levinson answered in the affirmative and referred to the statute that addresses legal counsel for police officers.

Chair Sword interjected into the discussion and informed commissioners a short recess will be called after Commissioner Sheehan speaks and he will call for the vote.

Commissioner Sheehan understands Corporation Counsel Leong's concern as well—that an attorney in the matter in which he or she chose to draft an indictment or criminal complaint would control whether a police officer would receive legal counsel. She then asked Corporation Counsel Leong if she thought commissioners would have to look for facts that are alleged in the charging document and not just conclusions. Commissioner Sheehan provided an example of an indictment stating that an officer was home, it was the middle of the night, he beat his wife, they are intimate partners, and he is guilty of abuse of a household member, which was done in the course and scope of his employment. The commissioners would have to examine the factual allegations as opposed to broad conclusions or statements in making a determination.

Chair Sword asked Counsel Leong if she had anything to add, which she did not.

Commissioner Levinson then requested to make two points. Chair Sword asked him to be brief, which he agreed. Commissioner Levinson then said that the allegation in a complaint (a charging instrument) that all of the acts of the defendant were performed in his official capacity as a police officer is not a factual allegation; it is a legal assertion and commissioners do not have to accept, for purposes of the request for legal representation, legal assertions as true, only factual allegations for purposes of the right to representation.

Further, Commissioner Levinson stated that the statute that entitles a police officer to legal representation when sued for acts done in the performance of duty as a police officer, presupposed the possibility that the officer's conduct is unlawful and the fact that it may be unlawful is irrelevant as to whether it was done in the performance of duty as a police officer. That is why beating the tar out of a suspect after he has been arrested, the officer being authorized by law to make arrests, is being sued for an act done in the performance of duty as a police officer, even though the conduct is unlawful.

Chair Sword announced that discussion is concluded.
Rule 11 (Continued)
Commissioner Levinson then made a motion to put the Commission’s version, which is his (Commissioner Levinson’s) version of proposed amended Rule 11 out for public comment. Commissioner Sheehan seconded the motion.

Discussion: Chair Sword shared that his hopes for the process, him asking Commissioner Levinson to work with COR, would produce some agreement which it did not. Chair Sword then stated that he is going to be consistent and feels that COR is the Commission’s lawyer and he agrees with Commissioner Levinson that the Commission is the client, but being a layperson and because there is no agreement, he prefers COR’s recommendations.

Commissioner Sheehan understand that the issue is confusing and that simply because commissioners have done something incorrectly in the past is not a reason for continuing to make the same mistake. The statute is clear, if an officer is sued or charged for acts that are done in the performance of duty, you get a lawyer, which is what Commissioner Levinson is proposing that commissioners include in the rules. She further explained that an officer can do his or her duty badly, illegally, wrongly, and he or she still gets a free lawyer. Commissioner Sheehan asked Chair Sword to reconsider and that the rule and standards provided by COR are wrong and illegal and commissioners are under a duty to correct it.

Vote: 4 (Chang, Gibson, Levinson, Sheehan) to 3 (Flores, Sword, Thompson) in favor of Commissioner Levinson’s motion.

(Recess 4:00 – 4:10 p.m.)

Status of Contested Case Hearings (Kealoha, Naki, Omoso, and Sellers)
Concerning the status of contested case hearings and the instruction to defer the cases until there is resolution on Rule 11 EO Lawrence wanted to know if it was permissible to schedule the contested case hearings for January 17, 2018. This is in anticipation of a public hearing on the proposed amendments to Rule 10 and 11 being on January 3, 2018, the Mayor’s signing off on the rules and filing with the City Clerk and the 10-day waiting period.

EO Lawrence will schedule as many of the contested case hearings on January 17, 2018, and shared that the attorney for Mr. Naki and Mr. Omoso expressed his concern and his wanting to have the contested case hearings today.

EXECUTIVE OFFICER’S REPORT
Executive Officer Lawrence reported as of November 15, 2017, the Commission has received 70 complaints to date compared to 76 in 2016. There are seven pending investigations and three new complaints and three complaints for PSR have been distributed.
MINUTES OF THE REGULAR MEETING
November 15, 2017
Page 17

EXECUTIVE SESSION
A 4:19 p.m., Commissioner Sheehan made a motion to enter into executive session to review agenda items pursuant to HRS 92-5(a), subsections (2), (4), (5), (6) and (8): to consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved; to consult with its attorneys on questions and issues pertaining to the Board’s powers, duties, privileges, immunities and liabilities; to investigate proceedings regarding criminal misconduct; to consider sensitive matters related to public safety or security; to deliberate or make a decision upon a matter that requires the consideration of information that must be kept confidential pursuant to state or federal law, or a court order.

Vice-Chair Thompson seconded the motion.

Discussion: None.

Vote: By a unanimous vote, the motion carried.

RETURN TO OPEN SESSION
The Commission returned to the open session at 4:39 p.m.

ANNOUNCEMENTS
Chair Sword announced the next meeting Honolulu Police Commission will be on December 6, 2017 at 2 p.m.

ADJOURNMENT
At 4:39 p.m. Commissioner Sheehan made a motion to adjourn the meeting. Commissioner Levinson seconded the motion, by a unanimous vote, the motion carried.
A NEW BEGINNING

CHIEF SUSAN BALLARD
NOVEMBER 8, 2017

VISION STATEMENT

The community and HPD working together to make our island safe.
MISSION STATEMENT

- Serving and Protecting with Aloha

VALUES

- Leadership
- Integrity
- Excellence
- Accountability
- Teamwork
PRIORITIES

- 1. Prevent and solve crime
- 2. Recruit and retain quality employees
- 3. Improve organizational efficiency
- 4. Advance the use of technology
- 5. Improve training
- 6. Restore and maintain trust between the community and HPD

PREVENT & SOLVE CRIME

- Cybercrime, increase capacity of computer forensic unit
- Domestic violence investigation
- Elder abuse/fraud investigation
- Reorganization of investigative units
- Review patrol staffing, strategies
- Coordinated interagency response to homelessness
► RECRUIT & RETAIN QUALITY EMPLOYEES
  ► No change to shift schedules
  ► Review Standards of Conduct
  ► Expedite hiring process
  ► Evaluate disqualification criteria
  ► Make filling the 200 uniformed vacancies a priority
    ► Create new positions after existing vacancies filled
    ► Request new positions already in budget
  ► Review promotion process for all ranks
  ► Expand Explorers program as part of recruiting effort

► IMPROVE ORGANIZATIONAL EFFICIENCY
  ► Review ROPA and termination criteria
  ► Reorganize community and youth services
  ► Increase online reporting, use of call center
    ► Create reporting area for the public at Alapai
  ► Continue work on reducing response times
  ► Expedite PSO investigations
  ► Evaluate CRS
ADVANCE USE OF TECHNOLOGY
- Body-worn cameras
- Dashboard cameras
- Virtual reality training
- Open source intelligence

IMPROVE TRAINING
- Audit recruit and ART curriculum
- Increase online training
- Ethics and integrity training
- Guardian mentality
- Leading by example
<table>
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<tr>
<th>▶ RESTORE COMMUNITY TRUST</th>
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<tr>
<td>▶ Emphasis on transparency, accountability</td>
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<td>▶ Patrol districts develop community-specific priorities</td>
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<td>▶ Officers are the face of HPD</td>
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<td>▶ Department spokespersons</td>
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<td>▶ Maintain community outreach, partnerships</td>
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<td>▶ Coffee With A Cop</td>
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<td>▶ Town hall meetings</td>
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