



The City of New York  
Department of Investigation

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## MEMORANDUM

TO: Distribution

FROM: Mark G. Peters *MGP*

DATE: July 10, 2014

SUBJECT: DISCLOSURE AND REPORTING OF DOI INVESTIGATIONS

### I. Authority and Purpose

1. The Department of Investigation ("DOI") investigates, among other things, the "affairs, functions, accounts, methods, personnel or efficiency of any agency" (City Charter, Ch.34). DOI is obligated to report upon its findings to ensure appropriate follow up action. *Id.*
2. In order to balance the competing need for confidentiality of investigations with that of informing government entities of issues for correction, the following rules are set forth governing disclosure of DOI investigations.

### COMMENT

*The fundamental rule regarding disclosure of DOI investigations is set forth in Chapter 34 of the City Charter, which articulates the structure, powers and duties of DOI. Chapter 34, § 803(a) and (b), provide, respectively, that DOI: (a) "shall make any investigation directed by the mayor or the council" and (b) "is authorized to make any study or investigation which, in the Commissioner's opinion is in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency." Section 803(c) further states in relevant part that "[f]or any investigation made pursuant to this section, the commissioner **shall prepare a written report or statement of findings and shall forward a copy of such report or statement to the requesting party, if any.**" As a general matter, and except as set forth herein below, nothing in Chapter 34 specifically mandates that a DOI investigation shall remain confidential after it is completed or while it is ongoing or precludes DOI from disclosing the fact of an ongoing investigation to a third party (emphasis added).*

### II. Definitions

1. "Civil Investigation" shall mean an investigation of misconduct, incompetence and/or inefficiency that is not otherwise a Criminal Investigation.

*Continued...*

2. "Confidential Investigation" shall mean an investigation in which: (i) information has been obtained through the use of a grand jury subpoena or similarly sealed process; or (ii) the party or parties being investigated may be engaged in ongoing criminal acts and are not aware of the investigation's existence.
3. "Criminal Investigation" shall mean an investigation in which criminal acts may have been committed. Certain Criminal Investigations may also be Confidential Investigations.
4. "Make Public" shall mean to release, on DOI's website or otherwise, without compulsion of a subpoena, a legally valid request pursuant to the New York State Freedom of Information Law ("FOIL") or other legal process.
5. "Mandatory Investigation" shall mean any investigation which, by law, DOI is required to conduct, including but not limited to investigations referred to DOI: by the Office of the Mayor or the New York City Council pursuant to New York City Charter, Section 803(a); by the New York City Conflicts of Interest Board ("COIB") pursuant to Chapter 68 of the New York City Charter; and pursuant to Section 12-113 of the New York City Administrative Code (the "Whistleblower Law").
6. "Prosecutor's Office" shall mean any District Attorney's Office or United States Attorney's Office within the State of New York, the Office of the Attorney General of the State of New York, or any other office empowered to prosecute violations of the Penal Code of the State of New York or the criminal laws of the United States.

#### **COMMENT**

*With respect to Mandatory Investigations, as noted, Chapter 34, § 803(a) of the City Charter provides, that DOI: (a) "shall make any investigation directed by the mayor or the council." Section 803(c) further states in relevant part that "[f]or any investigation made pursuant to this section, the commissioner shall prepare a written report or statement of findings and shall forward a copy of such report or statement to the requesting party, if any."*

*Further, DOI is required "to conduct an investigation of any matter related to the [COIB's] responsibilities" as the COIB may direct. See Chapter 68, Section 2603(f)(1). Further to this section, "[t]he commissioner of investigation shall, within a reasonable time, investigate any such matter and submit a confidential report of factual findings to the [COIB]." Pursuant to Section 2603(f)(2), "[t]he commissioner of investigation shall make a confidential report to the [COIB] concerning the results of all investigations which involve or may involve violations of the provisions of [Chapter 68], whether or not such investigations were made at the request of the [COIB]."*

*The Whistleblower Law imposes additional mandates on DOI:*

*Pursuant to New York City Administrative Code, § 12-113(c), "[a]n officer or employee (i) of an agency of the city, or (ii) of a public agency or public entity subject to the jurisdiction of the commissioner pursuant to chapter thirty-four of the charter who believes that another officer or employee has taken an adverse personnel action in violation of subdivision b of this section may report such action to the commissioner." Section 12-113(d) provides that:*

- (1) *"[u]pon receipt of a report made pursuant to subdivision c of this section, the commissioner shall conduct an inquiry to determine whether retaliatory adverse personnel action has been taken... ; [and] (3) Upon the completion of an investigation initiated under subdivision c of this section, the commissioner shall provide a written statement of the final determination to the officer or employee who complained of the retaliatory adverse personnel action. The statement shall include the commissioner's recommendations, if any, for remedial action, or shall state the commissioner has determined to dismiss the complaint and terminate the investigation."*

Further, §12-113(e) mandates as follows:

- (1) *“Upon a determination that a retaliatory adverse personnel action has been taken with respect to an officer or employee of an agency of the city in violation of paragraph one or five of subdivision b of this section, the commissioner shall without undue delay report his or her findings and, if appropriate, recommendations to the head of the appropriate agency or entity, who (i) shall determine whether to take remedial action and (ii) shall report such determination to the commissioner in writing. Upon a determination that the agency or entity head has failed to take appropriate remedial action, the commissioner shall consult with the agency or entity head and afford the agency or entity head reasonable opportunity to take such action. If such action is not taken, the commissioner shall report his or her findings and the response of the agency or entity head (i) if the complainant was employed by an agency the head or members of which are appointed by the mayor, to the mayor, (ii) if the complainant was employed by a non-mayoral agency of the city, to the city officer or officers who appointed the agency head, or (iii) if the complainant was employed by a public agency or other public entity not covered by the preceding categories but subject to the jurisdiction of the commissioner pursuant to chapter thirty-four of the charter, to the officer or officers who appointed the head of the public agency or public entity, who shall take such action as is deemed appropriate.”*

### **III. Creation and Release of Reports on Investigations**

1. Final Reports: At the conclusion of all investigations, DOI shall issue a Final Report as follows:
  - (a) Where a Criminal or Civil investigation determines that no criminal acts, misconduct, incompetence and/or inefficiency have occurred, DOI shall prepare a Closing Memorandum reflecting that DOI's investigation was unsubstantiated. Such Closing Memorandum shall not be made public and shall not be subject to FOIL.
  - (b) Where a Criminal Investigation determines that criminal acts may have been committed, DOI shall send a referral letter to the appropriate Prosecutor's Office setting forth the basic facts uncovered by the investigation along with a reference to any Penal Code provisions or provisions of federal criminal law potentially violated ("Criminal Referral").
    - (i) Where a Prosecutor's Office has been involved in the Criminal Investigation and is therefore fully aware of all of the relevant facts, or where DOI has made an arrest prior to sending a Criminal Referral, and where the investigation was not commenced at the request of another governmental agency, DOI may dispense with the sending of a formal Criminal Referral.
    - (ii) Where the facts contained in the Criminal Referral suggest a pattern of misconduct, a corruption vulnerability or other issues that, in the opinion of the DOI Commissioner require corrective action by a governmental entity, and where disclosure of the Criminal Referral is not precluded by law and will not jeopardize any future investigation or prosecution, the Criminal Referral may also be sent to the Mayor and/or to the head of the relevant governmental entity or entities.
    - (iii) DOI may make such Criminal Referral public where, in the opinion of the DOI Commissioner, a specific public interest requires such publication, and where disclosure of the letter is not precluded by law and will not jeopardize any future investigation or prosecution. Any such publication shall state the public interest that requires publication.
  - (c) Where a Civil Investigation determines that misconduct, incompetence, and/or inefficiency have occurred, or that a corruption vulnerability exists, DOI shall issue a report describing the

misconduct, incompetence, inefficiency and/or vulnerability and shall make recommendations for corrective action ("Civil Report"). Such Civil Report shall be sent to the Mayor and/or to the appropriate Deputy Mayor, Agency Head or other governmental entity. Such Report shall also be made public unless, in the opinion of the DOI Commissioner, publication would impede a substantial governmental function (including the confidentiality requirements of City Charter Chapter 68), an ongoing investigation, or any necessary corrective action.

- (d) In addition to, and notwithstanding, subparts (a)-(c) above, at the conclusion of all Mandatory Investigations, a report shall be sent to the referring entity, or, in the case of investigations made pursuant to the Whistleblower Law, to the complainant and appropriate agency, as specified in that Law. Where the report itself does not make reference to the referring agency, disclosure of the report shall be governed by the rules for Civil and Criminal investigations set forth above. In no event shall the fact that a request for investigation was made by the New York City Conflicts of Interest Board ("COIB") or the fact that a report was sent to the COIB be made public.
2. Interim Reports: Prior to the conclusion of an investigation, DOI may issue an interim report where appropriate. Such interim reports, labeled as such, shall be governed by the relevant rules set forth above.
3. Multiple Reports: Where an investigation has both Criminal and Civil aspects, DOI may choose to issue a Civil Report and, in lieu of a Criminal Referral, may provide a copy of the Civil Report to the appropriate Prosecutor's Office.
4. All Closing Memoranda and reports as defined and discussed herein shall be placed into the relevant case file and uploaded into DOI's Case Management System.

## **COMMENT**

*As described in Section III.1.a, DOI is not mandated to disclose closing memoranda concerning unsubstantiated investigations, and indeed has a legal basis not to do so both in the context of FOIL and civil discovery. Under FOIL, which is contained within the New York State Public Officers Law ("POL"), DOI may withhold information concerning unsubstantiated investigations pursuant to POL § 87(2)(b), on the grounds that disclosure would constitute an unwarranted invasion of personal privacy. This principle was confirmed by a state trial court in Matter of Lewis, Index No. 116214/96, Sup. Ct. New York Co., slip op. at 23 (Sup. Ct. April 21, 1997). The "law enforcement exception" to civil discovery obligations also provides a legal rationale for DOI not to disclose information regarding unsubstantiated investigations. See, e.g., In re Dep't of Investigation of the City of New York, 856 F.2d 481, 484 (2d Cir. 1988)(the purpose of the law enforcement privilege "is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witnesses and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.")*

*The obligation to make referrals to prosecutors where a Criminal Investigation determines that criminal acts may have been committed, as discussed in Section III.1.b, derives from § 803(c) of the City Charter, which states in relevant part that "[i]n the event that the matter investigated involves or may involve allegations of criminal conduct. The commissioner, upon completion of the investigation, shall also forward a copy of his written report or statement of findings to the appropriate prosecuting attorney...." The obligation to recommend corrective action in the context of a Criminal Report, as contemplated by Section III.1.b.2, or to make a Civil Report recommending corrective action, as set forth in Section III.1.c, reflects DOI's long-standing practice of making policy and procedure recommendations ("PPR's") to public officials regarding elimination of corruption hazards, waste, inefficiency and the like. The rationale for making PPR's flows from § 803(b) of the Charter, which authorizes and empowers DOI "to make any study or investigation which in [the opinion of the Commissioner] may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency."*

*The various obligations to report the findings of Mandatory Investigations, as set forth in Section III.1.d, are discussed above the Comments to Section II. The prohibition on identifying the COIB as the agency that either referred a matter to DOI or which received a report from DOI derives from Chapter 68 of the Charter. As noted above, Chapter 68, § 2603(f), mandates that DOI investigations referred to DOI by the COIB or which otherwise implicate Chapter 68 shall result in a **confidential** report by DOI to the COIB. See also § 2604(k) (“Except as otherwise provided in this chapter, the records, reports, memoranda and files of the [COIB] shall be confidential and shall not be subject to public scrutiny”).*

#### **IV. Release of Investigatory Information Prior to the Release of a Report Pursuant to Section III**

Information obtained by DOI in the course of its investigations may only be released prior to the issuance of a Report (Section III) as follows:

1. Except as set forth below, information from a Confidential Investigation may not be released except to a Prosecutor’s Office with jurisdiction over the subject of the investigation. Upon the unsealing of an indictment or other publication of information by the prosecutor, this prohibition shall end. Information derived from grand jury subpoena or similarly sealed process shall in no event be disclosed, except to the Prosecutor which provided DOI with access to such grand jury material pursuant to proper procedures.
2. Where the underlying acts that gave rise to the Confidential Investigation have been the subject of public or media reports, DOI may confirm the existence of the investigation if such confirmation does not, in the DOI Commissioner’s opinion, compromise the integrity of the investigation.
3. Where the facts underlying a Confidential Investigation suggest that the City is about to enter into a contract or other agreement with a corrupt entity or individual, the Commissioner may alert the Mayor and/or the Mayor’s Office of Contract Services, consistent with governing law.
4. Information from a Criminal Investigation, or information from a Confidential Investigation which is not itself confidential (i.e., it does not contain either facts which have been obtained through the use of a grand jury subpoena or similarly sealed process, or facts pertaining to ongoing criminal acts), may be provided to any appropriate Prosecutor’s Office. Such information may also be provided to the Mayor where such disclosure is not precluded by law and will not jeopardize any future investigation or prosecution, and where, (i) in the opinion of the DOI Commissioner, the information suggests the need for immediate action, (ii) the Criminal Investigation is reasonably anticipated to become public within two business days, (iii) DOI reasonably anticipates providing the Mayor with a copy of a Criminal Referral within two business days or (iv) in the opinion of the DOI Commissioner, future investigative actions may substantially impact government operations.
5. Information from a Mandatory Investigation that is not a Criminal Investigation may be provided to the Mayor where such disclosure is not precluded by law and will not jeopardize any future investigation or prosecution, and where, (i) the subject of the investigation is already aware of the investigation and (ii) in the opinion of the DOI Commissioner, a substantial impact on government operations may be implicated.
6. Information from a Civil or Criminal Investigation, or information from a Confidential Investigation which is not itself confidential (i.e., it does not contain either information that has been obtained through the use of a grand jury subpoena or similarly sealed process; and the information does not reveal the identity of a party or parties being investigated who may be engaged in ongoing criminal acts and are not aware of the investigation’s existence), may be made public at any time where, in the opinion of the DOI Commissioner, provision of such information will promote the public interest and where such publication will not jeopardize any future investigation.

#### **COMMENT**

*With regard to Section IV.1, a Confidential Investigation is defined by these rules as one in which:*

- (i) information has been obtained through the use of a grand jury subpoena or similarly sealed process; or
- (ii) the party or parties being investigated may be engaged in ongoing criminal acts and are not aware of the investigation's existence. Strict prohibitions and limitations exist on the ability of DOI to become aware of and redisclose to third parties grand jury material.

Grand jury secrecy exists both as a matter of federal and state criminal procedure. Rule 6(e) of the Federal Rules of Criminal Procedure governs federal grand jury secrecy. Rule 6(e)(2)(B) states in relevant part that:

*"Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:*

- (i) a grand juror;
- (ii) an interpreter;
- (iii) a court reporter;
- (iv) an operator of a recording device;
- (v) a person who transcribes recorded testimony;
- (vi) an attorney for the government; or
- (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii)."

Rule 6(e)(3) provides exceptions to the general secrecy rule, in relevant part as follows:

*"(A) Disclosure of a grand-jury matter—other than the grand jury's deliberations or any grand juror's vote—may be made to:*

- (i) an attorney for the government for use in performing that attorney's duty;
- (ii) any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; ....

***(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule."***

*(emphasis added).*

Section 190.25(4)(a) of the New York State Criminal Procedure Law (CPL) states that:

*"Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding. For the purpose of assisting the grand jury in conducting its investigation, evidence obtained by a grand jury may be independently examined by the district attorney, members of his staff, police officers specifically assigned to the investigation, and such other persons as the court may specifically authorize. Such evidence may not be disclosed to other persons without a court order. Nothing contained herein shall prohibit a witness from disclosing his own testimony."*

Further, New York State Penal Law § 215.70 prohibits prosecutors, public officers, and public employees from intentionally disclosing the nature or substance of a grand jury proceeding, except “in proper discharge of his official duties or upon written order of the court.”

The permission under these rules for DOI to share information from a Confidential Investigation with a Prosecutor’s Office with jurisdiction over the subject of the investigation is consistent with the federal and state grand jury secrecy provisions. Thus, for example, to the extent DOI has been made privy to federal grand jury information as a result of being the recipient of a “6(e)” letter, Rule 6(e)(3)(B) specifically contemplates that DOI may issue a report to the United States Attorney’s Office that issued the 6(e) letter “to assist an attorney for the government in performing that attorney’s duty to enforce federal criminal law.” There does not, however, appear to be any authority for DOI to discuss federal grand jury material in a report to a prosecutor’s office other than the one that issued the 6(e) letter.

There is no equivalent under the CPL to a federal Rule 6(e) letter, however, State prosecutor’s offices routinely share grand jury material with other agencies participating in the investigation by “cross-designating” employees of the agency as agents of the prosecutor’s office. See *People v. Anderson*, 237 A.D.2d 989, 655 N.Y.S.2d 220 (4<sup>th</sup> Dep’t 1997) (“The District Attorney may pursuant to [County Law] section[ ] 702 . . . appoint persons employed by other governmental agencies to assist in the prosecution of matters within his jurisdiction and statutory authority.”); *Chergotis v. State*, 259 A.D. 369, 19 N.Y.S.2d 626 (3d Dep’t 1940) (nothing that the authority to appoint special assistant attorneys general derives from N.Y. Exec. Law (now) § 63(8)); *People v. Behan*, 37 Misc. 2d 911, 235 N.Y.S.2d 225 (N.Y. County Ct. 1962) (same). Thus, disclosure by DOI of state grand jury material to which we were properly afforded access, in a report to the prosecutor’s office which afforded us the access, would be proper under state law. However, disclosure of this material to a different prosecutor’s office, to a City agency or officer, or to the public without a court order, would not be consistent with the state grand jury secrecy provisions.

The prerogative to not release information where parties being investigated may be engaged in ongoing criminal acts and are not aware of the investigation’s existence is a reflection of well-established “best practices” and is reflected in the “law enforcement privilege” from disclosure, as discussed above in the Comments to Section III. The law enforcement privilege, which reflects a concern with not interfering with ongoing investigations, and protecting confidential sources, witnesses and law enforcement personnel, informs many of the discretionary judgments that DOI is entitled to make under these rules about releasing information regarding ongoing and, in some cases completed, investigations.

With regard to Section IV.3, DOI has a role under the Rules of the Procurement and Policy Board (“PPB”) to ensure that the City policy that “[p]urchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.” See PPB Rules, § 2-08. DOI’s explicit role is to conduct a Vendor Name Check at the request of a City agency, as part of the agency’s determination of vendor responsibility, “to ascertain whether the [vendor] or its affiliated individuals are or have, during a relevant period of time, been the subject of an investigation by [DOI].” PPB Rules, § 2-08(f)(1). In general, as part of an agency’s determination of a prospective vendor’s responsibility or non-responsibility, agency contracting officers are required to use various sources of information, including but not limited to information provided by other government agencies. See PPB Rules, § 2-08(g)(1)(vi). Under the PPB Rules, the City’s Chief Procurement Officer, who is the executive director of MOCS, has an obligation to consult with DOI prior to making a final decision concerning a vendor’s application for a declaration of rehabilitation. See PPB Rules § 2-08(p)(5). Consistent with and further to these functions under the PPB rules, particularly the VNC function, DOI has historically informed MOCS when DOI has information about a prospective vendor that DOI believes may be material to the decision of the City to award a contract to that vendor. DOI exercises discretion about how much information to reveal to MOCS, consistent with the head to maintain an appropriate degree of confidentiality with respect to ongoing investigations. DOI plays a similar role with regard to hiring certain senior level city employees. See Mayoral Executive Order 16, Sec. 7 (July 26, 1978), as amended. These rules confirm this practice.

It should be noted that other prohibitions or limitations exist in the law with respect to the ability of DOI to access or disclose specific types of information, for example, records regarding child abuse and neglect, as set forth in § 422 of the Social Services Law. Nothing in these rules should excuse the obligation of DOI to ensure that to the extent such information is implicated in a DOI investigation, that proper and

*legally sound procedures are followed to (a) obtain such information and (b) if so obtained, disclose that information to third parties.*

**V. Miscellaneous**

1. Nothing herein shall be construed to limit DOI's obligations or powers under the New York City Charter, or any applicable law, statute, rule, or Executive Order.
2. Insofar as the rules expressed herein conflict with the requirements of Local Law 70, Local Law 70 shall control.
3. The rules expressed herein may be modified when, in the judgment of the Commissioner of DOI and consistent with relevant law, it is in the interests of the City or the public to do so.
4. No private right of action exists or shall be implied in these rules.
5. The rules expressed herein shall be publicly posted on the DOI website.

**COMMENT**

*With regard to Section V.1, as noted, DOI will follow proper and legally sound procedures regarding any disclosure of case-related information. These rules may not, and do not, limit or expand, and should not be interpreted to limit or expand, any legal obligation imposed on, or power afforded to DOI under the City Charter or other laws of the City of New York. See, e.g., City Charter, § 1152(a) ("This charter ... shall control in respect to all the powers, functions and duties of all officers, agencies, and employees of the city as provided herein....").*

*Similarly, with regard to Section V.3, DOI may choose to not exercise its discretion to release case-related information under circumstances deemed appropriate by the Commissioner as set forth in that section. This section is not intended, and should not be interpreted, to afford DOI the power to either: (a) suspend or modify any obligation imposed on DOI to make disclosure; or (b) make disclosure to an extent greater than that authorized by law.*

*Local Law 70, which established an office of the Inspector General for the New York City Police Department ("OIGNYPD"), imposes specific reporting requirements on the OIGNYPD beyond those which Chapter 34 of the Charter imposes on DOI in general. Section V.2 makes clear that to the extent the obligations under Local Law 70 are more stringent or specific than those set forth herein, the obligations of Local Law 70 shall control.*

*Regarding Section V.4, these rules are intended to provide guidance to the DOI Commissioner and his or her staff regarding disclosure of case related information as set forth herein. These rules are expressly NOT intended to afford third parties, including but not limited to members of the public or subjects of DOI investigations, any additional rights beyond what they may now possess to access DOI information.*