

LOS ANGELES POLICE COMMISSION

**REVIEW OF
ETHICS ENFORCEMENT
SECTION TESTS
FISCAL YEAR 2013/2014**



OFFICE OF THE INSPECTOR GENERAL

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February 25, 2015

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REVIEW OF ETHICS ENFORCEMENT SECTION TESTS FISCAL YEAR 2013/2014

I. INTRODUCTION

The Ethics Enforcement Section (EES) of the Los Angeles Police Department (Department) performs a variety of specialized tests of police officer conduct.¹ There are two categories of tests: complaint intake and integrity. Complaint intake tests examine whether desk and field officers will take a fictitious complaint from an EES undercover officer (UC) pretending to be a public complainant. Integrity tests examine all other types of officer behavior and often involve UCs and/or covert surveillance.²

Both complaint intake and integrity tests may be conducted in either of two forms. “Specific” tests focus on a specific officer suspected of a specific type of misconduct. “Random” or “special operation” tests are applied to the officers who happen to respond to a test scenario or to a surveilled location.

In Fiscal Year (FY) 2013/14,³ EES conducted 153 tests: 52 complaint intake and 101 integrity.⁴ Each test received a classification/result of either Pass, Fail, Pass with Comments to Command, Attempt, or Inconclusive and are summarized below.⁵

Table 1 – Classifications of Intake and Integrity Tests

| Test Category and Form | Pass | Fail | Pass with Comments to Command | Attempt or Inconclusive | TOTAL |
|--|------|------|-------------------------------|-------------------------|------------|
| Complaint Intake – Specific | 4 | | | 1 | 5 |
| Complaint Intake – Random | 28 | 4 | 15 | | <u>47</u> |
| <i>Total</i> | | | | | 52 |
| Integrity – Specific | 16 | 3 | | 6 | 25 |
| Integrity – Random & Special Operation | 34 | 3 | | 7 | 44 |
| Integrity – Random Crime Classification ⁶ | 25 | 6 | | 1 | <u>32</u> |
| <i>Total</i> | | | | | 101 |

Generally, when a test is classified as Fail, EES initiates a misconduct complaint against the subject officer.

¹ The EES is a unit within Special Operations Division (SOD) in Professional Standards Bureau (PSB).

² Examples of prior tests for inappropriate behaviors have included unlawful search/seizure, neglect of duty, dishonesty/theft, excessive force, on-duty/off-duty conversion, sexual activity, planting of evidence, and unbecoming conduct.

³ Fiscal Year 2013/14 is July 1, 2013, to June 30, 2014.

⁴ The EES also conducted three integrity tests of non-Departmental employees at the request of other entities.

⁵ The Department previously presented these results to the Police Commission in the EES Quarterly Report. For a full description of each classification, see APPENDIX A.

⁶ From February to July of 2014, EES conducted 32 random tests to determine if reported crimes were correctly classified in accordance with the FBI’s Uniform Crime Reporting Program.

II. REVIEW RESULTS

The Office of the Inspector General (OIG) reviewed all 153 tests conducted in FY 2013/14. The OIG concluded that the tests were generally conducted in a reasonable amount of time after being requested, correctly classified, and well-designed. However, the review identified three issues.

No Audio Recording of Subject Officers

The EES audio-records its UCs but does not audio-record the subject officers.⁷ This practice is based on a 2003 City Attorney opinion advising that covertly audio recording on-duty officers may violate state law and privacy rights. The OIG recognizes that the underlying case law is still valid. The precedent cases involved situations where conversations carried on in private areas were recorded. California state law prohibits one party recording a confidential conversation where the other party has no notice of the recording.⁸

However, the law also allows audio recording where there is a reasonable expectation that the conversation may be overheard or recorded.⁹ The EES UCs contact subject officers in public areas, including Area station front desks or public streets. The OIG contacted both the City Attorney and the Department Special Assistant for Constitutional Policing on this issue, requesting an opinion on whether UC audio recording in public places would be permissible.

Delayed Tests

The OIG identified three specific tests that were begun a year or more after a commanding officer brought a subject officer's misconduct allegations to the attention of EES management and requested a test:

Table 2 – Tests Conducted One or More Years After Requested

| Test # | Allegation Type(s) | Test Began |
|--------|--|-------------------------|
| 13-127 | Discourtesy | 3.5 years after request |
| 14-008 | Theft, Unauthorized Force, Unlawful Search/Seizure | 2.0 years after request |
| 14-005 | Failure to Take Complaints | 1.0 year after request |

The OIG noted a lack of a tracking or prioritizing system to promote timely testing. The risk in delaying these tests is that the type of misconduct alleged could continue unabated in the interim period, possibly causing liability to the City.

⁷ In contrast, EES's long-standing practice has been to covertly *video* record the subject officers whenever feasible, as this was not considered to violate state law and privacy rights.

⁸ Cal. Penal Code § 632. See APPENDIX B for full text.

⁹ See § 632 (c).

Issue with Capture of Complainant Phone Number

A complaint intake test examines whether the intake officer (a supervisor) will interview the UC complainant about his or her (fictitious) complaint. The supervisor is responsible to accurately enter all pertinent information into the Complaint Management System (CMS), including the description of the alleged misconduct and the complainant's contact information.

Capturing the UC complainant's phone number is critical for allowing an assigned investigator to conduct follow-up.¹⁰ However, EES identified a CMS problem that sometimes causes the complainant's telephone number to be inadvertently omitted from CMS. This occurs if the phone number is entered and saved with a group of other data elements, instead of separately.

For 11 of the 52 (21%) EES complaint intake tests, the UC complainant's telephone number was omitted from CMS. While in the past this failure to capture critical information would likely result in a Fail, EES could not conclude that the omitted telephone number was the fault of the tested intake officer because of the CMS issue. The EES classified two of these tests as Pass and nine as Pass with Comments to Command.

III. RECOMMENDATIONS

As a result of this review, the OIG has three recommendations:

1. That the Department and the City Attorney examine whether UC contacts with subject officers, when conducted in public areas where a conversation could be overheard, could be audio recorded without violating state law;
2. That EES develop a system to promote timely testing of identified officers; and,
3. That EES advise the appropriate Department unit regarding the CMS phone entry problem and request correction of the problem.

IV. DEPARTMENT RESPONSE

Department Special Operations Division (SOD) management expressed agreement with the OIG's review, results, and recommendations. The responses for the three issues are as follows:

No Audio Recording of Subject Officers: The SOD has sought clarification from the Special Assistant for Constitutional Policing and the OIG on the issue of telephonic and in-person recording of officers during UC operations. It is expected that guidelines will be forthcoming.

Delayed Tests: The SOD acknowledges and agrees that three of EES's 153 tests were not completed in a timely manner. The SOD is continuing to develop systems that will prevent this occurrence in the future. In addition to a database tracking system for EES tests, SOD is now using a case prioritization system to ensure that cases are assigned, tracked, and completed timely.

¹⁰ As part of the test, the UCs *do* provide all relevant information needed for investigation follow-up, including a (fictitious) phone number.

Issue with Capture of Complainant Phone Number: The PSB has requested that Information Technology Bureau (ITB) consider a change to the complaint intake process that would simplify the capture of a complainant's telephone number. The ITB is currently working on this issue and expects CMS will be upgraded sometime in April 2015.

APPENDIX A

Definitions for the Test Classifications

Pass – The employee(s) performed their duties in accordance with established policy/procedure.

Fail – The employee(s) failed to perform in accordance with established policy/procedure.

Attempt – The EES deployed in the field to conduct a test, but for reasons beyond their control, the test could not proceed (e.g., the subject employee was on sick leave or vacation).

Inconclusive – The results of the test could not be clearly identified as Pass or Fail.

Pass with Comments to Command – Although the employee may have passed the test, a training issue was disclosed and communicated to the employee's commanding officer for appropriate action.

APPENDIX B

California Penal Code § 632

(a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of this section or Section 631, 632.5, 632.6, 632.7, or 636, the person shall be punished by a fine not exceeding ten thousand dollars (\$10,000), by imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

(b) The term “person” includes an individual, business association, partnership, corporation, limited liability company, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording the communication.

(c) The term “confidential communication” includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

(d) Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding.

(e) This section does not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited by this section are for the purpose of construction, maintenance, conduct or operation of the services and facilities of the public utility, or (2) to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of a public utility, or (3) to any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

(f) This section does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear.

(Amended by Stats. 1994, Ch. 1010, Sec. 194. Effective January 1, 1995.)