



**CITY OF BOULDER
CITY COUNCIL AGENDA ITEM**

MEETING DATE: February 2, 2023

AGENDA TITLE

Consideration of a motion appointing Claybourne M. Douglas as Special Counsel to investigate and, if necessary, prosecute all complaints related to the selection and appointment of Police Oversight Panel members filed pursuant to § 2-7-10(c), Boulder Revised Code, 1981.

PRESENTERS

Nuria Rivera-Vandermyde, City Manager
Teresa Taylor Tate, City Attorney
Erin Poe, Deputy City Attorney

EXECUTIVE SUMMARY

This matter arises out a second complaint related to the selection and appointment of Police Oversight Panel members filed pursuant to § 2-7-8, Boulder Revised Code, 1981.

STAFF RECOMMENDATIONS

Suggested Motion Language

Staff requests council consideration of this matter and action in the form of the following motion:

Motion to request special counsel to investigate and, if necessary, prosecute all complaints filed pursuant to § 2-7-10(c), Boulder Revised Code, 1981, related to the selection and appointment of the Police Oversight Panel, and to appoint Claybourne M. Douglas as Special Counsel.

COMMUNITY SUSTAINABILITY ASSESSMENTS AND IMPACTS

- **Economic:** None.
- **Environmental:** None.
- **Social:** Careful and independent investigation of ethics complaints supports community trust in government.

OTHER IMPACTS

- **Fiscal-Budgetary:** Mr. Douglas's hourly rate is \$250.
- **Staff Time:** The City Attorney's Office will provide any necessary support.

BOARD AND COMMISSION FEEDBACK

None.

PUBLIC FEEDBACK

None.

BACKGROUND

On January 26, 2023, Council appointed Claybourne M. Douglas to serve as special counsel pursuant sections 2-7-8 and 2-7-10, B.R.C., 1981 to investigate and prosecute, if necessary, a complaint filed by John Neslage alleging violations of section 2-7-8, B.R.C., 1981. The appointment of special counsel was necessary because the City Attorney provided legal advice to the Selection Committee during the selection process at the direction of City Council. Thus, the City Attorney believed it would be a conflict of interest to investigate the Selection Committee regarding a complaint related to the selection process.

On January 26, 2023, the City Clerk received a sworn Code of Conduct Complaint pursuant to section 2-7-10(b)(2), B.R.C., 1981, from Zayd Atkinson alleging violations of the Code of Conduct related to the selection and appointment of the Police Oversight Panel. A copy of the complaint is **Attachment A**. Section 2-7-10(b)(2), B.R.C., 1981 provides as follows:

A resident of the city or any city employee may initiate an investigation of any city council member, employee or appointee to a city board,

commission, task force or similar body by filing a sworn statement with the city clerk setting forth facts which, if true, would constitute a violation of a provision of this chapter.

The filing of a sworn complaint triggers an obligation of either the city manager or the city council; depending on the subject of the complaint, to refer the complaint to the city attorney for investigation and prosecution. This referral is mandatory. The code does not provide for any discretion. Here, the complaint is filed by a community member, therefore council “shall request the city attorney to conduct an investigation regarding a violation of this chapter.” § 2-7-10(c), B.R.C., 1981. This request does not reflect any decision regarding the merits of Mr. Atkinson’s complaint, because the referral is required by the city code.

The code further provides:

The city attorney may request that the city council appoint special counsel to investigate and prosecute any case that may cause the city attorney to have a conflict of interest or may cause an appearance of impropriety under the provisions of this chapter or may violate any rule regarding professional responsibility § 2-7-10(c), B.R.C., 1981.

The City Attorney advised the City Council, the Selection Committee, and city staff related to the selection and appointment. As a result, the City Attorney believes it would be a conflict of interest to now investigate actions taken by the Selection Committee, the Council, or city staff, and would likely lead to violation of her professional responsibility obligations.

The City Attorney recognizes that other Code of Conduct Complaints may be received related to the selection and appointment of the Police Oversight Panel. The underlying facts will be largely shared across all such complaints. For efficiency of time and to avoid incurring redundant legal fees, the City Attorney recommends that the City Council appoint Mr. Douglas to investigate and prosecute, if necessary, all Code of Conduct complaints related to the selection and appointment of Police Oversight Panel members in late 2022 and early 2023.

OPTIONS

Council has the option to:

1. Appoint special counsel to investigate only the Atkinson Complaint;
2. Appoint special council for all complaints related to the selection or appointment of Police Oversight Panel members; or
3. Require the City Attorney to conduct the investigation.

ATTACHMENT

Attachment A – Atkinson Complaint

TO: Boulder City Clerk

FROM: Zayd Atkinson

RE: Complaint under B.R.C. 2-7-10(b)(2)

January 26, 2023

Dear Boulder City Clerk,

Pursuant to B.R.C. 2-7-10(b)(2), I am submitting a complaint against Boulder City Council Members Tara Winer, Bob Yates, Matt Benjamin, Junie Joseph, Lauren Folkerts, Rachel Friend, Nicole Speer, and Mayor Brockett and Mayor Pro Tem Mark Wallach. The basis for the complaint follows.

BACKGROUND

In March of 2019, while performing my student work study job on Naropa's campus, on the grounds of the building I lived in, Boulder Police Officer John Smyly approached me and requested my ID. I provided my university ID, which is all that I had on me at the time. I did so even though it was clear there was no reason to suspect me of any crime. I assumed, and nothing that occurred subsequently has convinced me otherwise, that Officer Smyly's unfounded suspicions were purely based on my being Black. Officer Smyly, even after seeing my valid school ID, asserted that he was detaining me and drew, at varying times, his Taser and his gun. After many other officers arrived, I continued to be detained until a white female student, and a white employee of the university affirmed what my ID had already shown: I belonged there.

As the city of Boulder is aware, I agreed to a settlement in lieu of pursuing a lawsuit addressing the violation of my constitutional rights. I was heartened to witness the Boulder community, led by the NAACP of Boulder County, respond to this incident. At that time, city council members and the former city manager, among others, were supportive of the public's call for independent community oversight. Ultimately, this effort resulted in passage of an ordinance: now Boulder Revised Code Title 2, Chapter 11: Police Oversight. This oversight model replaced the largely police-driven professional standards review panel that had existed prior.

The legislative intent section of the police oversight code states, in part, that the intent of police oversight is "[i]n order to improve community trust in the police department, the council intends to increase community involvement in police oversight and ensure that historically excluded communities have a voice in that oversight." Such historically excluded communities included, per public discussions at the time, LGBTQ, Latinx, and Black community members. The method of increased community involvement was to establish the police oversight panel.

The police oversight panel's 2021 report states that in that year, "[f]ifty-eight complaints were filed involving 88 separate allegations." Council recently voted to expand the number of police oversight panel members because of their heavy work load caused by large numbers of members of the public regularly bringing complaints of police misconduct. This work is valuable, considerable in its volume, and, importantly, is to be led by diverse community members, including, ideally, "a person who has

experienced incarceration.”¹ If participation of diverse community members were not important, the professional standards review model would not have been replaced with BRC 2-11.

It is my understanding the selection committee for the newest members of the police oversight panel that put forth a slate of candidates was led by a person contracted to facilitate that effort, Shawn Rae Passalacqua. Further, it is my understanding Equity Officer Aimee Kane attended and oversaw the selection committee’s efforts.

On January 19, 2023, five members of Boulder City Council voted to delay the up or down vote on the slate of candidates provided by the selection committee. This followed an earlier unanimous vote at the December 15, 2022 city council meeting to do the same, and a demand by the full City Council at that meeting for details of the selection committee’s deliberations. Both of these votes constitute a failure on the part of City Council to follow the requirements laid forth in the ordinance and as such both votes are a violation of the legal duty City Council has to follow the terms of the city’s municipal code. This complaint is to address multiple violations of the code of conduct related to the above.

COMPLAINT

Complaint 1: Failure to Vote

On December 15, 2022, Consent Agenda Item E was:

Consideration of a motion to approve Selection Committee recommendations for members of the Police Oversight Panel, as outlined in Title 2, Chapter 11, “Police Oversight,” B.R.C. 1981 pertaining to the composition, duties and powers of the City organization related to civilian oversight of the police, and setting forth related details.

Such a vote is called for in BRC 2-11-6(15):

The selection committee will provide council with a written summary explaining why each applicant was selected. A motion to approve the proposed candidates shall be

¹ Advocates for the Boulder Police Department have stated publicly over the last few weeks that having negative impressions about the current state of policing in Boulder and in America constitutes “bias” such that persons with such beliefs should be excluded from the police oversight panel pursuant to the requirements in Boulder’s code. That misinterprets the prohibition in the code concerning bias, which deals with an unwillingness to agree to consider evidence presented to the panel objectively. Indeed, if concerns about bias against police ruled out those who held negative views of the current state of policing in Boulder and in America, it would make no sense for BRC 2-11-6(10) to state that “the selection committee will strive to include a person . . . who has experienced incarceration.” My understanding is that such persons routinely share concerns about police misconduct based on mistreatment they or persons they know have been subjected to, and I do not believe it is the intent of Boulder’s ordinance establishing the police oversight panel to ban from the panel such persons based on that lived experience. Other persons, without such lived experience, likewise should not be discounted for possessing similar concerns about police conduct when the code specifically seeks people with such perspectives.

placed on the council's consent agenda. council members may choose to exercise the call-up option to discuss a proposed candidate's appointment. Council will approve or reject the appointments by majority vote.

Council, per the above section of code, should have either exercised the call-up option, which it did not, or “approve[d] or reject[ed] the appointments by majority vote,” which it did not. Instead, Council, upon information and belief unanimously voted, in part, to delay the vote to ask questions of the selection committee (to be discussed in Complaint 2, below).

Complaint 1, therefore, is that on December 15, 2022, every City Council Member failed to exercise the call-up option available to them, or to approve or reject the appointments by majority vote. Refusing to fulfill their required duties at the December 15, 2022 meeting by delaying action on a vote to approve, reject, or call up the selection of members to the oversight panel is not an option permitted by BRC 2-11-6(15). Thus, in doing so, each of the members of Boulder City Council violated Boulder’s code of conduct section BRC 2-7-8(e)(5) and BRC 2-7-8(f)(1). The public officials’ action in failing to fulfill these duties on December 15, 2022, put at risk the work of the police oversight panel, and undercut its credibility, harming its future efforts.

Complaint 2: Pushing Selection Committee to Share Confidential Deliberations

At the same December 15, 2022 Council meeting, the members of the Boulder City Council directed staff to get further information from the selection committee, in part because of concerns of bias (apparently bias of one or more of the slate of candidates for the police oversight panel).

City Attorney Tate stated in the meeting, after hearing Equity Officer Kane share criteria that were used in selecting candidates for the police oversight panel, “when I hear that, I don’t hear all the criteria reflected that are in the code, and I hear criteria reflected that are not in the code.” Mayor Brockett expressed that “hearing more from the panel about both their thinking process, but also how they applied their code criteria, I think would be really helpful.”

Council Member Friend put forward the motion: “We refer consent agenda item 3E back to the selection committee to re-look at all applicants or all recommended panelists under code criteria that are required to be appointed and eligible for this panel with guidance from the city attorney’s office and with explanations or certifications explaining the steps that were taken in writing.” Council Member Speer commented on the motion “it’s just about providing a little bit more documentation for kind of the public to understand what the process was and what went into it.” The motion passed unanimously.

Requesting the selection committee to “explain[] or certif[y] the steps . . . [it took] in writing” is in violation of the police oversight code, BRC 2-11-6(5): “[s]election panel deliberations shall be confidential.”

Complaint 2 therefore is that every City Council Member, in its vote of December 15, 2022 on the above motion that passed unanimously, intruded on the confidential deliberation of the selection committee by demanding information about the selection committee’s deliberations. In doing so, each of the members of Boulder City Council violated Boulder’s code of conduct section BRC 2-7-8(e)(5) and BRC 2-7-8(f)(1). The public officials’ action jeopardized the deliberative process of the selection committee by

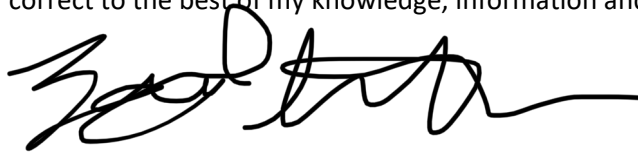
imposing disclosure requirements in violation of the code, thereby harming present and future efforts to make the best possible selections for the police oversight panel.

If it were determined that the selection committee did not sufficiently “provide council with a written summary explaining why each applicant was selected”, BRC 2-11-6(15), such that Council members seeking further information was warranted, then in the alternative, Complaint 2 is against Aimee Kane and/or contractor Shawn Rae Passalacqua, who advised the selection committee for failing to properly instruct the selection committee of its duties, or failing themselves to meet their duties.²

Complaint 3: Failure to Vote

Complaint 3 is similar to Complaint 1, except that is against a subset of Council members. On January 19, 2022, Mayor Brockett, Mayor Pro Tem Wallach, and Council Members Winer, Benjamin, and Yates again failed to either exercise the call-up option or to approve or reject the appointments by majority vote in violation of BRC 2-11-6(15). In doing so, these members of Boulder City Council violated Boulder’s code of conduct section BRC 2-7-8(e)(5) and BRC 2-7-8(f)(1). These public officials’ action in failing to fulfill these duties on December 15, 2022, put at risk the work of the police oversight panel, and undercut its credibility, harming its future efforts.

I swear under penalty of perjury after a reasonable investigation that the above statements are true and correct to the best of my knowledge, information and belief.



Signature of Zayd Atkinson

² Indeed, under the January 26, 2023 *Agenda for the Special Meeting of the Boulder City Council*, item B, Equity Officer Kane and others provided a thorough description of the process that adequately describes “why each applicant was selected.” On information and belief, all of the information to produce this document for the January 26th special meeting was available to Kane and Passalacqua to provide to Council ahead of the December 15, 2022 Council meeting.