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Fairfax County Board of Supervisors Security Committee, Tuesday, June 13, 2023

Date	Tuesday, June 13, 2023
Place	Fairfax County Board of Supervisors, Virginia
Length	34m (video)

- Official meeting video (Fairfax County): https://video.fairfaxcounty.gov/player/clip/2923
- Official Board of Supervisors page (Fairfax County): https://www.fairfaxcounty.gov/boardofsupervisors/

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Speech-to-text: whisper.cpp, model large-v3-turbo. Produced 2026-11-03. Each paragraph starts with its time [HH:MM:SS] in the meeting video.

[00:00:03] good afternoon everyone we're going to go ahead and start our meeting for june 13th here for the public safety and security committee we have one item on our agenda today and that is the report from our independent police auditor their 2022 annual report which will include information on the cases that they've reviewed involving use of force as well as officer-involved shootings.

[00:00:37] What I'd like to do before I turn it over to Richard Schott is to acknowledge maybe a couple of things. First, I want to thank him for the work that he's done over the course of the year in support of the civilian review panel as they have kind of stepped up with their executive director in helping them get their policies and practices set, as well as participating in a number of meetings around their work.

[00:01:07] So I just want to acknowledge that. And then just to also say, just appreciate the thoroughness of the presentation of the materials that he's provided as well. And if I can, I will turn it over now to Richard Schott for the annual report.

[00:01:27] Thank you. Thank you, Supervisor Lusk, and good afternoon, Supervisors. Thank you for giving me the opportunity to present my office's annual report for the year 2022. With me today is Rochelle Ramirez, my office's management analyst, and reflecting what Supervisor Lusk acknowledged, Rochelle really had a lot more to do with the transition of the newly created or newly established the Office of the Police Civilian Review Panel and that transitioned. So in addition to being

[00:02:06] integral in that, Rochelle is here to help me answer any questions you may have at the end of the presentation. During 2022, I reviewed or monitored a total of 22 cases, which included 12 automatically generated reviews because of the nature of the incident, that being an officer involved shooting or the death of someone while in the custody of the Fairfax County Police Department or a use of force resulting in a serious injury. In addition to the automatically

[00:02:44] generated reviews, I received and reviewed incidents where nine complaints were made about a use of force which were lodged either with my office or with the Fairfax County Police department. And the last of the 2022, 22 reviews was a holdover from then Chief Rossler's tenure in an electronic control weapon incident where he individually asked me to review the incident.

[00:03:20] And that incident did go back to 2020, but I issued the report on it during 2022. So that's why it's included. Ten of the 22 cases did involve an officer-involved shooting, six of which occurred during 2022. And I will address later in my presentation the somewhat dramatic uptick in the number of officer-involved shootings last year. In one case that I reviewed in 2022, there was a

[00:03:52] serious injury resulting from a canine bite, and the in-custody death situation resulted from a medical emergency suffered while a person was in the custody of the police department, but it did not result from any use of force. And again, in addition to the automatic reviews, there were nine complaints of excessive force made to either my office or the police department that I reviewed, and those included allegations of takedowns in two cases, brandished firearms in

[00:04:28] two cases and two incidents of being forced to cuff and the other incidents involved one complaint each of either being pushed, struck, or assaulted by FCPD officers. During 2022, I published eight incident reports. In each of those eight, I found that the FCPD investigations met the standards of being complete, thorough, accurate, objective, and impartial. However, I did make recommendations

[00:05:05] in three of the eight incident reports, which are detailed on the next slide. In 2022, I made a recommendation in the three incident reports, one of which involved the canine bite, one involved in a complaint of being assaulted, and one came from an officer-involved shooting review. In the canine bite incident, my recommendation was to revise General Order 530.1 to require a warning before

[00:05:43] releasing a patrol service dog anytime the dog is being released to apprehend someone. And I'm happy to say that was implemented almost immediately after I made that recommendation. I think it was more of an oversight. There was a stipulation in the policy that if you were to release a canine to apprehend an individual within a building, a warning was required, but not in the situation that presented itself in this situation. The other two recommendations, which stemmed from incident report reviews, were actually reiterations of earlier recommendations I had provided

[00:06:22] to the police department. These addressed adding non-criminal factors to the consideration of whether force was objectively reasonable during a non-criminal situation and training on the proper conduct of searches incident to a lawful arrest. Also during 2022, 12 previous recommendations that I had made before 2022 were implemented. So I would point out that

[00:06:58] a total of 21 recommendations were actually implemented during 2022, although only 12 were made in the calendar year 2022. I also provided policy recommendations that did not stem from an individual incident review or a subsequent report. For example, in April of 2022, the police Department sought to thoroughly revise its General Order 540 on the use of force. The department

[00:07:36] solicited feedback from community partners and also asked for my input. I provided 10 recommendations for the police department to consider, and the PD has implemented five of the 10. Among the five that the PD did not incorporate was a reiterated recommendation, which I've made as long ago as 2017 to replace the term, quote-unquote, less lethal with the term non-deadly throughout the general order. The recommendations that were implemented, so the five of the ten that were

[00:08:15] implemented, included the addition of definitions for multiple force options not previously included in the general order's list of definitions and a recognition in the policy that there may be more than one type or level of force, which may be construed to be objectively reasonable during any individual incident. The FCPD's revised General Order 540, which became effective on

[00:08:46] August 12, 2022, streamlined its prior 55-page policy on the use of force down to a much more, at least in my opinion, manageable 19 pages. And six of those 19 pages simply provide definitions or legal references. Three recommendations I previously made relating to arrest procedures, which again were unrelated to any specific incident, were also implemented in 2022.

[00:09:20] One of those was to recognize in policy the full extent of and limitations on the lawful search incident to a lawful arrest, which changed rather dramatically based on a 2021 Fourth Circuit Court of Appeals ruling. As this board is well aware, the research team from the University of Texas at San Antonio, or UTSA, was commissioned by my office in 2020, and it made several use of force

[00:09:57] recommendations for the police department to consider during a presentation the research team made to you in June of 2021. This board subsequently convened a County Use of Force Community Advisory Committee, or CAC, to evaluate and assess the recommendations made by the UTSA research team. The CAC presented its own recommendations to the board on March 1st, 2022. I reviewed both groups' recommendations and in a 2022 memorandum to the board

[00:10:37] expressed my agreement with the majority of them. However, I explained my disagreement with a limited number of their recommendations. With this group of recommendations again being considered by the board as part of the Police Reform Matrix Workgroups Action Plan, which was presented to you just last month, I will be happy to provide input as these recommendations continue to be evaluated.

[00:11:09] And finally, for 2022, my office continued to provide support to the civilian review panel while assisting with the startup of the new county agency, the office of the police civilian review panel, and the hiring of its first executive director. The complete handoff of administrative support duties occurred after September 2022 when the OPCRP was fully staffed with the hiring of that office's management analyst. Also included in my 2022 annual report

[00:11:47] is a summary of other office activities to include outreach and media events, involvement with and a presentation made to the National Association for the Civilian Oversight of Law Enforcement, and helping to establish a Virginia-centric alliance of civilian oversight practitioners as other cities and counties within the Commonwealth have recently established oversight in their respective jurisdictions.

[00:12:21] And again, I would like to turn to not a 2022 work product, but something that was generated by events of 2022. This final slide addresses work that is currently being done by Rochelle and myself, and I feel like it's important to mention today.

[00:12:45] From 2017, the year of the inception for the auditor's office, through 2021, my office reviewed a total of six Fairfax County Police Department officer-involved shootings of people and two shootings of domesticated animals.

[00:13:03] In 2022 alone, the PD had six officer-involved shootings of people and another one of a domesticated animal. And of course, you know it thus far in 2023, there have been three police department officer-involved shootings of people. Because of this alarming uptick, Rochelle and I have undertaken a trend review of all officer-involved shootings since 2017. Data of interest will

[00:13:35] include antecedent and situational factors to the incidents, the subject and officer demographics involved in the shootings, case outcomes, and police department responses to and policy changes generated by the shooting reviews. When our trend review is completed, we will prepare a summary for the board and for the public. Thank you for your time this afternoon, and Rochelle and I are now

[00:14:07] happy to answer any questions you may have. Thank you again very much for that presentation, and And just thinking about what you just articulated, which is the study of shooting since 2017, what do you anticipate will be the timeline for that review and report back?

[00:14:31] Rochelle, I was going to say by the fall, definitely to give us a little cushion, Rochelle is saying probably within two to three months. Okay. So maybe before the end of summer. Okay. That's helpful. I just want to make sure I'm not pushing you.

[00:14:47] I'm just asking you just for our own awareness what that timeline might be, but that sounds very reasonable. Again, I want to acknowledge the points that you have raised here with the use of force for recommendations, the GEO 540.

[00:15:05] And just maybe if I could just drill down on a couple of the points that you talked about. this point about changing the word less lethal with non-deadly force. Can you maybe talk us through that a little bit in terms of why you're recommending that, and then maybe help me understand where our police department is with regard to it? Yes, thank you. I'll start by saying

[00:15:37] I recognize that in 2023 I'm probably in the minority of law enforcement professionals in feeling that the more appropriate term is non-deadly as opposed to less lethal. Groups like PERF, they've been advocating for less lethal for probably a decade by now. It is more the accepted

[00:16:07] term within the community. My disagreement with it is there is a very limited situation in which a law enforcement officer is authorized to use deadly force. And that's when he or she is in reasonable fear of death or serious injury, serious injury to themselves or to another person.

[00:16:34] If you're not in that situation, you're simply not authorized to use deadly force. And my fear is if an officer answers a question that he or she was not in imminent danger of death or serious physical injury, but he or she chose to use a less lethal force, by definition, he or she is saying they used a lesser form of deadly force when it's simply not authorized. I guess for lack of a better

[00:17:08] term, it just seems to me to be an oxymoron. Force is either deadly or it isn't. If it's not foreseeable that a person will suffer death or serious injury from a use of force, then it should not be considered deadly force or less deadly force, in my opinion. I recognize the argument to use less lethal,

and that is because in very limited circumstances, the use of less lethal force or non-deadly force may, in fact, result in a person's death. But I don't think that converts

[00:17:48] it to a a use of deadly force okay um i might articulate here then from my own standpoint i'm leaning towards you at least in this um discussion and it might make sense for us to have a broader conversation um at a future meeting about this terminology because i think we have to come to a decision and i would feel more comfortable having that maybe as a more expanded conversation so number one. Number two, you sort of intimated this when you made reference to imminent versus

[00:18:27] kind of immediate. Do you want to maybe talk to that as well? Yes. Thank you. I can't quote specifically, but I know within General Order 540, the police department somewhat intermittently refers to imminent danger and immediate danger. Right. I think the better practice would be to use one or the other throughout the general order. And my recommendation would be to lean

[00:19:02] heavily toward imminent as opposed to immediate. And the reason for that is court cases throughout the judiciary have always indicated that law enforcement officers do not have to wait until a threat has become immediate to try to resolve a situation by using force, they are legally able to use force when the threat of harm is imminent, before it becomes immediate.

[00:19:37] Again, I think this is probably one that we might want to continue to maybe develop and have a conversation around with the chief just to understand the choice, imminent versus immediate.

[00:19:51] And then the last point I'll make, and I appreciate on the University of Texas at San Antonio you made the point about the policy recommendation that the UTSA folks were recommending as well as the CAC, and I think even now PERF, with regard to this objective reasonableness standard and considering replacing it with necessary and proportional.

[00:20:21] And I guess it might be helpful here, too, if you could help us understand this distinction and your position, which I think is to not do that. My recommendation, and on this one, I am in agreement with the police department, or we're in agreement.

[00:20:43] I think the better choice and the more legally sound standard is object of reasonableness. Some people say, well, one of the good arguments for maintaining that is we have literally 34 years of court opinions based on the objective reasonableness standard.

[00:21:09] But my concern is when you start trying to articulate a standard of necessity, the first thing I would challenge a person who's advocating that to do would be to define to me when is it necessary.

[00:21:29] My counter-argument would be it's almost never absolutely necessary. You can try many, many things, but you don't have to wait until it's more than objectively reasonable.

[00:21:46] So part of my problem is the defining when it is necessary. Another issue I have with some advocates of turning to necessary as opposed to objective reasonableness, They want to, based on the necessary standard, they want to bring in actions that led up to the use of force, which has never been part of the use of force analysis before.

[00:22:16] And please don't misunderstand what I'm saying. Actions prior to the use of force need to be analyzed, but I think it's a separate analysis from the use of force. Okay. Now, I appreciate that clarification.

[00:22:32] I appreciate that further detail. So with that, let me turn it over to the chairman for any comments or questions. Thank you. First, Richard, thank you for your annual report and the work you do. Much appreciated.

[00:22:48] And actually, this conversation that we're having is exactly why your position is so important for us to understand the totality of perspectives involved here. So the one question I have, and I want to thank you for voluntarily suggesting that you're going to do a trend review of the officer-involved shootings, because clearly that number is concerning.

[00:23:11] On the other hand, we need to get to an explanation, you know, of what's really happening, as opposed to just jumping right to what is happening and deciding in our own mind what's going on. And so I think that's very helpful. Knowing the timeline that you've worked on, which is aggressive, and I'm not suggesting that it shouldn't be aggressive, but I also want to make sure that it's complete and the quality of what you produce is high.

[00:23:39] Have you given some thought to what the scope of that trend review is going to be? I'm going to defer that to Rochelle. So this is Rochelle Ramirez with the Office of the Independent Police Auditor.

[00:24:01] We identified mostly public available information as information that would be going into this trend analysis, but it would look at all 15 officer-involved shootings of persons since 2017, which is a little bit of a larger window than, say, what the FCPD has asked PERF to complete for them.

[00:24:32] I believe PERF provided a review of seven incidents. So it would be a larger scope than that. But I think in terms of the information, it would be limited to more public information, especially for any shootings in which there's ongoing investigations.

[00:24:53] So we would obviously be able to provide more information on shootings that have closed investigations. and knowing that the perf review was done and maybe a little bit more narrow uh you're factoring in or trying to be blind to the perf recommendations and maintain an independence um that you know your office is good at or are you looking at the perf recommendations and also commenting on those i wasn't planning on on commenting on theirs uh if if the board would like me to i'll certainly

[00:25:33] undertake that, but we were looking at it, we were looking at the, as Rochelle said, 15 shootings of people, and we were just going to do kind of an analysis of those 15, separate from what PERF looked at. I think some of the data points might be duplicative of what PERF looked at, but we're going to try to go a little beyond that, but certainly beyond that in terms of going back to 2017. Yeah, and recognizing your timeline scope is, you know, quite a bit broader than theirs.

[00:26:11] I wouldn't necessarily expect there to be alignment. However, you know, I do think it would be helpful for us once you're finished with the scope, either as part of your trend review or maybe just part of your commentary to us, how your review aligns with some of the recommendations or differs and what reasons you might differ from those that were recommended by PERF, I think would be helpful for us to just kind of marry the two up.

[00:26:40] Even if they're not formally married within your trend review, I think we need to understand where they're different, where they're the same, and why. In the same way, we're having a conversation between your recommendations and where you may have differed from the leadership in the police department.

[00:26:55] I think that would be helpful. But thank you. Very well done. Thank you. Thank you, Mr. Chairman. I'll start with Vice Chair Penny Griss. Thank you, Mr. Chairman. Mr. Schott, I was on the interview panel when we selected you.

[00:27:12] You were impressive then, and you have never disappointed. I'm a great fan of Mr. Schott's. I think he was a great hire. And I really appreciate everything you do. You issue clear and reasonable opinions, and they're understood by the layperson like me.

[00:27:32] So I do appreciate that, and I read every word. But I also just don't have any questions on your report, but I do want to thank you for instituting the disclaimer about language that you have put into your more recent reports.

[00:27:49] I think that's really helpful for those who are reading it sort of outside of the normal public safety folks. Because I know at one point when I was looking at a previous report and I went, whoa, this is language you don't necessarily see in print all the time.

[00:28:09] But it was absolutely, it was a quote. And so you and I had a chat and you have issued a disclaimer at the beginning of each report now. And I really appreciate that. I think the community needs to understand quite often the heated conditions sometimes that are present in a situation like that.

[00:28:36] But also I think there is sometimes a little bit of a shock value. And so thank you for doing what you do. Again, great hire. You are really doing well. And I can't believe it's been six years. Thank you. Me neither. Thank you. Thank you very much, Vice Chairman Gross.

[00:28:52] James Walkinshaw. Thank you, Mr. Chairman. I want to second what Supervisor Gross said. I've been incredibly impressed with your work, and I think there's tough issues, obviously, on the table here that people are going to disagree on, and higher profile issues like definitions around use of force, but I think if you go through the dozens and dozens of recommendations that you've made, your office has made, most of which are not sexy um you know they're procedural in nature they're highly technical uh only someone with

[00:29:32] your expertise i think could help develop them and and most have been implemented and i think we have a much better police department because of it and this is a real success story and board members who were on the board when this position was created should should be really proud of of the work that's been done. And I really appreciate the fact that you don't just go with the flow.

[00:29:57] And I think, you know, sharing your perspective on the distinction between non-deadly versus less lethal and your view on it, that's what we want to hear, your perspective, even if it goes against the grain of what other professionals are saying. So thank you for your work. And that's a lead up too. I have a different view on the objectively reasonable standard, as you and I have discussed it, and I've talked about it with the chief and others. I think the idea of a reasonable

[00:30:34] officer is an abstraction. The very term reasonable is not an objective term. It is subjective as to who or what is reasonable, and the lawyers in the room know this better than me, but the Supreme Court has not established the qualities that define an officer who is reasonable. So the way that I look at it, that term is actually subjective, not objective. Clever lawyering to

[00:31:12] call something that's subjective, objective, but the truth is you must make a subjective determination as to whether the officer was reasonable. I think that our officers would be in a better

position, more defensible position, if they had a more objective standard, and reasonable is not objective.

[00:31:35] So, you know, I appreciate that people in the law enforcement profession disagree on this. I appreciate your perspective. Perf and others have their perspectives. To me, objectively reasonable is oxymoronic, and it is not clearly defined in the case law, and it allows each situation to be judged by a judge or jury or some other entity based on what they deem reasonable, rather than an abstraction of a hypothetical reasonable officer, which doesn't exist.

[00:32:12] But that's my soapbox. I really appreciate your work. I think your recommendations and the matrix of your recommendation are incredible. The question I'll have for you is, are you satisfied with the responses that FCPD has supplied to your recommendations, understanding they disagree with some of them?

[00:32:35] Have you gotten answers to all of them? Yes. Thank you for the question. I can assure you that they have always explained why they choose not to implement one of my recommendations or why they choose to implement it with some revision to what I recommended absolutely every time. And if I can, I just want to not respond, but confirm a little bit about what you just said about the reasonable being a subject of standard. I recently, in May, attended a week-long constitutional policing conference in Florida,

[00:33:15] and the primary instructor there was a retired instructor from the Federal Law Enforcement Training Center in Glencoe, Georgia, and he made that exact comment. I think the title of his presentation on that very topic was object of reasonableness is blatantly, you know, misleading or something to that effect.

[00:33:44] But he made almost the identical argument against it. So great mind, not that mine's great, but professional minds can differ. I remembered him at FLETC from when I was at the training center down at Quantico. Okay. Thank you.

[00:34:00] Thank you, Supervisor Walkinshaw. Any of the other colleagues like to ask any questions? Oh, wow. I'll just echo good job at that. All right.

[00:34:16] So with that, I will thank Richard Schott and Rochelle Ramirez for their presentation today. And we will look forward to your upcoming report to us in the fall. So thank you very much.

[00:34:31] And with that, today's meeting is now adjourned.

