



OFFICE OF CORPORATION COUNSEL

MARGARET C. DAUN
Chief Corporation Counsel

COLLEEN FOLEY
PAUL D. KUGLITSCH
Deputy Corporation Counsel

TIMOTHY R. KARASKIEWICZ
MOLLY J. ZILLIG
ALAN M. POLAN
DEWEY B. MARTIN
JAMES M. CARROLL
KATHRYN M. WEST
JULIE P. WILSON
CHRISTINE L. HANSEN
CARRIE THEIS
Assistant Corporation Counsel

Date: January 10, 2017

To: Honorable Supervisors of the County Board

cc: County Clerk George Christensen (c/o Janelle Jensen)
County Executive Chris Abele
Interested Parties

From: Deputy Corporation Counsel Colleen Foley

Re: Referral of File 16-743 regarding Implementation of External Investigation Policy

Introduction/Background: On December 1, 2016, this office issued an opinion regarding the County Board's authority concerning external investigations for deaths at the Milwaukee County Jail (Jail) or House of Corrections (HOC). After the December 15, 2016 special meeting of the Judiciary, Safety and General Services Committee, this honorable body adopted the amended resolution in File 16-743 and referred it back to the Office of Corporation Counsel (as well as to the Sheriff and Superintendent) for a report on countywide implementation of the policy. The policy mandates for the HOC and recommends for the Jail external investigations for deaths involving use-of-force, inmate-on-inmate assaults, or unexplained or unusual circumstances. The amended resolution expands the policy countywide to enact best practices and limit liabilities for which the Board is responsible per Wis. Stats. §§ 895.46 and 59.52(12).

The referral back to Corporation Counsel states:

The Office of Corporation Counsel shall provide an informational report on implementation of this policy on a countywide basis, inclusive of all county facilities and relative to county law enforcement community interactions by the January 2017 cycle.

Implementation of Policy Countywide for County Facilities and Relative to County Law Enforcement Community Interactions: Wis. Stat. § 175.47 establishes and mandates an investigative procedure whenever an on-or-off duty law enforcement officer is involved in a custodial death under suspicious or unexplainable circumstances. Wis. Stat. § 175.47(1)(c). Unlike HOC or jail officers, deputy sheriffs meet that "law enforcement officer" definition, which is as follows: "any person employed by the state or any political subdivision of the state, for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances that the person is employed to enforce." Wis. Stat. § 165.85(2)(c). A "law enforcement agency" is defined as a "governmental unit of one or more persons employed full time by the state or its political subdivision for the purpose of preventing

and detecting crime and enforcing state laws or local ordinances, employees of which unit are authorized to make arrests for crimes while acting within the scope of their authority.” Wis. Stat. § 165.83(1)(b).

Each law enforcement agency must have a written policy on investigations for officer-involved deaths. Wis. Stat. § 175.47(2). The policy requires that an investigation be conducted by at least two investigators, neither of whom are employed by the agency that employs the involved officer. Wis. Stat. § 175.47(3)(a). Internal investigation are still allowed, but cannot interfere with the external investigation, which must occur quickly and conclude with a report to the district attorney’s office for the county in which the death occurred. Wis. Stats. §§ 175.47(4) and (5)(a).

Sheriff’s Duties: This office’s prior report provided an analysis of the sheriff’s duties. In summary, the sheriff’s constitutionally protected duties include the operation of the jail, attendance on the courts, maintaining law, and preserving the peace. *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶¶52-57, 301 Wis. 2d 266, 732 N.W.2d 828. Statutorily, the sheriff’s duties include taking charge and custody of the jail and the persons in it, keeping a true and exact register of all prisoners, attending on the courts, and serving or executing all processes, writs, precepts and orders. Wis. Stat. § 59.27. The sheriff determines how his traditional duties and functions are performed.

This situation is distinct from establishing procedures for jail officers within the jail the Sheriff operates and the inmates for whom he has oversight. It does not invoke a statutorily or constitutionally protected duty inherent to the office. Here, the Sheriff is subject to a statutory, statewide mandate that deaths involving on-or-off duty law enforcement officers be investigated externally.

Indeed, the Sheriff’s Office is currently finalizing a Memorandum of Understanding with another law enforcement agency to conduct external investigations where statutorily required. So, any such death involving a deputy at a county facility (whether that be the courthouse, GMIA or the Zoo for example) or elsewhere in the community (the highway, the medical campus or a park) would trigger the statutory requirement.

Conclusion: The Sheriff’s Office is subject to the statute establishing procedures for investigations of deaths involving law enforcement officers. The law and this amended resolution therefore apply to deputy sheriffs engaged in law enforcement duties in county facilities or in the community, whether on-or-off duty.

Respectfully submitted,

/s/ Colleen Foley
Deputy Corporation Counsel