CIVILIAN OFFICE OF POLICE ACCOUNTABILITY

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August 28, 2019

Max A. Caproni
Executive Director, Chicago Police Board
30 North LaSalle Street, Suite 1220
Chicago, Illinois 60602

VIA Email

RE: Request for Review, Log No. 1078451

Dear Executive Director Caproni:

Pursuant to your August 23, 2019 email requesting answers to certain questions from the reviewing member assigned to this request for review, COPA provides answers below.

COPA notes that this is an issue of paramount importance for residents of Chicago who lawfully carry concealed firearms and should not be subjected to a seizure merely because they are exercising their Second Amendment rights. The Department's position is also inconsistent with its legitimate law enforcement interests and exposes the City of Chicago to civil liability. Should the Police Board permit the Department to continue its unconstitutional practice of seizing individuals based solely on the fact that they are carrying a concealed or partially concealed firearm, there will be otherwise strong criminal cases dismissed and/or overturned because the initial seizure was unconstitutional. In order to ensure that the Department is able to effectively fight crime (*i.e.* arrests that are capable of a successful conviction), the Police Board must strongly denounce the Department's current unconstitutional practice.

Question 1:

430 ILCS 66/65(a)(10) prohibits knowingly carrying of a firearm on or into: "Any public gathering or special event conducted on property open to the public that requires the issuance of a permit from the unit of local government . . ."

Regardless of whether a permit was, in fact, obtained, was the Black Lives Matter event the type of "gathering or special event" that would have required a permit? For example, would a permit to occupy the public right of way be required? Or would a different type of CDOT or other City permit be required? Were streets or public thoroughfares blocked? If a permit was required, would carrying a concealed firearm (if it was in fact concealed – see below) at or through such an event be a violation of the statute that would justify a detention for investigatory purposes?

COPA Response to Question 1:

While officers may work collectively (and knowledge may be imputed), none of the officers involved in this stop articulated a permit issue as a basis for the stop nor did the Department. Therefore, COPA did not investigate this issue because facts that were not known by any of the officers involved in the stop are irrelevant to the inquiry.

Regardless, the City of Chicago does not require a permit for gatherings and marches on sidewalks that do not obstruct the normal flow of pedestrian traffic. Chicago Municipal Code § 10-8-334(a) (definition of "public assembly"). There is no indication from the record that the protest obstructed the normal flow of pedestrian traffic. In fact, the record shows Michigan Avenue was filled with shoppers and other normal activities. Even assuming *arguendo* the Black Lives Protest had a permit or was required to have a permit, 430 ILCS 66/65(a)(10) does not apply to "to a licensee who must walk through a public gathering in order to access his or her residence, place of business, or vehicle." There is no evidence that the man spotted by ISP was participating in the protest, rather the evidence demonstrates he was merely walking on Michigan Avenue. Furthermore, the Mr. [redacted] – the man *actually* stopped – was simply leaving his home to meet a friend and *also* had no involvement in the protest.

Question 2:

> 430 ILCS 66/5 defines a "concealed firearm" as: "'Concealed firearm' means a loaded or unloaded handgun carried on or about a person completely or mostly concealed from view of the public or on or about a person within a vehicle."
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> In this case, given that the state police officer appears to have seen the firearm from some distance, it is unclear how the firearm in question would constitute a "concealed firearm" inasmuch as it appears to have been in plain view (neither "concealed" or "mostly concealed"). As such, if it was in fact displayed (not concealed) would that not be in contravention of the statute and justify a detention for investigatory purposes?

COPA Response to Question 2:

The Act permits a licensee to carry a concealed firearm on his or her person "fully concealed or partially concealed." 430 ILCS 66/10(c)(1) (West 2014). A displayed firearm (*e.g.* a person holding a firearm in his or her hand) would constitute a basis for an investigatory stop and arrest. However, in this case, the ISP officer merely spotted a firearm in the man's waistband, which is permissible under the Illinois Concealed Carry Act. There is no evidence that the firearm seen by ISP was "displayed."

In *People v. Harris*, the First Appellate Court District expressly held that an officer observing a firearm protruding from a man's waistband did not establish probable cause to arrest. 2018 IL App (1st) 151142-U.[1] While the case did not address whether this would justify a *Terry* stop, the same reasoning would apply: the gun was partially concealed. Indeed, the Court noted

[1] COPA recognizes that this was filed under Illinois Supreme Court 23. Nonetheless, it is illustrative of how Illinois courts analyze this issue.

that "possession of a firearm, without more, [is] insufficient to show that [a person is] participating in any suspicious or criminal activity." *See People v. Harris*, 2018 IL App (1st) 151142-U at ¶ 22. Furthermore, in *People v. Horton* the First Appellate District found that a *Terry* stop would not be justified based only on an officer's reasonable belief that an individual possesses a firearm. *See* 2017 IL App (1st) 142019 (vacated on other grounds[2] by *People v. Horton*, 2017 Ill. LEXIS 1094 (2017)). The Court noted the following:

> The dissent argues the officer did have reasonable suspicion for an investigatory *Terry* stop, because, although possessing a handgun could be a legal concealed carry, it could be illegal if Horton did not possess a firearm owners identification (FOID) card (as required by 430 ILCS 65/0.01 *et seq.* (West 2010)), and the officer could have stopped Horton to investigate whether Horton was carrying the gun legally. This rationale leads down a dangerous path. By way of analogy, it is also illegal to drive a car without a valid license. If an officer makes eye contact with another motorist, and that motorist then turns onto another street, can the officer execute a traffic stop to verify that the motorist has a valid driver's license? In that situation, we would say the police officer needed to have reasonable suspicion, based on articulable facts, that this particular motorist did not have a valid license. Officer Hummons had no articulable facts to believe that Horton was carrying a firearm without a valid FOID card.

Id. at ¶ 58. Just as in *Horton* and *Harris*, there is no evidence in the instant request for review that the person observed by ISP was doing anything other than carrying a firearm. The case cited by the Department, *People v. Gomez*, 2018 IL App (1st) 150605 is entirely inapplicable. *Gomez* did not involve observing an individual in mere possession of a concealed or partially firearm; rather, the officers observed an individual engage in "furtive behavior" and make repeated efforts to conceal the weapon from the officers. *Id.* at ¶ 30. The defendant's behavior in *Gomez* was suspicious because it was inconsistent with lawful possession of a firearm. *Id.* In the case at issue, the ISP officer simply observed a man walking down Michigan with a firearm concealed in his waistband.

<u>Question 3</u>:

> Finally, COPA cites *United States v. Watson*, a 2017 case. The events in question occurred in 2015. Please provide case law in support of the proposition that a Terry stop of a lawful concealed carry holder was not justified under the law as it was understood at the time of the events in question.

[2] The Illinois Supreme Court vacated the opinion based on its decision in *People v. Holmes*, 2015 IL App (1st) 141256, which addressed the retroactive application of the exclusionary rule to findings of probable cause based on laws that are subsequently ruled unconstitutional. The *Horton* seizure and arrest occurred prior to amendments to Illinois law that were ***<u>fully in effect</u>*** on the date of the incident in this case as outlined in COPA's summary report.

COPA Response to Question 3:

The timing of *Watson* is irrelevant to the present non-concurrence, as *Watson* merely interpreted pre-existing law. On the date of the incident, the Illinois Concealed Carry Act was in effect and the Illinois Supreme Court and United States Supreme Court had clearly and specifically articulated the Fourth Amendment right to be free from unreasonable searches and seizures and the Second Amendment right to bear arms. A "reasonable officer" is one who knows and understands the law at the time. On the date of the incident, a reasonable officer would have known an Illinois resident could lawfully carry a firearm outside the home if he or she possessed a Firearm Identification Card and Concealed Carry License and that "possession of a firearm, without more, [is] insufficient to show that [a person is] participating in any suspicious or criminal activity." *See People v. Harris*, 2018 IL App (1st) 151142-U. Indeed, in *Harris*, the Illinois First Appellate suppressed evidence from a ***2014*** traffic stop (a full year prior to the incident at issue in this non-concurrence) on this exact basis after the officer observed a citizen with a firearm protruding from his pants. *Id.* At most, the lack of case-law in 2015 on this exact point is a mitigating factor to appropriate discipline for the allegation.[3] To require COPA to find a case exactly factually analogous and predating an instance of misconduct would make it virtually impossible to sustain most allegations of misconduct which are often highly fact-specific.

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Please let us know if the reviewing member has any additional questions or requires additional information.

Respectfully,

[redacted]

Sydney R. Roberts
Chief Administrator
Civilian Office of Police Accountability

[3] COPA would be willing to lower the discipline relative to Allegation #1 to a reprimand.