

## Essential information and legal issues relating to the EquityActionATX Comparison Comment Sheet

This resource sheet is based on the document prepared and distributed Monday to City Council and the Public. That five-page chart makes the following assertions about the impact or result of the adoption of the EquityActionATX, the APOA + Item 80 (the One Year resolution), concluding that those two actions or outcomes taken together would do the following:

(The **bold** language in each numbered topic is verbatim from the Equity Action document)

### 1 **Protects the will of the voters related to police oversight.**

The APOA/Equity Action Petition if passed:

- Does not and cannot change state law creating the confidential policy “g” file (TLGC 143.089(g))
- Does not and cannot change state law setting the 180 day standard for police discipline
- Does not and cannot change state law restricting anonymous complaints to members of the police department

Those are the fundamental state law barriers to overcome. That must be accomplished for any enhancement of Citizen or City (OPO) oversight of the APD. Access to the “g” file is essential for all oversight activities, and the ability to release or discuss information from the “g” file in the public realm is essential for the public to understand and develop greater confidence in the process. We are satisfied that Equity Action agrees with each of the prior statements but they never say how that will legally happen. As a result, every aspect of the analysis in the chart false or misleading for failing to admit these simple legal facts to the community and the voters. Most of the assertions and commentary depend upon this core error. A “yes” vote to adopt the ordinance **cannot** and **will not** eliminate these state law barriers to the police oversight model they want. It is up to each citizen to decide if that approach is actually and legitimately advancing “the will of the voters.”

If “the will of the voters” is actually to accomplish those things, they can only be accomplished by a voter initiative to repeal Chapter 143 under state law, by obtaining changes to Chapter 143 in the Texas Legislature, or by obtaining the agreement and consent of the APA in a labor agreement. Telling the public otherwise is not accurate or true, at least in the sense of “the truth, the whole truth and nothing but the truth.”

The existing labor agreement resulted in an Arbitration Award in favor of the APA’s position on OPO authority. It seriously limits the ability of the City to use its existing state law and City Charter authority to develop OPO actions and investigations, and that award now a part of the agreement. An extension of the agreement carries that terrible baggage with it, but the proposed agreement does not.

### 2 **Places no limits on anyone’s ability to submit anonymous complaints.**

This is clearly false. The Petition cannot change the state law on investigation of anonymous complaints. (TLGC 143.312 (g) and the One year resolution would not.\*

Under the proposed agreement, anonymous complaints may be filed at the OPO by anyone, whether officers or members of the public, and OPO has no obligation to do anything about determining or revealing who the complainant is/was. Police officers may not file anonymous complaints with the Department under existing department policy. The agreement does not change the City's authority over the Chief, or the Chief's ability to prevent and eliminate any alleged or perceived "code of silence" and to use his discretion about when and how officers meet their public obligation to report misconduct by their peers.

**3 Empowers the OPO to perform random audits of use of force incidents and body camera footage and places no limits on the OPO's ability to act as a complainant.**

This is false. The Petition cannot do this, and the One year resolution would not.

The proposed agreement does not limit OPO preliminary investigations on complaints, and OPO has unfettered access to evaluate all information in the possession of the department for that purpose. The agreement does limit OPO for its new and robust officer and witness interrogation role. That role will only apply to complaints that are ultimately classified such that IA level investigations occur. The City retains its prerogatives over these department heads (Chief of Police and Director of OPO) to make sure that all matters are investigated that should be, and that both IA and the OPO are both doing it that investigation. Nothing in the proposed agreement limits OPO's ability to be a complainant, only that the person who makes the complaint cannot also be the investigator.

**4 Treats all complaints the same with respect to the involvement of the OPO and whether information and recommendations about them can be posted publicly.**

False. The Petition cannot authorize publication of "g" file information in the context of complaint classification or otherwise. The Petition plus The One Year resolution would not do this because current contract provisions would continue. Complaints are categorized as either internal or external, and OPO is not excluded from either of those two processes.

**5 Empowers the OP to conduct preliminary reviews of complaints and determine when complaints require a full investigation.**

False. The Petition cannot authorize publication of "g" file information in the context of complaint classification or otherwise. The Petition plus The One Year resolution would not do this because current contract provisions would continue.

The proposed agreement removes the prior contract language that the arbitration award relied upon in its ruling against the city about the OPO role. It allows unfettered access to the OPO to perform preliminary review for complaints. It is true that the OPO does not classify complaints, the Chief does so, but the OPO has the same role as IA in providing input, recommendations and influence on the Chief to make the correct choices. Both of those city officials work for the City, and its statutory and City Charter authority over this process was the cornerstone principle for this oversight model. The new provisions in the proposed agreement reverse the result in the disastrous prior arbitration decision.

**6 Grants OPO direct access to relevant personnel and department records for the purposes of pursuing its oversight function.**

This is false. The Petition and the One year resolution do not do this.

Under the proposed agreement, the OPO has complete unfettered access to all information, all complaints, and all materials that OPO deems relevant to performing the functions set out in the ordinance, subject to the policy oversight of the City.

**7 Enables the OPO to investigate and gather evidence when it deems necessary.**

The Petition plus the One Year resolution would not do this because current contract provisions would continue.

The Petition is irrelevant to this issue. The City has the authority from multiple legal sources to have subordinates conduct independent fact finding and investigate complaints, although there are not clear judicial determinations or arbitration rulings that set the boundaries and the demonstrate outcomes with Chapter 143 still in effect.

The proposed agreement allows unfettered access to the OPO to perform preliminary review for complaints. It is true that the OPO cannot search for or gather facts. The OPO does not classify complaints, the Chief does so, but the OPO has the same role as IA in providing input, recommendations and influence on the Chief to make the correct choices. Both of those city department heads work under the City Charter framework. The City's legal authority over this process was the cornerstone principle for this oversight model. These new provisions reverse the result in the arbitration decision, subject only to express provisions that were required to reach an agreement that overcomes the fundamental state law barriers to change.

**8 Allows public access to discipline information under the Texas Public Information Act as used in most departments.**

This is false. The Petition cannot do this, and the One year resolution would not.

State law does not allow access to investigative facts for cases where no discipline is imposed.

The agreement obtained APA consent to allow the OPO to make recommendations on any disciplinary matter, and to provide public reporting on these specifics:

- Recommendations and information to include final reports, in their entirety, for independent investigations regardless of whether discipline is imposed
- Recommendations and all information for complaints that result in oral reprimand or greater
- Information to complainant in a close-out meeting that would otherwise be confidential under state law
- Recommendations and information, in their entirety, for all critical incidents regardless of whether discipline is imposed

**9 Grants OPO clear authority to make nonbinding recommendations on discipline, and to publicize those recommendations.**

False. The Petition cannot authorize publication of “g” file information in the context of complaint classification or otherwise. The Petition plus The One Year resolution would not do this because current contract provisions would continue. The Proposed 4 years agreement does not prevent OPO making recommendations. Additionally, the Proposed City Ordinance provides for OPO to make nonbinding recommendations.

**10 Expands 180 day rule to 365 days from discovery for all complaints with a three year max to cap the discovery rule.**

This is false. The Petition cannot do this, and the One Year resolution would not. The proposed agreement expands the period for serious misconduct as defined to 365 after discovery at the rank of Assistant Chief or higher. The proposed agreement has no business dealing with how these are “classified,” nor setting out any role for the OPO. That is up to the City to determine by policy under the Council’s Chapter 215 ordinance.

**11 Removes barriers to volunteer for the Community Police Review Commission (CPRC).**

True. However, without an agreement there will be no CPRC with access to any investigative “g” files or non-public information to perform its role.

**12 Protects the overall oversight system through a severability clause.**

A severability clause does not protect the overall oversight system, because the Petition cannot accomplish the essential 3 elements noted at the top of this analysis. The One year resolution does not purport to do so and would not.

Any agreement should have a severability or a reverter clause. Severability is the wrong choice if a future ruling invalidates any one of the 3 core legal elements above, or impairs the ability of the OPO to conduct investigative interviews and have full unfettered access to all information to carry out its role. Without those key objectives, the agreement would be a failure. That is why the reverter clause (previously directed by the Mayor and Council) was chosen as the best option.

**13 Prohibits grievances against the civilian oversight system, whose roles is fact-finding and advisory, in order to maintain a stable system of oversight.**

This is false. The Petition cannot do this, and the One Year resolution would not. The City has been tasked with taking OPO out of the contract other than what needed to be negotiated by the APA to get around 143. The Petition language is worded so that the City Council cannot approve a contract that allows for grievances that are “within the scope of this ordinance.” As “this ordinance” includes oversight, and discipline, the Petition seeks for the APA to agree to waive their ability to grieve contract violations and disciplinary actions taken by the Chief.

**Legal Barriers v. Subjective views on how good the “deal” is in the proposed agreement**

This analysis has been made to explain the limits of the fixed legal framework that applies in Austin. Those restrict what the City, or the voters, can do to create and enhance oversight.

This analysis does not argue the relative success of the bargain achieved in a relative sense. The LRO analysis of the proposed agreement shows what we accomplished, and the team believes that it achieves major success on each of the objectives in the petition. Each person will have their own views about how much or how little the proposed agreement achieves, but that personal conclusion must be based on an understanding of what the City has the authority to change versus what we must negotiate and cannot dictate. If a voter believes we must eliminate the “g” file completely, they need to understand that the City cannot do that, the voters cannot do that, and the APA will not agree to do it.

By definition “negotiation” does not obtain everything on the wish list. There has been give and take for almost a year. The Arbitration Award explained above has made it more difficult because it was almost completely in favor of the APA. In that context, the APA has bargained for limits on what the City could do on its own legal authority, and we have made some reasonable concessions. We have bargained for changes in the law that we cannot make unilaterally, and they have conceded on many of our demands, far more than ever before, but not all of them. We have left most other issues out of the agreement, in order to avoid the old language that was the cornerstone of the Arbitration Award, just as the Petition dictated (with its internal conflicts).

\*The One Year resolution does not propose substantial, if any, changes in the current provisions on police oversight. In the last meeting it was discussed in terms of an extension or hold over agreement adopted to facilitate later negotiations for better provisions during the short term agreement. It appears that no enhancement of oversight at all would result during the term of any One Year agreement.