KING COUNTY DEPARTMENT OF EXECUTIVE SERVICES
INQUEST PROGRAM

IN RE INQUEST INTO THE DEATH OF JASON SEAVERS.	No. 18IQ61954 CITY OF SEATTLE'S OBJECTIONS AND RESPONSES TO PRE-HEARING CONFERENCE ORDER DATED OCTOBER 17, 2022

The City of Seattle ("City") objects and responds to the Pre-Hearing Conference Order dated October 17, 2022. The objections pertain to the employment of a Use of Force expert and to the request for production of Seattle Police Department (SPD) records. This response does not address witness, exhibit, or scope objections, as those matters are still under discussion. The City reserves the right to file additional objections and responses as they come due.

King County Charter Section 895 states that there shall be an inquest into the manner, facts, and circumstances of any death of an individual to which an action, decision, or possible failure to offer the appropriate care by a member of any law enforcement agency may have contributed. As the General Order states: [a]n inquest is not an adversarial proceeding." Pursuant to Chapter 36.24 of the Revised Code of Washington (RCW), *Family of Butts v. Constantine*, No. 98985-1 (July 15, 2021), and PHL-7-1-5-EO "Conducting Inquests in King County" [hereinafter

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the "Executive Order"], the County Executive may promulgate procedures governing inquests so long as they do not conflict with other state laws. Despite the administrative nature of this formal proceeding, an inquest has the trappings of trial. There are parties. The applicable Rules of Evidence are those governing proceedings in the courts of Washington, Administrators are to follow applicable provisions of the Code of Judicial Conduct, and participating attorneys are governed by the Rules of Professional Conduct. There is discovery and rules governing production subject to the Rules of Evidence and Appendix 2 of the Executive Order. A panel of eight members of a jury provided by Superior Court and subjected to voir dire and challenge make those findings of fact. The scope of the inquest upon which the panel is instructed, and of the factual questions posed to the jurors, is set by the administrator after consultation with the parties, however the scope of each inquest is limited by the parameters and purpose of the inquest program. The purpose of the inquest is to ensure a full, fair, and transparent review of a qualifying death and to issue findings of fact regarding the facts and circumstances surrounding the death, including whether the law enforcement member acted pursuant to policy and training. The grant of authority to an inquest is not only limited to this purpose, but it is also limited by its authorization when issuing orders and subpoenas: it does not have the powers of an Article III Court. These limitations form the foundation of the City's objections and response.

1. The City objects to the employment of a Use of Force expert.

This writing incorporates and adds to the objections articulated orally at the pre-trial conference hearing on October 12, 2022. There is no general prohibition on the employment of experts. Provision 12.1 of Appendix 2 of the Executive Order reads: "Each party, including the administrator, through the inquest program attorney, may proffer its own witnesses to provide testimony that aids the panel in the understanding of the facts, including *factual areas of experts*

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(e.g. ballistics and forensic medical examination)" (emphasis added). Both the Executive Order and the General Order requires that the Chief of the applicable law enforcement agency or their designee regarding applicable policies and training, the lead and/or forensic investigator(s), and the medical examiner(s) be called as witnesses. Each are *factual* witnesses. ER 702 provides in relevant part that a qualified expert may provide an opinion if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine *a fact in issue* (emphasis added)."

The term "use of force" is used in the context of law enforcement and can generally be defined as the amount of effort required by police to compel compliance by an unwilling subject. Generally, law enforcement officers should use only the amount of force necessary to mitigate an incident, effectuate an arrest, and/or protect themselves or others from harm. A spectrum of options is available to an officer—from verbal commands to lethal force—and agency policies and trainings reflect not only the state of the law regarding the appropriateness and necessity of force, but also the prioritization of various methods such as, for example, de-escalation techniques and the use of less-lethal force. In a criminal or civil trial, an officer's response and application of force in a particular case is evaluated for appropriateness and necessity given the circumstances. In an inquest, the jurors are called on to issue findings as to whether the law enforcement member's acted in conformity with the agency's policies and training. These are two related yet different concepts. The first encompasses a broader scope: a use of force expert in a criminal or civil trial may present regarding general norms in policing, apprehension, force-use, investigations, what constitutes excessive force, the officer's training and experience, and even an assessment of existing policies in light of accepted norms—all in an effort to assist a jury to answer whether the actions taken were legally appropriate. The second is a more limited scope

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and is reflected in the requirement that an agency designee for policy and training present evidence. The designee presents the panel with the applicable policies and training, the training and education of the officer, and if the actions taken complied with agency training. After all, the inquest is not a referendum on the then-existing policies and training. "Testimony regarding changes that should be made to existing policy, procedure, and training will generally not be permitted on relevance grounds" (EO Appendix 2, 12.2). Furthermore, it is not the purpose of the inquest to "determine the criminal or civil liability of any person or agency" (Executive Order, Appendix 2, 11.1). In the context of a non-adversarial, administrative inquest with a limited scope, a use of force expert is not a fact witness: instead, any opinion of such an expert is either irrelevant or worse, invasive of the fact-finding function of the panel.

During the pre-hearing conference on October 12, 2022, IA Spearman opined that the panel would benefit from an unbiased opinion on the topic of police practices and use of force. The order issued on October 17, 2022 discusses only a use of force expert. As indicated above, any testimony by an expert on police practices is wholly inappropriate considering the limited purpose and function of an inquest. A use of force expert's testimony is irrelevant to the scope of an inquest as such an expert serves to evaluate the instant case against broader law enforcement principles and norms. More troubling is the reference to the need for an *unbiased opinion*.

The purpose of an expert in an inquest is to illuminate *facts* and not to draw a conclusion ultimately in the purview of a panel. As such, the required presentation of then-existing policies and trainings and the officer's training history is not a matter of opinion. It is a matter of *fact*, provable by underlying documentary evidence: the relevant trainings and the published policies in use at the time. Ultimately, it would be beyond the purview of this proceeding to investigate whether the agency's policies and training were "good" ones. The City notes that the Seattle

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Police Department's policies are and have been scrutinized and evaluated under the Consent Decree with the Department of Justice and reviewed and approved by a Federal Judge. The purpose of the inquest is also not to assign civil or criminal liability—topics which might benefit from a use of force expert but only in an appropriate civil or criminal trial.

Without waiving or otherwise withdrawing these objections, the City was nevertheless asked to provide input regarding appropriate experts. The City puts forth Mr. Jeff Noble (CV and contact information available http://www.policeconduct.net/) and Mr. Geoff Alpert (CV and contact information available: https://sc.edu/study/colleges_schools/artsandsciences/criminology_and_criminal_justice/our_people/directory/alpert_geoffrey.php)

2. The City objects to and respectfully declines IA Spearman's discovery request for SPD records concerning prior uses of deadly force by Officer Shickler.

As mentioned above, discovery exists in an inquest process subject to the Rules of Evidence and limited by the authority and scope of the Inquest program. This request is overbroad and may contain both confidential and/or inadmissible evidence. A reading of Executive Order Appendix 2, 4.3 and 4.6 generally holds the following: 1) that the disciplinary history of the law enforcement member involved may not be introduced unless the administrator first determines that it is directly related to the use of force; and 2) that if there are confidential records, the administrator, "upon a prima facie showing of necessity, relevancy, and lack of an alternative source for the materials" shall examine them in camera.

Even in civil litigation, discovery does not permit unfettered incursion into all aspects of available information. Federal Rule of Civil Procedure 26(b) reads, in relevant part, "[u]nless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery

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regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit (emphasis added)." Although discoverable does not necessarily mean admissible, the rule further cautions that the court must limit extent of discovery otherwise allowable if "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive […]" (Rule 26(b)(2)(C)(i). Washington State Rule 26 has similar language: discovery is appropriate when the information sought appears "reasonably calculated to lead to the discovery of admissible evidence" but that the extent may be limited if "(A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; […] (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties, resources, and the importance of the issues at stake in the litigation" (emphasis added) (CR26(1)(A) and (C)).

Here, the request made is vague and overbroad both in terms of the content and type of records and in terms of the virtually unlimited time period such records may cover. The lack of specificity or limitation is unduly burdensome, particularly when neither the IA nor the attorneys from the inquest administrator have explored alternative means of obtaining the information sought. Moreover, given the scope of admissible evidence at an inquest and the overall purpose of the inquest, the information sought is not likely to lead to the discovery of admissible evidence. For these reasons, and absent additional limitations and justifications, the City, on behalf of the SPD, objects to and respectfully declines this request.

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Both the Executive Order and the General Order on the issuances of subpoenas and orders envision that an administrator or attorney for the administrator petition the Superior Court for the issuance of subpoenas for the production of records. Likewise, although in prior inquests sensitive matters were the subject of a "protective agreement," the appropriate recourse for securing such materials is a protective order issued by the Court. In the event that the administrator or the attorney for the administrator do not acquire information satisfying the request from some alternative source, these remedies are available for litigation.

DATED this 19th day of October, 2022.

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CERTIFICATE OF SERVICE

I certify that on the 19th day of October, 2022, I caused a true and correct copy of this document to be served on the following in the manner indicated below:

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