

NEW HAMPSHIRE DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
LAW ENFORCEMENT OFFICER DEADLY FORCE INVESTIGATION PROTOCOL
NOVEMBER 17, 2020

I. DISCUSSION

- A. Law enforcement officers are given extensive authority under State statutes to enforce the law and protect persons and property, including the authority pursuant to RSA 627:5 to use force when reasonable and necessary. This includes the authority to use deadly force under certain specified conditions. These laws reflect the special confidence that New Hampshire's Legislature and citizens bestow on police officers, and impose an obligation on the police to use it legally, and be accountable for its use.

- B. After an incident involving the use of deadly force by a law enforcement officer, it is paramount that an independent, unbiased, and professional body conduct an investigation. For this reason, all such investigations will be conducted by the Attorney General's Office (AGO). If the evidence demonstrates that criminal charges are warranted against the involved officer, the AGO will seek an arrest warrant and/or will present the matter to a grand jury. If the evidence demonstrates that the use of force was legally justified under the applicable law, the AGO will issue a detailed report summarizing the scope of the investigation, the facts, the applicable law, and the basis for its conclusion. If the release of a report would prejudice an ongoing or contemplated prosecution related to the incident, then an abbreviated report may be issued consistent with RSA Chapter 91-A and Rules 3.6 and 3.8 of the *New Hampshire Rules of Professional Conduct*.

- C. Regardless of the outcome of the AGO's deadly force investigation, the involved officer's employing agency will generally conduct an internal investigation to determine if the actions of the officer was consistent with the agency's policies, procedures, or best practices and whether any changes in such policies and procedures or in the agency's training programs are advisable. This may include an investigation by the employing agency's liability insurance carrier or legal counsel in order to respond to possible civil litigation.

- D. In addition to its own personnel, the AGO will routinely utilize the services of the New Hampshire State Police Major Crime Unit to assist in the investigation of deadly force incidents. This is because the State Police is the only around-the-clock statewide law enforcement agency in New Hampshire. Additionally, at the discretion of the Attorney General, law enforcement officers from a city or town where the incident occurred that

regularly investigate their own homicide cases with the AGO, may also be requested to assist the AGO with the deadly force investigation. The role of the State Police and any other supporting law enforcement agency is limited to providing assistance with fact-finding; the State Police and other law enforcement agencies make no recommendations or reach any determinations regarding the legality of the use of deadly force. That is a decision solely for the Attorney General.

II. PURPOSE

- A. As the State's chief law enforcement officer, as provided in RSA 7:6, and the chief prosecutor in homicide cases, the Attorney General has the responsibility to ensure that whenever deadly force is used by a law enforcement officer, that use conforms to the law. The purpose of this Protocol is to guide the AGO in its investigation of such incidents, and to inform the public and law enforcement officers of what will occur when the use of force by a law enforcement officer results in death or serious bodily injury to any person.¹
- B. While this Protocol cannot anticipate every possible circumstance that might occur, its goal is to create an independent, transparent, and objective process for the public and the law enforcement officers who serve the public.

III. DEFINITIONS

As used in this Protocol, the following words shall have the meanings ascribed to them in this section:

- A. **Deadly force** means deadly force as defined in RSA 627:9, II, including any force capable of causing death or serious bodily injury to a person.
- B. **Deadly force incident** means an incident in which death or serious bodily injury results to any person from the application of deadly force by a law enforcement officer, or when death results from the application of non-deadly force by such officer.
- C. **Deadly force investigation** means an inquiry conducted under the authority of the Attorney General in his or her role as chief law enforcement officer pursuant to RSA 7:6. The Attorney General does not investigate or opine on the particular procedures or tactics used by a law enforcement officer. Instead, the review of an officer-involved use of deadly force incident consists of a criminal investigation, which is limited to determining whether the officer complied with the applicable law and whether charges are warranted.

¹ The term "officer" is used throughout this Protocol. However, there may be instances where more than one officer is involved in the incident.

- D. **Deadly force investigation team** means a group of officers, attorneys, or other persons with specialized training or expertise who are designated by the Attorney General to conduct an investigation of a deadly force incident. The team may include an investigator and a senior attorney from the AGO, investigators from other law enforcement agencies, members of the New Hampshire State Police Major Crime Unit, and other persons expressly assigned by order of the Attorney General to assist in the investigation.
- E. **Directly involved officer** means an officer reasonably believed to have employed deadly force as defined above.
- F. **Handgun** means any firearm such as a pistol or revolver with a grip or short stock designed and capable of being fired and used by use of a single hand, rather than a shoulder weapon.
- G. **Investigators** means law enforcement officers assigned or attached to the Attorney General's Deadly Force Investigation Team and charged with investigating a specific deadly force incident.
- H. **Involved agency** means any agency of the state or one of its political subdivisions that employs one or more officers who are involved in a deadly force incident.
- I. **Law enforcement officer** means a person employed by a state, local, county, or federal law enforcement agency who is authorized by law to make arrests and use force, including probationary or uncertified officers.
- J. **Lead investigator** means the member of the Deadly Force Investigation Team assigned by the Attorney General to lead the other investigators, and whose responsibilities include ensuring that investigative interviews are conducted, the scene of the incident is secured and documented, and all physical evidence related to the incident is properly collected, marked, preserved, stored, and where appropriate, submitted for laboratory analysis. The lead investigator will be under the direction of the senior attorney.
- K. **Liaison representative** means a person designated by the head of the involved agency and approved by the Attorney General to provide logistical assistance to the Deadly Force Investigation Team and to update, as appropriate, the head of the involved agency on the status of the investigation.
- L. **Long gun** means any firearm that is not a handgun.

- M. **Senior attorney** means the Assistant Attorney General responding to and designated by the Attorney General, or his or her designee, to conduct a particular deadly force investigation, and responsible to the Attorney General for such investigation.
- N. **Serious bodily injury** means serious bodily injury as defined in RSA 625:11, VI, including serious, permanent, or protracted injury to the body or any part thereof.
- O. **Use of deadly force** means the use of deadly force as defined above resulting in death or serious bodily injury to any person.
- P. **Victim** in a deadly force incident means any person killed or who sustained serious bodily injury as a result of a deadly force incident. For purposes of this Protocol, the term “victim” does not necessarily mean that the death or injuries were the result of a crime.

IV. POLICY

A. Notification

- 1. Upon learning that a use of deadly force incident has occurred, the ranking on-duty officer of the involved agency shall immediately notify the head of the involved agency, the chief of police of the community where the incident occurred, the Attorney General’s Office (using as a guideline the Attorney General’s most recent law enforcement memorandum regarding notifications of homicides and suspicious deaths), the New Hampshire State Police Communications Center, the County Attorney, the County Sheriff, and in the event of a fatality, the Chief Medical Examiner’s Office (pursuant to RSA 611:4 and the most recent law enforcement memorandum).

B. Actions by the Involved Agency Prior to Arrival of the Investigation Team

- 1. Although an officer involved in a use of deadly force incident may be injured or suffering from traumatic stress reactions, in many cases he or she is able to take appropriate follow-up action until backup officers or supervisory personnel arrive. An officer involved should take practicable and appropriate measures to protect the safety of the public including injured victims, and to protect his or her own safety. The officer should also establish a preliminary perimeter at the scene in order to preserve evidence essential to the investigation. In addition, the officer should take the following steps when appropriate:
 - a. Administer first aid to themselves and all other injured people, as necessary, pending the arrival of emergency medical assistance.

- b. Ensure that there are no further threats to the safety of the public, the officer, and any injured victim at the scene.
- c. Request emergency medical assistance, if necessary, a supervisor, additional backup, and any specialized units, if required.
- d. Holster and secure in place any involved police firearms, ammunition magazines, or other weapons. Ensure that firearms are not opened, loaded, or unloaded, and live ammunition and discharged cartridge casings are not removed, or in any other way altered. Any police officer's or victim's firearms or weapons that were dropped or discarded should be left in place and guarded. If this is not possible, their location and position should be recorded and the firearm or weapon should be secured as is until it can be turned over to investigators.
- e. Establish an outer perimeter with crime scene tape or otherwise. Limit entry to the area to people necessary to the investigation or rendering assistance to any injured people. Protect possible evidence from loss, destruction, or damage that might result before assistance arrives. Ensure that items of evidence are not moved or if moved, note their original location and the position of people, firearms, weapons, and other relevant objects.
- f. Identify people who are present or have departed the scene including witnesses and vehicles. Ask people present at the scene for their cooperation and to remain in order to provide information to arriving supervisors. Separate witnesses to the extent possible.
- g. Even if persons at the scene claim to have seen or heard nothing, they should be identified and asked to remain until supervisors arrive.

C. Duties of First Arriving Backup Officers

- 1. Arriving officers should first ensure the safety of all people at the scene, including arranging for any needed medical attention.

2. To the extent that anyone has been arrested or placed in custody, ensure that they are appropriately secured. Confirm that all potential witnesses have been identified, a secure perimeter established, a log begun to document entry and exit into the scene, and critical evidence safeguarded to await the arrival of supervisors and the investigative team. To the extent possible, they should refrain from questioning the directly involved officer, victim, or witnesses. Formal interviews will be conducted at a later time by the Deadly Force Investigation Team.

D. Duties of Arriving Supervisors

1. Arriving supervisors should first ensure the safety of all people at the scene, including arranging for any needed medical attention.
2. If anyone has been injured or wounded and is transported to a hospital, ensure that an officer accompanies and remains with him or her at the hospital if possible.
3. Ensure that a proper perimeter has been defined and secured, and determine whether the scene is large enough that both an inner and outer perimeter are required, or in the event of an incident that took place in more than one location, that multiple perimeters are established.
4. Locate and secure in place any discharged firearms or other weapons used by anyone involved in the incident, which are no longer in their possession. These firearms or weapons must be left in place unless a supervisor determines that the firearms or weapons present a danger that could be ameliorated by removing and securing that firearm or weapon. In such case, the firearm may be removed after receiving permission from the lead investigator or senior attorney. Firearms or weapons still in the possession of the involved officer must be secured by a supervisor. Visually inspect and check the firearms or weapons still in the possession of ancillary officers who were present at the scene for discharge or use and secure them if they appear to have been discharged or used during the incident.
5. Determine and note the original position of the directly involved officer and of the victim at the time of the shooting. Speak with the involved officer separately, and avoid any questioning beyond what is absolutely required to secure the scene and identify witnesses. Beyond that, communication with the directly involved officer should be limited to questions or statements intended to assess and assure the officer's well-being, and should not include any substantive questions

regarding the incident. Formal interviews will be conducted at a later time by the Deadly Force Investigation Team.

6. Ensure that the involved officer is separated at the scene and cautioned not to discuss the incident with others until formal interviews have been completed with the Deadly Force Investigation Team.
 7. Ensure that any short-lived evidence that might be altered or destroyed by the elements or actions at the scene is secured, and that the clothing of the directly involved officer and any injured person that was removed during medical treatment at the scene, by first responders, or at a medical facility, is collected and properly preserved for evidentiary purposes.
 8. Ensure that witnesses at the scene have been identified and ask for their cooperation. Obtain their contact information and request that they go to the local police department to meet with a member of the Deadly Force Investigation Team. Advise them that a formal interview may be requested at a later time by the Deadly Force Investigation Team.
 9. Inform the Investigation Team's lead investigator or senior attorney if a witness captured any video or audio of the event using a cellphone or other handheld electronic device, or if a witness knows of someone who did.
 10. Appoint an officer to make a chronological record of activities at the scene until the Deadly Force Investigation Team arrives. Include person's present and entering or leaving the incident scene, actions taken by police personnel, and the identities of any emergency medical or fire personnel who are required to access the scene.
 11. If a still and/or video camera is available, carefully and without contaminating the scene, document the scene, including any bystanders.
- E. Responsibilities of the Deadly Force Investigation Team's Senior Attorney and Lead Investigator
1. Upon arrival at the scene, the senior attorney and the lead investigator of the Deadly Force Investigation Team shall be briefed on the facts known at the time and depending on the circumstances, may view the scene.

2. The senior attorney may request the agency head (unless the agency head was the involved officer) to designate a member of his or her staff as a liaison to the Deadly Force Investigation Team.
3. The lead investigator shall ensure that the recommended tasks outlined above in section IV, B-D, for the involved officer, backup officers, and supervisors have been performed appropriately, and shall ensure that any needed tasks are completed.
4. The lead investigator shall ensure that photographs and videos are taken of the overall scene, including any evidentiary items. Photographs of the involved officer and victim as they appear at the scene shall be taken, including photos of any bruises or injuries.
5. Any officer at the scene who took any notes or diagrams may be interviewed by members of the Deadly Force Investigation Team and those notes collected, copied, and copies returned to them. The Deadly Force Investigation Team shall ask about, view, and secure any photos, video or audio recording of the incident captured by the officer using a cellphone or other electronic device. The Deadly Force Investigation Team shall make prints or copies for the officer who took them and retain the originals. Formal interviews may be conducted at a later time by the Deadly Force Investigation Team.
6. Ensure that crime scene specialists thoroughly inspect the scene and collect and preserve any relevant evidence, and ensure that the scene is thoroughly documented by the team. This may include inspecting and collecting the clothing of any involved person.
7. Ensure that notification has been provided to next of kin of injured or deceased victims.
8. Identify witnesses and ask permission to conduct an interview in a timely manner. The interviews are to be conducted separately and are to be audio recorded and when possible video recorded.
 - a. Ensure that the witness understands that he or she is not under arrest (if that is the case) and that he or she is voluntarily participating in the interview.
 - b. Ascertain if the witness took any photos or recordings of the incident. View and secure any photos, video or audio recordings of the incident

captured by the witness using a cellphone or other electronic device with consent or other lawful process. The Deadly Force Investigation Team shall make prints or copies for the witness who took them and retain the originals.

- c. Conduct as complete and thorough an interview as possible. If the interview is conducted at a medical facility, consider whether it is necessary to consult with the witness's treating medical team before starting the witness's interview. If the witness's physical or emotional condition makes it impractical to obtain sufficiently detailed information, conclude the interview and arrange for a future, more detailed interview at a more appropriate time.
 - d. Any custodial interview must be done according to the requirements of *Miranda v. Arizona*, 384 U.S 436 (1966) (*Miranda*).
 - e. At the conclusion of the interview, the witness should be advised not to discuss the incident with any other witness, including all involved the officers, until all witnesses have completed their formal interviews with the Deadly Force Investigation Team.
9. Ask the victim for permission to conduct a recorded interview in a timely fashion. The interview shall be audio recorded and, when possible, video recorded.
- a. Ensure that the victim understands that he or she is not under arrest (if that is the case) and that he or she is voluntarily participating in the interview.
 - b. Ask the victim about, view, and secure any video or audio recording of the incident captured by the victim using a cellphone or other electronic device with consent or other lawful process.
 - c. Conduct as complete and thorough an interview as possible. If the interview is conducted at a medical facility, consider whether it is necessary to consult with the victim's treating medical team before starting the victim's interview. If the victim's physical or emotional condition makes it impractical to obtain sufficiently detailed information, conclude the interview and arrange for a future, more detailed interview at a more appropriate time.
 - d. Any custodial interview must be done according to the requirements of *Miranda*.

- e. At the conclusion of the interview, the victim should be advised not to discuss the incident with any other witness, including all involved the officers, until all witnesses have completed their formal interviews with the Deadly Force Investigation Team.
10. Consider whether formal interviews with fire department personnel, emergency medical service providers, and any other first responders to the scene are necessary.
 11. Be aware of and consider the existence of post-incident trauma when dealing with the involved officer, victim, and witnesses.
 12. Secure any agency-captured audio and video footage of the incident, including police body camera footage, cruiser camera footage, radio traffic, 911 calls, and all dispatch records related to the use of deadly force incident.
 13. The involved officer, victim, and eyewitnesses should be advised not to review or view any video or audio recordings of the incident from any device such as body cameras, cruiser cameras, surveillance video, or cellphone cameras and avoid viewing any such recordings on the news, the internet, social media, or otherwise, until after their formal interviews have been completed.
 14. At the direction of the senior attorney, an interview with the directly involved officer should be conducted in a timely manner. The interview is to be conducted separately, audio recorded, and when possible video recorded.
 - a. Prior to or during the interview, the officer or his or her representative should be informed that a criminal investigation is being conducted according to this Protocol. The officer or his or her representative should be informed that the purpose of the investigation is to determine whether the use of deadly force was justified under RSA 627:5, not to determine compliance with the officer's agency's use of force policy or for the purpose of departmental discipline.
 - b. Ensure that the officer understands that he or she is not under arrest and that he or she is voluntarily participating in the interview.
 - c. Conduct as complete and thorough an interview as possible. If the interview is conducted at a medical facility, consider whether it is necessary to consult with the officer's treating medical team before

starting the officer's interview. If the officer's physical or emotional condition makes it impractical to obtain sufficiently detailed information, conclude the interview and arrange for a future, more detailed interview at a more appropriate time.

- d. Any custodial interview must be done according to the requirements of *Miranda*.
 - e. Because this is not a departmental internal investigation, *Garrity* warnings do not apply and will not be provided.
 - f. At the conclusion of the interview, the officer should be advised not to discuss the incident with any other directly involved officers or witnesses until all directly involved officers and witnesses have completed their formal interviews with the Deadly Force Investigation Team.
 - g. The senior attorney shall follow the latest AGO Exculpatory Evidence Protocol and determine whether any involved officer has potentially exculpatory evidence in their personnel file that should be considered during the investigation.
 - h. The interview of a directly involved officer will be conducted exclusively by New Hampshire Attorney General's Office personnel.
15. Any necessary forensic examinations or testing, including testing of an involved officer's firearm or weapon should be done as soon as possible.
16. In situations where a firearm has been secured immediately after a deadly force incident and it can be conclusively determined that it has not been fired during the incident, the lead investigator may release that firearm to a supervisor from the involved agency after receiving approval from the senior attorney. Other items seized, such as clothing or personal property, which yield no useful evidence, may be released to their owner after receiving approval from the senior attorney.
17. The senior attorney and the lead investigator shall continue to supervise the investigation, identify leads that need to be pursued, collect relevant evidence, and assign all tasks. The lead investigator shall keep the senior attorney fully informed of all significant aspects of the investigation, and defer to the senior attorney's judgment on all legal matters.

F. Relationship to Involved Agency Internal Investigation

1. If the directly involved agency conducts an internal investigation of the use of deadly force incident, the senior attorney should ensure that no information, reports, or interviews conducted after *Garrity* warnings have been provided are shared with or made available to the Deadly Force Investigation Team. This is to conform to the requirements of the *Garrity* decision.

G. Advocate Services

1. To the greatest extent possible, and consistent with maintaining the integrity of the investigation, the officer who used deadly force, the victim, or if the victim is deceased or incapacitated, his or her family, shall be kept informed about the progress of the investigation and informed about available resources and services. The AGO may assign an advocate to assist.
2. If the evidence demonstrates that criminal charges should be brought against the officer who used deadly force, an AGO advocate will assume the duties in accordance with present practices in criminal cases with respect to victims.

H. Disclosure of Information Generally

1. An officer's use of deadly force is a matter of great public interest. The public has a right to know of all facts and circumstances leading to the use of deadly force, the evidence developed during the investigation, and the legal conclusions reached by the Attorney General. However, the AGO must balance the public's right to know with the need to preserve the integrity of the investigation, the rights of the involved individuals, and the attorney's obligations under Rules 3.6 and 3.8 of the *New Hampshire Rules of Professional Conduct*.
 - a. Prior to completion of the investigation and issuance of a report, press briefings and news releases shall ordinarily be limited to the identity of deceased or injured victim after notification of the next of kin, a brief summary of the incident, whether the officer involved suffered any physical injuries, and whether or not the officer involved has been placed on administrative leave, and if so, whether that is the usual procedure in incidents of this type. The name of the officer involved should not be released until after he or she has been formally interviewed as part of the investigation. This is done to maintain the integrity of the investigation.
 - b. Requests for public disclosure of evidence gathered during a deadly force investigation prior to the completion of the investigation and issuance of a

report shall be reviewed by the Senior Attorney and a determination made whether the requested evidence may be released in accordance with RSA 91-A and Rules 3.6 and 3.8 of the *New Hampshire Rules of Professional Conduct*. This shall include all evidence, including but not limited to requests for digital evidence, including police cruiser and body camera recordings, and 911 recordings.

- c. No persons other than the senior attorney are to make public statements about the investigation or respond to press questions, unless so authorized by the Attorney General.
2. Periodically during the investigation the Attorney General may direct the senior attorney to issue news releases or hold press briefings. The head of the involved agency (unless he or she was a directly involved officer) and the chief of police of the community where the incident occurred shall be notified in advance of any such release or briefing.
3. The senior attorney, or at his or her direction, the lead investigator or other designated person may provide periodic briefings to the head of the involved agency or his or her designee (unless the agency head was a directly involved officer) during the pendency of the investigation. All recipients shall agree to preserve the confidentiality of the information, and if the agreement is breached, no further confidential information will be shared.
4. The senior attorney, or at his or her direction, the lead investigator or other designated person may provide periodic briefings to the victim, or if deceased or otherwise incapacitated, his or her family during the pendency of the investigation. All recipients shall agree to preserve the confidentiality of the information, and if the agreement is breached, no further confidential information will be shared.

I. Investigation and Report

1. The Attorney General's review is limited to whether the officer's use of deadly force conformed to the applicable law. Therefore, it is a criminal investigation.
2. In furtherance of the AGO's directive, the Deadly Force Investigation Team shall conduct interviews, examinations, and analyses as are appropriate to successfully complete a thorough and accurate criminal investigation. Experts may be retained and consulted as needed. The senior attorney shall collect relevant documentation on the case, and prepare a report for the Attorney General. The investigative

report shall include sufficient, relevant facts to determine whether the use of deadly force by the officer was lawful, an analysis of applicable statutes and case law, a determination as to whether any crimes were committed by the officer or whether criminal prosecution is warranted, and a recommended determination as to whether the use of deadly force was legally justified.

3. In accordance with the Rules 3.6 and 3.8 of the *New Hampshire Rules of Professional Conduct*, the AGO will not release a report to the public in cases where criminal charges are brought against the involved officer in connection with the deadly force incident. Instead, upon completion of the criminal prosecution the entire investigative file will be made available upon request to the public and the news media consistent with RSA Chapter 91-A.
4. A report will be released where no criminal charges are brought against an involved officer in connection with the deadly force incident. Before releasing the report to the public, a designated member of the deadly force investigation team or the senior attorney shall notify the agency head or his or her designee (or if the agency head was a directly involved officer, with a designee of the agency head's appointing authority), the police chief of the community where the incident occurred, and the involved officer or his or her legal representative, of the report's conclusion and if appropriate under the circumstances, also provide a copy of the report. A designated team member shall also notify the victim, or if the victim is deceased or otherwise incapacitated, his or her family, before releasing a report to the public and if appropriate make the report available to them.
5. In cases where criminal charges are brought against someone other than the involved officer, the release of a full report may be delayed depending on whether the publication of any particular details would prejudice that ongoing or contemplated prosecution. In that event, an abbreviated report may be issued consistent with RSA Chapter 91-A, and Rules 3.6 and 3.8 of the *New Hampshire Rules of Professional Conduct*.
6. Prior to the release of a report of a deadly force incident involving a fatality, the Attorney General may hold a press briefing to summarize the investigation and the findings and conclusions in the report.
7. Upon completion of the investigation and the report, the entire investigative file will be made available upon request to the public and the news media consistent with RSA Chapter 91-A and Rules 3.6 and 3.8 of the *New Hampshire Rules of Professional Conduct*.

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