
**OFFICE OF THE CITY CLERK
MEMORANDUM**

DATE: MARCH 3, 2010
TO: HONORABLE CITY COUNCIL
FROM: DONNA J. GRIDER, CITY CLERK 
RE: PALO ALTO POLICE AUDITOR'S FINAL REPORT FOR 2009

The City Manager has provided me with the attached Police Auditors Final Report for 2009 to forward to you as per our procedures.



POLICE AUDITOR'S FINAL REPORT - 2009

**Presented to the Honorable City Council
City of Palo Alto
March 1, 2010**

**Prepared by Michael Gennaco
& Robert Miller**

**OIR Group
323-890-5425
www.laoir.com**

Palo Alto Independent Police Auditor

Final Report for 2009

I. The Third Year

This report is the second of two reports covering the third year of the Independent Police Auditor's work with the Palo Alto Police Department. It reports on investigations initiated and complaints that have been considered since the publication of the third year Interim Report and provides updated information regarding investigations that had not been fully resolved at the time the Interim Report was released. Additionally, this Report updates the work the Auditor and the Police Department have engaged in with regard to systemic issues.

This report also covers the Auditor's review of all applications of the Taser by PAPD personnel in the course of detention and arrest of suspects. This complies with the mandate of the Palo Alto City Council that the IPA expand its purview to include Taser-related incidents.

II. Taser Incidents

Taser Policy

PAPD officers have carried Tasers on patrol for almost two and one half years now. They have used or attempted to use the Taser to apprehend 12 different suspects during that time period. In accordance with our mandate, the IPA has reviewed each use of force where a Taser was involved, evaluated the force and tactics relative to the Department's policies and to best police practices, discussed our observations with the

Chief of Police and reported on each incident in our semi-annual reports. A few months ago, we requested that the Chief sit down with the IPA in order to take stock of the Department's short history of Taser use and its Taser policy. The Chief agreed with the IPA's view that a clearer policy instructing PAPD officers when they could use a Taser was desirable. The IPA agreed to work with the Department as a team was tasked to revise the Department's Taser use policy.

Shortly thereafter, the federal Ninth Circuit Court of Appeals issued an opinion that suggested a need for every police agency to reexamine its threshold of Taser use. We brought the case and its implications to the attention of the Department and recommended that any revision of the Department's policy should also be cognizant of the teaching of the Ninth Circuit opinion. As we write this report, PAPD is close to completing a revision of its Taser policy and has been extremely receptive to IPA input. Thus far, we have been impressed with the thoughtfulness of the group working on the project and believe that it will not be long before a revised policy will be forthcoming. Of course, assuming a revised policy is issued, the Department will need to provide the necessary training to familiarize officers with the new expectations.

Use of Force 2008-005

Officers, called to the scene of a man acting suspiciously near a car, observed a man alone in a parked car smoking rock cocaine from a glass pipe. They knocked on the closed windows of the car several times and ordered the man to get out. He locked the doors, continued to smoke the glass pipe, and refused to get out. After several attempts to get the man to voluntarily leave his car during which he frequently and erratically searched for something in the car, the officers broke a window and used a Taser to extract the man. After the first cycle of the Taser he exited the car but refused to be handcuffed, staying on his hands and knees. The officer with the Taser cycled it twice more before the man put his hands behind his back and was handcuffed without further incident.

We outlined this case in our last report and indicated that it raised some issues that related directly to the current PAPD Taser policy. We had reviewed the case materials and Taser video, but had not concluded our discussions with PAPD managers regarding this matter. As indicated above, those discussions evolved into the beginning of a policy revision process that is nearing fruition. Regarding this particular Taser incident, we concluded that the initial firing of the Taser was appropriate under the Department's current policy. The man was smoking crack in front of the police, acting bizarre and throwing himself around inside the car apparently looking for something hidden and possibly dangerous. The subsequent 5-second cycles of the Taser to effectuate the handcuffing are more problematic, exhibiting a questionable interpretation of the "active resistance" threshold for the use of the Taser. We do acknowledge, however that the current policy instructs officers to deploy the Taser for the "shortest period possible," but also emphasizes doing so until the individual can safely be taken into custody. More importantly, the current policy does not clearly specify the requisite level of resistance or threat with regard to subsequent deployments of the Taser. We anticipate that the policy revision will address this ambiguity and provide better guidance to officers regarding not only when to start using the Taser but also when to stop and move to other techniques. This additional guidance is crucial in light of recent Taser episodes in other jurisdictions where multiple cycling of the Taser may have placed suspects at increased health risk.

Use of Force 2009-005

An officer observed a motorist speed through an intersection and began to follow him. The motorist ran three red lights and a stop sign before pulling over and jumping out of his car. The suspect ran straight toward the officer who was beginning to get out of the patrol car. The officer instead drove on and broadcast a description of the suspect. Other officers soon observed the suspect nearby and the supervisor arrived at the new location along with several officers. The suspect was ordered to stop but continued to run, zigzagging erratically past the original officer, who fired a Taser at him. The Taser

darts appeared to hit the suspect who cried out but continued to run and pulled the Taser darts out. A nearby officer pushed the fleeing suspect who fell to the ground. As the officer and a sergeant tried to handcuff the suspect, he rolled onto his back, kicked the sergeant in the chest and rolled on his stomach. The original officer used the Taser in stun drive mode three times against the struggling suspect's torso to force him to release his hands from his waist area so he could be handcuffed. After handcuffing, the suspect continued to kick and was hobbled at the sergeant's direction. The suspect received head lacerations from his fall and struggle on the ground. He was booked for reckless driving, evading a police officer and resisting arrest.

We have reviewed the use of force reports and interviews associated with this incident, the supervisor's evaluation and the TaserCam and MAV videotapes and have discussed the use of force with the Department. The motorist's driving was reckless and his behavior once out of his car was erratic, surprising and did not comply with the officer's repeated orders. The motorist appeared to be actively resisting a lawful attempt to detain him. Accordingly, we agreed with the Department that the use of the Taser in this case was in compliance with the Department's current Taser use policy.

We also noted in the course of our review that the Taser officer's report of the probable cause for the arrest characterized the suspect's actions in running at the patrol car as a challenge to fight. This may be a plausible interpretation of the suspect's strange actions but it requires an inference or speculation that should generally be left out of police reports. This is clearly a report writing issue that can and should be handled with training by the Department.

Taser Use of Force 2009-010

Officers were called to the scene of a large fight in a nightclub. When they arrived, they observed a chaotic crowd outside the nightclub. Several persons with obvious injuries were pointed out by onlookers as involved parties and another disturbance was brewing in the parking garage. Officers saw one man taking a fighting stance toward others in the crowd and ordered him to get on the ground. He fled into the

parking garage. An officer gave chase and found the man hiding in an alley. When he ordered the man to get on the ground, the man instead turned away and began to walk back toward the crowd. The man was warned several times by the officer that he would be Tasered if he did not comply. The officer discharged his Taser, causing the man to fall to the ground where he was handcuffed without further injuries. The man was taken to the hospital for the removal of the Taser darts and treatment of his injuries. The man indicated that his injuries -- bruises and abrasions -- derived from the nightclub fight and were not ancillary to the Taser use. The evidence supports this assessment.

We have reviewed the reports and videotapes in this case and conclude that the use of the Taser on the nightclub patron minimally meets the standard established in the PAPD's current Taser policy for the threshold of use. The man was walking away from the officer at the time the Taser was fired, ignoring his commands and warnings but otherwise posing no threat to the officer. While the policy cautions that flight alone should not be the only justification for the use of the Taser, we observe that there were other relevant circumstances. The man was bruised, shirtless and furtive and gave every indication of having been involved in the recent brawl. He had also shown an inclination to reengage in the fighting by walking in the direction of the crowd. While this incident barely meets the threshold for Taser use under the current policy, we view it as further evidence that the current Taser policy is in need of revision and a clearer standard is required for the threshold of use. We note that the anticipated revised Taser policy may likely require a different evaluation of this type of non-compliance by a suspect. In other words, under the anticipated revised policy, officers confronted with these same circumstances in the future may not be presented with a sufficient basis to justify the use of the Taser and may need to resort to other tools to gain compliance and/or arrest.

Taser Use of Force 2009-011

Officers sent to the scene of an intoxicated subject who would not leave the vicinity of a nightclub arrived to see the man face to face with the club bouncer, moving

toward him and trying to punch him as the bouncer repeatedly admonished the man to back away. Officers intervened and told the man to take one step back. One officer trained his Taser on the man who was swaying in place and mumbling "What's the problem?" The officer discharged the Taser when the man moved his hand up to his chest area. When the man fell to the ground he failed to put his hands behind his back as ordered. After repeating a few commands, the officer used the Taser in stun drive mode against the man's leg. He was handcuffed without further use of force. The man was taken to the hospital, medically checked and released for booking.

Upon reviewing the reports, records and Tasercam video, we conclude that this use of the Taser was a mistaken application of the current PAPD policy to the factual situation. The man certainly failed to respond to the verbal commands of the bouncer and the police officers but in the period just before the Taser was discharged, he did not move from his position or actively resist any of the officer's actions. We do acknowledge that the man brought his arm up to his chest and his arm movement may have been interpreted as the beginning of an act of belligerence. In the calm light of day after multiple viewings of the video footage, we believe this was a mistaken perception because, upon reflection, in the context of the words that the man was saying in a mumbled slur, he appears to have been simply gesturing to his own chest while referring to his own experiences in his narrative. Additionally, contrary to current policy, the man was given no warnings that he would be Tasered if he did not comply. Moreover, the second use of the Taser is questionable because it is unclear whether the man had time to comply with commands after his fall to the ground.

This incident calls the officer's Taser training to date into question and demonstrates the need for a practical standard of Taser use that the officer can use in the field. Accordingly, we recommend that this officer receive targeted training on the performance issues elucidated here. The officer should also receive special remedial training on the revised policy and be debriefed on his failure to give warnings in this case. This training and counseling should be documented and the officer informed that

future questionable Taser uses by this officer would likely result in a formal internal affairs investigation and potential disciplinary action.

Taser Use of Force 2009-013

Following a vehicle pursuit and foot pursuit, the initiating officer used a Taser on the suspect as he was being brought into custody. The IPA will report on the Department's determination and its independent conclusion regarding this incident in its next report.

Taser Use of Force 2009-017

PAPD units responded to a fight. One intoxicated individual was contacted after he refused to disperse, challenged officers to fight, refused to obey commands, and resisted arrest. A Taser was used on the suspect and he was then taken into custody. The IPA will report on the Department's determination and its independent conclusion regarding this incident in its next report.

III. Complaints, Cases and Issues

1. Complaint of Biased Enforcement and Harassment #C 2009-007

Synopsis: A young African American adult driving one morning with his girlfriend and baby in the car lost control of the vehicle and ran onto the shoulder of the road, knocking over a fire hydrant and sending a geyser of water twenty feet into the air. There were no injuries and the car was still operable. After pausing a short while, the young man backed off the hydrant and drove off. Thirty minutes later, he called the police and reported the incident. Later that day, he met detectives who questioned him, wrote up their investigation and submitted it to the District Attorney's office. The District Attorney filed a misdemeanor hit and run charge. A couple of weeks later, the young man's parents contacted a former Department executive and requested that the hit and run charge be withdrawn because their son had tried to do the right thing and had no

record of run ins with the law. The Department executive promised to talk to the District Attorney who agreed to look into the case further and consider the request to withdraw it. The District Attorney conducted further investigation, contacted witnesses and ultimately decided that the hit and run charge was appropriate and furthermore that the young man had had previous driving-related encounters with the police. He refused to dismiss the charge.

Meanwhile, the Department executive contacted the parents, informed them that the issue had been resolved and that the charges would be dropped. When the parents found out that the hit and run prosecution would move forward, they felt misled and betrayed by the Police Department. In a subsequent letter to the PAPD, the parents alleged that their son was unfairly targeted by the police because he is African American and they cited two other incidents that they felt demonstrated the Department's biased enforcement involving their son.

One incident occurred a year and a half before the hydrant hit and run accident, when the young man was a minor. He was driving a car one evening with four teenage passengers. A PAPD officer pulled them over for a malfunctioning taillight and discovered that the young man did not have a driver's license and had never had one. He was cited as an unlicensed driver and his car was impounded. He and the other teenagers were released at the scene to their parents or friends.

The other incident took place two months after the hydrant hit and run. PAPD communications received a 911 call from a female victim who had just witnessed a fight involving several teenage suspects in front of her house. According to the call, at the conclusion of the fight, the suspects had kidnapped her female friend and fled. Officers went to the home of the female caller and obtained descriptions and names of some of the suspects. Officers in the field then received an update on the last reported location of the suspects. One officer spotted the young adult driving a car at the location. She recognized him, knew his name and received confirmation that he was not one of the named suspects. However, the officer was aware that he was friends with one of the named suspects. She also surmised from the movements of his head and hands as he sat

at the wheel that he might be signaling someone hidden in the back seat. Officers stopped the young man's car, ordered him at gunpoint to come out of the car and go down onto his knees, and then looked in the back seat. There was no suspect there and, after forty seconds on his knees, the young man was allowed to stand or sit by the patrol car while officers searched the area. The entire detention lasted nine and a half minutes.

Recommendation: The Auditor reviewed the reports and documentation related to all three incidents. There were also MAV videotapes of the broken tail light detention and the assault/kidnapping investigation detention.

As to these three investigations of the young man, Department personnel appear to be professional and restrained in their actions and demeanor in the field. In the traffic stop where there was no evident exigency or danger, the police officers behaved calmly and deliberately, taking extra time to check the license status of the driver. In the assault/kidnap investigation, the inherent urgency and potential consequences of the situation were much greater, but the officers kept the detention time to a minimum, did not subject the young man to inappropriate force or mistreatment, and released him in the field as soon as it was clear he was not harboring one of the suspects or otherwise involved after the fact. The young man's parents based their complaint on the belief that the young man was simply pulled over or detained for "driving while black." However, as noted above, there existed legitimate law enforcement bases for each of the detentions. Accordingly, there is insufficient evidence to establish the existence of bias based policing in either detention.

Detectives following up on the hydrant incident interviewed the young man at his convenience in his home and forwarded their findings in the normal course of police business. The District Attorney is the final arbiter of whether there is sufficient evidence of a hit and run under California law to file and prosecute the case. Before a case is tested in court, the District Attorney has the discretion to move to dismiss the case in the interests of justice. The District Attorney, based in part on his own supplemental investigation, chose not to exercise that discretion.

The parents may have been understandably upset that they were led to believe by the former PAPD executive that the charges would not proceed. However, if in fact the Department executive conveyed an opinion to the District Attorney that the case should not proceed, such an entreaty belies the subsequent allegations that the Department had targeted their son in other instances because of his race. The fact that the police executive may have “gone to bat” for the young man with the District Attorney and suggest that he use his prosecutorial discretion to dismiss the charges is also not indicative of any animus toward the family. In fact, it suggests just the opposite. The fact that there was an apparent misunderstanding as to whether the charges would, in actuality, be dismissed is, at worst, an example of the police executive overstating to the family whether she would be successful in the entreaty with the District Attorney.

Of course, the distrust that resulted may have been avoided if there had been clearer communications between the police executive and the family. If the police executive was interested in suggesting that the District Attorney use his prosecutorial discretion to dismiss the charges, it would have been advisable if the parents were forewarned that ultimately, the decision on whether to rescind the charges would rest with the District Attorney and not with the Department.

Resolution/Corrective Action: Department executives have met with the young man's parents on several occasions during the pendency and at the conclusion of this complaint investigation. The complainants also were notified by letter of the results of this investigation.

2. Complaint of Improper Force # C2009-011

Synopsis: A woman who was detained after a traffic violation complained that she sustained injuries when officers tried to restrain her.

Recommendation: The Department reviewed the MAV video from this incident and conducted an initial investigation, determined there was no basis for the allegations and, accordingly, decided not to open the case as a formal complaint

investigation. The IPA recommended that the case should, in fact, be designated as a complaint investigation and will review the documentation to determine whether the investigation conducted to date is sufficient to resolve the allegation.

IV. Cases Pending from Prior Report

3. Driving Under the Influence #IA 2009-002

Synopsis: An off duty officer was arrested for driving under the influence of alcohol by another law enforcement agency after the officer was involved in a single vehicle roll-over collision. The officer pleaded no contest to driving under the influence and was sentenced by the criminal court to probation, six days of weekend work program, mandatory alcohol classes, standard DUI fines, and driving privileges restricted to driving to work and in the course of employment and to any alcohol treatment program. Following the resolution of the criminal case, the Department conducted an internal affairs investigation. The administrative investigation was thorough and showed that the officer had lost control of his vehicle and rolled it into a ditch as a result of impairment due to the consumption of alcohol. The officer was alone and uninjured and was professional with the arresting officers. He did not seek any special treatment from them but he declined to answer some of their questions.

Recommendation: The officer was placed on desk duty during the pendency of the criminal case and the administrative investigation. The officer was also required to submit to a fitness for duty review before returning to active patrol duty. At the conclusion of the internal investigation, the Department found the officer in violation of two policies: (1) Violation of a misdemeanor statute, and (2) Conduct unbecoming a member of the department...which tends to reflect unfavorably upon the Department or its members. The IPA concurs with these findings and with the Department's imposition of a significant suspension on the officer. It is a matter of grave concern when a peace officer violates any of the laws that he or she is sworn and paid to enforce. Driving

under the influence of alcohol bespeaks poor judgment, poses a high danger to the community and erodes public confidence in members of the Department. The days when law enforcement agencies could take a relatively tolerant view of off duty alcohol related arrests are over and appropriately so. However, it is also important to note that alcohol related lapses in judgment are often amenable to accountability, rehabilitation and monitoring.

It is a testament to the Palo Alto Police Department that this is the first occasion in recent memory in which the Department was required to consider the appropriate discipline for this type of offense.¹ Prior to doing so, PAPD looked to other police agencies in the state to gain more insight regarding the range of discipline being imposed on officers convicted of DUI offenses and imposed a suspension within the range imposed by sister agencies. The IPA concluded that the charges and imposition of discipline imposed in this case were appropriate and within the standards of progressive police agencies.

Resolution/Corrective Action: Charges of misconduct were sustained against the officer and discipline was imposed.²

¹ While we reported on another case involving a DUI offense, in that case the officer resigned from the Department before the administrative case was concluded.

² There has been public discussion by community members about whether the identity of the officer arrested for this offense should be released. Some have insisted that the Independent Police Auditor should release that information. That insistence fails to understand the role of the Auditor in outside agency criminal cases. The handling of the criminal investigation by an outside agency and ultimate prosecution by the District Attorney of this off duty conduct is outside the scope of the Independent Police Auditor's authority. Likewise, any decision whether or not to disclose the name of the offender lies within the discretion of the arresting agency and the District Attorney who prosecuted the matter. In cases that begin as criminal matters involving arrests by outside agencies, it is only when the criminal case evolves into an administrative case that the Independent Police Auditor has province to review and offer determinations as to the quality of the administrative investigation, the Department's decision as to whether violations of policy should be sustained, and whether the level of discipline imposed was appropriate. As noted above, in this case, the Independent Police Auditor concurred with the Department's handling of the internal investigation and its outcome. And as with any

4. **Complaint of Improper Arrest #C 2009-003**

Synopsis: Several officers responded to a dispatch indicating possible trespassing or burglary occurring at an abandoned shopping center. Several unidentified figures ran from the scene in the dark. Two officers discovered a man in the vicinity of parked cars who appeared groggy and intoxicated. The man was arrested for being drunk in public. A few days later he complained to the Auditor that he was simply taking the garbage out next to his residence. The complainant agreed to authorize us to forward his complaint to the Police Department for an investigation. The Department assigned an investigator to the case who interviewed the complainant as well as the involved officers and gathered the relevant documents, videotapes, radio traffic, incident logs and reports. During the course of the investigation, the complainant further alleged that he had not been intoxicated and felt that he was arrested solely because of his race or where he resides.

Recommendation: We reviewed all of the case materials and concluded that there was ample evidence to show that the complainant was intoxicated at the time of his arrest and possibly attempting to find and drive his car. He was confused, disheveled and unable to say where he lived. There appeared to be no evidence to support his contention that he was arrested because of his race or where he resides. There is no evidence that the occasion of the arrest was a pretext. It is consistent with the circumstances of the original trespassing/burglary investigation. We concur with the Department's decision concluding that the allegations of misuse of police powers or discriminatory arrest are unfounded.

Resolution/Corrective Action: The complainant was notified of the results of the investigation by letter.

administrative matter, pursuant to California state law, the identity of any subject of an administrative investigation, i.e, the case the IPA reviewed, cannot be disclosed.

5. Complaint of Intimidation and Conflict of Interest #C 2009-004

Synopsis: A tenant at an apartment complex complained that a Department supervisor worked there in a private capacity as a security officer and employed trespassing and intimidating tactics. He also objected to a possible conflict of interest with the supervisor's Departmental responsibilities.

Recommendation: The Department recently completed its investigation of this matter. The Auditor has not yet completed its review.

6. Complaint of Off Duty Battery #C 2009-005

Synopsis: A man residing in a neighboring town belongs to the same athletic club as a supervising officer of PAPD. The club member alleged that he was working out on an exercise machine when the officer bumped him from behind and said, "Watch it." There was no further interaction between the two and no injury to the club member. Four months later, the club member filed a complaint with the PAPD saying that he believed the bump had been intentional and for the purpose of intimidating him. The Department determined that the complaint may allege a criminal battery and turned it over to the police agency of the town where the athletic club is located. That agency investigated the incident but chose not to submit it to the District Attorney. At that point, PAPD commenced their administrative citizen complaint investigation. An internal affairs investigator interviewed the complainant, the officer and several employees or officials of the athletic club. The officer denied that she had had any physical contact with the complainant, whether intentional or accidental. The complainant had not mentioned the incident to any staff or officials at the club before making his complaint to the off duty officer's employer, namely the PAPD. Club officials were aware however of some incidents of erratic or confrontational behavior from the complainant at the club in the past. Club officials were also aware that the officer, in her capacity as a volunteer administrator for the club had had to request dues from the complainant and evaluate his expense requests.

Recommendation: The Auditor found the investigation into this matter more than sufficient and agreed that the evidence supported the Department's conclusion that the allegations were not sustained.

Resolution/Corrective Action: The complainant was notified of the results of the investigation by letter.

7. Complaint of Abuse of Process #IIR 2009-021

Synopsis: A citizen complained that officers have improperly assisted in the enforcement of a restraining order against her instigated by her brother.

Recommendation: This matter relates to a criminal investigation which is still pending.

**Table of Complaint and Internal Affairs Investigations
Reviewed by the Auditor
October 2009 through December 2009**

Case No.	Case/Investigation Type	Allegation	Results of Investigation	Resolution
C-2009-007	Citizen Complaint	Biased enforcement and harassment	Unfounded	Complainants informed of results
C-2009-011	Citizen Complaint	Excessive force	Recommended completing investigation	Pending

Cases Pending from Previous Reports

C-2009-002	Internal Affairs investigation	Driving under the influence – off duty	Founded	Discipline imposed
C-2009-003	Citizen Complaint	Improper arrest	Unfounded	Complainant informed of results
C-2009-004	Citizen Complaint	Intimidation off duty & conflict of interest	Complete IPA review pending	Pending
C-2009-005	Citizen Complaint	Off duty battery	Unfounded	Complainant informed of results
IIR-2009-021	Review	Abuse of process	Pending due to related criminal investigation	Pending

V. Conclusion

We are pleased to report that, with regard to citizen complaint investigations and Internal Affairs investigations, the Department's case organization and communication with the Auditor about cases has improved considerably in the past few months. Internal Affairs has cleared up its backlog. Some cases earlier in the year took far too long to conclude. Others were completed and evaluated by Department executives without conferring with the Auditor in time for meaningful input. Nevertheless, we view recent developments as an indication that changes in the organization and format of interactions with the Auditor are paying off.

With regard to the relationship between the Auditor and the Department, we have had in person discussions with the Chief and again explained our need to receive timely notice of complaints and the opportunity to provide input into the resulting investigations before "outcome" decisions are made. At the end of those discussions, we received a firm commitment from the Chief to make the IPA aware of complaints as

soon as practicable and to be able to have meaningful dialogue with the Department so that we can have real time input into the decision making process regarding case outcomes.