



# POLICE AUDITOR'S INTERIM REPORT - 2010

Presented to the Honorable City Council  
City of Palo Alto  
September 3, 2010

Prepared by Michael Gennaco  
& Robert Miller

OIR Group  
[www.laoir.com](http://www.laoir.com)

# Palo Alto Independent Police Auditor

---

## Interim Report for 2010

### **I. Introduction**

This report is the first of two reports covering the fourth year of the Independent Police Auditor's ("IPA") 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 Final Report and provides updated information regarding investigations that had not been completely resolved at the time the last 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.

The Department has undertaken the revision or review of four important policies or protocols over the past few months. First, as discussed below, it has completed its revision of the policy controlling the use of Tasers by patrol officers. Secondly, it is currently revising policies and procedures regarding pat down searches in the field. The IPA has worked with the Department on this revision and we are told that the update will be completed soon. Third, the Department is considering changes that will clarify the conditions under which an officer may accept additional employment outside of the Police Department and what type of employment is permitted. Finally, the Department is considering adoption of a policy that would provide guidance and ensure consistency regarding requests for disclosure of the identity of PAPD employees who are arrested.

## **II. Taser Incidents**

---

### **Taser Policy**

All PAPD patrol officers carry a Taser and have done so since the weapon was implemented three years ago. The IPA reviews each use of force where a Taser is involved, and evaluates whether Taser use or attempted Taser use complies with Department policy, and reports on each incident in our semi-annual reports. We have also made it a practice to discuss our observations with the Chief of Police. This is especially pertinent to us because the deployment of the Taser is continually subject to guidance and refinement from the courts, scientific studies, and police research organizations. Regarding Taser use, there is currently a wide array of policies and practices followed by law enforcement agencies.

In our most recent report we stated that the IPA had begun a dialogue with the Chief of Police about a possible revision of the Department's Taser use policy. This emanated from a timely review of all Taser uses to date by Department personnel as well as the issuance of new legal opinions concerning Taser use. As a result of this dialogue, the Department agreed to draft a more rigorous policy instructing PAPD officers when Taser use is authorized. We have worked with the Department on this policy revision and believe it will provide clearer guidance to PAPD officers on the appropriate use of the Taser consistent with current case law.

The most significant changes in the Taser use policy are clarifications to the language describing the level of threat posed by the suspect and the factors an officer must consider before using the Taser a second time. Under the original policy, Taser use was permissible when persons were observed to be "actively resisting". "Actively resisting" was defined to include "physically evasive movements to defeat an officer's attempt to control, including bracing, tensing, pushing, verbally threatening or signaling an intention to avoid or prevent being taken into or retained into custody." Accordingly, as demonstrated in our case discussions below, under the original policy, situations in which suspects were simply resisting arrest by tensing or bracing provided sufficient justification to use the Taser. In contrast to the original policy, the revised policy now

requires that a suspect must pose an immediate threat of physical injury before firing a Taser is appropriate. As a result, "active resistance" as defined by the original policy no longer provides justification for use of a Taser. Accordingly, a suspect who is simply "tensing" or "bracing" in an effort to resist being taken into custody no longer provides a basis for PAPD officers to use their Taser.

The revised policy also provides important additional guidance regarding the propriety of multiple cycling of the Taser. Under the revised policy, before activating a Taser a second time, an officer must reevaluate the circumstances and not re-apply the Taser unless the suspect continues to pose an immediate threat.

The new policy restricts use of the Taser to more appropriate situations that are consistent with recent legal opinions. Now that the revised policy has been issued, the Department has begun to provide the necessary training to familiarize officers with the new requirements. We will continue to monitor this training as well as compliance in the field with the revised policy.

#### **Taser Use of Force 2009-012**

A 17-year-old boy rang the front door bell of a residence at night, and then rang the side door bell. When the resident answered, the teenager asked where University Avenue was. The resident grew suspicious and called the police. An officer dispatched to the area saw three young men walking together and tried to question them. One of the young men began to run away and the officer ran after him ordering him to stop. When the young man would not stop, the officer fired his Taser at him but missed. The young man heard the sound of the Taser, stopped, lay down on the ground and was handcuffed without incident. The young man had a small knife and a screwdriver in his pockets. He was arrested for possession of burglary tools.

The PAPD supervisor's initial review of the use of force, namely the ineffectual firing of the Taser, concluded that the use fell within Department policy. In due course, however, the Chief of Police reviewed the incident, had misgivings about the appropriateness of the Taser use, and referred the incident for evaluation by a lieutenant of the Department with internal affairs experience. The lieutenant concluded that the officer's decision to activate the Taser did not comply with the Department policy at the

time because the facts known to the officer and the suspect's flight did not constitute "exigent circumstances" or "active resistance or active aggression." The policy required at least one or the other. Furthermore, the policy pointed out that, "[g]enerally, a subject fleeing should not be the sole justification for the use of a Taser. Severity of the offenses and other circumstances should be considered before officers' use of a Taser on a fleeing suspect." Since the suspected offense had not ripened beyond a possible intent to burglarize and the evidence was minimal at best that the subject chased by the officer was even the same man who had rung the doorbell<sup>1</sup>, Department managers concluded that the officer had failed to comply with Department policy and confirmed that the officer had been required to undergo training and to receive counseling as a result of this determination by his chain of command. The Auditor has reviewed the available case materials and arrived at a similar conclusion.

In addition to this significant finding as to compliance with Taser use policy, the Department investigator noted that, in this case, the Tasercam video and audio failed to function because the software controlling them had not been updated. While the absence of video did not prevent the Department from making its finding and, in this instance, the Taser did not hit the intended target, this technical glitch demonstrates how a small maintenance shortcoming by the Department can hamper subsequent evidence gathering and deprive the Department of the technical capabilities of this tool. The Department has informed the Auditor that it has recognized the need to track inventory effectively and is working on a durable solution.

#### **Taser Use of Force 2009-013**

A PAPD officer was on patrol, looking for graffiti in a garage when he observed another vehicle almost strike his patrol car. The officer performed a check of the vehicle license plate and dispatch informed the officer that the vehicle registration had been suspended. The officer attempted to make a traffic enforcement stop and activated his emergency lights. The suspect vehicle then ran a red light and the officer went into vehicle pursuit.

The suspect vehicle collided with three parked cars and a light post before

---

<sup>1</sup> The resident gave no description at all of the man and could not indicate what direction he had gone.

stopping. When the vehicle stopped, the driver left and began to run. The officer went into foot pursuit with the suspect, requiring the officer to jump two fences.

Two assisting officers caught up with the suspect and one of them grabbed the suspect's right arm and took him to the ground. The officer applied one handcuff to his right wrist. The other assisting officer attempted to pull the other suspect's arm from under his body and the suspect's muscles tightened. The original officer arrived on scene and observed the suspect resist the assisting officer's efforts to secure his left arm, at which time he deployed the Taser. The suspect was then brought into custody without further incident. During his interview, the suspect denied resisting arrest but apologized for not obeying the officer's commands to stop his vehicle.

PAPD and the IPA reviewed this Taser use and concurred that under the original policy that authorized Taser use for "tensing", that the observations made by the officer that the suspect was resisting the assisting officer's attempts to secure his left arm provided sufficient justification for Taser deployment. PAPD and the IPA also agreed, however, that there were other ways to help bring the individual into custody, considering that, by the time the Taser was applied, two officers had the suspect face down on the sidewalk. PAPD and the IPA further concurred that had this Taser deployment been undertaken under the new revised policy, the application would have been out of policy.

There were additional concerns that the Department recognized were raised by this incident. Under these circumstances, the officer's decision to continue to pursue the suspect after he ran a red light was in violation of the Department's vehicle pursuit policy and the officer received counseling and additional training for this violation. The officer's decision to go into foot pursuit with the suspect and scale at least two fences was also found to be tactically unsound and the officer was counseled regarding other more appropriate tactical options.

#### **Taser Use of Force 2009-17**

PAPD units responded to a "two men fighting" call. Upon arriving at the scene, one officer observed a male pacing back and forth who appeared angry, intoxicated, and agitated. One responding officer unholstered his Taser and ordered the man to the

ground. The man disregarded the officer's orders and became verbally confrontational with the officer.

As other PAPD officers approached, a woman identified herself as the man's wife, grabbed the man about the waist and told the officers to stop. Two officers grabbed each of the man's hands and told him he was under arrest. The woman continued to hold on to the man, and he was bent forward at the waist.

The first responding officer indicated that he intended to use his Taser on the man. A supervising officer on scene directed the officer to deploy the Taser. Warnings were given by the first responding officer and the Taser was fired, striking the man in the back. The man went rigid and fell backwards. The man was then handcuffed. Later, the man apologized to the officers about making verbal threats to them. The man did not make a complaint regarding the use of the Taser against him.

The use of the Taser was video captured by the patrol MAV equipment. The supervising officer stated that he chose not to use OC spray instead of the Taser because he was concerned about being too close and had been trained that the OC spray could have caused damage to the eye at such close distance.

The supervising officer who ordered the Taser deployment prepared a memorandum of the incident. In the memorandum, the supervising officer concluded that the use of the Taser conformed to PAPD policy. The supervising officer referenced the PAPD policy as authorizing Taser use for persons "actively resisting." The supervising officer referenced the PAPD policy defining active resistance as including "tensing", providing a justifiable basis for the use of the Taser.

The IPA and PAPD executives had significant concerns about the Taser use in this incident. However, because the original policy did allow for Taser deployment when PAPD police officers observed a suspect to be tensing, in the end, PAPD executives and the IPA concluded that the Taser use was minimally within the original policy. However, both the IPA and PAPD executives opined that had this Taser use occurred after implementation of the revised policy, the deployment of the Taser would have been out of policy.

There were two additional issues raised by this incident, the first being the supervising officer's incorrect view of the dangers of using OC spray to the eye at close

distance. The supervising officer was retrained on that issue. The second issue was that, as noted above, the supervising officer who directed the Taser application then passed initial judgment on the appropriateness of the use of force. This assessment should have been made by an uninvolved supervisor. The supervisor was counseled on this issue as well.

#### **Taser Use of Force 2010-001**

A mother called the Police Department, saying that her 28-year old son had a history of mental illness and was possibly violent, suicidal and delusional. She asked that the Department find him and take him to the hospital for a 72-hour mental evaluation hold. She reported that the son needing evaluation was driving with her 21-year old son. Patrol officers located the vehicle and pulled it over. The older son cooperated with the officers, getting out of the vehicle and conversing with them. The officers asked the older son some questions and listened to his lengthy disjointed comments. During the ensuing several minutes, a female officer stood in front of the older brother on the sidewalk and conversed calmly with him while two male officers stood by a few yards away. He sometimes became agitated and gesticulated with his arms, but each time he appeared to calm down and return to his original position standing near the curb. At one point, however, he raised his arms over his head and moved toward the female officer. She pulled his hands down when they got near her head and the other officers moved in to handcuff the older brother. They were unable to get him handcuffed and he began to wrestle with them.

The female officer pulled out her Taser and fired it at the older brother's back, but the Taser darts made insufficient contact and were ineffectual. The older brother began to struggle violently as he was taken down to the ground. At this point, the younger brother, who had been sitting in the vehicle, got out, hurried to the wrestling scene and engaged in the fray. One of the officers immediately pulled him away and took him to a nearby wall and had him sit down by it. Seconds later, the younger brother began to move back toward the fray and the officer had to disengage once more and firmly order the younger brother to sit down against the wall. Other officers arrived and helped subdue the older brother. He was handcuffed, stood up and officers tried to place him in



the back seat of a patrol car. This was unsuccessful.

Paramedics and firefighters arrived and helped secure the older brother to a gurney. He was taken by ambulance to the hospital. The younger brother was arrested for interfering with the officers.

The Auditor has reviewed the reports in this case as well as the three available MAV tapes. The video tapes depict the incident from beginning to end. We were impressed by the officers' calm professionalism during the incident and their patience in dealing with a mentally disturbed individual. They appeared to take pains not to escalate the situation until he actually moved forward to touch one of them despite warnings. The older brother was large and athletic and one officer ended up with two chipped teeth. Another suffered scrapes and bruises. The older brother suffered no visible injuries. It is important to note that, when the older brother refused to get into the back of the patrol car and pushed back against the officers, they did not insist and simply waited for the paramedics to assist with a gurney. Placing a highly uncooperative arrestee in a patrol car can often result in an escalation of force and resultant injury to both arrestees and officers. Peace officers often have the impulse to immediately use force to complete their objective, but here the officers used commendable restraint and waited instead for additional resources.

The Taser use in this incident appears to have been timely, appropriate and in compliance with the Department's Taser policy, then or now. Had it been effective, it might have ended the conflict before anyone was injured.

We note that the Auditor has become aware that the younger brother has complained to the Police Department about how he was treated. We will review the Department's response and report on our findings in the next IPA report.

#### **Taser Use of Force 2010-002**

A burglary suspect jumped from a roof, fell through a plastic carport and began to run from officers. The suspect fought with the officers when they caught up to him. During a lengthy struggle, the suspect was bitten by a police K-9 dog. Two Tasers, one of which malfunctioned, as well as physical force were used on him. Both the suspect and officers were injured. The IPA has very recently received the documentation of this

use of force incident and will review it for the next report.

---

### **III. Complaints, Cases and Issues**

#### **1. Complaint of Rudeness and Intimidation #C 2010-002**

**Synopsis:** A 93-year old woman called the police because she felt threatened by her 58-year old son. Three officers went to the mother's house and talked to both parties for approximately 15 minutes. Both parties calmed down and the police departed.

The son subsequently complained that he felt that an officer had been discourteous and threatening in her demeanor. The Department completed a complaint investigation.

**Recommendation:** There was no formal police report of this call for service. The audio portion of a MAV video, however, captured most of the encounter. The Auditor reviewed the tape and the investigative materials which included the 911 call and interviews of the complainant and the two involved officers and the sergeant who was present. The officer's demeanor appeared to be professional and aimed at de-escalation, an effort which was successful. While one officer was occasionally curt with the son and admonished him not to interrupt her, she was never discourteous. The complainant had alleged that this officer had rudely told him to "get a job," but the full context of the conversation makes it clear that the officer was simply offering the complainant some suggested options that would get him out of the house and might reduce the friction with his mother. The IPA agrees that there is no basis for the allegations of discourtesy or threatening behavior by the officers. We also note that this complaint investigation was completed promptly.

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

#### **2. Complaint of Biased Enforcement #C 2010-004**

**Synopsis:** A man walking down the sidewalk in the afternoon was approached by

a patrol officer who asked him what his name was, where he lived and whether he was on probation or parole. The man answered some of the questions, then ended the conversation and walked away. The man later complained to the Police Department that he believed he was stopped by the officer for no reason or because he is of Native American descent, and did not feel he was free to leave. The Department initiated a complaint investigation.

**Recommendation:** The Auditor reviewed this investigation and found it to be timely and thorough under the circumstances. The investigation and the Department's ability to determine the tone and context of this encounter were hampered by the officer's failure to activate his MAV audio recorder. Nevertheless, there was very little conflict between what the complainant recalled of the content of the conversation and what the officer recalled, except that the complainant alleged that the officer had demanded that he, "Come over here," which the officer denied. Ultimately, there was insufficient evidence to conclude that the officer had made an improper or discriminatory stop. The Department did, however, find that the officer had failed to comply with the MAV activation policy.

This complaint and the encounter underlying it raise a question that comes up frequently in a variety of policing activities: What is a consensual encounter? Stops, detentions, searches and seizures require varying levels of evidence to be constitutionally permissible, but a consensual encounter between an officer and a citizen requires none of these. Nevertheless, the perception of what is consensual and what is mandatory often depends on point of view. A conversation may seem entirely casual to a police officer who has no intention of forcibly detaining the person to whom he is speaking, but the person may view the badge, the gun, and the direct personal questions as demands in and of themselves. For these reasons the Auditor urges the Department to continue to train officers to cultivate casual encounters with the public and to be clear and unthreatening in those encounters. It is just as important for the Department, as was done here, to insist that officers follow Department MAV activation policy and utilize the MAV resource to record any investigative or enforcement contacts.

**Resolution/Corrective Action:** The IPA agrees with the Department's finding that there was a violation of the MAV activation policy. The Department has provided

counseling and corrective action. The Department has revised the MAV policy to remove ambiguity and ensure consistency. The complainant was notified of the results of the investigation by letter.

#### **IV. Cases Pending from Prior Report**

##### **3. 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 used intimidating tactics against him. 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 Chief met recently with the complainant and walked him through the results of that investigation. Now that the meeting has occurred, the Auditor will report on the results of this investigation in its next report. This case also triggered a Departmental review of the protocols and approval mechanism regarding outside employment. As noted above, that initiative is a work in progress.

##### **4. Complaint of Unnecessary Force # C 2009-011**

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

**Recommendation:** After reviewing the MAV video from this incident and conducting an initial review, Department managers determined there was no basis for the allegations and initially decided not to open the case as a formal complaint investigation. The IPA recommended that the case should be designated and documented as a citizen's complaint investigation and the PAPD agreed to do so. The Auditor has reviewed the reports, documents and the MAV video and has spoken to Department investigators as well as the complainant. The evidence, particularly the MAV video, depicts a controlled use of force by the officers that appears to be proportional and appropriate to the actions of the woman. The woman was initially pulled over by a patrol officer when she drove

through a red light. He talked to the woman as she sat in her car, then spent several minutes alternately standing near her window and talking to her. He appeared to adopt a patient and calm demeanor throughout this period but after he walked back to his patrol car, the woman became increasingly agitated and eventually came out of her car. A partner officer had arrived and the woman walked directly toward the two officers, yelling and slapping her fists against her torso and briefly taking a martial arts stance.

The woman was seventy years old at the time of the incident but appears to be equal in stature to the two officers and does not appear frail. The officers tried to take her by the arms and walk her back to her car, but she held her arms away from them. At that point the officers both pressed the woman up against the side of her car. She tried to bite the female officer as the officers tried to get control of her arms. The officers took her slowly to the ground and handcuffed her, then walked her to the sidewalk. She showed no outward signs of injury. The woman was detained and taken to the hospital for a 72-hour mental health evaluation due to her bizarre statements and behavior and the fact that, before the struggle, she had expressed a desire to kill herself.

Throughout the encounter, the officers appear to show restraint and consideration. They do not strike the woman and appear to take pains not to injure her or allow her to come dangerously close to traffic. It is possible that her ribs were injured by the encounter as she asserted, but the Auditor did not find the use of force excessive under the circumstances.

The complainant also had concerns about the status of her driver's license subsequent to this incident. The Auditor recommended that the Department explain to the complainant that the Department of Motor Vehicles makes its own evaluations. The Department and other City personnel have met with the complainant to explain this aspect of her concerns.

**Resolution/Corrective Action:** The IPA discussed with the complainant the results of our evaluation and requested that PAPD notify the complainant of the results of the investigation by letter, offer to review the evidence with her, and provide her any further appropriate guidance on resolving her issues with the DMV.

## 5. **Complaint of Abuse of Process #C 2010-003**

**Synopsis:** A woman complained that officers had improperly evicted her from her mother's residence, acted unprofessionally, and discriminated against her because of her ethnicity and mental disability. A Department supervisor had previously responded to the home of the woman's mother when the woman called the police alleging that her brother was failing to provide adequate care for several children living in the mother's home. At that time, the brother had alleged that the woman, his sister, was misappropriating the mother's assets. The sister claimed that it was in fact the brother who was misappropriating funds. The supervisor arranged to meet social workers at the house the following day. During the family gathering with social workers the next day, the sister was argumentative and disruptive. The supervisor suggested that she return to her own home in another city for a week and, at the request of the social worker, asked for her key to the mother's home.

**Recommendation:** The Auditor reviewed the original report by the responding PAPD personnel as well as the complaint investigation report and witness interviews. The investigator conducted a thorough and balanced investigation. The questions of ultimate responsibility in the mother's home for the apparent shortcomings in child care, elder care and financial stewardship were complicated by long-standing conflict between the adult brother and sister and were not amenable to quick solutions. Nevertheless, the evidence from those at the scene was persuasive that the PAPD supervisor performed his investigation in a calm and professional manner, did not exceed his authority by asking the sister to leave, and did not discriminate against her. Despite the convoluted family issues, the supervisor took pains to try to sort the matter out in a reasonable way, returning the next day to assist social workers. At the close of his initial investigation, he also referred the problems in the home to Child Protective Services and to Adult Protective Services to conduct a further financial abuse investigation.

The IPA concurred with the investigating lieutenant's recommendation that the potential administrative charges against the supervisor were unfounded.

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

**6. Complaint of Unjustified Arrest [No number assigned]**

---

**Synopsis:** A community member complained to the IPA that she had been falsely arrested and charged with child endangerment by PAPD. Criminal charges were subsequently brought by the District Attorney's Office. The IPA recommended to the PAPD that a complaint file should be opened on the case but agreed with the Department that it would be impractical to proceed with active investigation of the complaint until after the criminal case had concluded. This is because the facts and laws at issue in the criminal case— whether there was sufficient evidence of child endangerment – were the same as those at issue in the citizen's complaint. The IPA explained this to the complainant and she agreed to contact the IPA when the criminal case had concluded. Recently, after her criminal charges were dismissed by the Court, she contacted the IPA again and the IPA, in turn, requested that Internal Affairs commence its investigation of the complaint. Department investigators have made several attempts to contact the complainant for an interview, but to date she has not responded.

**Recommendation:** The IPA asked the Department to send the complainant a letter explaining the complaint investigation process. The Department did so and received a response from the complainant that she was ready to re-engage with the complaint investigation process. The IPA will monitor this investigation.

## Table of Complaint and Internal Affairs Investigations

**Reviewed by the Auditor**

**January 2010 through July 2010**

Case No.	Case/Investigation Type	Allegation	Results of Investigation	Resolution
C-2010-002	Citizen Complaint	Rudeness and intimidation	Unfounded	Complainant informed of results
C-2010-004	Citizen Complaint	Biased enforcement	Unfounded for allegations, Founded for noncompliance with MAV activation policy	Complainant informed of results

### Cases Pending from Previous Reports

C-2009-004	Citizen Complaint	Intimidation off duty & conflict of interest	Investigation and IPA review complete	Chief of Police met with complainant to discuss results of investigation
C-2009-011	Citizen Complaint	Unnecessary force	Unfounded	Complainant informed of results
C-2010-003	Citizen Complaint	Abuse of process	Unfounded	Complainant informed of results
No number	Citizen Complaint	Unjustified arrest	Investigation re-activated and pending	Complainant informed of process

#### V. Conclusion

This appears to be a period of constructive re-evaluation at the Palo Alto Police



Department. The implementation of the revised Taser use policy and the consideration of revising the pat down search policy and the outside employment policy exemplify this. These changes and anticipated changes have come as a result of careful scrutiny – by both the IPA and Department managers -- of use of force incidents and disciplinary investigations. This is a very important and positive process and one that the Department appears to have embraced. On the other hand, carrying some of these initiatives across the finish line does not appear to be as readily accomplished, in part, because of the staffing challenges in the management ranks. Executive positions have gone unfilled over recent reporting periods. We are hopeful, however, that by our next reporting period, these works in progress will have been successfully completed. Additionally, some specific pending policy revisions that we have highlighted in this report are part of a broader revision process of many of the Department's policies. We are informed that this Department-wide policy revision process is in its final stages and we will report on the results of this process as they unfold.