



# CITY OF PALO ALTO OFFICE OF THE CITY MANAGER

March 22, 2021

The Honorable City Council  
Palo Alto, California

## 2019 Independent Police Auditor's Report and Supplemental Report From the City Manager

### INTRODUCTION

Since approximately 2006, Palo Alto has contracted with an outside firm to act as Independent Police Auditor (IPA). The IPA performs several functions for Palo Alto. First, the IPA provides independent review of PAPD internal affairs investigations, including both investigations of complaints by members of the public and department-initiated investigations that involve a member of the public. Police Department management confers with the IPA periodically as investigations are opened and in process. When the Police Department's investigation is complete, the IPA conducts a *secondary* review and assesses "thoroughness, objectivity and appropriateness" of the investigation and disposition. Where appropriate, the IPA provides recommendations for training, procedural adjustments or other follow-up actions. Second, the IPA reviews every deployment of a Taser device and the PAPD's use of force review of that deployment, regardless of whether a citizen complaint is filed. It should be noted that based on City Council action in November 2020, future IPA reports will include additional categories of operational review, as noted below. In addition, in conjunction with the next written report, City Council will have an opportunity to confer with the IPA at an open-session meeting.

Typically, the IPA produces a written public report to the City Manager and City Council twice per year summarizing the IPA's conclusions and comments. Attached to this memo is the written public report by the IPA for calendar year 2019. All IPA reports issued since 2006 are posted and available on the City's website, here:

[www.cityofpaloalto.org/gov/depts/pol/auditor.asp](http://www.cityofpaloalto.org/gov/depts/pol/auditor.asp). In addition, for details about other accountability measures within the Police Department, go here:

[www.cityofpaloalto.org/policeaccountability](http://www.cityofpaloalto.org/policeaccountability).

### PROCESS TO FILE A COMPLAINT

The Chief of Police is responsible for overseeing the complaint process. An explanation of the complaint process and a complaint form can be found at:

[https://www.cityofpaloalto.org/gov/depts/pol/report/employee\\_complaint.asp](https://www.cityofpaloalto.org/gov/depts/pol/report/employee_complaint.asp).

Complaints may also be directed to the Independent Police Auditor through the following:

Contact: Mr. Mike Gennaco Phone: (323) 412-0334 Email: <a href="mailto:Michael.gennaco@oirgroup.com">Michael.gennaco@oirgroup.com</a>	Or mail to: OIR Group 1443 E. Washington Blvd., #234 Pasadena, CA 91104
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## IPA REPORT RELEASED FOR CALENDAR YEAR 2019

A contract renewal process resulted in delays in the IPA's work for a portion of 2019, causing an interruption in the development of the written public report for that year. For that reason, the standard reporting period of twice per year was adjusted and a single report covering the full calendar year for 2019 is published for City Council review and public information. Following City Council's receipt of the 2019 report, the next IPA report will come to the City Council after the City Council summer break, later in 2021.

## SUPPLEMENTAL REPORTING OF PERSONNEL AND HUMAN RESOURCES INVESTIGATIONS

In addition to the IPA report, the City Manager's Office provides a supplemental reporting of investigations not included in the IPA's scope of work as of the 2019 IPA contract amendment adopted by the City Council. The City Manager's supplemental reporting includes personnel and Human Resources matters that do not directly involve police activities with the public and are not initiated by members of the public. Personnel and Human Resources matters are defined as workplace conflicts. These matters include, but are not limited to, investigations of human resources and personnel matters regarding sworn officers relating to assignments, evaluations, promotions, demotions and similar issues, and allegations of harassment, discrimination, and retaliation. Under State and Federal labor laws, these issues are subject to review by State or Federal agencies set up to provide third party review of labor-related matters in addition to City-administered reviews and potential appeals and grievance procedures.

For the current 2019 calendar year reporting period, the City Manager's Office is reporting one investigation as follows:

Supplemental Reporting of Personnel and Human Resources Matters		
Allegation	Allegation Summary	Determination*
Disparaging remark or conduct	Employee made an inappropriate comment during a staff meeting.	Supported.

### \* Definitions of "Determination" Terms

- *Unsupported* - the investigation failed to disclose evidence sufficient to prove or disprove the allegation by a preponderance of the evidence.
- *Supported* - the investigation disclosed evidence sufficient to prove the allegations by a preponderance of the evidence.
- *No finding* - the complainant failed to provide necessary information to further the investigation; the complainant failed to cooperate; the incident was reported to the Police Department after the statute of limitations for the Police Department to initiate a disciplinary investigation had expired; the investigation revealed that another agency was involved, and the complaint has been referred to that agency; or the complainant withdrew the complaint.

As noted, complaints and investigations of internal personnel and human resources matters are not included in the City's current independent police auditing program and the OIR (IPA) existing contract. As discussed later in this memo, under the framework of the City Council's

adopted priorities on Race and Equity, the Policy and Services Committee will consider if the IPA’s scope of work should be expanded to include review and reporting of instances involving sworn officer personnel and human resources matters such as the case above.

**IPA TO REVIEW INFORMAL INQUIRIES**

In some instances, members of the public make informal inquiries (called “Informal Inquiry Review” or “IIRs”) that are not filed as formal complaints and do not require a full formal investigation; however, the IIRs are still examined by the Police Department. These matters are typically resolved after review of police records and policies. Informal inquiries may include matters such as misunderstandings or minor issues of discourtesy. Historically, these informal inquiries have not been included in the IPA’s scope of work and as a result were not included in the 2018 IPA reports issued, but were included in the City Manager’s Supplemental Reporting. However, beginning with the attached IPA report for calendar year 2019, and moving forward, these inquiries will be included in the IPA’s review. As a result of the IPA report review, there is no IIR chart listed in this supplemental reporting of calendar year 2019. The attached IPA report includes two IIRs for the reporting period of calendar year 2019.

**RACE AND EQUITY WORK RELATED TO THE INDEPENDENT POLICE AUDITOR**

In November 2020, following several months of intensive work on issues related to Race and Equity, the City Council adopted a set of directives (link pages 4-5: <https://www.cityofpalalto.org/civicax/filebank/documents/79566>) covering a number of areas, including police policies and practices. Several of the directives are related to the IPA role and contracted scope of work. Those directives and relevant updates are listed here.

**City Council Direction to Staff Related to Independent Police Auditor**

City Council Adopted Direction (November 2020)	Timeline
1. “Expand IPA scope to include <b>all administrative use of force reports</b> where a baton, chemical agent, Taser, less-lethal projectile, canine, or a firearm is used, and all cases where the subject’s injuries necessitate any treatment beyond minor medical treatment in the field.”	Taser deployments are already included in the IPA review and reports. The contract is being amended to include the additional uses of force. The additional uses of force will be included in any IPA report that covers investigations which occurred after January 1, 2021.  Contract amendment for consideration by the City Council is anticipated by late Summer 2021.

<p>2. "IPA to provide an <b>audit workplan</b> to the City Council for approval."</p>	<p>Contract amendment for consideration by the City Council is anticipated by late Summer 2021. This directive is being discussed with the IPA as part of the contract amendment.</p>
<p>3. "Refer to the Policy and Services Committee consideration of <b>IPA oversight of internal complaints</b> regarding misconduct related to harassment, discrimination, or retaliation resulting in city investigation of uniformed officers."</p>	<p>This directive is related to the workplace conflicts/internal complaints which are currently investigated by HR.</p> <p>This item is tentatively scheduled to the Policy and Services Committee in April 2021.</p>
<p>4. "Amend the contract to require the Independent Police Auditor (IPA) to meet with the City Council in open session twice a year with each report"</p> <p>and</p> <p>"Direct Staff to maintain an every six (6) months schedule for IPA reports to City Council containing reviews <b>ready at the time of the report.</b>"</p>	<p>Contract amendment for consideration by the City Council is anticipated by late Summer 2021.</p> <p>Staff is coordinating with the IPA to tentatively release their next report in August 2021.</p>
<p>5. For future supplemental memorandums: Direct Staff to include use of force information to the regular Supplemental Report submitted to the City Council as a cover memorandum to each IPA report.</p>	<p>The use of force (UOF) information for Jan. 1, 2015 – June 1, 2020 is available online (<a href="https://tinyurl.com/4kwwy6xb">https://tinyurl.com/4kwwy6xb</a>). The next UOF report will be included in the January 2022 Supplemental Report in order to include a full year of data.</p>

For other updates on the timeframes listed above or other Race and Equity work at the City, visit the recent staff report that went to the Policy and Services (P&S) committee on March 9, 2021. Link: <https://www.cityofpaloalto.org/civicax/filebank/documents/80509>.

**ATTACHMENTS:**

Attachment A: Palo Alto Independent Police Auditors' (IPA) Report: Review of Investigations Completed in 2019 (PDF)

**ATTACHMENTS:**

- Attachment A: Palo Alto Report Confidential Draft 2 25 21 (PDF)

- Attachment A-Palo Alto Independent Police Auditors Report-Review of Investigations Completed in 2019 (PDF)

Department Head: Ed Shikada, City Manager



# INDEPENDENT POLICE AUDITORS' REPORT: Review of Investigations Completed in 2019

Presented to the Honorable City Council

City of Palo Alto

March 2021

Prepared by: Michael Gennaco and Stephen Connolly  
Independent Police Auditors for  
the City of Palo Alto



# Introduction

This report addresses materials received by the Independent Police Auditor (“IPA”) for review from the second half of 2019. It includes five cases that were investigated by the Palo Alto Police Department (“PAPD”) and completed during that time period. Though our past practice has been to issue reports that cover six months of investigation activity at a time, and though our most recent report addressed the second half of 2018, we have skipped ahead for the simplest of reasons: there were no cases finished by the city during the first portion of the year.

The report includes the review of one Taser case and four allegations of misconduct. The Taser incident involved the detention – and ultimately the arrest – of a man who was stopped on his bicycle for traffic violations and quickly became angry with the officer. The Taser activation was brief and oddly effective: though the probes did not penetrate the man’s layered clothes, he did rock back into a seated position and remained there until backup officers arrived, as if deferring to the weapon’s potential as much as its physical effect. While concurring with the Department’s finding that the force was justified and in policy, we note some peripheral issues for consideration.

As for the misconduct allegations, they fall into two related categories. All of them originated with complaints from members of the public about how they had been treated during contacts with Department officers, with three of them including allegations of excessive force. However, while two of them were investigated in the traditional way, two were characterized as “Informal Inquiry” matters. This meant that the Department assessed the complaint and found that it was able to reach a resolution regarding its merits without going through a full-scale investigation process (including, most significantly, interviews of witnesses and subjects).

Though agencies call it different things, and may follow slightly different protocols, the *idea* behind the Informal Inquiry approach is one we have seen with other departments. It combines an appropriate deference to “due diligence” and accountability with a recognition that some complaints lend themselves to efficient disposition. This could be because the substance of the complaint, even if true, does not constitute a policy violation or even an individual performance issue; a hypothetical example would be a person who admits to a traffic violation but complains that the Department should have better things to do than writing tickets). Or it could be because there is sufficiently definitive evidence to establish what occurred in the encounter at issue, thus rendering further investigation or interviews unnecessary.

Here, both of the complaints at issue pertained to incidents for which there were recordings of what happened, and these were central to the ultimate determination that a more complete workup was not necessary. While we have minor concerns that we discuss below, PAPD’s version of the concept seems like a legitimate approach. We also appreciate the added accountability the Department has imposed on itself by offering the cases for our assessment.



# Taser Incident

The scope of our auditing responsibilities in Palo Alto includes any use of force involving a Taser. This has been the case for several years and is responsive to community concerns about this particular force option. PAPD had one relevant incident in 2019. It involved an adult male whom a PAPD officer spotted while driving on patrol.

## Factual Overview:

The man was on a bicycle on the wrong side of the road, in violation of traffic rules. When the officer initially pulled up alongside the man and made contact from within his vehicle, the man reacted by yelling and pedaling slowly away. This prompted the officer to engage his car lights and make a more earnest effort to detain the man.

After a short distance, the cyclist stopped, threw down his bike, and turned toward the officer in obvious anger as the officer got out of his car and approached. A standoff ensued in which the man berated and challenged the officer, who called for backup and removed his Taser from its holster. The officer gave increasingly heated commands for the man to get on the ground; eventually the man bent into a crouched position but refused to comply fully and remained verbally belligerent. Much of his frustration seemed related to a belief that, as an African American, he was being unfairly singled out for “profiling” and harassment.

Some seconds later, as the officer moved slightly closer, the man began to lean forward in a way the officer interpreted as aggressive and perhaps the prelude to an assault. This caused him to activate the Taser. The probes hit the man’s outer clothing and appeared to knock him back into a seated position without fully “working” in terms of muscular incapacitation. The Taser did seem to make an impression on the man – if more psychological than physical – and he stayed in place (while maintaining his verbal challenges to the officer) until backup units arrived. The additional officers took the man into custody without significant additional struggle – although his attempts to kick caused them to wrap his legs in a special restraint device.

The man was briefly evaluated by medics at the scene; they determined that he had no injuries, which matched the man’s own assertions. He was booked into jail on charges of resisting/obstructing an officer in performance of his duties.

## Outcome and Analysis:

In keeping with established protocols, the Department’s review of the use of force involved several steps. These included a supervisor’s interview with both the subject of the force and the involved officer, a downloading and analysis of the Taser data, written reports from the primary and backup officers, and evaluation of available recordings (including in-car video and body-worn cameras).

Unfortunately, while in-car video was helpful, the primary officer's body camera lens was blocked by his own jacket until after his Taser use— a seemingly foreseeable situation that officers have found ways to avoid. While the problem was acknowledged in the sergeant's original memo, no remediation of it is cited in the materials.

RECOMMENDATION ONE: The Department should address (through documentation and counseling) performance issues that interfere with body-worn camera recordings when they come to the attention of supervisors.

The handling sergeant and the reviewing lieutenant ultimately determined that the use of force was justified and in policy. They based this on considerable evidence of the man's agitated, uncooperative, and hostile state from the outset of the encounter. (It should also be noted that the officer had a valid legal basis for detaining the man.) The Taser activation itself was preceded by warnings (in compliance with policy), short in duration, and responsive to an objectively reasonable threat assessment by the officer.

We found this answer to the "bottom line" policy question to be well-supported by available evidence. We also noted some additional issues – some of which the Department addressed as part of its review, and some which we introduce here.

#### *Officer Tactics and Communication*

The officer was alone in dealing with the subject for several minutes before other officers arrived. He did some things commendably well, including calmly and promptly calling for backup. He also controlled his Taser effectively – including turning it off and back on to "re-arm" it if needed after the first activation – and with some measure of restraint. Once the subject had ended up seated, the officer held his position patiently until the additional officers arrived.

There were, however, other aspects of officer performance that were more questionable. One of these was the officer's heated and repeated use of profanity in his exchanges with the subject. The policy prohibiting the use of "obscene, indecent or derogatory" language does contain a relevant exception: for a "deliberate verbal tactic" intended to gain compliance and/or avoid a physical confrontation with an individual who is "non-compliant, hostile, or aggressive."

To the Department's credit, the sergeant's report accurately documented the officer's language, and the lieutenant analyzed the issue in his own memorandum on the incident – and determined that it was consistent with the exception cited above. We find this reasonable in the context of the encounter as it played out, and it did seem as though the officer was in control of his own emotions (as opposed to seeming angry or gratuitously abusive).

On the other hand, the recordings raise broader questions about the *efficacy* of the officer's verbal approach. He appears to quickly match the subject's pugnacious demeanor with his own, and makes no attempt to defuse or de-escalate the situation by explaining his own actions or otherwise addressing the man's anger over being stopped. Once the Taser had been activated and

the man was seated on the ground and somewhat neutralized (at least as a physical threat), the officer's tone shifted into more of a glib condescension. He addressed the (older) man several times as "bro," for example, which did little to mitigate the man's resentment or establish a more constructive footing for the interaction.

Again, the lieutenant's memo addresses the issue by recommending a debrief with the involved officer, with a particular focus on approaches to de-escalating "tense encounters." Assuming that this session actually occurred, this constitutes the sort of "next level" supervisory intervention that we have long advocated, and that is a clear advantage of the more direct and formal involvement of lieutenants in the review process for these incidents.

Also puzzling from a tactical perspective was the decision to move *closer* to the man that seemed to precipitate a reaction from him – and in turn prompted the Taser activation. There is no question that the man was both agitated and verbally belligerent. The officer's decision to remove the Taser from his holster and give commands for the man to get on the ground seemed justified as well, and he provided clear warnings as guided by policy. Perhaps the goal was to ensure the effectiveness of a Taser deployment that the officer had (reasonably) decided upon *before* moving in. But it seemed like a specific question worth addressing in the analysis.

### *Investigative Steps*

A PAPD supervisor did conduct an interview with the subject as to his perceptions of the incident. This did not provide significant insight as to the Taser use – the man's remarks were rambling and seemed only tenuously related to particulars of the force. However, the man alleged racial bias and lack of probable cause at various points in the interview. And, while patiently accepted during the interview, these claims were not pursued or formally addressed.<sup>1</sup>

There was nothing malicious about this: the objective evidence did establish a legal basis for the stop, and the sergeant was clearly focused on the force to the exclusion of other issues. But the issue – inherently sensitive and worthy of careful attention – was relevant in the broader sense. The man's initial anger at being stopped was based at least in part on a perception of racial discrimination, and he chose to amplify this when the sergeant provided the opportunity. Accordingly, some forum for addressing this "complaint" as it emerged in the supervisor's force interview would have been appropriate, even though that had not been the original purpose behind taking the statement.

**RECOMMENDATION TWO:** The Department should evaluate, investigate as needed, and document its response to racial bias allegations, even when they emerge through avenues outside the traditional complaint system.

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<sup>1</sup>There was a similar failure to address the racial bias allegation in a complaint investigation discussed below.

Impressively, the Department also sent officers to canvas the immediate surroundings for possible witnesses. While this did not yield useful results, it showed creditable due diligence by the responding parties.

## Misconduct Investigations

### *Case 1: Allegation of Excessive Force After an Initial Consensual Encounter*

#### Factual Overview:

This complaint came from an individual who was challenging different aspects of his arrest for obstructing/resisting officers in the performance of their duty. The incident in question had begun under circumstances that were later disputed: the complainant was waiting at a bus terminal in the early morning hours and got the attention of an officer who was passing by in his radio car. His intent was either to offer a friendly hello (his version) or to summon the officer (which was the officer's claimed understanding). The officer parked and approached, and the encounter deteriorated from there.

For his part, the man seemed bothered by the officer's demeanor and aggressive reaction to a pleasant wave; the officer, on the other hand, found the man's behavior strange and came to believe he was under the influence of alcohol or drugs. The officer detained the man and called for backup, which further antagonized the complainant.

When the second officer arrived, the misunderstanding/confrontation escalated. The man was uncooperative with requests to show his identification, did not comply with other directions, and made aggressive statements and gestures. The officers sought to take physical hold of the man, and later reported that he offered significant resistance, including a punch to the face of the initial officer as well as a persistent struggle once he was taken to the ground.<sup>2</sup> A total of five officers were eventually involved in handcuffing him and taking him into custody.

The man was eventually charged with four misdemeanor counts, including battery on the officer, in conjunction with the incident. Six months after his arrest, he filed a written complaint with the Department. He also filed a claim with the Palo Alto City Attorney. From these materials, the Department identified two central allegations: that the detention and arrest were unlawful, and that he had been subjected to excessive force in the form of an unwarranted punch to the face that left a "permanent scar."

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<sup>2</sup>The body camera footage depicts what was clearly a struggle to get the man in cuffs, but as oftentimes with "hands on" events, the particulars are difficult to discern.

## Outcome and Analysis:

Ultimately, the Department determined that the allegations were unsupported. It took the position that the detention and arrest had been legally justified, and that the man's claim of a punch – necessary or otherwise – was unfounded.

For the most part, we found the complaint investigation to be thorough and thoughtful, and the outcome to be reasonable; as discussed below, some of the investigative resourcefulness was particularly noteworthy. But we also noted a couple of shortcomings in the Department's approach.

### *Investigative Steps*

Early in his review, the investigating sergeant attempted to interview the complainant in order to supplement the written complaint with a more detailed version of events. The man was reluctant to cooperate with this process on the advice of his civil lawyer, but they nonetheless ended up speaking on the phone for more than a half hour.<sup>3</sup>

This made for an odd hybrid: the repeated references to the lawyer made the first part of the conversation cumbersome, as the sergeant attempted to clarify the initial complaint. Then the sergeant persevered with a series of follow-up questions that the man willingly answered, but that seemed out of sync with his stated preferences to follow his lawyer's advice. While the sergeant drew repeated distinctions between the legal claim and his own responsibilities, and while his intentions seemed much more related to thoroughness than any attempt to "trick" or take advantage of the man, the obvious overlap in issues – particularly with regard to fact-gathering and the significance of the man's own version – perhaps warranted a revised approach.

Ideally, some outreach to the attorney might have been a useful way to bridge the communication gaps, get a more definitive version from the complainant, and ensure that a represented party's legal rights were being protected.<sup>4</sup> Moreover, the man alluded briefly to a security guard witness who had supposedly agreed in a conversation with that lawyer that the actions of the police officers were hard to understand; this would have been an interesting angle to pursue.

While attorneys often decline to facilitate the cooperation of their clients in administrative reviews, a better practice would have been to get the lawyer's contact information and reach out

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<sup>3</sup>He also directed the PAPD supervisor to a YouTube video in which he was informally interviewed about the incident in question and offered his version of events in more detail; the sergeant did watch this as well.

<sup>4</sup>Our understanding is that criminal charges were also still pending at that point, which heighten the concerns about engagement with represented individuals.

to get confirmation of this decision. Doing so would have shown enhanced due diligence at the very least and may have led to a more thorough exploration of events.

RECOMMENDATION THREE: When complainants are represented by counsel, the Department should coordinate with that person before proceeding with an interview in pursuing the best available evidence as to what occurred.

One important source of information was a third-party witness: a transit system security officer who witnessed the arrest and had himself encountered the complainant prior to the first officer's arrival.<sup>5</sup> The security officer had provided the man with bus directions and found him to be in a cheerful but peculiar mood. He saw the complainant get the officer's attention and watched the officer approach in a casual manner that seemed a reasonable response to the complainant's actions. He described the event as shifting in tone when the officer asked for the man's identification, which clearly provoked him. Though he did not see the man punch the first officer, he did confirm that the man had taken an aggressive physical stance and eventually lunged at the officer; this led to his being taken to the ground. The security guard did not see any of the officers punching the man, justifiably or otherwise, and found them to be controlled and matter of fact in their handling of the incident.<sup>6</sup>

PAPD's investigating sergeant also took pains to pursue physical evidence relating to the allegation of a "permanent scar" the man claimed to have received from being punched in the face. This included asking for copies of his medical reports from the jail (which did not make reference to a facial injury), acquiring a copy of his driver's license photo, and requesting a booking photo from a prior arrest of the complainant in another part of California. These materials were inconclusive. (While the man appeared to have a relevant mark on his face after his arrest, its nature and source were unclear. Nor did any other evidence – including the contemporaneous recorded statements of the man himself – offer corroboration for his claim.) The finding and analysis of them, however, reflect impressive thoroughness on the investigator's part.

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<sup>5</sup>The investigator was directed toward this witness when inquiring about possible surveillance cameras operated by the transit center. Although the cameras were apparently not operational at the time of the incident, the emergence of the witness was a significant development. Curiously, though, he claimed to have not been previously contacted by the complainant or his lawyer, which leaves an open question about the complainant's assertions during his interview.

<sup>6</sup>This interview, which was quite helpful to PAPD, became somewhat "leading" at times, with the sergeant prompting the security guard as to his recollection of specific actions discernible from the body camera videos. This is not ideal as an investigative practice. But some of it was attributable to the passage of time as being an understandable impediment to complete recollection.

The reports from the prior arrest were instructive in other ways as well. They featured allegations of erratic and belligerently uncooperative behavior that were doubly relevant: first as corroboration of the demeanor the officers claimed to have experienced, and second as a counterweight to the complainant's claim that his initial actions had been a gesture of benign politeness that the officer inexplicably misunderstood. While we are sometimes leery of complainant's "prior acts" being used to undermine the legitimacy of later assertions – since a spotless history should not be a prerequisite for fair, objective consideration – in this case the earlier police encounter had specific overlaps with the claims at issue here.

Additionally, both of the primary officers involved in the arrest were interviewed as subjects pursuant to the complaint investigation – and later arriving officers were treated as witnesses.

The initial officer's body-worn camera shows the initial encounter, tense dialogue, and eventual efforts to subdue the man as additional officers arrived. Unfortunately, though, camera angles and movements make it hard to discern what specifically occurred once the two officers closed distance to take the man to the ground.<sup>7</sup>

#### *Use of Force Review*

One gap in the Department's review process was the lack of a supervisory review of force, or detailed reporting about force from the involved officers. On the contrary, the responding supervisor seemed quick to accept the representations that no force requiring a formal workup had occurred, in spite of the fact that several officers had responded and had been physically involved in handcuffing the man – and in spite of the fact that one of the officers had a visible injury to his eye that he attributed to the suspect's aggression.

The Department's relevant policy includes several circumstances in which a supervisor's report is required, and it is true that none of those technically applied in this case. (The subject's assertions about his facial injury were not made at the time, and he was not cooperative with questioning after his arrest.) Still, the physical effort actions required to subdue the man surely constituted "force" within the Department's definition, and therefore at least warranted a detailed accounting from involved officers – which is required by a separate policy. Instead, only one officer apparently wrote a report, and his description was both brief and somewhat vague. This one in spite of the fact that, as he wrote, "It took five (5) officers to gain compliance and gain control of his hands and take him into custody."

This lack of conclusive documentation – particularly from the officer whom the subject later alleged to have punched him – was a deficiency in the investigative record of the complaint that should have been avoided at the time of the incident.

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<sup>7</sup>It was also unfortunate that two of the on-scene officers' cameras failed to capture the takedown at all, for fairly technical reasons that were explored in a lieutenant's memo concerning the case.

RECOMMENDATION FOUR: The Department should use this case as a forum for assessing whether lower-level force incidents are being appropriately documented by its personnel and assessed by its supervisors.

## *Case 2: Allegation of Excessive Force After Arrest and Handcuffing*

### Factual Overview

A PAPD officer observed a female cross the intersection in downtown Palo Alto against traffic and detained her for further investigation. Because the woman appeared unsteady and showed symptoms of intoxication, the officer detained her to conduct an “intoxicated in public” investigation. Based on his observations and the woman’s conduct, he decided to take her into custody, advised her she was under arrest, and handcuffed her.

The woman was verbally resistant while the initial officer handcuffed her. Another officer assisted, and the two officers then began to escort her to the police car. At some point as the three were walking, the woman turned and bit the second officer in the upper arm. Observing this action, the initial officer pulled the woman away from the officer and then both officers took her to the ground. The woman struck her face on the sidewalk, causing her nose to bleed. Medical attention was requested on scene, paramedics responded, and the woman was transported to the hospital for further treatment.

Later, the woman complained that the officer had arrested her for no reason and had used unnecessary force against her. PAPD conducted an investigation and determined that there was sufficient cause for the arrest and the use of force was within policy.

### IPA Analysis of Allegations

IPA has reviewed the complaint, the investigative materials, and the body-worn camera footage relating to this incident and agree that there was a sufficient basis to effectuate a detention and that the use of force was within policy. However, IPA identified the following issues that are deserving of further discussion:

#### *Confusion regarding identification requirement*

A point of strong contention between the on-scene officers and the woman was whether she was required to obey their instructions to produce identification after she repeatedly rebuffed her entreaties to do so. When the woman advised that she had no reason to provide them with her identification, one of the backup officers said “actually, you do.” When the woman asked why she would have to produce identification, the initial officer told her that when you are detained in the United States, you have to identify yourself.

The officers’ statements to the women are actually misstatements of the law in California. While the failure to identify oneself may have further implications in that it will increase the likelihood



that an individual will be arrested or even taken to jail because of the heightened suspicion caused when an individual fails to identify oneself, there is no law requiring that a pedestrian who is detained provide identification to an inquiring officer. PAPD should regularly advise its officers about the limits of their authority on this point, as it is frequently a point of confusion among law enforcement.

*Unprofessional remark by arresting officer*

Appropriately, a PAPD supervisor responded to the location and conducted an inquiry into the incident. In describing the incident, the initial officer told the supervisor he observed the woman bite his colleague and said: “then we dumped her.” The way in which the officer described his use of force was inconsistent with the professionalism PAPD appropriately expects of its police officers. Even though it was an internal conversation and not made in a mocking or celebratory way, the characterization not only seems callous on its face, but also occurred in a public setting. It is the sort of comment that reflects poorly when the public hears, or when recordings are produced to the public for one reason or another. This description of the use of force incident should have been identified by the supervisor who conducted the investigation as an opportunity for course correction.

*Activation of Body-Worn Camera in Hospital Setting*

The initial officer continued to activate his body worn camera as he walked through the hospital, capturing employees and patients as he traveled through the halls to speak with the woman in her hospital room. At one point, the officer asked a supervisor whether he should have his camera activated and was told that police officers were exempt from any privacy concerns. Current PAPD policy regarding activation of body-worn cameras does not provide any guidance to officers regarding this issue.

Hospital patients and workers have an expectation of privacy that their activity or conversations will not be tape recorded by police officers unless there is an official reason for doing so. Certainly, it is appropriate to use the taping capability of the body-worn cameras to record an interview in a confined hospital room of an individual who has been subjected to a use of force. But officers should be instructed through policy to minimize their intrusion into hospital space by de-activating their cameras as they walk through the hospital corridors and activate them only when interacting with the interviewee.

We have been advised that the local hospital has identified the issue and now routinely advises officers that they should not walk through the corridors with their body-worn cameras activated. Despite this initiative by the hospital, it would be important to align PAPD policy with hospital expectations to ensure privacy concerns are not impacted.

RECOMMENDATION FIVE: PAPD officers should regularly advise its officers on the right of individuals not to identify themselves and how they should respond when an individual declines to do so.

RECOMMENDATION SIX: PAPD should advise the supervisor who reviewed the body camera footage of this incident about the missed opportunity for course correction regarding the officer's unprofessional description of his actions.

RECOMMENDATION SEVEN: PAPD should counsel the officer about the need to use professionalism in describing any use of force.

RECOMMENDATION EIGHT: PAPD should modify its body-worn camera policy to provide further guidance to its officers regarding activation in hospital settings.

### *Case 3: Allegation of Excessive Force During a Pat Down Search*

#### Factual Overview

A PAPD officer conducted a traffic stop when he noticed that the vehicle had failed to come to a full stop at a stop sign and the car was missing appropriate license plates. After his approach to the vehicle, the officer recognized the driver as having a felony warrant for theft. When asked, the driver provided someone else's identity.

The officer wrote in his arrest report that he placed the driver unhandcuffed in the back of his patrol vehicle for officer safety purposes, because he was going to have the other two occupants exit the vehicle so he could search it incident to an arrest, and there was only one additional officer on-scene. The report indicated that the officer observed multiple sets of clothes with clothing security tags on them in the back seat of the vehicle in plain view. The police officer also wrote that multiple family members of the vehicle occupants arrived on scene and started causing a disturbance.

The officer wrote that upon a search of the vehicle, he found more clothes with metal detector clips on them in the backseat of the vehicle. The officer wrote that, believing that the driver was in possession of stolen property, he then conducted a probable cause search of the vehicle's trunk and discovered additional clothing with clothing security tags on them.

The officer wrote that while the driver was in the back of his patrol vehicle, he asked her about the clothes that he had located inside of the car but that she was not under arrest for possessing stolen property. The officer wrote that the driver said she bought the clothes from someone that she knows steals clothes.

The officer wrote that he arrested the driver for false impersonation (for providing him with a false identity) and the outstanding warrants.

The officer said he asked the driver out of the vehicle and then arrested her.

The complainant, who was seated in the front passenger's seat of the vehicle and was the driver's sister, prepared a complaint form. She was also interviewed by a supervisor assigned to conduct an inquiry and made the following allegations in writing and/or during the intake interview:

- The officer was rude by opening the door after approaching the car.
- The officer placed her sister in the rear of his police car without Mirandizing her.
- The officer searched the car "for no reason".
- The officers asked them if there were any weapons in the car because they were African American.
- The officer left with an arrestee not in handcuffs.

According to the supervisor assigned to conduct the inquiry into the allegations, the complainant told her that PAPD could "do what they wanted" with the complaint and that she was satisfied just letting the supervisor know about her feelings regarding the police contact and arrest of her sister. The supervisor concluded that the opening of the door by the officer was understandable considering the facts that the driver did not attempt to roll down her window to speak with him and that there was obvious damage to the car. The supervisor further determined that placing the arrestee in the back of the patrol car unhandcuffed and without reading a Miranda advisement was a discretionary procedure. The supervisor found no violations of policy with regard to the allegations.

#### IPA Analysis of allegations

**The officer was rude in opening the car door.** A review of the body camera footage shows that as the officer approaches the driver's side, he politely asks if he can open the driver's door and then proceeds to do so. There is nothing objectively rude about the officer's actions.

As noted above, the supervisor's assessment was that the officer's actions were reasonable since the driver did not attempt to roll down her window to speak with him and the obvious damage to the car door. But these explanations are limited in their persuasiveness. The officer did not ask the driver to roll down her car window, which would seemingly have been a useful intermediary step. (Indeed, later in the encounter, he did ask her to roll down the driver door window and she immediately complied.) Nor did the damage to the car explain why the officer chose to open the driver's door; the car damage was all on the right side of the vehicle.

To reiterate: we did not find the officer's opening of the driver's door to be "rude" or inappropriate to the circumstances. But it was inherently more intrusive than a more commonplace traffic stop dialogue through a window, and the supervisor's justification for the officer's action is not borne out by the body camera footage. It is imperative that supervisors are accurate when using evidence to account for officer behavior. Ideally, a slightly more nuanced response – and an acknowledgment of possible bases for the complainant's perceptions – would have occurred here.

**The officer placed her sister in the rear of his police car without Mirandizing her.** The supervisor concluded that the decision of the officer to place the arrestee in the back of the patrol car and not Mirandize her was discretionary. Both assertions are correct. However, the report indicates that, after the sister was detained, the officer then asked her about the clothing and she made an admission. The officer intimated in his police report that since the arrestee had not been arrested at that point, at least with regard to the suspected stolen clothing, he did not need to Mirandize her before asking her about them.

At the time of the questioning, the arrestee was clearly not free to leave and arguably under arrest. Even if the preliminary reasons for her arrest were for the felony warrant and failure to correctly identify herself to him, by the time the officer questioned her about the clothing, he had suspicion that the clothing was stolen. If the officer wanted to ask her about the clothing, it would have been better practice to avoid running afoul of Miranda to have advised her of her Miranda rights before questioning her about the clothing. The supervisor should have identified this issue in his review of the allegations.

**The officer searched the car for no reason.** As indicated in the arrest report and borne out by the body-worn camera footage, there was clothing in plain view in the car which had clothing security tags still on the clothing. That observation formed sufficient suspicion for the officer to then search the remainder of the car. When the officer found additional clothing in the back seat with clothing security tags intact, he had sufficient cause to search the trunk of the car.

In his inquiry report, however, the supervisor did not address this allegation. Best practice in complaint review requires separate and direct attention for each allegation that is raised, even when the objective facts show that it is unfounded.

**The officers asked the occupants if there were any weapons in the car because they were African American.** There is no evidence that the officer's on-scene investigation and questioning was racially motivated. However, again, it is imperative that any review of complaint allegations address each of them. While there is actual notation made presumably by PAPD that there was a racial component to the handwritten complaint, the supervisor did not address this allegation in his analysis. He should have.

**The officer left with an arrestee not in handcuffs.** The arresting officers chose not to handcuff the arrestee until they arrived at the police station. Under current PAPD policy, the decision whether to handcuff arrestees is discretionary as stated by the supervisor who conducted the inquiry. Despite the discretion provided officers on whether and when to handcuff individuals who are under arrest, it is our understanding that the Department's strong preference and presumption is that individuals who are under arrest will be handcuffed, especially if they are to be transported to the station. While we have been advised that the first contact officer is no longer with PAPD, a review of the body camera footage indicates that the decision not to

handcuff the arrestee was suggested by the secondary officer. That officer should be briefed on Department expectations.

RECOMMENDATION NINE: The supervisor should be briefed about the need to address every allegation raised by a complainant in his review and the need to base any justification for officers' actions on the evidence available.

RECOMMENDATION TEN: The on-scene officer who suggested not handcuffing the arrestee in this case should be briefed on PAPD practice and expectations.

## Additional Issues

### *Complainant interview not tape-recorded*

It is standard internal investigative practice to tape record interviews of complainants so that there is the "best record" of what was alleged and the fullest account of the complainant's narrative. In this case, the supervisor did not tape record the conversation and there is no explanation in the file for why this did not occur. PAPD should devise protocols to ensure that complainant interviews are recorded.

RECOMMENDATION ELEVEN: PAPD should devise protocols to ensure that all intake and follow-up interviews of complainants are tape recorded, and if extenuating issues make this not feasible (such as complainants' refusal to be recorded), there should be documentation explaining this.

### *Use of profanity*

In his initial encounter with all of the three occupants of the vehicle, the arresting officer is polite and professional. He does not assume a commanding or demeaning presence and uses a tone that effectively keeps tensions low. The officer gives the occupants significant leeway and patiently explains to them why he is doing what he is doing and why he is asking them to do certain things. However, at one point, he tells the arrestee repeatedly "this is bull\*\*\*\*" when he believes that she is not telling him the truth. The comment seems both discordant and unnecessary in relation to the overall tone of the encounter. While these remarks were not part of the sister's complaint, she would likely not have been within earshot of them.<sup>8</sup> But the reviewing supervisor presumably would have encountered the comments on the recording and should have identified them as a basis for remediation.

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<sup>8</sup>They occurred outside the patrol car, while the complainant was still inside the subject vehicle.

### *Notification Letter*

In advising the complainant of the disposition of this matter, PAPD sent a form letter with no information about what the Department did to investigate the complaint. It is an approach common among law enforcement agencies, largely because of confidentiality and efficiency concerns. But the downside to the lack of detail is that it easily contributes to skepticism about the thoroughness of the review and the legitimacy of the outcome. We have seen agencies address this dynamic by providing specific information that personalizes the response and reflects the due diligence that occurred.<sup>9</sup> And those departments include language thanking the complainant for engaging and acknowledging the importance of public feedback.

We mentioned this issue in our last report – in the context of encouraging PAPD to share its efforts in a case that it had reviewed quite carefully and thoughtfully. Providing additional information will make the process more meaningful to complainants and, given the small volume of cases.

RECOMMENDATION TWELVE: Whenever a review of an incident identifies gratuitous profanity being spoken by an officer to a civilian, supervisors should ensure an appropriate remediation.

RECOMMENDATION THIRTEEN: PAPD should consider providing more information and context in its closing letters, such as advising the complainant what investigative steps were taken and what sources of information contributed to the Department’s conclusion.

## *Case 4: Allegation of Excessive Force During a Search Incident to an Arrest*

### Factual Overview

An officer stopped a vehicle with expired registration. During the investigation, the driver exhibited signs of intoxication. The officer decided to arrest the man for being under the influence of illicit drugs. Just before searching the man incident to this arrest, the officer instructed the individual to spread his legs and when the individual did not immediately comply, used his foot to spread the man’s legs farther apart.<sup>10</sup> The man immediately screamed about the action, said that he had been injured and that a pre-existing medical condition had been

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<sup>9</sup> Clearly, a summary of the allegations and a description of the investigative steps/sources of evidence fall outside the confidentiality restrictions imposed by the Peace Officer’s Bill of Rights.

<sup>10</sup> In his police report, the officer described his actions as follows: “While searching [the man] incident to arrest, I asked him to separate and he refused. I lightly moved his left foot with my right foot so I could properly search him. [The man] began to complain of pain and PAFD medics were called to the scene”.

aggravated by the officer's action. As a result of the man's complaint, he was taken to a local hospital for evaluation and treatment.

While on-scene, the man's level of cooperation with law enforcement went from initially cooperative to argumentative, belligerent, and slow to cooperate as the incident proceeded – especially after the officer asked him questions like: “When was the last time you used?” When the officer asked the man to perform sobriety tests, the man was partially cooperative but indicated that he could not perform some of them due to a pre-existing physical infirmity. After the officer's action with the foot, the man's belligerence significantly increased and continued during his time at the hospital, with the man threatening the officer with harm.

The District Attorney agreed to file charges against the man for being under the influence of an illicit substance and for possession of an illegal billy club that was discovered in the man's vehicle during the investigation.

Later the man submitted a written complaint alleging that the officer “kicked” his feet apart, causing him injury. The supervisor who was on-scene during the incident endeavored to contact the man to interview him about his complaint, but was unable to locate him despite repeated attempts. The supervisor, who was on scene during the search, did review the body camera footage and the case report; he concluded that the officer's use of his foot in searching the man was an approved defensive tactic technique and consistent with PAPD policy.

## IPA Analysis of Allegations

### Concepts of De-Escalation

Recently, PAPD worked in conjunction with the other City stakeholders regarding its policies on use of force. As a result of those conversations, PAPD revised its policies to require a supervisor to “describe any de-escalation techniques employed or an explanation for why such techniques were not feasible”. In addition to revising the policy, PAPD revised its use of force cover sheet to require information regarding the use of de-escalation techniques.<sup>11</sup> Since that time, state law now requires police agencies in California to integrate de-escalation concepts in its use of force policies and training.

As a result of the new policy, whenever an encounter between police officers and the public results in a complaint about excessive use of force, PAPD will now evaluate the encounter not only in terms of whether the officer's use of force is consistent with its policies, but also whether the officer's use of de-escalation practices is also consistent with the new policy.

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<sup>11</sup>We have also been advised that the Department has also proactively offered to generate a Use of Force report to be submitted to City Council as a cover memorandum with each IPA report. This report will contain information on use of force incidents and will specifically address the use and effectiveness of de-escalation techniques by officers.

While this incident pre-dated the recent change in PAPD policy, the concepts of de-escalation have been long featured in PAPD's training. In this case, the officer indicated that he instructed the suspected intoxicated man to spread his legs further apart. When there was no immediate compliance, he used his foot to "assist" the man, causing the resulting allegations of injury, the need for medical attention, and conflict that escalated over the next several hours.

Had the officer been a bit more patient with the man, asked him if he was able to do what the officer was requesting (the man had already complained about a pre-existing medical condition that hampered his ability to complete some of the field tests given to him), and given him more time to either respond or comply, the escalated conflict and the subsequent complaint of excessive force may well have been avoided. Moreover, in this situation, there was time to deploy such a strategy: the man was handcuffed, a back-up officer was on scene, and no significant threat level was presented requiring immediate action. Police departments are recognizing how important consideration of de-escalation approaches prior to resorting to force and how effective deployment of them can work to the benefit of both the civilian and the officer alike.

In the spirit of the new policy, PAPD should begin to embrace the de-escalation concepts recently adopted.

RECOMMENDATION FOURTEEN: PAPD should counsel the involved officer on how de-escalation efforts should be deployed whenever practicable, using this incident as an example.

### **Systemic Issues: Adding Reporting Component to New De-Escalation Policy**

We appreciate the swiftness with which PAPD modified its policy in response to community sentiment and impending state law. While the new reviewing requirement noted above will ensure that de-escalation techniques (or the lack thereof) will be considered, we also believe it should be incumbent on the officer who uses force to describe any efforts to de-escalate a situation or why such efforts were not feasible.

RECOMMENDATION FIFTEEN: PAPD should devise policy that instructs officers who use force to include a narrative about any attempts to use de-escalation prior to the application of force, and to explain why such options were not feasible if no de-escalation efforts were deployed.



