

# INDEPENDENT POLICE AUDITORS' REPORT

Review of Investigations Completed as of January 1, 2023

Presented to the Honorable City Council

City of Palo Alto

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# Introduction

Below is the latest installment of a report process that dates back more than fifteen years. As the Independent Police Auditor (“IPA”) for the City of Palo Alto, OIR Group<sup>1</sup> is entrusted with the responsibility of providing outside scrutiny of the Palo Alto Police Department (“PAPD”) across certain key areas of its operations. These include the handling of civilian complaints and other allegations of officer misconduct, and the review of significant use of force used by officers.

Our “inventory” for this latest six-month review cycle (with cases completed as of December 31, 2022) is small. The Report covers only two misconduct allegations from the public, one internally generated investigation into the alleged mishandling of an incident in the field<sup>2</sup>, and one use of force that met the IPA review criteria (because the subject, who had minor injuries, was treated at the hospital). As we note, except for the internally generated complaint in which some of the allegations were found to have violated policy, the officers’ conduct was found to be consistent with policy in each instance. In our review, which focuses more on the strength of the investigative and review process than the “bottom line” outcome, we found much to commend, especially the thoroughness and thoughtfulness of the administrative review processes that resulted.

At the same time, this Report also has a new feature: a brief discussion of three reported instances in which PAPD officers pointed firearms in the context of enforcement activity. (None resulted in a discharge of the weapon.) PAPD has begun tracking these events in keeping with a burgeoning trend throughout the state to categorize pointed weapons as an exercise of police authority that warrants documentation and review, and we were asked expressly by Council to include such events as part of our semi-annual process. We describe the circumstances for each of the incidents at issue, and offer recommendations about how the Department can further standardize its new internal review protocol in ways that are not unduly burdensome.

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<sup>1</sup> OIR Group is a team of police practices experts that has worked in the field of civilian oversight of law enforcement since 2001. Led by Michael Gennaco, a nationally recognized leader in the field, OIR Group performs a range of services in jurisdictions throughout California and in several other states. More information about its projects, including a number of public reports, is available at [oirgroup.com](http://oirgroup.com).

<sup>2</sup> This is the first completed case involving internal allegations within the police department since those types of investigations became expressly included as part of our expanded scope of work.

PAPD's leadership continues to facilitate our access to the information required for our work as auditors. Just as importantly, it engages with us in an effort to understand our perspective, and it is open to suggestions that are intended to enhance the effectiveness of the processes we review. We appreciate this dynamic, and we are gratified by our continued opportunity to serve in this important role for Palo Alto.

## External Complaint Investigations

### *Case 1: Third-Party Complaint about Officer Aggression during Detention of Misdemeanor Suspect*

#### Factual Overview:

Palo Alto dispatch received a call from a manager who claimed that an adult male had walked out on a \$140 bill after dining at her restaurant. She described the man and stayed on the phone as she followed him on foot onto a street that was blocked to vehicles and included a number of shops and outdoor dining options. It was during daylight hours, and several members of the public were in the area.

Two of these people were a mother and her young adult son, who were having a meal outside and were passed, first by the man, and then by a single Palo Alto police officer who was responding to the call. The officer yelled for the man to stop and had his hand atop his holster as he ran closer to the subject. The man did stop and turned toward the officer, who directed him to turn and face the wall. He refused, saying he had done nothing wrong. The officer then told him to sit on the curb while he attempted to sort out the situation with the restaurant manager, who had caught up to them. Again, the man failed to comply, claiming he had left money at his table. He did, however, eventually agree to wait while a backup officer arrived, and he was calm during the thirty-minute detention that ensued – much of which was spent trying to determine the man's identity.

The mother and son watched the situation unfold and were immediately concerned about different aspects of the officer's actions. Especially troubling to the son was the idea that the officer had run up with his hand on his weapon – a response that seemed to them to be both unduly aggressive and needlessly endangering to bystanders. They expressed concerns to both the backup officer (who passed them on the way to the encounter and then again as he returned to his vehicle to do a computer check on the subject) and later to a supervisor who came to the scene.

Meanwhile, the restaurant manager also expressed unhappiness with the initial officer's treatment of the man. She said that she had only been seeking a "mediation" when she called the police (using a non-emergency number) and found the officer's tone and commands to be excessive. She accordingly demurred from pressing charges for any alleged offense at the restaurant; additionally, the mother and son witnesses ultimately paid the bill that was in dispute.

The supervisor spoke to the two bystanders for several minutes. He heard their concerns, and also took time to explain the uncertainty officers experience at the outset of any encounter. He cited the fact that an officer from a nearby jurisdiction had recently been shot and wounded in the context of a routine traffic stop. He also explained the complaint procedure options available to them.

The mother ultimately did submit a complaint form that reiterated their concerns: that the officer had been too aggressive for the context, that it had been demeaning for him to order the man to get on the ground, and that the officers had overreacted to a minor problem.

#### PAPD Investigation and Outcome

This case was handled as a "Supervisory Inquiry Investigation" and was initially reviewed by the supervisor who participated in the service call and had spoken with the two concerned citizens in the field. Based on the body-worn camera recordings, the sergeant was able to determine that no violation of policy had occurred. The first officer to arrive had indeed been elevated in his initial attempts to get the man's attention and gain compliance. But he adapted quickly upon getting an initial sense of the subject, and did not force the issue in spite of the man's initial recalcitrance. His brief gesture of having his hand near his weapon was judged to be a reasonable exercise of discretion as he assessed the situation. And he actually instructed the man to "have a seat" on the curb for safety reasons – as opposed to ordering him to "get on the ground."

Each of these elements led the supervisor to believe that no further action was necessary. A lieutenant then evaluated the initial memorandum. He concurred with the findings that no policies had been violated by the officer or his backup. However, he also identified five separate ways that the incident could have been handled differently/better by the three Department members who were involved.

These "training points" were later discussed with the relevant officers. They included the importance of being mindful of surroundings and avoiding unnecessary behaviors which might alarm bystanders. The lieutenant also reminded the supervisor to limit speculation and explanation when addressing a potential complaint in the field, and to ensure that responsiveness to a complainant not come at the expense of appropriate monitoring of the underlying call for service. Finally, the lieutenant noted that the time-consuming

inquiry into the man's identity was actually peripheral to resolving the call, and that prolonging a contentious call for service should be avoided where possible.

### IPA Review and Analysis

We concur with the finding that no violations of policy occurred. While the mother and son were very reasonable,<sup>3</sup> and while their concerns were understandable, our impression was that the officers were controlled and professional in navigating the situation with the subject.

Though the original officer had indeed been slightly elevated at the outset of the contact, his demeanor was far from egregious; on the contrary, we were struck by how quickly he pivoted to a calm, accommodating exchange with a contentious person. And, though he did have his hand on his holster at the outset of the encounter (and rested it near there at times during the detention), the officer never withdrew the gun or treated the subject in a threatening manner. While the complainants were correct about the man's unarmed status and the relatively benign nature of the crime at issue, the officer's low-level precautions were a reaction to initial uncertainty that dissipated quickly.

We were also impressed with the lieutenant's careful scrutiny of the incident, as well as his constructive suggestions for improving future performance. Treating a complaint as a learning opportunity is one hallmark of an effective administrative review process. The points that emerged here seemed insightful and worth sharing. And the extra effort to translate observations into actual interventions (in the form of a follow-up discussion with involved personnel) was also commendable.

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<sup>3</sup> Notably, the two were careful at the scene to acknowledge counterarguments as they politely expressed their concerns, and the written complaint included a paragraph of appreciation for the supervisor's willingness to engage with their perspective and share his own.

## *Case 2: Complaint about Failure to Investigate and Other Mistreatment*

### Factual Overview:

This case involved two separate calls for service that occurred within several hours of each other, and involved the complainant during his time at a local hospital.<sup>4</sup> The first call involved a report by the complainant that he had been the victim of a sexual assault, with the perpetrator being a police officer from a neighboring jurisdiction. Two PAPD officers went to the hospital to meet with the reporting party and to gather forensic evidence of the alleged crime; he declined to give a detailed statement because of a stated dislike/distrust of the police.

Several hours later, the complainant was discharged from the hospital after different conflicts with staff. The process became contentious, and hospital security was needed to escort him from the premises. This led to a physical struggle in which the complainant allegedly bit a security guard. PAPD responded to the scene, arrested the person for battery, and ultimately cited and released him in the field. They left him, seated in a hospital wheelchair, at the bus stop where the hospital staff had first brought him.

Several weeks later, the Department received the first of multiple complaints about these encounters. (The complainant's mother, who lives out of state, also wrote on his behalf.) The core of them was twofold: that the Department had failed to take appropriate action regarding his assault allegation, and that the officers had been rude and unresponsive to his various needs when they arrived to address his forcible removal by hospital staff.

### PAPD Investigation and Outcome

This case was handled as a Supervisory Inquiry Investigation. Because some of the involved officers had been supervisors, it was a lieutenant that conducted the review. He was able to rely on body-worn camera videos, other documentation, and his own conversations with the complainant. The lieutenant determined that the officers had acted professionally and in keeping with their duties, and that no further action was required.

With regard to the complainant's allegations of assault by a police officer (and subsequent alleged failures of due diligence), the PAPD members who spoke with him handled the

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<sup>4</sup> There was some ambiguity (and conflict within official records) as to the gender of the involved party, but he apparently self-identified as male.

intake of his case in an appropriate manner. They spoke with hospital staff, attempted to get a useful statement from the complainant, collected physical evidence, and turned the case over to the agency in the jurisdiction where the alleged crime had occurred. What happened after that was not controlled by, or the responsibility of, the handling officers or PAPD.<sup>5</sup>

Body-worn camera evidence also refuted the allegations that PAPD officers had mistreated him after he was removed from the hospital by security personnel. The complainant claimed that PAPD officers had failed to help him when he was "tossed" from his wheelchair by security. External evidence showed that this was not accurate. Recordings showed the on-scene officers making repeated offers to assist, and ultimately lifting the complainant back into the chair.<sup>6</sup> Similarly, the officers took down his version of the confrontation with security and took other steps in an effort to assist him – all in contravention of the different claims that had been made against PAPD personnel.

### IPA Review and Analysis

We concurred with the Department's findings in this case. While leaving the man at the bus stop at the end of the encounter raised initial concerns in light of his compromised circumstances, the reality was that officers had made appropriate attempts to engage and provide support. (As the lieutenant noted, one supervisor on scene went to some trouble to retrieve a missing folder of paperwork from the hospital at the complainant's request when their investigation was concluded.) And overall, in both of the encounters that the complaint(s) encompassed, the PAPD officers came across as being patient and solicitous with a person who was in emotional turmoil.

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<sup>5</sup> Per the Department's memo about this complaint review, the neighboring jurisdiction confirmed that it was pursuing the investigation in conjunction with the District Attorney's Office.

<sup>6</sup> The complainant claimed to be paralyzed and unable to move his legs, a contention that was disputed by the hospital staff that treated him.

# Internal Complaint Investigations

## *Case 1: Complaint by Employee Regarding Handling of an Investigation*

### Factual Overview

A PAPD employee complained about the way that an incident was handled by supervisors. The case stemmed from a confrontation between two civilians. The employee complained that supervisors did not support a robust investigation of the incident and presentation of the matter to the District Attorney. The employee further complained that one supervisor had not been factual in an internal email relating to instructions for the handling of the incident.

Appropriately, PAPD made the decision to have the issues handled by an outside investigator, since it involved allegations by a PAPD employee against supervisory PAPD personnel. In addition to the concerns raised by the employee, the investigator was also asked to investigate concerns that the Administration had regarding the conduct of the complaining employee relating to the incident. There was a concern that the employee had failed to follow instructions on the handling of the case and had used derogatory language when referring to supervisory employees.

The investigation was extremely thorough and detailed. It found no wrongdoing relating to the supervision of the incident and did not find any basis for a false statement finding against the supervisor. It did, however, find that the complaining employee had improperly failed to follow instruction and had used derogatory language in referencing supervisors. The investigation thoroughly framed and reached a disposition as to the allegations and counter allegations.

### IPA Review and Analysis

The investigative memo did a creditable job of parsing out and addressing the charges and counter charges that were presented. We have no reason to disagree with the outcome reached.

We did note one investigative challenge faced by the outside investigator. Apparently, the complaining employee and another employee had used personal emails and text messages from personal cell phones to communicate about this case, including the possible sharing of draft police reports and strategies on how to prepare the eventual report. When the investigator asked the complainant for copies of these records, the complainant's attorney declined to produce them. As a result, valuable work-related information was inaccessible to the investigator.



In another context, the California Supreme Court has determined that work-related information by a government employee, even if conveyed over personal email accounts, is subject to a California Public Records Act request. City of San Jose v. Superior Court, 2 Cal. 5<sup>th</sup> 608 (2017). Yet here, the employee was able to successfully forestall access to this work-related information by refusing to simply produce the information. Moreover, in the policing context, work related emails may need to be reviewed in order to meet the Department's discovery and Brady obligations.

We have been advised that even though sworn employees are issued cell phones for work-related business, a number of employees and supervisors continue to use their personal phones for work. Yet current policy prohibits their use for work-related purposes except in "exigent circumstances". And current policy also advises employees that using personal cell phones subjects employees to a disclosure requirement for such information, even if it is lodged on their personal phone.

#### **702.5 PERSONALLY OWNED PCD**

[...]

(e) The device should not be used for work-related purposes except in exigent circumstances (e.g., unavailability of radio communications).

(f) Employees are advised and cautioned that the use of a personally owned PCD either on-duty or after duty hours for business-related purposes may subject the employee and the employee's PCD records to civil or criminal discovery or disclosure under applicable public records laws or a lawful order.

The Department should enforce current policy. Moreover, the Department should advise internal investigators that if it is learned that information potentially relevant to the investigation is lodged on a personal cell phone, that they should order the employee to surrender the information. If there is a refusal to do so, the employee should be subject to further disciplinary charges for insubordination.

#### **RECOMMENDATION 1**

PAPD should enforce its current policy prohibiting employees from using personal email accounts or cell phones to conduct police business except in exigent circumstances.

#### **Recommendation 2**

PAPD should advise internal investigators that employees who have lodged information potentially relevant on a personal cell phone should be ordered to surrender such information or be subject to potential future charges for insubordination.

## Use of Force Case:

This case involved officers' efforts to take a young man into custody as he experienced the apparent effects of drug use and was acting erratically in public. His agitation led officers to detain him, and some resistance ensued as the subject became intermittently frantic about his condition and the police presence. In light of the subject's highly agitated state, officers sought the assistance of emergency medical personnel, who ultimately transported him to the hospital.

The PAPD involvement began when police received an early morning call for service in a residential neighborhood regarding a young male who had jumped over a fence on to the report party's property and was screaming. (He was accompanied by another young male who seemed calmer.) Another person in the vicinity called separately to report a young man running in the middle of the street with no shirt. Officers quickly spotted the subject and engaged with him; in fact, he quickly approached the driver's side door of an arriving patrol car as the officer emerged, to the point where the officer shoved him backward to create space. He was speaking incoherently and not responding to officer instructions, and they quickly decided to detain him in handcuffs; this process was challenging in light of his heavy perspiration and lack of cooperation. Multiple officers were eventually able to get him to the ground using bodily force (but no weapons or strikes). They had renewed difficulty in trying to get him into the backseat of a car; another officer put a restraint device around his ankles as they awaited the paramedic response.

When the medical personnel arrived, they administered a sedative after assessing the subject's condition. He was then transported to the hospital, and released there from police custody based on the determination that the subject was under the influence of psychedelic drugs.<sup>7</sup>

### PAPD Review:

The case went through the Department's supervisory review process, which utilizes a detailed template to ensure that relevant evidence is gathered and that compliance with policy is thoroughly evaluated. Here, the assigned supervisor showed due diligence in moving through the relevant investigative steps. These included review of body-worn camera recordings and reports, and follow-up interviews with the subject (whom the supervisor spoke with by phone after he had recovered from his experience) as well as a third-party witness.

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<sup>7</sup> Officers eventually made contact at the scene with the original companion of the subject, who confirmed the officers' assessment that they had consumed drugs earlier in the evening.

Though the subject did receive several abrasions in the course of the encounter, he was quick to assure the supervisor that the injuries were minor and that he expected them to heal completely. He expressed appreciation for the officers' interventions during the incident.

The reviewing supervisor determined that the force, which was limited to physical restraints and grappling on the parts of different officers, was justified by the circumstances and consistent with policy.

#### IAPD Review and Analysis:

We reviewed body-worn camera and reports from this incident, and we concur with the Department's findings. The limited, controlled force was appropriate to the subject's erratic behavior and resistance.

We did notice that two supervisors were among the several officers who responded to the scene and went "hands-on" at one or more points in the encounter. As we have noted before, our sense is that the ideal function for supervisors entails monitoring the situation and providing direction as needed while refraining from being directly engaged.<sup>8</sup> Our last report addressed this issue and included a related recommendation:

*"As needed, PAPPD should reinforce to supervisory staff the principle that, barring exigent circumstances, supervisors should refrain from direct physical engagement with subjects, so as to maintain their ability to manage the operation as a whole."*

PAPPD, for its part, concurred with the concept while noting that officer and subject safety must remain the priority, and that circumstances may occasionally dictate a need for more active involvement. They supplemented this point with another relevant observation: that staffing and resource limitations have necessarily made supervisory participation in direct enforcement activity more commonplace in recent months.

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<sup>8</sup> It is true that one of the supervisors did assert a leadership role, which arguably "freed up" the other to provide more direct assistance. Still, there also appeared to be an able cadre of line-level officers to handle the actual grappling with the subject.

We respect these arguments while reiterating that supervisors should prioritize a strategic detachment where possible so as to maximize the "added value" of their rank and presence in the field.

## "Pointed Firearm" Incidents

PAPD reported three instances in which the Department's officers pointed firearms at a subject. The circumstances varied, but each of these events was found to be consistent with policy and training.

The context for the deployments was as follows:

- A "real time" suspect in auto burglaries was observed by an officer who attempted to conduct a traffic stop of his vehicle. The subject drove away and was pursued by multiple officers; he eventually collided with a police car in a parking lot before being surrounded. Two officers reported pointing their guns as they gave initial commands to the subject and he emerged from the car. His hands were raised, and he eventually went to the ground as ordered. Officers handcuffed him without further incident.
- Multiple officers responded to reports of a man allegedly brandishing a gun at another driver in the context of a possible "road rage" encounter. Officers located the subject as he was exiting his vehicle. When he did not comply with their initial commands to stop, one of the officers pointed his firearm as he gave additional direction. He reported that he was concerned by the combination of the subject's lack of cooperation and the report of a gun. Officers eventually took the subject to the ground and handcuffed him; the "gun" at issue turned out to be a black power drill.
- PAPD SWAT personnel assisted a neighboring agency in the service of a search warrant for a murder suspect, and members pointed their firearms in keeping with their respective assignments during that operation.

For this, the first time our process encompasses this category of incident, we offer a few observations. For starters, the heightened accountability expectations that are reflected in this protocol are commendable for PAPD and the City. It is consistent with a larger shift in which traditional deference to law enforcement autonomy is being replaced by a greater degree of transparency and a heightened public interest in police practices. And certain exercises of authority, which once were not even considered reportable, are now subject to new levels of scrutiny.

As a substantive matter, we reviewed the reports connected to these incidents and found the respective use of firearms, and the Department's endorsement of them, to be reasonable in light of the known circumstances. We were also struck by the very small number of events that were reported in the entirety of last year. Assuming that officers are in fact meeting new reporting requirements with appropriate rigor, this reflects a restraint that seems notable in and of itself.

At the same time, it seems as if the Department's protocol is still finding its way to some extent. Most obviously, there were initial (and apparently inadvertent) time lags in providing us with information about the earliest of the incidents – and a fourth incident (which is still in process) was belatedly discovered months after its actual occurrence. We have no reason to believe that these minor lapses in process are anything other than the "growing pains" of new procedures, and are confident they have been rectified for the future.

The evolution of the process has a substantive component as well. The incidents were reviewed by supervisors (and reports were approved) in keeping with regular practice. But while a "bottom line" conclusion was forwarded to us along with the relevant documentation, there was not a formal standalone assessment of the tactic that was memorialized in a supervisory memo – unlike, for example, PAPD's standard use of force reviews.

This raises the question as to what level of formality and thoroughness makes the most sense for the review of a tactic that is usually of very brief duration, has limited impact, and occurs in the context of a larger police response that is itself subject to standard review. As always, there is a tension between the optimally robust and the realistically attainable. Department leadership has expressed to us its hesitations about over-committing supervisor time and energy in this specific context.

We are sympathetic to this and recognize the ways that a lesser standard could potentially suffice for this particular category of accountability. Still, there seems to be room for a "happy medium" of sorts, particularly in light of the low volume of incidents involved. We think, for example, that a simple template would be both beneficial and minimally labor-intensive. It could, for example, capture the supervisor's specific review efforts, include at least a brief analysis in support of any findings, and identify collateral actions items where relevant (such as positioning, or waiting for backup, or communication concerns).

We know the Department is considering its options as it adjusts to this new aspect of its responsibilities, and we welcome further dialogue on the topic.

### **RECOMMENDATION 3**

PAPD should develop an efficient, formalized structure for supervisors to review and opine regarding instances in which officers point their firearms at subjects in the context of enforcement activity.