



CITY OF PALO ALTO OFFICE OF THE CITY CLERK

December 3, 2012

**The Honorable City Council
Palo Alto, California**

Independent Police Auditor Interim 2012 Report

Attached you will find the Interim Independent Police Auditor Report for 2012, dated November 20, 2012.

ATTACHMENTS:

- PAPD Interim 2012 IPA Report (PDF)

Department Head: Donna Grider, City Clerk

POLICE AUDITOR'S INTERIM REPORT - 2012

Presented to the Honorable City Council
City of Palo Alto
November 20, 2012

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I. Introduction

This report is the first of two reports covering the sixth 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 Final Report for 2011 and provides updated information regarding investigations that had not been completely resolved at the time the last report was released. Additionally, this report discusses Taser uses by Palo Alto Police Officers. After almost two years in which there was no application of the Taser against a suspect in the field, there were two recent Taser uses, one of which is discussed in detail below. Finally, the report discusses recent issues with the PAPD Preliminary Alcohol Screening Devices and the Department's response to those issues.

II. Taser Activations

Taser Use of Force #T 2012-01

Synopsis: An officer stopped a car during the daytime because he had observed that the registration sticker had expired. The driver had no valid driver's license and did not own the car so she was asked to step out of the car. The officer noticed that the passenger responded strangely when he asked him questions, so he called for a back up officer. The backup officer arrived and approached the passenger in the car, observing as he did so that the passenger bent forward and appeared to hide or recover something in the area of the floor. The backup officer asked the passenger to step out of the car, then noticed that the passenger had bloodshot eyes, mumbled speech, had a hard time standing still and was sweating. He also had a bulge in his front pocket. The passenger consented to a pat down search but pulled away when the officer commenced. He also gave some erratic answers to questions and the officers concluded he might be under the influence of a drug. He again agreed to the search but tried to dig in his pockets after being ordered

not to. When the two officers grabbed his arms to keep him from taking an unknown object out of his pocket, he struggled to try to get in his pocket. He slipped from the grasp of the first officer who pulled out his Taser and fired it at the passenger. The Taser was effective and the passenger crumpled to the ground. The backup officer immediately attempted to put the passenger in handcuffs but the passenger was lying on the ground with his hands hidden under his chest. The first officer activated the Taser for another 5-second cycle, then the backup officer was able to get the passenger's hands into handcuffs. The first officer called for medical transport and the passenger was taken to the hospital where one of the Taser darts was removed from his chest – the other had fallen out at the scene – and he was medically cleared for booking and placement in the station custody cells. His blood tested positive for cocaine. The object in his pocket was a glass “crack pipe” with characteristic residue and a steel wool screen. The pipe broke in the course of the incident and cut one of the officers. A use of force review and evaluation were performed by the sergeant at the scene and by the lieutenant who had been the watch commander that afternoon. Each concluded that the Taser use was justified and conformed to PAPD policy.

The IPA reviewed the police reports of this arrest as well as the MAV system videos recorded by each of the first and second officer's patrol cars and the TaserCam video recorded while the Taser was activated. We concur with the determination that both five-second activations of the Taser were reasonable and conformed to PAPD Taser use policy. The initial officer had a sufficient reason for the vehicle stop and interacted with the driver in a businesslike manner. The passenger showed immediate signs of being under the influence of a drug and spoke disjointedly in response to questions. While the officer's perception of immediate threat – a prerequisite for Taser use under PAPD policy – was inherently speculative in this situation, it was a reasonable inference from the suspect's belligerent stance and his fixation on an object in one of his pockets and his vigorous struggle against the pat down search. The initial officer moved to the Taser to thwart the possible weapons threat from the suspect. Once the Taser is in use, the appropriate objective should be to handcuff the suspect as soon as possible. The initial officer in fact told the backup officer to “cuff him up” while the first five-second Taser

cycle was still running and the backup officer immediately moved in to accomplish this. When the suspect kept his hands clenched under his torso on the ground after the first cycle, the initial officer ran a second cycle and the backup officer completed the handcuffing. Medical assistance was also called for immediately per policy even though the arrestee did not appear to be in distress.

There were additional concerns that the Department recognized was presented by this incident. The officer did not give a verbal Taser warning as policy requires when possible. The rapidly evolving nature of the physical struggle provides justification for a warning not being given in this case. The detainee not involved in the physical altercation, that is the vehicle driver, was questioned after the incident about her observations of the officers' actions. She appeared to be relaxed and candid in this brief field interview and described her friend as having "flipped out" and the officers as acting "very proper." However, the interviewer was the backup officer involved in the incident. In addition, the driver was interviewed while she was still detained in the back of a patrol vehicle. These are far from ideal circumstances for a post use-of-force civilian witness interview and could easily have been avoided by having the interview conducted by an available supervisor in a setting outside the patrol car. A Lieutenant did conduct a follow up investigation the day of the incident and briefly interviewed an employee of a nearby business who had witnessed the incident. The interview was a brief "place holder," and was not detailed nor recorded. Unfortunately, the witness eluded follow up efforts to contact him. That witness also played a surveillance video from the business that captured a portion of the incident but was not able to make a copy for the Lieutenant at the time. The Lieutenant reported that the video appeared to depict a portion of the force incident and was consistent with the officers' reports. Even though the Lieutenant attempted repeatedly to contact this witness and another employee of the business, those efforts proved unsuccessful in obtaining a copy of the video. It is unfortunate that the business employee stopped cooperating with the investigation and perhaps further effort to engage the business owner may have yielded better results in obtaining a copy of the video.

Taser Activation # 2012-02

Synopsis: The IPA has recently received the use of force reports and exhibits associated with a Taser use in mid July. We are currently reviewing the materials and will include an evaluation of this incident in our next semi-annual report.

III. Complaints, Cases and Issues

1. Internal Affairs Investigation of Off Duty Police Contact #IA 2012-01

Synopsis: At about 5:00 a.m., City of San Francisco police received a 911 call from a young woman requesting help. Her boyfriend had just left their hotel room and she believed he was headed to the hotel roof and might be planning to commit suicide. Officers arrived and contacted the woman who told them her boyfriend was an off-duty Palo Alto Police Officer who was extremely intoxicated and emotionally down on himself. His gun had been left in the hotel safe. She showed them a note on hotel stationery that appeared to be a makeshift will written by the off-duty officer. The female friend reached the off-duty officer by cell phone but he would not tell her his location. He also refused to provide his location to an SFPD sergeant who got on the phone. SFPD officers searched throughout the area and quickly located the off-duty officer walking on a nearby sidewalk. The off-duty officer said that he had no intention of committing suicide; the SFPD officers nevertheless decided to detain the off-duty officer for a psychiatric evaluation and took him to a hospital. Hospital personnel examined the off-duty officer and, after a few hours, released him to Palo Alto PD supervisors, who had been notified in the meantime. They took him back to the Palo Alto Police station, placed him on administrative leave, retained his firearm and opened an Internal Affairs investigation of the incident.

The original 911 caller, the officer's female friend, did not cooperate with any of the investigator's several follow up attempts to contact and interview her. Ultimately, the investigation concluded that the officer did violate the Department's policy against "conduct on or off duty unbecoming of a member of the Department...and which tends to

reflect unfavorably on the Department or its members.” The Chief of Police imposed discipline upon the officer in the form of a written reprimand. The officer was also required to write a letter of apology to the San Francisco Police Department. The officer has also been referred to the Employee Assistance Program, an evaluation and counseling service that provides services and referrals for employees who voluntarily seek assistance with substance abuse or psychological issues.

Recommendation: The IPA reviewed the police reports. The IPA agrees that the Department’s sustained finding of a violation of its “conduct unbecoming” policy was an appropriate finding. The officer’s conduct unnecessarily consumed the resources of another police agency and he was less than cooperative with them. Our main concern, however, is whether the Department has made the appropriate decisions regarding the future status of the officer within the PAPD. The Department is to be commended for performing an exhaustive investigation of this incident to determine as much relevant information as possible. The investigation included interviews with SFPD officers and supervisors and other PAPD officers whom the off-duty officer met briefly at a bar a few hours before the incident.

Additionally, investigators gathered information about an incident approximately six months earlier at an off-duty party where the same officer had reportedly become very intoxicated. Other off-duty PAPD officers had helped take responsibility for the officer and made sure he got home safely. A few days later, a Department lieutenant had had a one-on-one conversation with the officer about the incident and admonished him to control his behavior when drinking in public. While medical and psychological evaluations and diagnoses have confidentiality protections which can hinder a Department from obtaining details and documentation, the Department has engaged the officer in a process to assure his well-being and readiness for duty.

The off-duty officer was described as dismayed by the police contact, affected by alcohol, professional but somewhat uncooperative throughout the detention. He was also given a field breath analysis test four hours after his initial detention, which showed a

blood alcohol level of approximately twice the legal limit for drunk driving. It is legal to walk the streets while under the influence of alcohol, as long as you are able to care for yourself, and therefore not “drunk in public.” The officer was not charged with this offense, nor was he detained for the full 72 hours by hospital staff who may use this period to evaluate the psychological state of someone brought in under these circumstances. The officer was, however, clearly intoxicated during the San Francisco incident, which contributed to the involvement of the police, then failed to cooperate fully with the police by refusing to disclose his location even after the SFPD supervisor said that it was necessary to check on the officer’s welfare. These circumstances constituted conduct unbecoming a police officer, but more importantly, when combined with the retirement party incident, point to a possible pattern of alcohol abuse.

Resolution/Corrective Action: The IPA has recommended to the Department that, if information available to the Department indicates an alcohol dependency problem, clear rehabilitative goals should be set out for the officer during a probationary period, with a follow up evaluation set for a specific time in the future. Alternatively or in conjunction with that, PAPD managers could devise a more regimented monitoring or mentoring program for this officer to reduce the likelihood that future off duty alcohol-related incidents do not occur.

IV. Cases Pending From Previous Report

2. Complaint of Discourtesy, Improper Application of the Law and Unprofessional Conduct #C 2011-07

Synopsis: Theater employees called 911, alleging that a man was handing out pamphlets in front of the theater door, harassing patrons and creating a disturbance. Officers talked to the pamphlet distributing man and theater employees, determined that there was no trespass or other illegal activity, and departed. The pamphlets protested the contents of the play being performed at the time. The play was a historical piece about Leo Frank, a Jewish factory superintendent in the American south accused of strangling a thirteen year old girl who worked in the factory. Frank was tried and convicted of the

crime, then lynched and hanged by a mob. The events are often cited to illustrate the perversion of the justice system by anti-Semitism in the early 20th Century. The pamphleteer's literature took exception to the play, describing it as perpetuating a myth of Jewish victimhood. Two days later, he complained to the Department that he had been threatened with arrest and treated in a rude and unprofessional manner by officers. The pamphleteer also asked about the ethnicities of the various officers and opined about their character and competence based on his assumptions about their ethnicities, suggesting, for instance that one officer was probably an "affirmative action hire" while another was "a good German boy." A Lieutenant took the pamphleteer's complaint and opened a citizen complaint investigation. Another Lieutenant met with the pamphleteer a month later and recorded a statement from him regarding his complaint against one of the officers from that night. The rest of the complaint investigation, however, was not formally assigned to an investigator until two months after that and was completed a month later. The Department determined that the citizen's allegations were unfounded.

Recommendation: The IPA reviewed the police reports of this arrest as well as the exhibits, including photographs of the scene, the pamphlets that were distributed, and the hate crime policies of the PAPD as well as the County. We concur with the Department's finding with regard to the complaint about the face-to-face interaction with the pamphleteer by PAPD officers. He was questioned respectfully while other officers ascertained the circumstances from other witnesses. When the pamphleteer appeared offended by the questions posed by one officer, another officer took over to attempt to establish a better rapport. Officers and supervisors were patient and unbiased in their treatment of the pamphleteer. Moreover, the ranking supervisor at the scene made a legally appropriate and prudent decision to simply withdraw.

We have misgivings, however, about the handling of the case after the call for service at the theater was resolved. Upon receiving a citizen's complaint from the pamphleteer, the Department opened a complaint investigation. But it held that investigation in abeyance while pursuing a "hate crime" investigation relative to the same incident. While the activities of the pamphleteer were not regarded as actually constituting a hate crime,

PAPD supervisors believed that standard County protocol categorized this as a possible “hate incident” or “bias-related incident” that required documentation and review by the District Attorney’s office prior to investigation of the citizen complaint. A supervisor completed the “hate incident” investigation and submitted the documentation to the D.A.’s office, which declined to file charges. At that point, the Department restarted the citizen’s complaint investigation, completed it, and concluded that the complaint was unfounded.

This staggering of the two ongoing investigations – citizen’s complaint and hate incident – raises three potential problems. First, the supervisor who commenced the citizen’s complaint investigation by interviewing the complainant was at the same time responsible for putting together the documentation of the “hate incident,” instructing the officers involved in the incident to write reports and preparing this package for the D.A.’s review. This confusion of roles risks confusing the objectives of these two investigations.

Second, the PAPD standard procedure invoked in this case appears to be based on a very broad understanding of the County Hate Crimes Policy. The Santa Clara County Law Enforcement Policy Statement Regarding Hate Crimes (adopted August 2008) admonishes participating police agencies like PAPD to commit to thorough and effective investigation of hate crimes as well as their tracking and reporting to a centralized authority. It defines a hate crime as a crime committed for reasons of bias toward someone because of their race, religion, gender, sexual orientation or other specified characteristic. Since the pamphleteer was determined at the scene not to have committed a crime, the incident would have to fall, if at all, into the other category addressed by the Policy Statement, a “bias-related incident.” Participating agencies are told to document, collect and store records of bias-related incidents but are conspicuously not required to report the incidents to the D.A. The decision to do so in this case was therefore a discretionary one by PAPD.

A week after the incident, the Department received several calls from citizens associated with the theater who complained that no action had been taken by the police against the pamphleteer. They also received an allegation that the pamphleteer had spit on a member of the public during the incident, and the District Attorney's office suggested the Department look into these allegations. Unfortunately, this information is not reflected in the documentation of the citizen's complaint or hate incident investigations. We recommend that such information be documented whenever it relates to Department actions during an investigation.

Third, in order to accommodate the hate incident investigation, the PAPD held back on completing the citizen's complaint investigation for an additional three months, delaying and potentially undermining its response to a complaining member of the community. The interruption of the citizen's complaint investigation in favor of the hate incident investigation might also make the Department vulnerable to the accusation that the hate incident investigation was in some way retaliatory.

The IPA would like to emphasize that we believe that PAPD personnel handled the original incident quickly and cordially and made a determination in the field that was commensurate with the law and good police practice. We are also convinced that the citizen's complaint investigation was thorough and unbiased. Finally, the hate crime package was carefully researched and assembled. It is also evident that the Department did not expect the D.A.'s office to file criminal charges based on the "hate crime package" of reports related to this event. Rather, the information reviewed by the IPA indicates that the PAPD submitted the package in order to maintain a consistent procedure with bias-related incidents and as a precautionary measure to comply with the County Hate Crimes Policy. There was not the slightest indication of a retaliatory motive. Nevertheless, the chronology of these investigations and the precautionary investigation and submission of the incident to the D.A. may create the appearance of bias against the complainant because of his odious and unpopular viewpoint.

Resolution/Corrective Action: The complainant was informed of the results of complaint investigation. We recommend that PAPD proceed swiftly with all citizen complaint investigations and that it consider adopting a more literal interpretation of the County Hate Crimes Policy, thereby referring crimes committed for reasons of bias to the D.A., but not non-criminal bias-related incidents.

V. Resolution of Issues Involving PAPD-Issued PAS devices

In the spring of 2010, PAPD purchased new PAS devices. The PAS (“Preliminary Alcohol Screening”) devices are used by officers in the field to obtain a reading of the blood alcohol content of motorists suspected of being intoxicated. Per PAPD protocols, the new devices were subject to weekly accuracy checks which revealed no indicia of problems with the devices. However, by the summer of 2010, PAPD officers began to report that field tests had shown erratic results with dramatic result variances for the same subject or no readings whatsoever. As a result, PAPD reported the issue to the tech support for the manufacturer of the devices. The manufacturer suggested that liquid had invaded the units and that they needed to be dried out. PAPD dried out the units performed the accuracy checks and returned them to the field.

Later in 2010, PAPD officers continued to report issues with the devices registering erratic results. The Department then downloaded the data from the units and reviewed the results which showed erratic registering of data. The manufacturer was re-contacted and PAPD was advised to return all of the new units for further inspection. PAPD returned the units and returned the older model PAS devices to the field.

At that time, PAPD advised the District Attorney of the issues with the PAS devices. PAPD advised the District Attorney of any arrests in which the problematic PAS devices had been used. The Office of the District Attorney then reviewed all of the cases and found that each arrest had other indicia of the arrestees being under the influence of alcohol, such as failure of SFST’s (Standardized Field Sobriety Tests) and

subsequent definitive blood or breath tests.¹ Per advice of the District Attorney, the newly purchased devices remain shelved until a better track record of reliable results is achieved by other agencies that have purchased the newer devices.

PAPD is to be commended for its diligent checking of the devices after they were introduced in the field. Once patrol officers complained of erratic results, PAPD appropriately contacted both the manufacturer and the District Attorney's Office.

**Table of Complaint and Internal Affairs Investigations
Reviewed by the Auditor
January 2012 through July 2012**

Case No.	Case/Investigation Type	Allegation	Results of Investigation	Resolution
IA-2012-01	Internal Affairs	Off duty police contact	Founded for Conduct Unbecoming	Discipline imposed

Cases Pending from Previous Reports

C-2011-07	Citizen Complaint	Discourtesy; Application of Law; Unprofessional Conduct	Unfounded	Complainant informed of results
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VI. Conclusion

As noted above, during this reporting period, there were two Taser deployments, a noticeable increase from recent prior periods. While we agreed with PAPD's decision to find the one Taser use discussed above in policy, training issues were raised even as to

¹ To be clear, the PAS device is only intended to provide a preliminary screen of whether a subject is under the influence of alcohol. Standard protocol calls for each arrestee to be given a definitive breath or blood test at the station.

that deployment. We are hopeful that PAPD continues its resolve to provide robust in-service training to its officers in Taser use, as it did when the Tasers were first brought into the Department.

The sustained case during this reporting period involving off-duty misconduct provides warning signs regarding the officer's off-duty conduct that suggests a conscientious response in monitoring the officer as he progresses in his career.

We continue to be well informed of relevant incidents and developments by PAPD as the Independent Police Auditor even as liaison personnel have changed.