



CITY OF PALO ALTO OFFICE OF THE CITY CLERK

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

Independent Police Auditors Interim Report for 2013

Attached you will find the Independent Police Auditors interim Report for 2013, December 2013.

ATTACHMENTS:

- palo alto interim final (PDF)

Department Head: Donna Grider, City Clerk



POLICE AUDITOR'S INTERIM REPORT - 2013

Presented to the Honorable City Council

City of Palo Alto

December 2013

**Prepared by: Michael Gennaco and Stephen Connolly
Independent Police Auditors**

I. Introduction

This report covers monitoring activity by the Independent Police Auditor (“IPA”) regarding the internal review processes of the Palo Alto Police Department. It covers activity from the first half of 2013, and follows up on 2012 cases that were not complete at the time of our previous report in February.

II. Taser Activation

As indicated in our last report, one Taser activation occurred during the 2012 reporting period but the PAPD review process was still pending. It is now completed, and we have had the opportunity to evaluate it and provide feedback to the Department.

Overview:

The incident began when a suspect, who turned out to be sixteen years old, fled from officers on a bicycle that authorities later determined to be stolen. Officers initially observed the suspect not stopping for a stop sign, and then not obeying their commands to stop. Another set of officers (a training officer and a trainee) eventually took over the pursuit. At some point, the training officer left his patrol car and pursued the suspect on foot. In an attempt to detain the suspect, this officer discharged a Taser at him while the suspect rode at and then past the officer. According to the officer, the juvenile was riding right at him when he told him to stop and the officer deployed the Taser as the juvenile rode by him. The Taser had no apparent effect.

At about the time the Taser was deployed, the officer in the vehicle drove up beside the suspect. The officer quickly applied his brakes, blocking the path of the suspect and forcing him off his bicycle. There is physical evidence that the bicycle actually struck the patrol car as a result of this maneuver. The suspect fell to the ground, at which point the trainee officer got out of the vehicle and used force to push the suspect down and then pin him in order to keep him from trying to flee. The first officer rejoined the struggle by placing his Taser on the suspect’s neck and back area and telling him that he would activate the Taser if the suspect did not comply. The trainee then was able to handcuff the suspect and place him into custody.

Palo Alto paramedics were called but located no puncture wounds from Taser darts and the juvenile said that he had not been shocked. The suspect told an on-scene supervisor that he had been struck on the left wrist by the Taser but that it had had no effect on him.

The suspect had an abrasion on his face and pain to his neck. The suspect was transported to the hospital where he was medically treated, cited for the stolen bicycle and then released to his father.

PAPD Investigation

The PAPD conducted a review of the incident in keeping with its usual protocols. It found that the use of the Taser by the training officer was not consistent with the Department's Taser use policy. The Department found that while some level of force would have been reasonable to effectuate the stop of the suspect, the higher threshold of force required for deployment of the Taser did not exist. As for the force used by the trainee to effectuate a take-down of the suspect, PAPD determined it was reasonable and within Departmental policy.

The PAPD review further noted that deploying a Taser on someone riding a bicycle added additional complexities compared to someone standing on firm ground. The review noted that since the Taser is designed to incapacitate the individual, a cyclist who loses muscle control as a result of a successful Taser deployment could foreseeably end up injured because of a fall.

PAPD's review also recognized the dynamic and challenging situation the officers were dealing with in their attempt to apprehend an individual on a bicycle. Given the possibility of injury or other unpredictable outcomes arising from the speeds and complications of the pursuit, the incident prompted the Department to consider updates to its use of force training. One proposal was to incorporate weighing the seriousness of the offense against the risks involved, similar to its vehicle pursuit policy.

A related issue identified by PAPD's internal review was that the pursuing officers might not have received sufficient radio communications from officers who initiated the attempt to apprehend the suspect. According to the second team, they had heard from the initial officers that there was "good PC [probable cause]" to stop the suspect, which caused them to infer that the suspect might be associated with a burglary.¹ In fact, at the time of the pursuit, the only information known to the initial responding officers was that the suspect had failed to stop for a stop sign and then fled from the patrol car.

Based on its findings, PAPD took responsive action in terms of both officer performance and systemic reform. The Department ordered the officer who deployed the Taser to additional training that covered both the use of the Taser and proper communications in the field; he was also formally held accountable for his Taser deployment.. The officer who used the patrol car to attempt to block the bicyclist was to receive training with regard to the potential significant dangers of such a technique.

Regarding systemic reform, the PAPD review recommended that the Department's Defensive Tactics Team conduct appropriate research regarding using Tasers on suspects riding bicycles and to review whether the Department's current policy should be modified and officers

¹ This suspicion may have been enhanced by the fact that the officers who initially observed the bicyclist were responding to a potential burglary. As it turned out, there was no burglary at the location.

should be provided additional guidance regarding the use of Tasers on bicyclists. The PAPD review further recommended that the Department research and explore options and training available regarding pursuing and apprehending fleeing bicyclists and the attendant dangers. This includes issues related to the use of the police car to pursue, block, or cut off a suspect on a bicycle. Officers are now taught that this risk must be weighed against the need for apprehension, and that other strategies should be adopted in the absence of real exigency.

OIR Review of PAPD Investigation

The PAPD internal review was impressive in that it identified both performance issues (relative to the involved officers) and issues worthy of further exploration (and applicable to the Department as a whole). We concurred with PAPD's decision to find that the Taser deployment in this case was a violation of Department policy. At the time of deployment, the juvenile on the bicycle was not suspected of any crime except for running a stop sign and fleeing from officers. Had the attempted use been successful, the result may have been an unduly serious injury.

In past reports, we have commented favorably on the lengthy and substantive training that PAPD devotes to this controversial force option. The IPA is pleased that this incident caused PAPD to reconsider whether additional guidance and changes in policy needs to occur so its officers are specifically instructed that a Taser should not be used on a bicyclist. Subsequent to its internal review, PAPD began specifically training its officers that the Taser should not be used on persons in motion because of the greater potential for injury that such a deployment might cause. In addition, IPA has been informed that PAPD will be changing its Taser policy to reflect the special considerations regarding use of a Taser on persons who are in motion.

Additionally, the IPA is heartened by the Department's response to the challenging issue of how best to apprehend a fleeing cyclist. This is a tactical question that many agencies have struggled with, but have not clearly resolved. In fact, IPA has reviewed an incident involving another agency in which a bicyclist was killed by a patrol car seeking to prevent his escape, but there is a paucity of available literature or responsive training. Therefore, it reflects well on PAPD to have identified the issue and put its training experts to work on it.

In addition to these positive responses, the IPA identified additional matters that it believed warranted consideration by the investigation and review process.

A. Investigative Issues

- *Criminal Charge Information:* In this case, the results of the charges filed against the juvenile were not included in the force package, though it is useful information that contributes to the completeness of the review. Upon IPA's inquiry, PAPD did conduct follow up to learn that the juvenile was placed on informal probation as a result of the citation.

- *Failure to Interview Involved Officer:* The officer who pursued the suspect in the radio car and used take downs to eventually bring him into custody was not interviewed about his actions. While his pursuit of the suspect and the force that he used was largely captured by the car's dash camera, the use of the Taser by his fellow officer was not captured on tape. It is always critical to interview officers who used or witnessed force as part of any thorough review. The fact that PAPD did not interview an involved officer left a significant gap in this force investigation.
- *Insufficient Follow Up Regarding Suspect Allegations:* When the on-duty field supervisor interviewed the juvenile suspect, he indicated that the involved-officers were "just doing their jobs". However, the suspect took exception to some of the language used by one of the officers. There was no apparent formal or written follow-up to this allegation – even though it was corroborated by the in-car recording system. When the IPA made further inquiry, it was told that the Department was aware of it, and had counseled the officer regarding the interaction. However, its absence from the investigative materials constituted a significant gap in our view.
- *Officers' Use of Profanity and Threatening Language:* Similarly, the IPA noted other questionable comments used by involved officers in the heat of the encounter. One officer used profanity when applying the Taser to the juvenile and instructing him not to move. The other officer used profanity to threaten force against the juvenile if he moved. Of special concern to the IPA was PAPD's lack of documented or investigative attention to these remarks. Moreover, while many agencies recognize that "forceful" language can sometimes have a useful tactical effect, there is a fine line between making a calculated impression and suffering a lapse in professionalism. The IPA has recommended that the Department more rigorously scrutinize (and document) similar circumstances in the future.

B. Force Review Issues

- *Foot Pursuit Concerns:* When the eventual arresting officers observed the suspect fleeing on the bicycle, one officer eventually alighted from the vehicle and began pursuing on foot. The other officer continued to pursue in the radio car. At one point the officers lost visual contact for about a city block. This kind of "partner splitting" in a pursuit context raises the inherent dangers and is discouraged or prohibited in many agencies. When the IPA inquired about this tactical decision-making, PAPD executives responded that, because every foot pursuit is different, the Department has no hard and fast policy requiring officers to stay in sight of each other. It did, however, assess the issues in this case and

make them a subject of informal briefing reminders. While this is beneficial, the IPA encourages further attention to this tactic from a policy and training perspective. Similarly, the self-acknowledged fatigue that one of the participants experienced as a result of the pursuit is a training issue that was not expressly addressed, and that IPA believed merited further attention. This is because when officers exert themselves to the point of fatigue, it negatively impacts their tactical proficiency and judgment.

- *The Decision to Use the Taser:* As discussed above, the Department correctly determined that the Taser use in this case had deviated from policy. The IPA identified additional issues in conjunction with the deployment that were not expressly covered in the formal review. For example, the officer failed to provide the warning that is required under PAPD policy prior to use of the Taser. Moreover, the officer's explanation for failing to give warnings demonstrated a clear misunderstanding about the reason for the warning requirement. When we raised this issue with PAPD, it indicated that this misunderstanding will be communicated to the involved officer in his future retraining. PAPD had the same response to the IPA's questions about the incomplete video recording of the incident, which stemmed from the officer's not taking the safety off the weapon until the time of deployment.
- *Post-incident Involvement of Participating Officers:* After the suspect was taken into custody, the officer who took him to the ground and apprehended him questioned him about the stolen bicycle allegation. While we reviewed that interview and found the officer to be professional toward the suspect, a case can be made for having any interviews of the suspect not be conducted by an officer who has used force on him. In this case, the officer who took the suspect to the ground and apprehended him also transported him to the hospital. For similar reasons, we advocate that, when practicable, non-involved officers transport suspects away from the scene.

III. Request for Information

In June 2013, a man complained about having lost property – including a cell phone – after being arrested at a park in Palo Alto for public intoxication. He initially alleged that he lost a cell phone and a cane. The man's complaint came to the IPA through a lawyer who works for an inmate rights organization; she contacted the IPA regarding an incarcerated veteran she had recently met. The IPA immediately referred the inquiry to the PAPD.

After the matter was referred by the IPA, PAPD promptly conducted an inquiry that accounted for the cell phone and credibly asserted that there had been no crutch or cane at the time of arrest. PAPD's responsiveness and information during its investigation were both appreciated.

IV. Review of Misconduct Allegations

A. Multiple Complaints from a Single Citizen

Overview

In April of 2013, the IPA received a number of e-mails from a citizen who had been arrested repeatedly by PAPD in the spring of this year. The e-mails were repetitive, hostile, and somewhat difficult to track; the complainant turned out to have a documented history of mental illness and addiction, as well as a lengthy multi-agency arrest record for a variety of minor crimes. We responded to the complainant to explain our monitoring responsibilities, emphasizing that we do not conduct our own investigations. We then forwarded the materials to PAPD.

PAPD Investigation

To its credit, PAPD made an effort to sort through the allegations, tie them back to individual encounters with the complainant, and evaluate their validity. The Department provided the IPA with memos regarding its investigative efforts, as well as extensive video recordings relating to the different encounters. The allegations included excessive force, improper and retaliatory arrests, lost property, and refusal to take a complaint. None were corroborated, and in fact considerable evidence exists that refutes the different claims.

IPA Review of the PAPD Investigation

We commend the PAPD for its diligence in addressing this matter, and its willingness to assess complaints inclusively and on their substantive merits. Invalid complaints obviously exist, as do complainants who are willfully insincere in their allegations because of hostility toward law enforcement. However, progressive agencies recognize that a complainant need not be flawless to raise a meritorious point or have a legitimate grievance. All feedback from the public provides an opportunity to root out problematic behavior and improve performance.

In this case, PAPD gave understandable weight to credibility concerns. However, in spite of the fact that the email complaints were repetitive, hostile, and difficult to track, the Department pursued the allegations thoroughly and effectively.

B. Allegation of Discourtesy

Overview

This incident occurred after a Palo Alto resident called 911 to report that he had been assaulted. While responding to the 911 call, the officer in question came into contact with a man

and woman who were in an intersection. The parties exchanged words. The officer then continued on to the call, which was resolved without incident.

The man in the intersection called the station to complain about a rude officer. Later, the officer himself notified his sergeant that a complaint might be forthcoming. The sergeant ordered the officer into the station so that he could review the relevant MAV recording, which had captured the encounter.

A review of those recordings shows the man and woman just stepping into a crosswalk and the man then raising his arms in the air in a “what the heck” type of motion. The officer stops his patrol car several feet into the intersection. The audio of the recordings starts with the man saying something about the crosswalk. The officer’s shouted reply is obviously discourteous and includes the use of profanity. The man is then heard to ask the officer to give him his name. The officer then gets back into the patrol car and drives away. Later, the MAV shows the officer failing to stop at two stop signs and violating the right of way of other cars by making a left turn.

PAPD Investigation

When the officer was interviewed as part of the internal affairs investigation, he admitted to the allegations of discourtesy and profanity that were captured by the MAV recording. He also admitted to driving unsafely without his emergency equipment activated. He said that he immediately reported the encounter with the man and woman to his supervisors because he realized he had made a mistake and wanted to inform his supervisors as soon as possible. The officer said that he would not repeat such actions in the future.

The PAPD found that the officer had violated policy regarding rude and discourteous treatment, had engaged in conduct unbecoming an officer, and had violated policy by engaging in unsafe or improper driving. As a result of the findings, the allegations were sustained and the Department took corrective action in keeping with its disciplinary protocols.

IPA Review of the PAPD Investigation

IPA found the investigation to be thorough and timely and agreed with the Department’s findings and disciplinary response. IPA was particularly impressed by the contemporaneous self-reporting by the involved officer and his acceptance of responsibility for the misconduct.

IPA, however, takes issue with one investigative protocol that occurred in this case. Prior to interviewing the officer, the Department allowed the officer to view the MAV tapes that captured the incident. This obviously had the potential to influence the recollection and statements of the officer.

In this particular case, the nature of the allegation and the officer’s initial acknowledgment of a problem (as discussed above) both tend to mitigate any detrimental impact

of the pre-interview exposure to the recording. However, the same practice could foreseeably undermine the investigation under other fact patterns.

Accordingly, we recommend that PAPD consider options for avoiding this issue in the future. One approach we recommend is that, when officers are the subjects of complaint investigations, they not be afforded the opportunity to review audio and video recordings of the event that is being investigated prior to being interviewed. After a pure statement is obtained from the officer, he or she can then review the recording, and the statement can be supplemented as needed.

The issue of “when to review” recordings is the subject of considerable current debate within law enforcement and the justice system, and we are aware that the Department has grappled with it in consultation with other stakeholders. PAPD’s awareness of the relevant pros and cons is encouraging, and we hope they will continue in their efforts to formulate clear and effective policy.

C. Internally-Generated Complaint: Care of Departmental Property

Overview

In 2012, PAPD installed test equipment in a patrol car designed to resolve a connectivity problem with the Department’s mobile data computers. The sergeant who primarily used the car initially agreed to have it installed; however, he later decided to remove the equipment from his patrol car prior to informing a supervisor he was doing so. As a result of the removal of the equipment, an internal affairs investigation was initiated.

PAPD Investigation

The sergeant said that he removed the equipment because it was unsafe and looked unprofessional. The sergeant said, in retrospect, that he should have contacted his supervisor rather than taking it upon himself to remove the equipment.

In response to the sergeant’s stated concerns, PAPD concluded that they were unpersuasive, particularly because the equipment was being installed as a test. At the conclusion of the investigation, the Department found the sergeant to be in violation of the policy regarding care of PAPD property because of his removal of the equipment without supervisory approval. As a result of the findings, the allegations were sustained and the Department took corrective action in keeping with its disciplinary protocols.

IPA Review of the PAPD Investigation

IPA reviewed the investigative reports and supplementary materials, found the investigative report to be objective and thorough, and concurred with the Department’s findings.

D. Allegation of Racial Profiling

Overview

In May 2013, we became aware of an allegation of racial profiling that arose from a traffic stop in the previous month. The source of original complaint was not the driver or passenger, but rather from a bystander who had witnessed part of the stop and spoke with the parties out of a concern for the possible violation of their rights. The bystander's perception of misconduct apparently stemmed from the fact that the driver was a young male Latino who was questioned about possible criminal history at the outset of his encounter with the officer.

PAPD Investigation

PAPD became aware of the allegation and conducted an initial review of the incident. The in-car recording system of the handling officer captured the encounter and provided compelling audio and video evidence. Based primarily on this recording, the Department was able to determine that the officer had behaved appropriately and in keeping with policy.

The IPA communicated with PAPD regarding the complaint and investigation. OIR encouraged the Department to contact the driver of the vehicle in the interest of thoroughness. The goal was to assess his perceptions and perhaps develop insight or evidence not captured by the recordings.

PAPD was able to locate and interview the driver about the stop. The driver's account of the incident – which he described as a “nothing deal” – largely matched the video as summarized by PAPD. As he asserted, he had indeed been cooperative throughout the detention, and he said he understood the grounds for the officer's actions (beginning with the missing front license plate that had been the initiating traffic violation).

The PAPD memo about the interview notes that the driver did recall being “alarmed” by the officer's asking him about gang affiliation – a status he denied. This happened late in the stop, in the midst of a discussion about the driver's tattoos. It is unclear whether the driver was offended by the question, or simply anxious about avoiding trouble with the police.

Importantly, PAPD seems to have taken steps to put the driver at ease about the reasons for the follow-up interview, and offered at the end to meet with him or the passenger if either were interested in further discussion about the matter.

IPA Review of the PAPD Investigation

Along with providing its investigative memos and analysis of the allegations, PAPD also gave the IPA copies of the recordings from both the handling officer and his backup. We

reviewed those materials, and independently determined that the evidence supported the Department's conclusions.

Our assessment of the recording is as follows:

The stop lasted about twenty-five minutes in all, and included an initial conversation followed by a call for backup and a search – based on the officer's probable cause to believe there might be marijuana in the vehicle. The tone of the encounter is low-key and professional: not only is the driver extremely cooperative and deferential, but the officer also seems to take a relaxed and conversational approach. No contraband is discovered in the search, and the driver leaves after receiving a warning notice about the license plate.

One of the original allegations by the third-party complainant was that the officer very quickly asked whether the driver had a criminal history. While such a question is legal on its face, it could be problematic in various ways if the intention behind it was to intimidate, or if it was prompted exclusively by the driver's minority status. In this case, however, the recording reveals that the relevant questions came up relatively casually, after a couple of minutes of conversation – not immediately, as had been alleged. Moreover, they occurred in the context of a detention in which possible criminal conduct (namely, marijuana use) was already at issue. The officer's demeanor is courteous and professional, and his investigative efforts appear to flow reasonably from the evolving circumstances of the detention.

Taken together, these facts support the Department's determination of a lawful detention in which no policy violations occurred.

Few issues are as sensitive as allegations of racial profiling when it comes to police-community relations. Any perception of bias-based mistreatment creates a sense of real injustice, and any accusation is just as likely to provoke defensiveness and indignation among officers. Often, the difficulty in definitively resolving these allegations compounds the frustrations of both sides.

For these reasons, it is especially important for law enforcement to monitor this dynamic, to remain attuned to public perception as well as to its own intentions, and to look for objective indications of possible misconduct when allegations arise. Tone and context and timing all matter, and should be evaluated along with the officer's own assertions about his intent.

It is encouraging that PAPD's handling of this complaint reflected a willingness to take these steps. The investigation was thoughtful and pro-active, and the IPA concurs with the results while commending the thoroughness of the response.

IV. Conclusion

We appreciate the opportunity to monitor PAPD on behalf of the city. We welcome the opportunity to discuss the contents of this report at your convenience, should you have feedback or questions.