



## CITY OF PALO ALTO OFFICE OF THE CITY CLERK

January 11, 2016

The Honorable City Council  
Palo Alto, California

### **Independent Police Auditor's Second Report - 2014**

Attached you will find the Independent Police Auditor's Second Report - 2014.

#### **ATTACHMENTS:**

- **Attachment:** PAPD FINAL 12 29 15 (2nd rpt 2014) (PDF)

Department Head: Beth Minor, City Clerk





# **INDEPENDENT POLICE AUDITOR'S SECOND REPORT - 2014**

**Presented to the Honorable City Council  
City of Palo Alto**

**January 2016**

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## **I. Introduction**

This is the second of two reports covering the eighth year in which the Independent Police Auditor (“IPA”) has monitored the internal review processes of the Palo Alto Police Department (“PAPD”). It primarily covers activity from the second half of 2014, including complaint investigations, internally generated misconduct investigations, and reviews of two different Taser deployments.

The report features discussion of four allegations of misconduct that were investigated internally by the Department and completed within the audit period, with the exception of one case that was completed earlier in 2014 but not included in our last report.<sup>1</sup> That case involved a female arrestee who had raised three different allegations against the Department that related to her initial time in custody. Another case related to a female driver who was stopped for speeding on her way to urgent care for medical treatment; she questioned the officer’s timing and decision-making in giving her a citation under the circumstances. Two other cases involved bicyclists who took issue with being stopped. One received a citation, the legitimacy of which he questioned. The other did not, but found it curious that he had been stopped at all given the officer’s alleged comments to him about the rationale.

As with our prior reports, the IPA reviewed the completed case materials with an eye toward the thoroughness and legitimacy of the investigations, and the potential for systemic reforms. As discussed below, we concurred with the discipline-related “bottom line” outcomes in each of the above cases – only one of which resulted in a finding that policy had been violated. This was one component of the female arrestee’s three-part complaint.

On the whole, the Department did a creditable job of taking misconduct allegations seriously, investigating them thoroughly, and responding appropriately. We did, however, also note several elements within those cases that prompted questions or recommendations for the Department. These concerned the potential strengthening of investigative or substantive protocols, and are detailed below.

The Department also had two different Taser deployments during this time period. The IPA found the Taser activations to be consistent with relevant Department policies for use of the device. However, in one of the cases, we found several aspects of the incident that seemed to warrant further attention from a training and tactical perspective.

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<sup>1</sup> The Department had completed the case and provided the materials in a timely fashion to the IPA for review. The omission from our previous report was inadvertent.

## II. Case Reviews

### Case # 1

#### *Factual Overview:*

This incident, from the fall of 2013, began in the early-morning hours with the arrest of two individuals under separate circumstances, about twenty minutes apart. The first was a male who was taken into custody for a probation violation after attempting to flee from a PAPD officer. The second, who eventually became the complainant, was a female who was suspected of being involved in an assault at a bar.

According to the police report, the female had allegedly thrown a glass at another patron and was escorted out by private security, at which point responding officers arrested her. She had been drinking, and by all accounts (including her own) she was somewhat intoxicated. After she was handcuffed, and as she was being escorted to a car for transport by Officer A, she abruptly fell and hit her head on the ground. Paramedics responded, but she declined treatment and was eventually placed in the back seat of Officer B's radio car.

According to the police report, after being transported separately to the station, the male and female suspect eventually both ended up in the back seat of Officer B's car for the trip from the station to the jail. They were still handcuffed and seat belted, but the car lacked any sort of partition to separate the two arrestees from each other. Palo Alto has police cars that record activity that occurs in the back seat during transport of arrestees.

The police report indicated that during the trip to the main jail (which lasted approximately twenty-five minutes), there were at least two instances in which the male suspect slid closer to the female suspect and twisted his body so as to contact her breast with his elbow. He also apparently touched her with his (cuffed) hands on different occasions, though this was difficult to verify from the recording. The recording indicates that the female, who was groggy and appeared to doze off intermittently, repeatedly admonished the male to stop touching her, and spoke to Officer B in an effort to get his help. Each time, though, the male had moved away, and the female was not verbally specific about the nature of the touching that was occurring.<sup>2</sup> The officer ended up taking no action apart from a few spoken directions to the male passenger.

Once they had arrived at the jail and were going through the intake process, the female did specifically mention that the male had been touching her breasts. This initiated an investigation into what had happened, which included questioning of the male suspect and

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<sup>2</sup> The IPA had the opportunity to review various recordings from the in-car video system, as is standard in its monitoring of cases. While the female's words and actions make it clear that she is aware of what the male is doing in the backseat and is bothered by it, her overall manner appears to reflect annoyance or irritation, as opposed to fear or agitation. However, at one point, she does say, "That's sexual harassment. Hey, this guy is touching me."

review of the tape. (This led to an additional police report and charges against the male for battery; he was later convicted of that crime.) Meanwhile, according to the police report, because of her earlier head injury, jail staff refused to accept the female, and Officer B ultimately transported her to the hospital for treatment.

Several days later, the female came to the PAPD to make a formal complaint. First, she asserted that her fall and subsequent injury was the fault of Officer A, who was “pulling on” her arm as he escorted her to the radio car. Second, she believed it was improper for her to have been placed in the backseat of the car with the male arrestee who molested her during the drive. Finally, she felt that Officer B, who was driving the car, had been inadequately responsive to her requests for help as she reacted to the other suspect’s battery of her.

*Outcome and Analysis:*

The Department conducted a thorough investigation of the complaint, and analyzed the individual components carefully in arriving at policy and disciplinary determinations. It ultimately concluded that Officer A was not culpable for the fall that caused the complainant to injure her eye. It determined that the transport to the main jail in the back seat, which resulted in her being contacted sexually by the male suspect, was inappropriate and should not have occurred; it found the responsible supervisor had violated Department policy in authorizing the dual transport. Finally, it found that Officer B, who was driving the car, had not fallen below appropriate standards of care and attentiveness.

As discussed below, the IPA concurs with these findings, though all three of the decisions were arguably “close calls” for different reasons. It also recognizes that the Department’s actions in responding to the complainant’s allegations of sexual harassment/battery, once they became understood at the jail, were swift and appropriate: a report detailing the male suspect’s actions was completed within hours, and was sent for prosecutorial review. Finally, the IPA believes the Department made appropriate gestures toward addressing the issue systemically on a “going forward” basis – though we also recommend further consideration of possible policy amendments.

Allegation of Causing Fall: The complainant’s contention was that the escorting officer caused her to fall and injured her eye by pulling on her arm aggressively as she walked with him, in handcuffs. The fall did, in fact, occur. However, the notion that it was Officer A’s fault was not conclusively supported by the surveillance camera that depicted the incident. Instead, she seems to have very suddenly tangled feet with the officer before falling quickly. She was turning away from him at the time, perhaps to talk to a bystander. She herself seemed initially unsure about what had happened, and only began to blame Officer A after another person at the scene suggested he had been to blame.

The suspect’s level of intoxication and her high heels as factors may have contributed to her unsteadiness. This is both accurate and relevant, and speaks to the lack of improper intent on

the part of the escorting officer. Arguably, though, it also suggests that he should have been more attentive as he led her to the car, to the extent her precariousness made a fall more foreseeable than it normally would have been. However, considering the totality of the circumstances surrounding this sudden and unfortunate accident, we find PAPD's disposition of this aspect of the complaint to be reasonable.

Similarly arguable is the failure to take the suspect to the hospital for medical clearance prior to bringing her to the station (and ultimately, to jail). According to the police report, though paramedics were summoned to the scene to treat her, she refused treatment because of concerns about the cost. Nonetheless, the decision-making PAPD supervisors could have overridden her preference in order to make sure that her head injury was adequately addressed.

The choice to proceed without a hospital stop was not egregious – it appears to have been given some consideration, and her injury was not so obviously significant as to require the opposite outcome. Furthermore, the suspect's reluctance to go to the doctor because of financial concerns was adamant and persistent. But head injuries merit special care and consideration, both medically and from a risk management perspective, and it ultimately turned out that the jail staff would not accept her for booking until she had been cleared at the hospital after all.<sup>3</sup>

Decision to Conduct Dual Transport: The Department does and did have a policy relating to the transport of multiple passengers in the same radio car. While it discourages the combining of male and female prisoners, it does not prohibit it. Instead, the language allows for the exercise of discretion when strict separation is “not practicable”, which provides some degree of latitude.

Additionally, the same policy puts some burden on the transporting officer when a dual transport of a male and female is occurring. It is expected that the officer will monitor the prisoners to ensure that no inappropriate interactions are occurring. This makes sense, of course, and arguably relieves some of the responsibility from Supervisor C or a similarly situated supervisor.

In this incident, however, the decision proved to be ill-fated. (The performance of Officer B, who drove the male and female, is discussed below.) The IPA acknowledges that it is important when analyzing such situations to be wary of hindsight. It seems obvious now, given what happened, that to invest the resources in a separate transport would have been “better” and worth the inconvenience. But the fact that it was *not* obvious beforehand makes some sense in the context of past practice and the unexpected audacity of the male suspect.

Still, the Department's decision to hold the supervisor accountable is appropriate. Bad outcomes do inevitably influence retrospective analysis, and the incident was serious and

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<sup>3</sup> She was ultimately cleared for booking by a doctor after a few hours of treatment and observation.

significant enough to merit a formal sanction – even while acknowledging the mitigating factors and lack of wrongful intent. Here, it seems reasonable to point to the increased risk factors, such as the female’s intoxication and grogginess and recent fall, and conclude that the normal policy that discourages dual transports should definitely have prevailed over the exception.

Officer’s Failure to Intervene During Transport: As noted above, the relevant Department policy about dual transports specifically cites the expectation that the driver will monitor activity in the back seat to prevent problems from arising. (The same policy, though, also assumes a physical barrier in the back of the car, which PAPD did not have available at that time.) It is clear from the video of the transport that Officer B did not realize the extent or specifics of what was happening. A closer question is whether he *should* have, given the available facts.

Here, the Department found that Officer B’s performance had not fallen below expectations to the point of a policy violation warranting discipline. The IPA, having reviewed the video of the transport and the police reports finds this result reasonable, if debatable. This is because the decision to transport had not been his, because of the surreptitious nature of the suspect’s actions, and because of the ambiguity in the female arrestee’s complaints and requests for intervention during the trip.

The video of the transport shows that there were also long stretches during the ride in which the male and female were apart from each other and not in conflict. It also shows the secrecy and wariness with which the male suspect looked for opportunities to touch the sleepy female without being detected by the officer. The video is also slightly misleading to the extent it offers a clearer angle of events than Officer B’s own more obstructed vantage point.<sup>4</sup> Obviously, he was also rightly attentive to his driving responsibilities as well. The female’s comments – both to Officer B and to the male – are only intermittent and do not directly describe what is happening.

If the IPA had been the decision maker in this matter we might have found the acts of the officer in violation of policy but it does not find the Department’s ultimate disposition to be unreasonable. As indicated by the police reports, the officer moved promptly and effectively at the end of the transport to notify supervision, review the video evidence, and document the male suspect’s actions.<sup>5</sup>

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<sup>4</sup> PAPD officials also noted in discussions with the IPA that the lighting in the video recording is brighter than the officer would have seen, and that the relevant audio was captured by a microphone in the rear of the vehicle – which means it was clearer and louder than it would have seemed to the officer.

<sup>5</sup> Another issue discussed with the Department by the IPA, was that Officer B’s radio was playing music during the ride. This arguably had the potential to interfere with Officer B’s

Importantly, the Department also used this incident, and the feedback that emerged from the investigation, to focus renewed attention on its dual transport policy. It has taken pains to reinforce the expectation that such transports should be much more of an exception than they had apparently become. And, as it updates its fleet of vehicles, it has invested in cars that have a partition in the back seat that would physically separate passengers in the event such a transport was not avoidable. Incidents like this have a powerful influence on Department behavior in the short run, and the additional remedial steps should help ensure the longer-term prevention of a similar issue.<sup>6</sup>

At the same time, another remedial measure worth considering relates to strengthening of the actual policy language for dual transports. To review: such transports, though discouraged, are not prohibited by the policy. There are reasons for this, since maintaining some flexibility for unique or extreme circumstances is a regular part of law enforcement's exercise of discretion. Here, though, the "exception language" is more open-ended and vague than it should be.

The IPA has no reason to doubt the Department's representations that the evaluation of this case last year had a significant impact on executive-level attention to the issue, and on supervisory understanding of the need to be vigilant and protective of prisoner welfare during transport. However, even with the best of intentions, "lessons learned" and points of emphasis have a way of fading with time. The memorializing of current concerns through a stronger, more restrictive policy would help ensure a lasting positive impact from this case.

- **Recommendation 1: PAPD should strengthen its policy to require a stronger degree of exigency before a dual transport is authorized, to document the exigency when a dual transport is authorized, to require that any dual transport is only undertaken in a radio car with a physical barrier between the two individuals, and to require the transporting officer to immediately stop the transport should an arrestee complain of conduct by the other individual.**

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ability to perceive what was occurring; however, the Department has no specific policy precluding the use of the radio in that way.

<sup>6</sup> While not part of the administrative process, to provide further Departmental learning and guidance out of this incident, the Department conducted an extensive de-briefing to all of its members and used that discussion to remind them to take arrestees who have been injured to a medical facility for clearance before booking them.

## Case # 2

### *Factual Overview:*

A Palo Alto police officer was working a traffic detail when he observed a female driving at speeds above the posted limit. As indicated in the body camera the officer was wearing at the time, the officer stopped the car in the driveway of an urgent care facility. The driver explained that she was on her way to the facility because of symptoms that caused her concern, and that she had received advice to come in for treatment from the urgent care personnel. The officer instructed the female to leave the car in the driveway of the facility and proceed directly to the urgent care desk. The officer followed the female inside the facility as she talked with reception personnel.

As the female was waiting to be treated, the officer asked urgent care personnel if she had time to move her car since it was illegally parked in the driveway. The officer then asked the female to park her car legally and issued her a citation for speeding.

The female later complained that the officer failed to provide her with adequate medical care. The female indicated that because the officer followed her into the urgent care facility, her medical treatment was delayed. The female explained that if the officer had just written her a ticket, she could have then proceeded into the facility and received more timely care.

### *Outcome and Analysis:*

PAPD conducted an objective and thorough investigation. The handling supervisor interviewed appropriate witnesses and collected and evaluated supporting data, such as the video and audio evidence.<sup>7</sup> To his credit, the investigator also performed time assessments on whether writing a citation prior to accompanying the female inside would have caused her to be seen by medical personnel more quickly.

The Department determined that the officer did not violate policy. (Citing her first would perhaps have delayed things more than the course of action that did occur, which involved having her check in before writing the ticket.) The IPA concurs with this assessment. In addition to the ultimate issue of whether the officer violated policy, the IPA notes the following additional matters worthy of discussion:

**Failure to Record Follow-Up Telephone Interview:** The interviews conducted by the investigator were tape recorded – with one notable exception. While the initial interview with

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<sup>7</sup> Virtually all of the interaction between the officer and the female was captured on a body-worn camera deployed by the officer. PAPD has been utilizing this technology since 2014 year in a pilot program involving a limited number of officers. The audio/video record from the camera is of high quality and effectively encapsulates conversations and actions by the officer and the complainant.

the urgent care intake person was tape recorded, the investigator telephonically re-contacted the employee and asked several follow-up questions. The follow-up interview was not recorded because the investigator failed to use a recorded line to do so. PAPD is equipped with recorded lines. Ideally, the supervisor would have used a recorded line so that the follow up interview could also have been recorded.

PAPD Presence During the Conversation Between the Female and Urgent Care Reception Personnel: The body-worn camera worn by the officer showed that he was present and proximate to the female when she reported to the reception center of the urgent care facility. During that interaction, the female was asked about symptoms that were the basis for her distress and visit. Because the conversation was captured by the body-worn camera, it is clear that the officer was close enough to overhear the conversation.

Medical information is protected by state and federal law to ensure that such closely held and private information is kept from unnecessary third parties. In some situations, law enforcement cannot help to overhear conversations between medical care providers and patients for purposes of affording treatment. However, in this case, it was improvident and unnecessary for the officer to stand by the female while she described her medical condition to a medical care provider. His presence likely contributed to her distress and her unhappiness over the way he handled the situation. It would have been helpful had PAPD supervision identified this particular issue and informally raised the matter with the officer; the officer may have benefited from additional insight into the complainant's perspective. IPA recommends that PAPD use this opportunity to remind its personnel of the need for discretion and sensitivity in this arena.

Providing Guidance to PAPD Members on Exceptions to Recording. Recognizing competing privacy interests in the medical arena, some police departments body-worn camera policies instruct their members not to activate a camera when a health care provider is discussing medical issues with a patient or when an officer is in the hospital for the sole purpose of waiting for an arrestee to be medically cleared. PAPD should consider whether such guidance would be helpful to its officers regarding the use of the body worn cameras.

To summarize, the IPA offers the following recommendations based on this case:

- **Recommendation 2: PAPD should remind supervisors of the need to take advantage of recorded lines when conducting follow up telephone administrative interviews.**
- **Recommendation 3: PAPD should remind its members to avoid listening in when individuals are providing medical information to medical practitioners.**
- **Recommendation 4: PAPD should consider whether written guidance should be provided to its officers regarding the deactivation of body worn cameras when medical information is being shared between a health care provider and a patient.**

### Case # 3

#### *Factual Overview*

This case involved a complaint by a male bicyclist who was detained and cited by a patrol officer for riding his bike on the wrong side of the road. At the time of his detention, the male requested the presence of a supervisor. When one responded to the scene, he alleged that that stop had lacked legal justification, and that the officer had used profanity in initially ordering him to stop his bicycle. Several days later, the man responded to the station to lodge his complaint formally and to provide an interview to PAPD supervisors.

#### *Outcome and Analysis*

The Department determined that the main thrust of the complaint – that the stop had lacked a proper basis, was unfounded. The IPA concurs with this assessment.

Regarding the intake interview, the IPA had the opportunity to listen to a recording of the interview with the complainant, and found the approach of the Department's representatives to be impressive. While being respectful and welcoming to him, they also refrained from being condescending and took the time to explain and clarify things about which the complainant was mistaken. In short, they took him seriously and worked to make the interaction as constructive as possible. The complainant felt comfortable enough to assert himself, and was also receptive to the information from the officers.

While the complainant raised issues about the circumstances of the stop (timing, location, lack of lights and sirens), the in-car video evidence corroborates the citation that was issued by the officer. In fact, the complainant's version does not significantly vary dispute as to what specifically is depicted in the video evidence, though the time gap between where the improper riding occurred and the actual stop may have contributed to legitimate confusion. And while the complainant seemed to believe the officer was lying in wait and making a special effort to find an infraction by following him, the recording does not corroborate this perception. Instead, the slight delay occurred because the officer was initially busy on the radio with another matter.

The audio recording does corroborate the complainant's contention that the officer used profanity, but this was not formally evaluated. Instead, the Department chose to focus only on the detention's legitimacy. This decision was based on the framing of issues by the complainant, who apparently seemed less concerned about the discourtesy component than about the validity of the stop.

The IPA believes the Department could have handled this latter component of the incident more effectively. To a certain extent, it does make sense for a complainant's own priorities to drive the investigation, and in this case it is true that the cyclist was not fixated on

the profanity/discourtesy problem. However, the Department's decision here falls short of the inclusive, comprehensive approach to internal review that the IPA espouses. In our view, the complainant's articulated issues and subjective priorities in any case should be a floor, not a ceiling. Just as a plainly wrong allegation does not gain value because someone is passionate about it, a reasonable concern should not be dismissed because the complainant does not consider it a priority or take pains to repeatedly emphasize it.

The officer's use of profanity was not egregious in this instance.<sup>8</sup> Because the complainant was not prompt in immediately obeying the initial instructions to stop riding and pull over, the officer's more direct instruction to him juxtaposed with a small dose of profanity does arguably fit within the oft-cited "command presence" rationale for the use of strong language in a tactical, calculated way.<sup>9</sup> But it was, in our view, significant enough to address during this investigation.

In short, profanity matters enough to the Department to have a policy about it – as it should, given the impression that it makes on the public. Accordingly, it should have mattered enough to be more thoroughly considered by PAPD.

#### Case # 4

##### *Factual Overview:*

This complaint began with a father visiting the PAPD station on behalf of his teenage son. The father mentioned having read about questionable Taser deployment by PAPD against a juvenile on a bicycle, which had received recent media attention. The coverage apparently prompted him to inform the Department about an encounter that allegedly had occurred some six months earlier. The father asserted that his son – while riding a bicycle – had been stopped by an unnamed officer for speeding and subjected to a search of his bag before being allowed to go with a verbal warning. It bears noting that the teenager and his father are African-American, though PAPD officials say that neither of them expressly alleged racial bias or "profiling" as the reason for the stop.

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<sup>8</sup> The IPA reviewed the recording of the encounter, and it should be noted that, for the most part, the officer is markedly controlled and professional in dealing with a contentious and unhappy subject.

<sup>9</sup> While the IPA is familiar with this argument from its work with a variety of agencies, and sees the legitimacy of it in theory, we are also wary of it as an exception that too often swallows the rule.

Based on the facts provided by the father<sup>10</sup>, the Department made an initial effort to find documentation and other available evidence relating to the stop. It was unable to do so. Subsequent efforts to contact the father by phone and e-mail were not successful.

However, the father re-initiated contact with the Department several months later. This time, he brought his son to the station with him. The father explained that national media coverage of controversial police events elsewhere had helped motivate him to make further inquiries, and express dissatisfaction regarding the lack of results from his previous contact. The handling supervisor had the opportunity to speak with the son as well, and obtained some clarifying details as the son and father collaborated on the submission of a written complaint form.

The son provided some additional identifying details, including a physical description of the involved officer. Again, though, the Department was unable to locate any record of the contact at issue, in spite of taking pains to do so in its follow-up investigation. After a further round of due diligence (which included reviews of call logs, data bases, dispatch records and in-car videos from the date at issue and a broader range within that month), the Department decided to close the complaint as “Not Sustained.”<sup>11</sup>

*Outcome and Analysis:*

PAPD appears to have responded to this complaint in a conscientious fashion. After both the initial and subsequent in-person contacts with the father, Department officials made a concerted effort to investigate the circumstances of the stop, but were unable to find relevant supporting information. There are various possible explanations for this, ranging from a mistake of recollection by the complainant to a failure by the involved officer in properly logging the contact. It is also possible that the incident involved another agency, or did not occur at all.

Importantly, though, the substance of the complaint itself – as described – further limits the possibility that misconduct occurred. In his own version of events, the teenage cyclist reported he was puzzled by the reason for the stop, given that he was in a dedicated bike lane and moving slower than car traffic. But he also indicated he had consented to it without hesitating, that the officer had been polite and even apologetic, and that the officer had not in fact searched his bag. The stop had apparently lasted only about two minutes.

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<sup>10</sup> These included the date and time, an approximate address, and of course the name of his son.

<sup>11</sup> The gap of several months between the incident and the original complaint, while not insurmountable, also contributed to the challenges of the investigation.

### III. Taser Cases

#### Case # 1

##### *Overview:*

An officer with the Palo Alto Police Department observed a subject kicking a male who was on the ground in a parking lot. According to the officer, the subject had blood on his hands and on his head. The officer saw that the man on the ground was in the fetal position and had blood on his face. The officer reported that he identified himself as a police officer, ordered the suspect to raise his hands and called for assistance over his radio. The officer indicated that he then drew his Taser from his holster and pointed it at the subject but did not immediately activate it.

The officer reported that he observed a third individual nearby who he initially thought may have been a lookout to the assault. According to the officer, the subject turned and began to run into a narrow and dark alley. The officer reported that he then discharged his Taser at the subject's torso at a distance of approximately 20 feet. Neither of the two probes of the Taser made contact with the subject and he continued to run down a narrow alleyway. The officer chased after the subject and when the subject realized there was no egress from the alleyway, he turned around to face the officer and went down to the ground. The officer handcuffed the subject without incident.

According to the officer, he then instructed the subject to sit down on top of some milk crates in the alley. The officer reported that he observed what he believed was a wallet protruding from the subject's pant pocket and attempted to remove the wallet but the subject became extremely upset with him and attempted to stand up. The officer indicated that he put his foot on top of one of the subject's shoes and one of his hands on top of his left shoulder. The officer reported that the subject then leaned back against the alley wall and stood up. According to the officer, he tried to push the subject back down into a sitting position but that he was overpowered by the subject.

The officer reported that he told the subject to sit back down but he refused. According to the officer, because he believed that the subject was going to attempt to flee, he grabbed the subject's left leg with his hands and kicked the subject's right leg out from under him. The officer reported that the subject fell onto the ground, landing on his buttocks and back.

The officer reported he had attempted to activate his MAV recording system while he was initially walking toward the disturbance but did not know if it had activated.<sup>12</sup>

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<sup>12</sup> It had not, in fact, activated.

The officer reported that he had used the Taser because he believed it to be the most appropriate tool to subdue the subject and to keep him from becoming a danger to the public should he escape.

The investigation revealed that the subject had assaulted the individual on the ground as well as a second individual the officer had initially thought was a lookout for the subject, causing them both injuries. When interviewed after his arrest, the subject asserted that he had no recollection of the incident. According to the investigative report, a PAPD officer overheard hospital staff say that the subject had a blood alcohol content of .0392%.

*Outcome and Analysis:*

Policy Determination: The PAPD investigator relied on available evidence, including testimony and surveillance video cameras from adjoining businesses. IPA does not find that the use of the Taser fell outside its use of force policy. The officer had indeed interrupted the subject committing a violent felony and at the time the Taser was deployed, the subject posed the requisite threat level that justified its activation.<sup>13</sup>

Consideration of Force Options: At the same time, we question the advisability (as opposed to permissibility) of the use of this weapon in this circumstance. This is because of the physical limitations of the Taser as they applied to these facts.

Tasers are designed to propel two darts on separate leads in the direction of the subject. Ideally, the Taser probes will imbed in the subject's body some distance apart. With an ideal spread of several inches, an electric current created between the two probes will effectively incapacitate the subject. However, if both probes do not strike the subject, the Taser will be ineffective. The Taser is designed so that the probes spread after they are ejected so they do not strike near each other on the body. Taser instructors teach that the ideal distance the officer should be from the subject for successful deployment is 7-10 feet at which point the spread of the darts is 16 inches. Taser cartridges have leads of 10, 15 or 25 feet, depending on the model.

A review of the Taser Cam footage suggests that the subject was approximately 15 to 25 feet from the officer when the Taser was discharged. This, of course, averages to 20 feet – or twice the recommended ideal distance for Taser activation. However, PAPD did not document the length of the leads of the Taser cartridge deployed in this case. This matters because if the cartridge deployed were equipped with the shorter leads, there was actually *no* likelihood that the Taser activation would have been successful. Even if the cartridge contained 25-foot lines,

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<sup>13</sup> In spite of the analysis in this case, IPA cautions against overuse of the *potential* threat a subject might pose as justification for use of the Taser against someone who is fleeing (as opposed to being actively assaultive). If agencies are not vigilant in their assessments, reliance on the “threat” exception can potential render the basic prohibition meaningless. A second Taser incident, discussed below, offers an interesting point of contrast.

considering the spread of the probes at that distance, the likelihood of the officer being able to strike the torso of the subject with both probes was extremely low.

In light of these limitations, in IPA's view the Taser was seemingly not the most practicable weapon choice or tactic for the officer to deploy. This conclusion seemed to have been borne out by the result, since the Taser deployment was ineffective. Unfortunately, these limitations on the viability of the Taser were not set out by PAPD in its use of force analysis – at least as reflected in the materials made available to the IPA.

Interestingly, as we discussed this point subsequently with PAPD management, we were informed that that cartridge was indeed a “25-foot” model, and that considerable internal discussion and assessment of the incident had in fact occurred among Department executives. We are gratified to hear it, have no reason to dispute it, and concede that the totality of information known to the decision-makers may well have militated more obviously in favor of the officer's tactics even though the deployment of the Taser did, in fact, prove ineffective. But this cuts both ways: because the *available documentation* did not capture the fuller analysis, we have no basis for assessing it. Nor can we track the way that “lessons learned” might have been produced and disseminated to the involved officer and the Department as a whole.

An atmosphere of rigorous self-scrutiny is no small thing in law enforcement. We recognize the dynamic nature of these force encounters and the distastefulness to some officers of what can seem like “Monday Morning Quarterbacking.”<sup>14</sup> And our sense is that the culture and protocols of the Department are increasingly geared toward thoughtful and holistic review, which is very positive. At the same time, we encourage PAPD to be mindful of the importance of “showing its work” and creating a more robust record of the meaningful evaluations that it does.

Narrow Scoping of the Force Analysis: As noted above, when the handcuffed subject began to become uncooperative with the officer, he reported the use of a takedown that caused the subject to fall to the ground. This action qualifies as a use of force under PAPD policy, but was not addressed during the use of force analysis. A comprehensive use of force analysis should include an investigation, review, and analysis of all force used during an incident. However, in this instance, there was insufficient distillation of the facts with regard to the takedown. For example, while the investigative report indicates that a responding supervisor witnessed the officer push the subject to the ground, the witness description of that event in the police report is terse and does not include whether the supervisor believed the force he observed was appropriate. More importantly, a reserve PAPD officer was on scene prior to the supervisor's arrival, yet there is no written account of whether he observed the use of force in the

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<sup>14</sup> To extend the sports metaphor, though, we also observe that successful athletic teams routinely review tape on “Monday Morning” with an exacting eye— even after a victory, so that they can be improved and better prepared for the next game.

alley. With regard to the review and analysis of the takedown use of force, there was no analysis or conclusion about whether the force was consistent with PAPD's use of force policy.

The Rank of the Investigating Officer: In this case, an officer was assigned to conduct the force investigation of a peer officer. While the officer was serving as an acting supervisor and the watch commander, it is preferable to have force investigations conducted by individuals of higher rank than the involved officer.<sup>15</sup> If resource issues prevent a supervisor from being available to conduct the investigation, the extenuating circumstances should be documented in the report.

The Failure to Obtain Medical Records of the Subject: As noted above, while some evidence of the subject's blood alcohol level was obtained as a result of overhearing comments from medical personnel, a comprehensive force investigation would necessarily obtain medical records of the subject. In this case particularly, where there was an unexplained head injury to the subject and where the actual blood alcohol content was relevant, it would have been important for the Department to obtain the medical records, not only for the use of force investigation but for any eventual charges to be lodged against the subject. Unfortunately, this was not apparently undertaken in this case.

To summarize, the IPA offers the following recommendations based on this case:

- **Recommendation 5: PAPD should instruct its supervisors to recognize that any use of force analysis should include an assessment of the tactical appropriateness of the force option.**
- **Recommendation 6: PAPD should instruct its supervisors of the need to consider, investigate, and evaluate all uses of force that occur during an incident.**
- **Recommendation 7: PAPD should endeavor to assign a use of force investigation to a member of higher rank than the involved officer and should document the extenuating circumstances if staffing limitations preclude this.**
- **Recommendation 8: PAPD should ensure by written investigative protocols that medical records of any person that force is used upon are obtained and incorporated into the use of force report.**

#### Case # 2:

##### *Factual Overview:*

This incident began with a confrontation at a bar, and a subject who was intoxicated, behaving obnoxiously, and refusing to leave. At one point, he brandished a large knife from

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<sup>15</sup> PAPD management informed us that the officer in this case was not an emergency stand-but was instead assigned on a longer-term basis to the rank of acting supervisor, as a means of dealing with staffing issues.

within his backpack after making a verbal threat to bar security. When the first officer arrived within a minute or two of the call for service, witnesses pointed out the suspect, who at this point was outside the bar and on the move. The suspect ignored the officer's commands to stop, and a short foot pursuit ensued through a nearby restaurant and then the street.

The officer eventually used his Taser in an effort to stop the suspect's attempts to flee. The initial deployment was limited in its effectiveness and the pursuit continued. Then the officer used a second cartridge that incapacitated the subject and allowed an assisting officer to handcuff him without further incident.

At the hospital, the Department documented the suspect's injuries (which were minor, and primarily consisted of swelling from the Taser probes) and attempted to interview him about what had occurred, in keeping with its standard protocols. This was approximately an hour after the arrest. The suspect was combative with hospital staff to the point where they sedated him intravenously. Eventually, officers did take statements from the suspect, but they were interspersed with profanities and largely incoherent. The suspect's statements, other than establishing his condition/state of mind, were of limited usefulness in determining what had occurred.

#### *Outcomes and Analysis:*

The Department conducted a thorough investigation that consisted of detailed reports from responding officers, witness statements from the bar, physical evidence, and technical evidence from the Taser itself. Based on our review of that information, the IPA finds that the Taser deployment is consistent with Departmental policy.

Clearly, the suspect's initial actions in the bar, his belligerence, and the knife that he possessed warranted his apprehension. The use of the Taser was both a valid force option for the physical circumstances and a justifiable option under Department guidelines. This was true even though the suspect appeared to be fleeing as opposed to actively engaging, because the use of the Taser was warranted by the threat he was reasonably perceived to have posed to others in the crowded area.

Overall, the officer's report is uniquely comprehensive and persuasive in articulating his perceptions and decision-making. He shows a strong grasp of Department policy and the reasons behind it, and does a good job of explaining how and why he used the Taser as events unfolded. For example, he is careful to account for the continuing threat he perceived, even after he noted the suspect dropping or discarding the large knife that he had presumably brandished at the bar. The officer did not discount the possibility that the suspect possessed other weapons in his backpack – and that theory turned out to be correct as well as plausible. Two other knives, wrapped in a towel, were also tossed by the suspect during the pursuit.

The officer's account also explains the need for the second cartridge and the repeated cycling of the Taser. It primarily arose from the inadequate spread of the first set of probes. Importantly, when the Taser finally did work effectively to halt the suspect's progress and illicit his cooperation, he was handcuffed without further force.

This case appears to be a relatively straightforward example of an effective deployment that fit within the PAPD policy and training for Taser use. The IPA's primary question, which it raised with PAPD management, related to the interview of the suspect at the hospital. As a general rule, those statements have significant importance for both evidentiary and risk management purposes. In this case, the clarity and value of them was undermined significantly by the suspect's extreme intoxication and medical sedation.

As Department management noted, creating a record of the suspect's actual state of irrationality had significance of its own, and the IPA acknowledges the legitimacy of this point. Ideally, though, a supplemental interview with the suspect at a later time, when he had had some time to recover, might have been beneficial. It is a practice that the Department should consider as an option in subsequent force investigations.

In doing so, it must perhaps balance perfection against practicality, and the evidence in this case was already quite substantial. However, the IPA recommends that the Department at least consider the option in subsequent cases when the interview is compromised by the subject's medical condition, and critical facts are less clear.

- **Recommendation 9: PAPD should develop investigative protocols that instruct supervisors that if the person upon who force is used is apparently intoxicated and/or displaying outward signs of irrationality/emotionality when interviewed, the supervisors should attempt to re-interview the individual after some time has passed and the effect of intoxication or other factors has been mitigated.**

#### **IV. General Observations**

##### Use of Counseling to Provide Further Guidance to Officers

To its credit, even when PAPD finds no violations of policy by its members and accordingly no finding of discipline or recordation of any adverse action in the officer's personnel file, it often takes advantage of the opportunity to provide counseling. For example, it has taken the time to discuss with members issues such as the best use of officer discretion and various alternatives to handling a stop other than writing a citation such as issuing a written warning, sending the citation to the court as a complaint to be filed, or issuing a verbal warning.

IPA commends PAPD supervision for initiating these types of counseling sessions. The mere fact that a citation *can* be issued does not necessarily mean it *should* be issued; both the law and Department practice gives officers discretion about whether to cite, in recognition of the common sense and judgment that goes into effective law enforcement. These types of

interventions show a holistic and constructive attitude toward complaint assessment that the IPA endorses.

Letters to Complainants Do Not Convey Full Nature of Department’s Holistic Response.

Per Department policy and state law, upon completion of the investigation and disposition of a citizen complaint, PAPD prepares and forwards a letter notifying the complainant of its findings. In our review of these letters, they generally state only the ultimate disposition reached by the Department. Even in cases which resulted in a broader discussion with the officer about how his or her conduct might have been better, the complainant is not informed in the letter that such a holistic response was generated. In our view, providing this additional information would likely be of interest – and perhaps affirmation – to the complainant about the value of the process.

Concerns about confidentiality and officer privacy rights dictate the inclination of many agencies to take a minimalist approach to notification letters. Another concern is the workload involved in tailoring letters individually, rather than offering more standard and concise language. While these factors are understandable<sup>16</sup>, the Department generates relatively few complaints, and more can be said without encroaching on legal restrictions. In the IPA’s view, it would be both feasible and beneficial to use these letters as an opportunity to provide more satisfaction and information to complainants about the Department’s remedial actions.

- **Recommendation 10: PAPD should compose citizen letters that more fully explain to the complainant the Department’s investigative efforts and responses.**

Officers Are Afforded the Ability to Review Video and Audio Evidence of Relevant Events Potentially Contaminating Their Recall.

Current PAPD protocols allow that prior to involved officers being interviewed, they are able to review any mobile audio visual recordings from their patrol cars and any recordings made by their body cameras. Allowing an officer to review audio/video footage before being interviewed is likely to distort pure recall either consciously or subconsciously. Studies by experts in witness memory have repeatedly established that subjecting witnesses to external evidence can cause them to supplant or modify what they actually recall with what they see from the recorded evidence. As a result, allowing personnel to view a video or listen to audio prior to interviewing the involved officers eliminates the ability to obtain a pure unvarnished account of the event from them.

A “view and listen first” practice can also create the impression that the Department is attempting to influence the officers’ accounts so that they can be tailored to the audio and video

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<sup>16</sup> Indeed, PAPD has explained that it has deliberated on this issue and sincerely believes the limited approach is more advisable for a variety of reasons.

evidence that has already been gathered. Such an impression could reduce confidence in the Department's objectivity in addressing allegations of misconduct.

Finally, a "view and listen first" practice is not consistent with current investigative practices PAPD employs on a daily basis. For example, bank employee victims are not shown surveillance videos of a robbery prior to being interviewed.

IPA recommends that when PAPD is investigating the conduct of an officer, it should set out a written procedure whereby the investigator is to first interview the officer about his recollections, then provide the opportunity for the officer to view any audio or video of the incident, and afford the officer the opportunity to expand or modify his first response based on review of the recording. Under this practice, the Department is able to obtain a pure statement of the officer's recollection, yet provide the opportunity for the officer to use the recording to refresh his or her memory of the events at issue.

This is an issue that the IPA has previously raised with the Department, most recently in a report on cases from the first half of 2013. At that point, PAPD acknowledged the issue as one that generates debate and different approaches throughout law enforcement, and said that it was in communication with stakeholders such as the District Attorney's Office regarding possible modifications to its protocol.

PAPD does participate in a county-wide agreement not to allow "view first" interviewing or reporting in officer-involved shootings and other serious incidents in which the officer's conduct receives automatic formal review. Driven by the county District Attorney's Office, this is an important step. Nonetheless, the IPA believes that the same reasoning applies to any case in which the conduct of an officer is under review, and encourages the Department to look for ways to alter its practice and bring it in line more consistently with the District Attorney's guidance.<sup>17</sup>

- **Recommendation 11: PAPD should develop written protocols so that when an employee's conduct is under review, an interview of the employee occurs before the member is afforded an opportunity to review any recording of the incident.**

## V. Conclusion

Thank you for the continued opportunity to monitor PAPD on behalf of the community it serves. Please feel free to contact us at your convenience with questions or other feedback.

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<sup>17</sup> It should be noted that the Department has discussed the issue recently with the IPA. While its rationales for following a "view first" approach in more routine law enforcement reporting contexts (including citizen complaint cases) are not persuasive to us, they are sincere and shared by other law enforcement agencies.