

Independent Review of the BART Police Oversight Structure

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TABLE OF CONTENTS

I. Executive Summary	3
II. Introduction.....	6
A. Background.	6
B. Scope and Methodology.....	7
C. Acknowledgements	9
III. Findings and Recommendations.....	11
A. Clarifying Oversight’s Scope	11
B. Increasing OIPA’s Monitoring Responsibilities.....	12
C. Making the Complaint Process Available to All	14
D. Enhancing OIPA Investigations	14
E. Improving the Disposition Process of OIPA Investigations	18
F. Additional Risk Management Role for OIPA.	23
G. Developing a Mediation Program.....	24
H. Ensuring Prompt OIPA Notification of All Critical Incidents	25
I. Enhancing OIPA’s Footprint Regarding Use of Force.....	25
J. Mapping Out a Significant Role for the Auditor in BART PD’s Early Identification System	
26	
K. Increasing OIPA’s Role as Auditor	27
L. Expanding OIPA’s Role in Policy Development	28
M. Ensuring Integration of Oversight in BART PD’s Policies and Practices	29
N. Clarifying the Relationship Between OIPA and the BART Police Citizen Review Board....	30
O. Clarifying and Enhancing the Roles of the BART Police Citizen Review Board	31
P. Providing Increased Transparency Authority for BART Oversight	34
Q. Ensuring Periodic Review of BART Oversight.....	34

I. Executive Summary

Overview of the review: Chapter 3-01 of the BART oversight model (hereinafter the “Model”) provides as follows:

The Board of Directors, with input from the BART Police Citizen Review Board, Auditor, BART Police Associations, complainants and the public, will evaluate the BART Police citizen oversight structure after the first year of implementation to determine if the need exists to make changes and or otherwise make adjustments to the system to improve its continued performance. This evaluation shall in no way be intended to eliminate the BART Police citizen oversight structure.¹

This review and report were commissioned and conducted in furtherance of BART’s compliance with this provision of the Model; that is, to facilitate the Board of Directors’ evaluation of the oversight structure.

Our review began in January 2017. We interviewed the stakeholders whose input is expressly set out in the Model, but we conducted many additional interviews with a broad range of other significant parties. We ensured that the evaluation takes account of the original impetus for the establishment of the oversight system – the January 1, 2009, shooting of Oscar Grant by a BART Police Department (BART PD) officer – as well as the subsequent systemic reviews of policies and practices. Because oversight’s effectiveness depends heavily on the community’s trust, engagement, and support, we placed a high premium on community attitudes and concerns regarding the oversight system. We measured these factors in a variety of ways.

During our review, all individuals we met were generous with their time, accessibility, and candor. Representatives of the Board of Directors, the BART Police Citizen Review Board, and the BART PD were particularly helpful in providing both relevant documents and important insights regarding the issues discussed herein. The Office of the Independent Police Auditor (OIPA) was especially helpful in facilitating the mechanics of our work, and was continually available to provide documents and important perspective. To the degree that our findings and recommendations may help enhance the current civilian oversight system, it reflects the cooperation, assistance, and acumen provided by these stakeholders.

The oversight system: The BART PD oversight system, established in July 2010 following a process that involved community input, consists of the OIPA and the BART Police Citizen Review Board. According to the Model, OIPA (with a current staffing level of three) is to conduct investigations of complaints alleging serious officer misconduct, make recommendations on BART PD policies and practices, audit Internal Affairs (IA) investigations, conduct close monitoring of officer-involved shootings, conduct community outreach, issue

¹ The Oversight Model is available on the website of the Office of the Independent Police Auditor: <https://www.bart.gov/about/policeauditor> and attached to this report as Attachment A.

public reports on investigation outcomes and trends, and provide staffing and other resources to the BART Police Citizen Review Board.

The BART Police Citizen Review Board consists of 11 members. Each of the nine Directors selects one member, while one is appointed by the police associations, and one is “at-large.” According to the Model, the Review Board is to hold monthly public meetings, review OIPA’s investigations, review BART PD and OIPA recommendations regarding BART PD policies, make its own recommendations regarding BART PD policies, conduct community outreach, and issue reports on its activities. Its members are also authorized under the Model to participate in officer and executive hiring.

Overview of findings: We found that the Model devised in response to the tragic shooting of Oscar Grant created two oversight entities that have served a valuable purpose in establishing effective civilian oversight over an agency that had no such previous external influences. The fact that we offer numerous recommendations designed to strengthen and clarify the original Model should in no way diminish the work of those who have worked diligently to fulfill the overarching objectives of accountability, advancing progressive police practices, and fostering greater community trust in law enforcement. Instead, this Report seeks to fulfill a key part of the Model’s original vision: one that recognized that a constructive re-assessment of BART’s nascent oversight program should be built into the design.

From that starting point, we found several areas in which the Model could benefit from revision and reform. These include significant omissions in the Model relating to investigations and auditing authority, and the ambiguities in provisions relating to outreach, reporting, investigations, and policy recommendations.

The review features a total of fifty-three recommendations. They range in scope from broad issues of jurisdiction and structure to more particular or technical adjustments to specific provisions in the Model. Among the key categories that produced specific suggestions for reform are the following:

Recommendations to expand authority and related findings: We recommend expanding the oversight system’s authority in two areas:

- **Broader audit authority:** First, we recommend expanding the auditing authority to allow OIPA to review any operational aspect of BART PD – as opposed to merely reviewing IA’s operations.
- **Investigations absent a complaint:** Second, we recommend authorizing OIPA to conduct its own independent investigation or review into any use of force or potential act of misconduct without the need to await receipt of a qualifying citizen complaint.

Other recommendations and findings:

- **Independence** from each other’s roles and responsibilities should be reinforced through structural changes to OIPA and the BART Police Citizen Review Board for the sake of their respective and mutual effectiveness. OIPA’s obligations relating to staffing the

Review Board should be removed, the requirement of a Review Board performance evaluation of the IPA should be eliminated, and orientation and training for Review Board members should be enhanced to delineate roles and responsibilities.

- **Case Auditing** should be conducted in a more consistent and thorough manner that allows for not only pre-completion input into the IA investigation, but also the ability to influence dispositions and discipline prior to BART PD's final decision.
- A **Systemic Auditing** protocol should be developed and implemented. OIPA should analyze trends and patterns, and it should be involved in BART PD procedures relating to use-of-force reviews and early identification of officers who may require remedial interventions.
- **Investigations** should address a broader range of complaints; any person should be able to file a complaint; and written protocols should be developed regarding investigative techniques, procedures, and coordination with other BART components to ensure confidence in OIPA's investigations and to ensure that it receives all complaints coming in to BART.
- **Use of Force Review** should become an arena in which OIPA more regularly participates, including assessing individual incidents, and contributing to holistic discussions of tactics and training, and other potential elements of constructive feedback.
- **Policy, procedure, and practice recommendations** should constitute a regular and formalized element of OIPA's interactions with and influence on BART PD.
- **Public reporting** by OIPA should be enhanced, in the form of greater detail with regard to its case monitoring role of internal investigations initiated by BART PD. Similarly, OIPA should report on the increased activities proposed in this report.
- **Mediation** should continue to be studied for ways to make it more attractive to complainants and officers.
- **An oversight system evaluation** should be conducted periodically.

II. Introduction

A. Background.

BART PD: Established in 1969, BART PD is “comprised of 296 personnel, of which 206 are sworn peace officers,” according to BART PD’s website.² BART PD covers the entire BART system, which extends into four counties. The Chief of Police reports to the General Manager (GM), who is appointed by the Board of Directors.

Shooting of Oscar Grant and aftermath: On January 1, 2009, Oscar Grant was fatally shot by BART police officer Johannes Mehserle on the Fruitvale Station platform. On August 11, 2009, the law firm Meyers Nave issued a report regarding policies and practices “relevant to the” Oscar Grant shooting.³

From June 2009 to September 2009, the National Organization of Black Law Enforcement Executives (NOBLE) conducted a review of BART PD’s policies and practices, and it issued a report on January 1, 2010, which identified areas for improvement in a number of areas of BART PD’s operations.⁴ A follow-up audit was conducted in 2013, and BART PD continues to report on its ongoing efforts to implement the recommended reforms.

In June 2010, Mehserle was convicted of involuntary manslaughter and acquitted of murder and voluntary manslaughter charges.

BART Public Safety Accountability Act: In September 2009 – immediately following the Meyers Nave report and before the completion of the NOBLE report – a bill was proposed in the state legislature to create an independent oversight system for BART PD. In July of 2010, the BART Public Safety Accountability Act was enacted. It directed the BART Board of Directors to “establish an office of independent police auditor, reporting directly to the board, to investigate complaints against district police personnel” and assigned the following “powers and duties” to the appointed auditor⁵:

- (1) To investigate those complaints or allegations of on-duty misconduct and off-duty unlawful activity by district police personnel, within the independent police auditor’s purview as it is set by the board.

² “History of the BART Police Department,” <http://m.bart.gov/about/police/employment>.

³ Meyers Nave, “Review of BART PD Policies, Practices and Procedures Re: New Year’s Day 2009,” 1 (Aug. 2009), available at https://www.bart.gov/sites/default/files/docs/Meyers_Nave_Public_Report.pdf.

⁴ NOBLE, “BART Management Audit,” (Jan. 2010) [NOBLE Audit (2010)], available at https://www.bart.gov/sites/default/files/docs/NOBLE_Final_Report.pdf.

⁵ CA Pub. Util. Code § 28767.8(a) (2016).

- (2) To reach independent findings as to the validity of each complaint.
- (3) To recommend appropriate disciplinary action against district police personnel for those complaints determined to be sustained.⁶

The Act also authorized the Board to create “a citizen review board to participate in recommending appropriate disciplinary action.”⁷

Oversight Model: Pursuant to the legislation, the BART Board of Directors formed a committee to study what type of oversight should be established. There were numerous public hearings with robust input from members of the community. The Model eventually promulgated called for an independent police auditor, as well as a citizen review board. Responsibilities of the oversight system – detailed in this report – included: investigations of complaints alleging serious officer misconduct, recommendations on BART PD policies and practices, auditing of Internal Affairs investigations, close monitoring of officer-involved shootings, community outreach, and issuing public reports on investigation outcomes and trends.

OIPA: The OIPA is appointed by and reports directly to the Board of Directors. OIPA consists of three staff, including the Independent Police Auditor (IPA), an investigator, and an administrative support person.

BART Police Citizen Review Board: The Review Board consists of 11 members, including nine members appointed by the respective Directors, a member appointed by the police associations, and an at-large member selected through a formal application process.

B. Scope and Methodology

Scope: Chapter 3-01 of the Oversight Model provides as follows:

The Board of Directors, with input from the BART Police Citizen Review Board, Auditor, BART Police Associations, complainants and the public, will evaluate the BART Police citizen oversight structure after the first year of implementation to determine if the need exists to make changes and or otherwise make adjustments to the system to improve its continued performance. This evaluation shall in no way be intended to eliminate the BART Police citizen oversight structure.

Even though the Model calls for an evaluation after one year of implementation, no assessment has ever been conducted since the inception of BART’s civilian oversight. While this lapse was unfortunate, it is a testament to OIPA and the Board of Directors that this independent review has now been commissioned.

We sought to answer two basic sets of questions:

⁶ CA Pub. Util. Code § 28767.8(b)(1)-(3) (2016).

⁷ CA Pub. Util. Code § 28767.8(c) (2016).

- Does the oversight structure perform as contemplated in the language of the Model? If not, what ambiguities or omissions in the Model’s language may impact optimum performance?
- Could the oversight structure be improved or enhanced to further the oversight system’s goals, as articulated in best practices and understood by the communities it serves?

Overview of methodology: To these ends, we evaluated:

- The language of the Model for ambiguity or weaknesses.
- Whether practice could benefit by providing clearer authority, expansion of duties, and reconsideration of priorities.
- The perceptions and concerns of communities BART serves and BART system stakeholders, as well as national best practices, to gauge what changes would help to instill additional trust in the oversight structure and aid in serving its goals.

Interviews: Our review began in January 2017 and entailed more than 50 interviews with nearly four dozen stakeholders. These included OIPA staff; BART Police Citizen Review Board members; seven BART directors; local oversight professionals; local advocacy groups, including the local ACLU affiliate and the Coalition on Homelessness; police associations; IA officers; and BART PD command staff.

Community interest and concerns: Just as it was essential that we speak with police officials and representatives, community feedback – particularly input from impacted communities, including communities of color – was of critical importance in our review. This is because the effectiveness of civilian oversight depends heavily on the community’s trust in its independence, authority, and capacity.

Community members – especially those who have perceived or borne the brunt of systemic unfairness and an adversarial relationship with law enforcement – are much more likely to provide information and insight to an oversight entity that they consider fair, meaningful, and empowered. Those contributions from the community can, in turn, strengthen the legitimacy and the effectiveness of the oversight entity. And this dynamic can ultimately increase community trust in the police department, as well – the public is reassured by the sense of accountability and gives credence to the positive acknowledgements of progress that the oversight entity can provide. Accordingly, our recommendations draw heavily on what we learned from and about the communities served by BART.

We assessed community interest through interviews with individual residents as well as political leaders, leaders of community and advocacy groups, and leaders of other Bay Area oversight agencies who could speak to broader community sentiment. We also gauged community interest and concerns through other Bay Area initiatives on oversight, as well as input provided during the original 2009 process.

Finally, we sought to account for any countervailing concerns, with an eye toward maximizing the understanding and acceptance of all key stakeholders, including those subject to oversight and those with contrasting viewpoints on how it should function.

BART Police Citizen Review Board sessions and documentation: We attended three Review Board sessions and requested and reviewed additional documentation, including:

- The Model and earlier drafts of the Model
- Review Board bylaws
- Complaints and OIPA investigation reports
- Notifications provided to officers and complainants
- OIPA monitoring reports regarding IA investigations
- OIPA and Review Board reports
- Review Board agendas and minutes
- OIPA and Review Board policy recommendations
- IPA and Review Board member selection materials
- The 2010 NOBLE report, the follow-up 2013 audit, and the 2009 Meyers Nave report
- Outreach materials
- Public information regarding the process for developing the oversight Model, community members' observations of the oversight system, and serious incidents involving BART PD officers

Best practices and standards: In addition to drawing from our own experience and exposure to various oversight models and practices, we consulted best practices and standards from a variety of sources, including the National Association for the Civilian Oversight of Law Enforcement (NACOLE) reports and reports by other professional organizations; scholarly literature on oversight; the NACOLE code of ethics (cited in the Model); the Core Principles for an Effective Police Auditor's Office (cited in the Model); U.S. Department of Justice, Civil Rights Division investigations and consent decrees⁸ and COPS Collaborative Reform Initiative reports⁹; and the Final Report of the President's Task Force on 21st Century Policing (May 2015).¹⁰

C. Acknowledgements

We received enormous support throughout the review process from a range of stakeholders and are grateful to each person who took the time to sit down with us for an interview. We were able to interview most members of the Board of Directors, who expressed strong interest in the review. Some helpfully directed us to other stakeholders. BART PD's executive staff, Internal

⁸ The U.S. Department of Justice publishes its findings letters and settlement agreements on its website: <https://www.justice.gov/crt/special-litigation-section-cases-and-matters0>.

⁹ The U.S. Department of Justice catalogues its COPS assessment reports: <https://cops.usdoj.gov/collaborativereform>.

¹⁰ Final Report of the President's Task Force on 21st Century Policing (May 2015), available at https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

Affairs investigators, and the police associations, as well as the OIPA staff were open and candid and provided invaluable insights.

The current IPA enlisted this review, provided a comprehensive list of potential interviewees, contacted many of them to help schedule interviews, and was readily available for ongoing questions. The IPA provided critical OIPA documents and spent many hours sharing his understanding of and views on the system with us. We applaud his energy and interest and note that this review likely would not have happened but for his proactivity and creativity. The IPA's embracing of this peer review process, and full cooperation with it, is testament to an admirable growth mindset.

Finally, we are grateful to the family of Oscar Grant, who remain constructively engaged in the subjects of oversight and accountability, and who took the time in that spirit to share their experience and suggestions with us.

III. Findings and Recommendations

BART's current oversight model has many admirable features and has served its transit community well for almost six years. The Model provides OIPA with access to the most sensitive of Police Department records and gives it the ability to conduct independent investigations, audit internal investigations conducted by BART PD, and make policy recommendations. Moreover, the Model provides the BART Police Citizen Review Board with an opportunity to meaningfully weigh in on complaint investigations and recommend disciplinary outcomes, an authority that very few community-based oversight entities possess.

However, the Model has ambiguities and places unnecessary limits on oversight authority. This is due in large part to requiring the existence of a complaint before authority can be exercised. In addition, the Model saddles OIPA with administrative functions for the BART Police Citizen Review Board, blurring the lines between oversight entities with complementary yet distinct and independent roles. The recommendations set out below – which flow from an evaluation process expressly contemplated by the original model – are intended to provide clarity regarding both OIPA and the BART Police Citizen Review Board's authority. The recommendations suggest a course that could result in more impactful oversight for the benefit of the community and BART PD alike.

A. Clarifying Oversight's Scope

The Model Should Make Explicit that OIPA's Oversight Scope Includes All Employees of BART PD and Any Potential Violations of Policy.

Currently the Model states that OIPA has the authority to exercise its oversight duties with regard to “any and all law enforcement activities or personnel operating under the authority of” BART. We have been informed that this passage has been interpreted to include non-sworn members of BART. However, for purposes of clarity, the Model should indicate that all employees of BART are within OIPA's oversight authority.

Many of the non-sworn employees of a police agency have considerable interaction with the public and are indirectly imbued with the authority of the law enforcement entity for which they work. Accordingly, those employees often have significant influence on whether the public is appropriately served by the agency. For that reason, all police department employees should be subject to civilian oversight's ambit.

Moreover, at least as to sworn officers, the Model should make clear that any potential violations of policy should fall within the ambit of OIPA. Law and practice has also recognized that there is a clear nexus between off-duty conduct and on duty responsibilities for sworn officers. For that reason, it has been long held that police officers can be held accountable for off-duty misconduct inconsistent with their duties and responsibility to uphold the law. For example, officers who are found to have engaged in domestic violence or impaired driving can be independently sanctioned for that conduct by their employing agencies. In order to ensure accountability for these actions, progressive oversight entities have recognized that they must

similarly be able to exercise oversight over off-duty officer conduct. The Model for OIPA must ensure that such oversight authority exists over BART PD.

Recommendation One: The Model should be revised to make clear that the scope of OIPA’s authority extends to non-sworn employees of BART PD and to all potential misconduct involving sworn officers whether on or off duty.

B. Increasing OIPA’s Monitoring Responsibilities

OIPA Should Consider Revising Its Approach Towards Monitoring Internal Affairs Investigations Conducted by BART PD Toward Real-Time Monitoring and More Transparency.

Pursuant to the Model, OIPA has the authority to audit internal affairs investigations conducted by BART PD to determine if the investigations are “complete, thorough, objective and fair.” OIPA also has the ability to “require” follow-up investigation into any citizen complaint or allegation that is handled by BART PD.

OIPA has, in the past, exercised this authority provided by the Model when it determined that a BART PD investigation did not meet investigative standards. However, we are aware of a recent instance when there was resistance by BART PD after the Auditor identified an incomplete and substandard investigation and sought follow-up investigative work. BART PD should be reminded of the non-discretionary language in the Model requiring it to conduct follow-up investigation when requested by OIPA. To ensure an effective remedy should there be any BART PD compliance issues, the Auditor should be able to present any significant lapse to the attention of the General Manager, the Board of Directors, and the BART Police Citizen Review Board and set out the incident in its public reporting.

The Model provides the opportunity for OIPA to engage with BART PD as it proceeds with its internal investigative process. That ability has been enhanced by OIPA’s direct access to IA’s investigative database. We have been informed that OIPA regularly uses its database access to audit investigations being conducted by BART PD and has provided input and suggestions such as identifying additional witnesses to interview. OIPA also provides feedback on completed investigations to BART PD.¹¹

However, to the degree that OIPA provides such auditing of the Department’s internal affairs investigations, most of the feedback occurs after the case has been completed and a disposition has already been rendered. At that point, any post hoc input from OIPA has a potentially limited impact on disposition decisions made by the Police Department since the disposition has already been determined and subject officers and complainants notified about that decision.

Another approach to auditing of BART PD cases that appears to be workable within the current Model would be for OIPA to deploy “real-time” monitoring of cases. Under that paradigm,

¹¹ To the degree there remains any uncertainty, OIPA should be provided the authority to monitor any internal investigations conducted by BART PD, including internally generated investigations.

OIPA would audit active Internal Affairs investigations, serve as a resource during the pendency of the investigations, and, upon their completion, would review each case for completeness and objectivity. OIPA would then provide any feedback to Internal Affairs, suggesting any additional investigation prior to the case being completed. Similarly, prior to BART decision-makers' determination as to whether the evidence indicates a violation of policy, OIPA would offer independent recommendations on investigative outcomes. Finally, on founded cases, OIPA would present its recommendations with regard to the appropriate level of discipline. While BART PD would have ultimate authority regarding each of these internal decisions, OIPA's real time involvement in these decisions would likely make its input more impactful than the "after the fact" interaction currently deployed.¹²

In addition to providing quality assurance in real time for thorough investigations and evidence-based determinations on outcomes, OIPA could and should weigh in on other important investigative decisions. Sometimes, allegations of misconduct implicate potential crimes. The decision whether to forward such allegations to the District Attorney is one in which OIPA should participate. Additionally, under this approach, OIPA could play a helpful role in the proper scoping of investigations.

As importantly, OIPA should document and report on its auditing function. Currently, there is no detailed report of OIPA's auditing of BART PD cases, and the data reported regarding discipline and the outcomes by investigating agency (i.e., OIPA versus IA) is unclear. If OIPA decides to transition its current auditing function into real-time monitoring, it should significantly enhance its reporting of this function to the BART Police Citizen Review Board, the Board of Directors, and the public. OIPA should set out a narrative of each case audited, whether it found the investigation adequate, any input made by OIPA regarding improving the investigations, the disposition, and, in founded cases, the discipline imposed. OIPA should also report on the degree to which it concurred or disagreed with BART PD's case determinations. This increased level of transparency would provide stakeholders an important window into the Police Department's accountability system and an independent assessment of its vibrancy.¹³

Recommendation Two: OIPA should consider modifying its monitoring function of BART PD internal affairs investigations to "real-time" monitoring, offering recommendations on the strength of investigations and appropriateness of dispositions prior to BART PD completing the process.

¹² We have been informed that, to the credit of the former Chief, occasionally OIPA had been asked in real time to provide input regarding investigative or disposition determinations by BART PD. Our recommendation is for a more comprehensive expansion of this encouraging dynamic.

¹³ We leave to OIPA to determine based on its resources what portion of BART PD's internal investigations it could monitor in real time. One potential "bright line" suggestion would be to monitor all internal investigations conducted by the Department's Internal Affairs unit.

Recommendation Three: Should OIPA move to real-time monitoring, it should be involved in decisions regarding whether a matter should be forwarded to the District Attorney for criminal review, and the appropriate scoping of an investigation.

Recommendation Four: OIPA should make its reported data on investigations and recommended discipline clearer and should publicly report its involvement and auditing functions in detail, setting out its assessment of the quality of each investigation and the appropriateness of each disposition and disciplinary determination. The Model should be modified to provide OIPA the express authority to report any resistance by BART PD to conduct additional investigation to the attention of the Board of Directors, the General Manager, the BART Police Citizen Review Board, and the public.

C. Making the Complaint Process Available to All

The Model Should Be Revised to Allow Any Person to File a Complaint with OIPA or the BART Police Citizen Review Board Against Any BART Employee.

Currently, the Model provides for a very limited universe of persons who may file a complaint with OIPA or the BART Police Citizen Review Board. Only “victims of on-duty police misconduct, a victim’s parent or guardian or a witness to misconduct” are permitted to file complaints against “a BART police officer.” The Model’s limitation on who qualifies as a complainant has led to circumstances in which OIPA has been handcuffed in its ability to investigate concerning incidents.

In one recent case, a widow of a person who died in custody did not qualify as a “complainant” under the Model’s definition. And in another case, a concerning use of force incident that occurred on a train platform, was captured on video, was uploaded on You Tube, and received thousands of views but did not qualify for OIPA purview because a qualified complainant did not file with the Auditor.

There is no rational justification for denying access to any individual who desires to file a complaint with BART’s oversight entities. In fact, progressive oversight entities even allow receipt of anonymous complaints. In addition, for the reasons discussed above, OIPA should have clear authority to investigate complaints against any BART PD employee, not just police officers.

Recommendation Five: The Model should be revised to provide any persons the ability to file a complaint with OIPA and/or the BART Police Citizen Review Board against any BART PD employee.

D. Enhancing OIPA Investigations

The Model Should Be Revised to Provide OIPA the Discretion to Investigate Any Complaint Received.

Currently, the Model provides OIPA the authority to investigate “all complaints of allegations of police officer misconduct regarding unnecessary or excessive use of police force, racial profiling, sexual orientation bias, sexual harassment, and the use of deadly force, suspicious and wrongful

deaths.” It is inconsistent with progressive oversight practices to limit OIPA’s investigative authority to these categories. Instead of setting out what OIPA “can do,” the Model should provide OIPA the discretion and authority to investigate any complaint received.

Recommendation Six: The Model should be revised to provide OIPA the ability to investigate any allegation of misconduct that implicates the policies of BART PD.¹⁴

OIPA and BART PD Should Consider New Investigative Models Designed to Create Efficiencies and Avoid Duplicative Investigations.

Currently, when OIPA determines to investigate a complaint and proceeds with its investigation, BART PD conducts its own investigation into the same allegations. This paradigm results in two investigations of the same allegation with the same purpose – to determine whether the facts indicate a violation of BART PD policies. In addition to the inefficiencies of having two investigations being conducted for the same purpose, such an investigative scheme has the potential of requiring the complainant, witnesses, and involved officers to be interviewed twice, with any inconsistencies being used to undermine the investigation if a disciplinary determination is challenged. Moreover, the existence of two investigations with separate review criteria could lead to disparate results based on the same set of facts.

For these reasons, we recommend that OIPA and BART PD examine the possibility of developing an investigative paradigm whereby the Auditor has initial review authority on complaint allegations made to his Office. In those cases, the Auditor should determine whether to investigate the case or refer all or some of the allegations to BART PD for investigation. Any allegations referred to BART PD should be monitored by OIPA. BART PD should defer any investigation of allegations assumed by OIPA. Such a paradigm would eliminate the inefficiencies of two investigations undertaken for the same purpose and the potential negative consequences discussed above.

Recommendation Seven: OIPA and BART PD should develop an investigative paradigm whereby OIPA would determine whether to investigate any complaint allegations received initially by the Office and BART PD would defer investigating allegations that the Auditor opted to investigate.

OIPA Should Develop an Investigative Handbook.

Too frequently, investigative authority is provided to entities with little guidance or direction on how to exercise that authority. This has proven true in our experience regarding police agencies and their internal review processes, and oversight agencies are often susceptible to the same

¹⁴ To the degree that our recommendations provide clear authority for OIPA to investigate allegations of misconduct, it may become necessary for the Auditor and BART PD to work out protocols regarding which entity investigates which allegations. One “bright line” rule that may work is for the entity that initially receives the allegation to take the investigative lead. We are confident, however, that OIPA and the Police Department will be able to work out these jurisdictional questions.

omissions. OIPA apparently falls within this paradigm. While, to its credit, OIPA did create investigative templates and standard formatting for its investigations, principles of investigation were not set out in any handbook or manual. Such a handbook is particularly important for internal investigations of police officers, given the unique substantive elements and the distinctive framework of statutory requirements set forth in California’s “Police Officer’s Bill of Rights.”

An investigative handbook that codified basic principles would help ensure that OIPA investigations were conducted consistent with best internal investigative practices.¹⁵ Moreover, the development of an investigative handbook should not create a substantial resource burden. Our experience suggests that, while the handbook should be tailored to OIPA’s oversight responsibilities for BART PD, universal investigative principles that already exist in handbooks of other agencies could be easily incorporated into an OIPA version.

Recommendation Eight: OIPA should develop a handbook to provide guidance and expectations for its internal investigations.

OIPA Should Develop Internal Guidelines Regarding Investigative Timelines for Completion of an Investigation.

Under California law, in order for discipline to be imposed, a subject police officer generally must be informed of the agency’s intent to discipline within a year of agency knowledge of the investigation. For that reason, with some exceptions, internal investigations of police officers need to be completed within a year of their initiation. While police agencies and oversight entities imbued with investigative authority recognize this statutory requirement, many recognize the interest in completing investigations well before the one-year deadline. There are several reasons for this.

First, if an investigation languishes unnecessarily, the complainant and subject officer will not receive timely notice of the result. More importantly, because most discipline is intended to be remedial, a delayed investigation will result in the remediation also being delayed. Nor does the quality of evidence tend to improve with age; on the contrary, memories fade and a delayed investigation can undermine the gathering of accurate and complete recollections. Finally, collateral issues such as consideration for promotion or special assignment can be unnecessarily delayed for the subject officer during the pendency of unresolved investigations.

Fortunately, OIPA has established a history of being timely in completing its investigations, in part because of its relatively small caseload. However, because the recommendations set out in

¹⁵ While a qualitative review of OIPA’s internal investigations was not the focus of our inquiry, we learned of one investigative technique that was concerning, namely the frequent use of telephone interviews by OIPA. Investigative principles strongly favor in-person interviews because of the natural limitations that exist if an interview is conducted over the telephone.

this report envision a larger caseload for OIPA, it is important to establish formal protocols for maintaining timeliness.¹⁶

Recommendation Nine: OIPA should set out investigative timelines in its internal protocols that not only meet the statutory requirements but also reflect a commitment to prompt and efficient resolution of cases.

The Model Should Be Amended so that OIPA’s Disciplinary Determinations Correspond to Those Utilized by BART PD.

Currently, the Model states that OIPA is to recommend that the matter be “dismissed” at the conclusion of an OIPA investigation in which the allegations are not supported by the evidence. Such a finding is not a generally accepted outcome for internal investigations in California. Rather, police agencies provide a menu of disposition options; for BART PD they are sustained, not sustained, exonerated or unfounded.

We have been informed that, in practice, OIPA makes findings after its investigation consistent with the four options available to BART PD. However, in order for the Model to conform to current practice, the language should be revised accordingly.

Recommendation Ten: The Model should be clarified to reflect that upon the conclusion of an OIPA investigation, OIPA should recommend a finding of sustained, not sustained, exonerated, or unfounded.

OIPA Should Revise its Closing Letters to Provide the Complainant as Much Information as Legally Permissible.

At the conclusion of an internal investigation, OIPA prepares a closing letter informing the complainant of the results. Consistent with many closing letters we have reviewed, OIPA’s closing letters are brief and provide little detail about the underlying investigation. Instead, the notification letter simply reports the outcome without explaining the basis for the decision or the nature of the investigative process. Complainants whose allegation is not proven (i.e., exonerated, unfounded, or not sustained) are left wondering about the thoroughness of the investigation and the legitimacy of the result.

California law provides restrictions on the type of information that can be provided to a complainant. Those restrictions, for example, have been interpreted to bar the agency from providing precise information about the disciplinary action taken. However, there is room under the law to give complainants more insight into the process. There is no prohibition, for example, on providing the number of witnesses interviewed, or whether video or audio evidence existed and was reviewed. By sharing this information, and otherwise tailoring the notification to the unique circumstances of the case, OIPA could move away from the type of “form letter” response that can exacerbate disappointment and undermine trust in the process. Accordingly,

¹⁶ We iterate that the ability to successfully keep to any internal timelines will be dependent on a sufficient allocation of resources to OIPA.

OIPA should craft closing letters that offer insights into the process and the means by which the result was reached.

Recommendation Eleven: OIPA should tailor its closing letters to each individual case and provide the complainant additional information about the investigative steps taken to reach its conclusion.

At the End of an Investigation, OIPA Should Consider Offering the Complainant the Opportunity to View Video Evidence.

Because of the adoption of body-worn cameras and the other video surveillance available at BART stations, there is a significant likelihood that the conduct complained about may be captured by video evidence. Video evidence can be significantly dispositive of allegations made against police officers. In cases in which video evidence exists and has contributed to the decision not to sustain an allegation, it is recommended that OIPA offer the complainant the opportunity to view the video, particularly when the complainant is the alleged victim of the misconduct.¹⁷

Recommendation Twelve: When a concluded investigation does not result in a sustained finding, OIPA should offer the complainant the opportunity to view any video account of the incident.

E. Improving the Disposition Process of OIPA Investigations

The Model Should Be Revised so that More Transparency is Provided Regarding the BART Police Citizen Review Board's Determination on Case Outcomes.

Currently the Model requires the Auditor to submit his findings to the BART Police Citizen Review Board for consideration. Under current practice, the Review Board considers the Auditor's recommendations and votes in closed session regarding whether to agree or disagree with those recommendations. The Model is silent about how that vote is reported. Current practice is to report out the results of any vote and the vote count when not unanimous, but the way in which individual Board members voted is not discernable.

While the case deliberation must remain private in accord with state law, there is no legal prohibition on publicizing how each Review Board member voted. Moreover, when there is a dissent, a rationale for the opposing votes should be crafted that could be made public. Accordingly, and consistent with enhanced transparency, the Model should be revised to stipulate that such information will be made public in the interest of providing further insight into the process and outcomes.

¹⁷ Competing privacy interests may prevail in cases in which the complainant is not the person being captured on video and in those situations OIPA should use its discretion on whether to offer to show the video evidence.

There may be occasions where OIPA may be interested in presenting monitored BART PD cases to the BART Police Citizen Review Board in order to receive input and feedback. Modifying the Model to provide the Auditor flexibility and discretion to do so is consistent with the document's overarching interest in gaining meaningful feedback and input from the community-based oversight entity.

Recommendation Thirteen: The Model should be revised to instruct that the BART Police Citizen Review Board's vote tally by member on the Auditor's case recommendations and findings should be made public. In cases in which a non-unanimous majority agrees with the Auditor's case recommendations and findings, the dissenters should set out their rationale for diverging from the majority's determination.

Recommendation Fourteen: The Model should be revised to provide the Auditor the discretion to present BART PD internal investigations to the BART Police Citizen Review Board in order to receive input and feedback.

The Model Should Be Revised to Provide More Clarity Regarding Process When BART's Chief Disagrees with OIPA/BART Police Citizen Review Board's Recommendation.

Currently the Model states that, should the BART Chief of Police disagree with the findings and recommendations of the Auditor and the BART Police Citizen Review Board, the Chief has the ability to appeal the determination to the General Manager in a confidential personnel meeting. The Model further states that the General Manager shall then make a decision and convey his/her decision to the Chief, Auditor, and the BART Police Citizen Review Board. The Model then instructs the Chief to implement the General Manager's decision.

We have been informed that this process has been used at least twice in the six-year existence of BART's oversight system. Based on recollection, we learned that in both cases, the Chief communicated with the General Manager's Office, pursuant to the Model, and the General Manager decided to accept the Chief's recommendations.

As implemented and as the current Model suggests, the appeal process has to date amounted to an ex parte meeting between the Chief and the General Manager. In that process, the General Manager only apparently heard the arguments put forth by the Chief; neither the Auditor nor the BART Police Citizen Review Board had an opportunity to be heard or to rebut the Chief's arguments. Moreover, because there was no public accounting of this process, there was no record of the Chief's reason for disagreement or the rationale for the General Manager accepting the Chief's view over those of the oversight entities.

In common law jurisprudence, most "appeal" processes consist of a forum where the appealing party submits arguments in writing, all other parties submit papers in response to the moving party and all parties can be heard in a meeting. Moreover, the decision-maker generally affords each party the opportunity to respond to any arguments put forward by the "appealing" party at the meeting. However, under the current plain language of the Model and apparent practice, the Chief of Police has the apparent ability to present his arguments to the General Manager without any opportunity for the Auditor or the BART Police Citizen Review Board to be heard.

The Model should be revised to explicitly provide for an opportunity for the Auditor and a representative (e.g., the chair) of the BART Police Citizen Review Board to have seats at the General Manager's meeting with the Chief in order to be able to listen to the Chief's arguments and to respond to them accordingly.¹⁸ Such a process will provide the General Manager the opportunity to hear from all impacted parties and be able to make a better-informed determination based on input from each of them. The Model should also be revised to require the Auditor to publicly report on the outcome of any such appeals consistent with state law.

Recommendation Fifteen: The Model should be changed to require the Chief to timely put forward the reasons and arguments for appeal in writing and provide the Auditor and the Chair of the BART Police Citizen Review Board the opportunity to respond in writing, to be present at any appeal meeting, and to respond to any additional arguments set forth by the Chief at the appeal meeting. The Model should be further revised to require the General Manager to set out her/his findings in writing.

Recommendation Sixteen: The Model should be changed to require the Auditor to publicly report the results of any such appeal meeting consistent with state law confidentiality requirements.

The Model Should Be Revised so that the Chief of Police Does Not Determine Disputes Between the Auditor and the BART Police Citizen Review Board on Case Outcomes.

Currently the Model states that in cases in which the BART Police Citizen Review Board disagrees with the Auditor and fail to come to a consensus, the Review Board and the Auditor are to appeal the disagreement to the Chief of Police for a determination. Under the current model, the Chief then listens to both parties and determines whether to accept either the Review Board or the Auditor's findings.

Under the current language of the Model, the potential exists for an untenable situation in which the head of the agency subject to oversight is empowered to be the initial decision-maker when the two oversight entities disagree on outcome.¹⁹ A more appropriate dispute resolution process would be for the General Manager to convene a meeting with the Auditor, the Chair of the BART Police Citizen Review Board, and the Chief of Police. During that meeting, the General Manager would hear the opposing positions of the oversight entities and render a disposition determination accordingly.

Recommendation Seventeen: The Model should be changed so that when the BART Police oversight entities disagree on a case disposition, the General Manager will convene a meeting and, after receiving input from the oversight entities and the Chief of Police, render a disposition determination.

¹⁸ Moreover, in order for the envisioned process to effectively work, the Chief must timely present any appeal to the General Manager.

¹⁹ We have been informed that, to date, this provision has not been applied in an actual case. While this is fortunate, the potential for such a circumstance obviously continues to exist.

The Model Should Be Modified to Allow Complainants to Appeal to OIPA Any BART PD Internal Affairs Findings.

Currently the Model provides complainants the right to appeal to OIPA the findings of an internal investigation conducted by BART PD regarding “on-duty incidents.” There is scant rationale for so limiting appellate rights of complainants.

Recommendation Eighteen: The Model should be revised to provide complainants the right to appeal to OIPA the findings of any internal affairs investigation conducted by BART PD.

Complainants Should Be Informed as a Matter of Course of Their Right to Appeal BART PD Internal Affairs Findings to OIPA.

We have been informed that the right to appeal BART PD IA findings to OIPA has been used by complainants only infrequently. One explanation for this may be complainants’ unawareness of this option. Pursuant to state law, when BART PD closes an internal affairs investigation, it informs the complainant of that event by letter. The closing letter could be used as an efficacious way to make complainants aware of their right to appeal the findings to OIPA.

Recommendation Nineteen: BART and OIPA should work with BART PD to ensure that the Police Department’s required notification letter to the complainant regarding case outcome also informs the complainant of his/her right to appeal the finding to OIPA.

Recommendation Twenty: OIPA should regularly report on the number of appeals received and the results of those appeals.

The Model Should Be Revised to Protect all Disposition and Disciplinary Decisions from Unprincipled Changes at the End of the Process.

Currently, the Model simply states that any discipline recommended shall be subjected to an administrative hearing prior implementation to address the “due process” rights of public employees. However, the Model does not articulate a role for either oversight entity in the post-disciplinary processes that currently exist.

Prior to the actual imposition of discipline, BART employees have the ability to argue that any decision is not supported by the evidence or is inappropriate or otherwise unfair. Currently, the Chief of Police has the ability to modify the initial determination and rescind charges or discipline as he sees fit. As a result, the potential exists for initial disciplinary findings by the oversight entities to be entirely undone by the Chief with neither notice nor opportunity for input from them. The Model’s silence on oversight’s role in post-disciplinary appellate processes creates a huge hole in the process that must be filled in order to ensure the effectiveness of oversight.

One easily implemented remedy would be to add a provision to the Model requiring the Chief to consult with the Auditor prior to modifying any disposition or discipline decision. If the employee has raised principled reasons during the post-discipline process for a modification, the Auditor should obviously be open to the Chief’s proposed amendments. Conversely, the Auditor should have the opportunity to resist changes in outcome that do not seem to have a reasonable

basis. If the proposed change is sufficiently significant in its impact on accountability, the Auditor should request a meeting with the General Manager prior to the change being effectuated. The Model should also require the Auditor to report on any post-disciplinary changes in disposition and discipline and whether he agreed with the modifications.²⁰

After a disciplinary determination has been made, BART PD employees have the ability to appeal to an arbitrator. BART is required in this forum to establish the policy violation and discipline, and any determination by the arbitrator is binding on the parties. Again, our experience with other jurisdictions is that prior or during these proceedings, the Chief and entity may be approached by representatives of the employee with an offer to settle the case. The settlement offer is usually an agreement by the employee to drop the appeal in exchange for a lessening or removal of the disciplinary determination. Without the oversight entity's input in these settlement offers, the potential exists for a settlement that undermines accountability.

Again, an easy remedy exists. The Model should require input from the Auditor before any settlement agreement is struck between BART and the appealing employee. Should the Auditor determine that the settlement offer was unreasonable and undermined accountability, the Auditor should be able to convene a meeting with the General Manager for a final determination regarding the settlement offer. Finally, the Model should require the Auditor to report on any disciplinary determinations that are settled, whether he was consulted, and whether he agreed with the decision to settle the case.

The arbitration process itself is beyond the authority of OIPA but nonetheless warrants attention as an important influence on its work. Arbitration hearings test the strength of internal investigations and disposition determinations and can uncover potential weaknesses in those processes. In addition, an arbitrator has the authority to rescind even termination cases and order the agency to return the police officer to work – a power that is worthy of public awareness and scrutiny.

During our review, we were informed of at least one instance in which a BART police officer was returned to work after being initially terminated by the Department for a serious violation. However, because the Model sets out no role for its oversight entity in these processes, the Auditor did not review or assess the reason for the decision to return this terminated employee to BART employ. As importantly, the Model did not contemplate a public accounting of this decision as part of the Auditor's transparency responsibilities. This should be addressed.

Recommendation Twenty-One: The Model should be revised to require the Chief of Police to consult with the Auditor prior to modifying any initial disposition or disciplinary determinations. The Model should provide the Auditor an appeal process to the General Manager should he believe that any modification would result in a serious erosion of

²⁰ We were informed of one case in which a BART police officer originally received notice that he was to be terminated for a serious infraction that was investigated by the Police Department. However, that decision was reversed during the grievance process and the employee was returned to work. The appropriateness of this decision notwithstanding, this is the type of case that OIPA should be reporting on publicly.

accountability. The Model should require the Auditor to publicly report on any modification of an initial disposition or disciplinary modification and whether he agreed with the modification.

Recommendation Twenty-Two: The Model should be revised to require BART to apprise OIPA of any offers to settle cases after discipline has been imposed and provide the Auditor an opportunity for consultation. The Model should provide the Auditor the opportunity to appeal any intention to settle the matter to the General Manager should the Auditor find that the settlement would amount to a serious erosion of individual accountability. The Model should require the Auditor to publicly report on any cases settled at the post-discipline stage and whether OIPA agreed with the decision to settle.

Recommendation Twenty-Three: The Model should be revised to require the Auditor to report on any arbitration determinations that modify or rescind initial disposition and disciplinary decisions and to evaluate the reasons for any modification. The Model should require the Auditor to identify any systemic issues that formed the basis for any modification and work with BART PD to remediate those issues.

OIPA Should Report Publicly the Results of Any Completed Investigation.

While currently OIPA provides some information regarding completed investigations, we recommend that its reporting be modified to include a narrative of the allegation, the results of the investigation, whether the BART Police Citizen Review Board agreed with OIPA's recommendation, whether the Chief agreed with the proposed disposition, and whether there were any post-disciplinary changes to the initial disposition. In most cases, the reporting should begin when the investigation is initiated, with additional information being included as the process moves forward. Consistent with state law requirements, identifying information about the case or officers involved should not be included.

Recommendation Twenty-Four: OIPA should publicly report on every investigation from inception to conclusion, providing information about the case result and the degree to which OIPA and the BART Police Citizen Review Board recommendations were implemented.

F. Additional Risk Management Role for OIPA.

OIPA Should Be Expressly Authorized to Review Any Claim, Civil Complaint, and Law Suit Settlements and Judgments.

When an individual believes he or she has been aggrieved by police officers, the person can file a complaint with the agency and/or oversight entity. Some persons, however, seek relief through the courts and file a claim or lawsuit instead. Depending on how the concern is received, the entity's response may be entirely different. Complaints filed with the agency or oversight entity are investigated as personnel matters, while the evidence-gathering for litigation has a different and inherently defensive orientation. We understand this dichotomy but see it differently – or at least more broadly. Among other things, a claim or lawsuit is essentially a “citizen complaint with a price tag attached.” If a jurisdiction handles these matters solely in litigation mode, it may overlook important questions of potential misconduct or resist the kind of investigation that might produce unwanted evidence.

For that reason, leading oversight entities routinely review claims and lawsuits to ensure that such an appropriate internal inquiry does occur in addition to other responses. In a similar vein, oversight entities monitor civil litigation to identify potential individual officer performance issues as well as systemic issues that may be unsurfaced. In cases resulting in significant settlements or adverse judgments, the oversight entity is often involved with the agency in developing a corrective action plan designed to remediate any of those issues.

In large part, because the Model did not specify a role for OIPA in these matters, it has not been involved in reviewing the civil litigation from an oversight and risk management perspective. OIPA should expressly be provided such authorization so that it can perform this important function.

Recommendation Twenty-Five: OIPA should be provided authority to review claims and lawsuits to ensure allegations of misconduct are thoroughly investigated.

Recommendation Twenty-Six: OIPA should review any significant settlements and adverse judgments involving BART PD performance and work with BART PD to develop corrective actions intended to remediate any systemic issues.

Recommendation Twenty-Seven: OIPA should report publicly on its work in reviewing civil litigation.

G. Developing a Mediation Program

OIPA Should Redouble its Efforts to Develop a Robust Mediation Program.

The Model expressly sets out a role for the Auditor in developing a mediation program. It states expressly that OIPA “shall develop a voluntary alternative dispute resolution process for resolving those complaints which may most appropriately be corrected or modified through less formal means.” The Model also contemplated that the BART Police Citizen Review Board and BART Police Associations would be part of the development process.

Nonetheless, in four years there has yet to be a case that has gone through a mediation process. While a few individual instances have come close, participants withdrew from the process at the eleventh hour.

Mediation – where involved parties can safely and productively articulate different viewpoints with a neutral arbiter – provides a process consistent with contemporary principles of restorative and procedural justice. The key to developing an effective mediation program is to make the process worthwhile to all participants, and departments have often faced challenges in getting officers to see the benefits. While these challenges are real, the experience of agencies in other jurisdictions shows they are surmountable. OIPA should examine these other jurisdictions to gain ideas for achieving a successful program. BART PD also should be more engaged in working with OIPA and the Police Associations to consider additional incentives for police officers to engage in mediation.

Recommendation Twenty-Eight: OIPA should redouble its efforts to create a mediation process that is attractive to complainants and officers and provides an effective alternative dispute resolution process.

H. Ensuring Prompt OIPA Notification of All Critical Incidents

OIPA Should Receive Notification as to All Critical Incidents.

Currently, the Model provides that the Auditor shall be notified immediately regarding an officer-involved shooting that results in the death or serious bodily injury to a member of the public or a police officer so that the Auditor can respond in real time to the investigative scene. The current language of the Model restrictively limits notification of OIPA to only uses of deadly force that result in death or serious bodily injury.²¹ While a shooting that does not result in serious injury or loss of life has less significant consequences for the involved parties, a non-hit shooting or one that results in minor injury still involved a decision by the officer to use deadly force, and that decision is worthy of the same scrutiny. Additionally, the notification protocol does not expressly include other uses of force that result in death or serious injury, or incidents in which an off-duty officer may take police action and use deadly force.

We have been informed that, to the credit of BART PD, it has been regularly informing OIPA of a broader set of critical incidents that do not fit squarely within the Model's language. While BART PD's voluntary approach is praiseworthy, the Model should be modified so that it is clear to all that notification of OIPA should occur for a broader category of incidents.

Recommendation Twenty-Nine: The Model should be enhanced to ensure that OIPA is timely notified of any critical incident including all officer-involved shootings (on duty or off duty) regardless of whether the use of deadly force resulted in injury or death, any use of force resulting in significant injury, and any in-custody death.

I. Enhancing OIPA's Footprint Regarding Use of Force

The Auditor Should Be Regularly Reviewing Uses of Force by BART Police Officers.

In order for peace officers to perform their public safety function they are provided unique authority. In addition to being provided the power to arrest, police are provided the authority to use force when necessary. This authority, however, must be strictly limited and its exercise carefully scrutinized in light of the Constitution, the law, and internal policy. As a result, police officers are required to report when they use force, and command staff of the agency has a responsibility to review the policy and legal appropriateness of these incidents.

Because of the inherent seriousness of force incidents, and the profound ramifications of misuse or abuse of this police power, independent oversight should be significantly involved in

²¹ The subheading of the Model is entitled "On-Duty Officer Involved Shooting Incidents," suggesting that there is no need to notify OIPA of off-duty uses of deadly force.

monitoring force. Currently, except for some officer-involved shootings, OIPA’s review of force incidents is limited to situations when a “qualified person” complains of force. As a result, both significant and minor force incidents escape the purview of BART’s oversight entity and are not subjected to outside independent review.

OIPA should be afforded the opportunity to review every force incident and determine whether the force should be the subject of an internal affairs investigation. OIPA should also review the force to determine whether other issues are implicated for the involved officers or the Department as a whole. OIPA should work with BART PD to ensure that each force incident is reviewed with an eye toward identifying systemic issues such as training, equipment, supervision, and policy.

We also understand that BART PD convenes use of force review boards that examine significant force incidents. OIPA should regularly participate in those review boards to provide an independent perspective and to help assess individual performance and conduct as well as identify systemic issues. Finally, OIPA should regularly report on its involvement in the force review process and on any critical incidents.

Recommendation Thirty: The Model should be revised to provide OIPA the authority for and responsibility of reviewing use of force incidents by BART PD, regardless of whether the incident is a subject of a complaint.

Recommendation Thirty-One: OIPA should regularly participate in BART PD’s use of force review boards.

Recommendation Thirty-Two: OIPA should report publicly on its use of force review program including the outcome of BART PD’s use of force review boards.

Recommendation Thirty-Three: OIPA should report publicly on the internal review of any officer-involved shootings, in-custody deaths, or serious uses of force.

J. Mapping Out a Significant Role for the Auditor in BART PD’s Early Identification System

OIPA Should Be Involved in the Early Identification System.

We have been informed that BART PD continues to develop an early identification system. This system is intended to use relevant data to identify police officers who may be displaying patterns of conduct that need to be addressed before they become a problem for the officer, the agency, and/or the public. For example, an early identification system may reveal an officer who uses force significantly more frequently than his or her counterparts on the shift – a potential “red flag” that could make further scrutiny worthwhile. The resultant intervention is intended to be remedial rather than punitive and might use mentoring, closer supervision, or other non-punitive strategies tailored to help mitigate or fix identified concerns.

Our experience is such programs are not only potentially beneficial, but also that independent oversight can be a helpful resource in their development, implementation, and execution. Currently, there is no role for OIPA in the Department’s early identification system; we are

confident that setting out a distinct role for an independent voice will strengthen the system that BART PD has been developing.

Recommendation Thirty-Four: The Model should be revised to provide authority and responsibility for OIPA to regularly participate in BART PD's early identification process.

Recommendation Thirty-Five: OIPA should report regularly on the status of the Department's early identification system and results.

K. Increasing OIPA's Role as Auditor

The Model Should Be Modified to Increase the Auditing Function of the Independent Police Auditor.

While the professional oversight entity for BART PD is named the Independent Police Auditor, most of its work to date has been not auditing but investigating complaints. This incongruity stems, in large part, because the Model does not clearly define the auditing role for the Auditor.²² As a result, OIPA has not conducted systemic audits of vital police functions. Other jurisdictions with robust oversight regularly conduct audits of their responsible police agencies, including the following areas:

- Recruiting and hiring practices
- Background investigations
- Supervisor performance
- Email, MDC and texting reviews
- Academy and in-service training
- Performance evaluations
- Promotional and special assignment processes
- Potential bias-based policing in stops or searches
- Stop and frisk practices
- Complaint intake procedures
- Appropriate use of the disciplinary matrix
- Transparency and public reporting of data by the police agency
- Crisis intervention practices and/or interactions with the homeless
- Police Department outreach
- Use of lock-ups
- Assessing compliance with precepts set out in pillars of 21st Century Policing

²² For example, one lost opportunity was that no role was created in the Model for OIPA to audit and report on BART PD's progress on implementing the recommendations set forth by the NOBLE report referred to above.

These oversight entities publicly report on the results of those audits.²³ Those same jurisdictions often monitor systems audits conducted by the police agencies themselves and publicly report on the results of those audits.

The Model should be revised so that OIPA is provided authority and responsibility to conduct systemic audits of BART PD functions that impact the quality of the Department and the service provided to its public. Similarly, the Model should provide OIPA the authority and responsibility of monitoring internal audits conducted by BART PD and to publicly report the results of those audits.²⁴

Recommendation Thirty-Six: The Model should be revised to provide OIPA the authority, access to data and records, staffing, and responsibility to conduct systemic audits of BART PD functions that impact the quality of the Department and the service provided to its public.

Recommendation Thirty-Seven: The Model should be revised to provide OIPA the authority and responsibility to monitor any audits conducted by BART PD regarding similar issues and report publicly the results of those audits.

L. Expanding OIPA's Role in Policy Development

The Model Should Explicitly Authorize OIPA to Be Involved in BART PD-Initiated Policy Development.

The current Model expressly authorizes the Auditor to develop specific recommendations concerning “General Orders and Directives, procedures, practices, and training” intended to improve “professionalism, safety, effectiveness, and accountability” of BART PD employees. To its credit, OIPA has made policy recommendations – for example, it most recently suggested changes to the way in which BART PD deals with panhandlers. However, OIPA has had little involvement in policy and training changes initiated by BART PD.²⁵ Our experience is that the most efficacious method of policy development is to have the police incorporate the feedback and input of oversight entities at an early stage, rather than the presentation of a “finished” product for review at the end of the process.

²³ We were informed that the recently retired Chief requested OIPA to conduct an audit of background investigation files, but that the project was halted because of disagreement regarding the Auditor's access and authority.

²⁴ The increased role we recommend for OIPA in auditing, reporting, and real-time monitoring of BART PD IA cases will likely result in a need to provide additional resources to the Auditor. The Board of Directors, the General Manager, and OIPA should work jointly to determine the degree to which additional resources will be needed to perform these additional functions.

²⁵ For example, BART PD recently developed language intended to modify its use of force policy; OIPA had no involvement in its initial development.

Recommendation Thirty-Eight: The Model should be revised to provide OIPA the authority and responsibility to be involved in any policy or training initiatives being developed by BART PD and to report publicly on any reforms.

The Model Should Explicitly Authorize OIPA to Forward Any Policy Recommendations to the General Manager and/or the Board of Directors.

While the Model currently authorizes the BART Police Citizen Review Board to forward any of its policy recommendations to the General Manager and/or the Board of Directors, no similar express language exists for OIPA. While we have been informed that in practice OIPA has been provided the ability to forward policy recommendations it has made to these entities, it would be advisable to revise the Model to expressly recognize this authority.

Recommendation Thirty-Nine: The Model should be revised to provide OIPA the express authority to forward policy recommendations to the General Manager and/or Board of Directors. In situations in which OIPA's recommendations are not accepted by BART PD, OIPA should consider whether to forward its recommendations for further consideration to BART's governing entity.

OIPA Should Ensure that the Public Is Informed on Status and Outcome of Policy Recommendations.

Over the years, OIPA has developed thoughtful policy recommendations. However, there is no “record” of the degree to which BART PD accepted and integrated those recommendations. For example, in its 2012-13 annual report, OIPA set out in detail recommended changes to BART PD’s recording policy. However, in the subsequent annual reports, there is no follow up on whether BART PD accepted or rejected each of the recommendations.

Recommendation Forty: In its annual report, OIPA should include an update on any previous outstanding recommendations and the degree to which the recommendations were endorsed by the Review Board and accepted by BART PD.

M. Ensuring Integration of Oversight in BART PD’s Policies and Practices

BART PD’s General Orders Should Include the Authorities and Responsibilities of its Oversight Entities and a Provision Recognizing the Duty to Cooperate with those Oversight Entities.

While the current General Orders and Directives of BART PD include some references to the existence and responsibility of the Independent Police Auditor and the BART Police Citizen Review Board, the specific responsibilities set out by the Model do not appear to be incorporated into those Orders. BART PD General Orders should make specific reference to oversight and its responsibilities. Moreover, BART PD’s Orders should inform its members of their responsibility to cooperate and respect the role of its oversight entities.

Recommendation Forty-One: BART and OIPA should work with BART PD to ensure that BART PD’s General Orders incorporate the authority of its oversight entities and the duty of members to cooperate in the execution of that authority.

N. Ensuring Regular Dialogue Between Oversight and BART Police Associations

OIPA and the BART Police Citizen Review Board Should Develop Mechanisms to Ensure At Least Annual Meets with the BART Police Associations.

The Model instructs both OIPA and the BART Police Citizen Review Board to meet “periodically” and “seek input” from the BART Police Managers Association and the BART Police Officers Association. We have been informed that while meetings may have occurred during the first year and have been subsequently scheduled, actual meetings over the past few years have been sporadic at best. We believe that there is value in having periodic meetings between the oversight entities and those tasked with representing the interests of BART police officers. For that reason, a meeting schedule should be devised by both oversight entities to ensure there is an attempt to meet with both Police Associations at least annually. OIPA and the Citizen Review Board should annually report on any meetings that are held with the Police Associations.

Recommendation Forty-Two: OIPA and the BART Police Citizen Review Board should attempt to schedule a meeting at least annually with the two BART Police Associations. The oversight entities should annually report on whether such meetings occurred.

O. Clarifying the Relationship Between OIPA and the BART Police Citizen Review Board

The Model Should Be Revised to Provide Further Guidance Regarding the Relationship Between OIPA and the BART Police Citizen Review Board.

Consistent with oversight trends nationwide, BART’s oversight system includes a professional oversight office and an oversight board appointed from the community. That paradigm has resulted in OIPA being able to develop an expertise in police accountability practices adapted to a police agency designed to police an extensive transit system and a Board selected from the BART community that has a meaningful voice and role in both individual cases and systemic reform.

While it is laudatory that the drafters of the Model recognized the value in having both police practices experts and community members involved in providing oversight, more clarity is needed in defining the relationship between the two entities. The Model should expressly recognize that OIPA and the BART Police Citizen Review Board are to be considered as entities with complementary oversight roles that are independent of each other.

Much of the source of confusion about the complementary oversight entities is that the Model assigns the BART Police Citizen Review Board administrative tasks to OIPA. To eliminate this overlap, BART should consider creating an Executive Assistant position to provide

administrative support for the BART Police Citizen Review Board. The Executive Assistant would assume the administrative functions now set out in Chapter 1-05 of the Model including:

- Records of Review Board meetings
- Preparation of Review Board reports
- Review Board staff support and facilitation of training
- Review Board community outreach and communicating with the public
- Application process for open Review Board seats

In addition to the administrative tasks expressly set out in the Model, the Executive Assistant could also be responsible for assisting in developing the Review Board meeting agenda, arranging Review Board training, coordinating Review Board outreach, assisting with Review Board reporting responsibilities, and providing any additional administrative support for the BART Police Citizen Review Board.

The Model currently states that the BART Police Citizen Review Board “shall assess and report to the Board of Directors’ Personnel Committee on the performance and effectiveness” of OIPA. We have been informed that this provision of the Model has not been implemented in practice. The Auditor is subject to an annual performance review by the BART Board of Directors, the appointing authority. In assessing that performance, the Board of Directors could and should solicit input from several stakeholders, including the BART Police Citizen Review Board. However, the Model should be modified to clarify that the BART Police Citizen Review Board is not the “assessor” of the Auditor’s performance but simply another important source for input to the Board of Directors.

Similarly, when a BART Police Citizen Review Board seeks reappointment to a new term, the appointing Director should seek input from OIPA along with other important stakeholders on the performance of that Review Board member.

Recommendation Forty-Three: The Model should be revised to expressly clarify the independent yet complementary roles of the BART Police Citizen Review Board and OIPA.

Recommendation Forty-Four: BART should consider creating an Executive Assistant position for the BART Police Citizen Review Board to assist with administrative tasks now assigned to OIPA.

Recommendation Forty-Five: The Model should be revised to acknowledge that the BART Police Citizen Review Board is one potential source of information when the Board of Directors is seeking input on the performance of OIPA.

Recommendation Forty-Six: The Model should be revised to provide OIPA the opportunity for input when a BART Police Citizen Review Board member seeks reappointment.

P. Clarifying and Enhancing the Roles of the BART Police Citizen Review Board

The Model should provide clarification of BART Police Citizen Review Board Member Qualifications.

Currently the Model disallows from service on the BART Police Citizen Review Board any person “currently employed in a law enforcement capacity” or any “relative of current and former BART Police Department personnel.” While prohibiting relatives of current and former BART PD personnel from serving, the Model does not expressly disallow former BART PD personnel themselves from membership on the BART Police Citizen Review Board. The Model should be revised to correct this incongruity.

Recommendation Forty-Seven: The Model should clarify that former BART PD personnel are ineligible to serve on the BART Police Citizen Review Board.

BART Police Citizen Review Board Members Should Have Requisite Training in Order to Fulfill Their Responsibilities.

By selecting BART Police Citizen Review Board members from the community, BART oversight benefits from each member’s life experience and perspective. However, modern day policing is increasingly complex, and BART PD itself has a unique role in providing public safety for a large transit system. As detailed above, the BART Police Citizen Review Board has been provided considerable authority, including the ability to consider and vote on the Auditor’s recommendations regarding specific complaint investigation dispositions.²⁶ This authority carries with it a heavy burden of responsibility and the BART Police Citizen Review Board cannot effectively exercise that authority regarding investigation dispositions without each member undertaking a careful read of each case.²⁷

Accordingly, in order to effectively carry out BART Police Citizen Review Board duties, each member must be afforded a basic understanding of progressive police practices, constitutional and state law, principles of civilian oversight, and BART PD’s distinctive challenges. The training should also focus on how, as expressly stated in the Model, the BART Police Citizen Review Board fulfills the “essential community involvement component” piece of the system and how it can most effectively fulfill this role. To these ends, a training curriculum developed for each new Review Board member, including ride-alongs, should be devised. In addition, Review Board members should get additional training at least semi-annually, perhaps as an agenda item during regularly scheduled meetings. As noted above, we recommend assignment of an Executive Assistant to the Review Board; that individual could be responsible, with input from the existing BART Police Citizen Review Board and the Auditor, for developing and maintaining the BART Police Citizen Review Board’s training program.

²⁶ The Board of Directors should continue to be mindful of the weighty responsibilities demanded of each Review Board member when making future appointments.

²⁷ Review Board members who have not had the opportunity to read the investigation and accompanying materials should recuse themselves from deliberations and voting on the Auditor’s recommendation for that particular case.

Recommendation Forty-Eight: A Training Curriculum Should Be Devised For Incoming BART Police Citizen Review Board Members, and In-Service Training Should Be Provided at Least Semi-Annually to Current Review Board Members.

Rotating the Location of the BART Police Citizen Review Board Meetings Would Allow the Review Board to Reach More Communities.

As noted above, BART PD is responsible for providing public safety for a transit system to traverses multiple jurisdictions over a wide-ranging area. Yet the BART Police Citizen Review Board responsible for oversight over this region only meets at one location. Community members served must travel to this location to attend meetings and provide public comment. While this challenge is ameliorated by the transit-friendly locale of the meetings, it would demonstrate the Review Board's responsiveness to other communities to rotate the meeting locations. While such a rotation may provide some logistical challenges, it appears worth exploring whether those hurdles can be overcome.

Recommendation Forty-Nine: The BART Police Citizen Review Board should consider rotating its meetings to a wider array of locales served by BART.

The BART Police Citizen Review Board's Outreach Should Be More Vibrant.

The current Model notes that the existence of the BART Police Citizen Review Board effectuates the essential community involvement component of the oversight system. To advance that crucial role, the Model expects that the BART Police Citizen Review Board will lead in outreach efforts to the community, particularly constituencies impacted most by policing, including communities of color, immigrant communities, and individuals with psychiatric disabilities. While the Review Board's regularly scheduled public meetings fulfills that role to some degree, the Model certainly contemplated that more could and should be done in the outreach arena. We gather from the BART Police Citizen Review Board's annual reports that outreach has been largely undertaken by a few members. However, outreach should be an expected responsibility of all members of the Review Board.

To that end, before a Review Board member is appointed, the appointing authority should emphasize the outreach expectation to the potential appointee. Moreover, at one year intervals, the BART Police Citizen Review Board should place an item on the agenda in which each member publicly reports on the outreach efforts he/she has undertaken. The degree to which a member has engaged in public outreach should be considered by the appointing authority in determining whether to reappoint the member to an additional term. The Executive Assistant (recommended elsewhere) for the BART Police Citizen Review Board should track the outreach efforts of individual members and the Review Board as a whole.

Recommendation Fifty: Procedures should be adopted by the BART Police Citizen Review Board intended to ensure that the Model's commitment to outreach is achieved. To that end, each incoming member should be alerted to outreach expectations by his/her appointing authority. On an annual basis, each Review Board member should report publicly on the outreach he/she has undertaken the previous year. Finally, the degree of each member's

public outreach will be considered prior to reappointing the Review Board member to an additional term.

The Model Should Provide More Flexibility for “Good Cause” Meeting Absences.

Currently, the Model calls for removal of any BART Police Citizen Review Board member who misses more than three regularly scheduled meetings per year. While the interest in having Review Board members attend meetings is well-placed, there may be situations where a member has “good cause” to miss a meeting. For that reason, it would be advisable to provide each Director with flexibility to excuse his/her appointed Review Board member’s absence for good cause. Such excusal would not count against the absence limit requirements.

Recommendation Fifty-One: The Model should be revised to authorize excused absences for good cause that would not count against the absence limitations.

Q. Providing Increased Transparency Authority for BART Oversight

The BART Oversight Entities Should Be Expressly Authorized to Make Public Statements.

It is not uncommon for officer-involved shootings, in-custody deaths, significant force incident or allegations of misconduct to engender immediate controversy and concern, particularly if part of the incident is captured on videotape. In those cases, the existence of oversight entities can assist in tempering that concern with the recognition that there will be an independent review and accounting of the incident at the conclusion of any investigation. In recognition of this, jurisdictions have provided their oversight entities full rein to make public statements about their role in the wake of controversial incidents.

We have been informed that the Auditor has interpreted the Model to allow him the authority to make public statements about his work and BART policing issues. That being said, the Model should be revised to expressly authorize the Auditor freedom to make such statements. Moreover, the Auditor should be free to speak with any media outlets about any aspect of oversight and in conjunction with any public report or findings. The BART Police Citizen Review Board’s ability to make timely public statements provides logistical challenges since the Review Board meets as a body only periodically. However, the BART Police Citizen Review Board should consider authorizing the Chair to make public statements on behalf of the Review Board regarding role and process when an exigency to respond is presented.

Recommendation Fifty-Two: The Model should be revised to expressly authorize OIPA and the BART Police Citizen Review Board to make public statements about their oversight work.

R. Ensuring Periodic Review of BART Oversight

BART’s Oversight Entities Should Be Reviewed on a Regular Basis.

As noted above, the current Model provided for an assessment of oversight after one year of implementation. Because the world of oversight is new and constantly evolving, there should be a commitment to a periodic review of BART’s oversight entities on a going forward basis.

Recommendation Fifty-Three: The Model should be revised to call for periodic reviews of BART's oversight entities at a minimum of four-year intervals.

Independent Review of the BART Police Oversight Structure

July 2017

ADDENDUM



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INDEPENDENT REVIEW OF THE BART OVERSIGHT STRUCTURE: ADDENDUM

The Model Should Set Out With More Clarity Procedures for Replacement of BPCRB Members.

A question has arisen since the issuance of our initial June 2017 report, and we were asked to address an issue surrounding the replacement of BPCRB members. The specific question was whether a new BART Director may, prior to the end of the BPCRB member's term of appointment, replace the BPCRB member appointed by that BART Director's predecessor. The Model is currently silent on this specific issue. Chapter 2-04 of the Model does address removal for cause "including but not limited to breach of ethics, confidentiality, or criminal conviction" and allows for removal by a resolution adopted by the majority of the Board of Directors. As stated in our Report, Chapter 2-04 of the Model also calls for automatic termination of a BPCRB member after three Board meeting absences in a calendar year.¹

Whether the Model currently provides authority for an incoming Director to remove a BPCRB member unilaterally is not specifically addressed by the current Model. The fact that the Model does not provide clear guidance on this issue suggests a need to amend the Model in order to do so. Because our project was focused on improving the Model through revisions, we offer our thoughts below.

From a civilian oversight perspective, modifying the Model to expressly allow a Director to remove a BPCRB member appointed by his/her predecessor could be seen by some as undermining the independence of the BPCRB. If a BPCRB member can be replaced by an incoming Director for no reason, that BPCRB member may be concerned that making decisions on individual cases, policies, or systemic issues that are controversial could then be a basis for his/her removal. Such a tenuous situation may also dissuade otherwise interested individuals from seeking appointment to the BPCRB.

On the other hand, the BPCRB's strength and authority arise in part from the support and confidence of the elected Directors in the member and the current Model appointment process clearly provides Directors the ability to each select a member with virtually unfettered discretion. Consistent with that discretion, a persuasive argument could be made that an incoming Director should have the authority to replace a BPCRB member with a new appointee who better reflects the values, interests, and philosophy of the incoming Director.

In sum, the Model should be clarified to specifically speak to this issue. Potential options to modifying the Model would be to expressly prohibit removal of BPCRB members except for unexcused absences or good cause or provide incoming Directors a brief window such as 60 days during which they could replace the outgoing Director's appointee. Requiring the incoming

¹ In our initial report, we have recommended modification of this provision in order to provide relief for excused absences.

Director to act within a brief period of time reduces the perception that a BPCRB member is being removed because the Director is unhappy with actions taken in a particular matter.

Recommendation Fifty-Four: The Model should be revised to clarify whether a newly-seated BART Director may unilaterally remove his or her predecessor's BPCRB appointee and specify any time limits for doing so.