Office of the City Clerk
M E M O R A N D U M

DATE: September 20, 2011

TO: Council Members

FROM: Donna J. Grider, City Clerk, MMC Donna Grider

SUBJECT: Police Auditor's Interim Report - 2011

Attached please find the Police Auditor's Interim Report - 2011.

POLICE AUDITOR'S INTERIM REPORT – 2011

Presented to the Honorable City Council City of Palo Alto September 16, 2011

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Palo Alto Independent Police Auditor Interim Report for 2011

I. Introduction

This report is the first of two reports covering the fifth year of the Independent Police Auditor's ("IPA") work with the Palo Alto Police Department. It reports on investigations initiated and complaints that have been considered since the publication of the fourth year Final Report and provides updated information regarding investigations that had not been completely resolved at the time the last report was released. Additionally, this report updates the work the Auditor and the Police Department have engaged in with regard to systemic issues and policy revisions. This report would also typically include the Auditor's review of all applications of the Taser by PAPD personnel in the course of detention and arrest of suspects, but there have been no applications of the Taser during the report period, as discussed below.

A. Taser Use

The last use of the Taser by a Palo Alto Police Department officer was fourteen months ago. This could be the result of a natural statistical variation, but there is another contributing factor – the response of patrol officers to last year's revision and tightening of the Taser use policy, requiring a higher level of threat to be present before use of the Taser is authorized. PAPD officers also received additional in-house training in Taser use, emphasizing the policy update, tactical decision-making, and de-escalation. If the revised policy and additional training caused officers to rely more heavily on verbal skills and communication, lower level uses of force when necessary, and more cautious and restrained decision-making when considering the Taser option, that is an appropriate and desired response.

Since we last discussed this issue, an important study has been released by the National Institute of Justice. The report's authors suggest that there is still much to learn regarding the relationship between the use of a Taser and its physiological impact. While the report concludes that the "relative risk of [Taser] deployment appears to be lower than other use of force options," the authors pointed out that extended Taser exposure may not be effective in subduing some individuals with high levels of drug intoxication or mental illness. The report emphasizes that most adverse reactions and deaths associated with Taser deployment appear to be associated with multiple or prolonged discharges of the weapon. As with other law enforcement agencies, we urge the Palo Alto Police command staff to be familiar with the NIJ report, with particular attention to the caution about multiple or prolonged discharges of the Taser.

Per regular protocols, we will continue to monitor the Department's use (or non-use) of the Taser in the upcoming months.

B. Recommendation for Disclosure of PAPD Members Who Are Arrested

In an earlier report, we indicated that a member of the PAPD had been arrested by another agency for driving under the influence. At that time, despite requests from community members, the City declined to provide the name of the officer who had been arrested. We indicated that we would continue to study the matter to determine whether a policy and/or protocol should be devised that would provide better guidance to the Department should future situations arise, and ensure consistency in approach. Fortunately, since that time, there have been no real cases with which to reconsider this issue, as there have been no PAPD officers who have been arrested. Nonetheless, because such a future occasion is bound to occur, in our view it would be helpful to consider developing a protocol now so that all will be put on notice about how the Department would respond to those circumstances. We propose that the principles outlined in the following draft policy be considered by the Department and the City for implementation as a means to serve the interest in transparency as well as respecting the interests of outside agencies:

ARREST OF POLICE DEPARTMENT PERSONNEL

A. Should Department members be arrested by Departmental personnel, upon notice to the Chief of Police, the Office of the City Attorney, the Office of the City

Manager, and the District Attorney, the fact of the arrest and the identity of Department members will be made known to the public. In the rare instance where one of these entities objects to disclosure, the fact and reasons for the objection will be documented.

B. Should the Department learn that one of its members has been arrested by another law enforcement agency and should it receive a request to identify the member who has been arrested, it shall proceed as follows:

1. *The Chief of Police, after consultation with the Office of the City Attorney, will contact the arresting agency handling the matter and inform it of the request.*
2. *The requestor will then be notified of and referred to the arresting agency.*
3. *In cases involving arrests by other law enforcement agencies, the decision about whether and when to disclose the identity of the Department member will remain with the arresting agency.*

We believe the above draft policy recognizes the public's right to know when PAPD members arrest one of their own, which right should only be circumscribed for countervailing compelling reasons. The draft policy further recognizes that such a calculus may be different in other jurisdictions and that deference should be provided that other jurisdiction in a case it is handling to determine whether and when to release the name of the arrestee. Nonetheless, the requestor should be able to request information and disclosure from the outside arresting entity. We look forward to further discussion with the Department and other interested entities regarding our recommended policy.

C. Revised Outside Employment Policy

In our last report we stated that the Department was considering a policy change to clarify the conditions under which an officer may accept additional employment outside of the Police Department and what type of employment is permitted. This stemmed from concern over a citizen complaint investigation of the off duty activities of a Department supervisor who worked a second job as a private security officer at an apartment complex. The internal affairs investigation found that the supervisor had violated the Department's outside employment policy. Despite this finding, the supervisor was not formally disciplined because he had just retired from the Department. [For further discussion, see IPA March 2010 Report]. Following the investigation, the IPA encouraged the Department to revise and clarify its policy setting the allowable limits for Police Department personnel to maintain employment outside the Department without coming into conflict with the interests of the Department and

the City. The Department agreed to do so and has recently implemented its new, more precise and exacting expectations regarding outside employment. The policy previously required that the written approval of the Chief must be obtained prior to engaging in outside employment. Now, this approval must be renewed every year and at any time there is a change in the nature or demands of the outside job. The policy also admonishes employees that permission to have an outside job may be revoked if, among other things, the employee's performance declines or if the job conflicts at any time with Department policy. The policy makes it clear that employees must not "use the Department badge, uniform, prestige or influence for private gain or advantage." It is also prohibited to perform tasks in an outside job that may later be subject to the inspection, review or enforcement of other PAPD employees. The policy places a number of additional restrictions on the employee if the outside job is as a private security guard or investigator. Finally, and perhaps most importantly, any employees who take outside jobs must agree to allow their personal financial records to be reviewed or audited for potential conflict of interest. [See attached revised policy 1040.3.1]

We commend the Department for following through on its commitment to confront this thorny issue and to fashion explicit and useful guidance for employees.

II. Complaints, Cases and Issues

1. Complaint of Biased Enforcement and Improper Search #C 2011-001

The investigative materials in this case are pending review by the Auditor.

2. Complaint of Unlawful Detention and Search, Property Damage #C 2011-02

Synopsis: An officer on patrol observed a motorist driving down a main boulevard at 3:45 a.m. then turn into a closed drug store parking lot and park. The officer drove toward the parked vehicle, parked about one car length behind it and shined his spotlight at the vehicle. He then approached the driver's window on foot and asked the lone motorist what she was doing there. The motorist replied that she was looking at her

computer. The officer asked if the car was hers and if she had some form of identification. The motorist only had her brother's driver's license and a paycheck with her name printed on it. The officer went back to his patrol vehicle briefly, accessed the woman's records and found that her driver's license had been suspended a month ago and she had been notified twice by the DMV of her suspension, at least once in person. Additionally, the officer found that the woman was on probation for a misdemeanor offense and had a "search condition," that is, a condition of her probation required that she submit to searches of her person without a warrant or probable cause. The officer returned to the motorist, asked her to step out of the car and conducted a cursory search of her person and the contents of her coat pockets. Other officers and a sergeant had arrived to assist the officer and they searched the motorist's vehicle. The officer issued a citation to the motorist for driving with a suspended license and arranged to have the vehicle towed. The motorist returned to the vehicle and extracted some of her property before the tow truck arrived.

Later that morning, the motorist called the police department and complained the officer's contact with her and search and impounding of her car was non consensual and unlawful. She also complained of damage to her computer and the inside of her vehicle, but later withdrew those allegations. She later added that she believed a female officer was available and should have been employed in the pat down search.

Recommendation: The Auditor reviewed the reports, interviews and MAV videos in this case and concurs with the Department's finding that the contact and detention of the motorist were lawful and that the search of the car and the motorist's person were also legal. The officer's initial contact with the motorist at her window did not constitute an illegal detention under the circumstances and, given the location and time of night, his question and request for identification was appropriate. Once the officer discovered that the motorist was driving on a suspended license, further detention and search were constitutionally allowable. Whether the pat down search of the female motorist by the male officer was consistent with current Department policy is not entirely clear.[1] The

[1] This recently revised policy was discussed in the IPA report of March 2011. The policy reads in pertinent part, "Whenever practical, a pat-down search of an individual should be conducted by an officer of the same sex as the person being

sergeant who arrived at the scene indicated in his report that there was no female officer present or available but there is no further documentation to back this up. In either case the officer who performed the pat down search should have documented in his incident report the unavailability of a female officer to assist. We recommend that the responding officer receive targeted counseling on the pat down policy requirement and be required to demonstrate familiarity with the revised policy. We further recommend that the revised pat down policy be briefed to the Department as a whole, with particular emphasis to field supervisors.

The documentation of this investigation makes it apparent that this complaint occasioned vigorous debate, research and self-examination among some members of the Department concerning the constitutional issues relevant to this simple incident. This exemplifies the best type of response to a citizen complaint and shows a department receptive to self-critique and improvement. Nevertheless, there were procedural issues in this investigation, which, while they likely had no bearing on the outcome, should be avoided in the future. First, the investigation took five months to complete, even though only two witnesses were interviewed. This amount of time before resolution of the issues is too long and erodes the opportunity for reaching a timely and constructive understanding with the Complainant. Moreover, any time an investigation is significantly delayed, it conflicts with the principles behind timely resolution; it causes the cloud of an investigation to hang over the officer's head for too long and if a violation is found, any resulting discipline and remediation will be unnecessarily delayed and less effective. In some cases of this nature, there may be an opportunity for a Department supervisor to sit down with the Complainant after she lodges her complaint to discuss the video evidence and the legal guidelines with her. We have discussed this procedure in general with the Chief of Police and agree with him that such offers to the Complainant to view the MAV video evidence must be presented in a way that does not dissuade the Complainant from requesting an investigation of her complaint. Alternatively, once the investigation is concluded, rather than simply send the Complainant a form letter

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searched...[t] he search and the officer's unsuccessful attempts to procure a member of the same sex to conduct the search should be documented in an accompanying report or captured over radio traffic." [Revised policy adopted in October 2010.]

indicating its completion, the IPA recommends that the complainant be provided an opportunity to review the MAV video evidence.

Second, the investigation was conducted partly by an uninvolved sergeant and partly by the sergeant who supervises the involved officer and who arrived at the scene that morning while the officer was checking the status of the motorist's license. This put that sergeant in the potentially awkward role of being a witness who was interviewing another witness. Moreover, the documentation requirement of the pat down policy ended up being a field responsibility for the sergeant and his failure to fully document or have the responding officer fully document their unsuccessful attempt to procure a female to conduct the pat down left him as a potential subject of the investigation. Fortunately, the potential significance of these issues was reduced by the existence of the MAV video and the conscientious review of all case materials performed by a Department lieutenant. However, for the reasons enumerated above, IPA strongly recommends that a non-involved supervisor of the Department investigate any similar complaints.

Resolution/Corrective Action: The Department has notified the Complainant of the results of this investigation.

3. Complaint of Discourtesy, Failure to Perform Duties, and Wrongful Exercise of Authority #C 2011-03

Synopsis: An officer working daytime traffic enforcement on foot was approached by a man who described a disturbance where another man had touched his truck, then threatened to beat him up. The officer walked with the man over to the scene and contacted the man who had touched the truck and his two companions. An assisting officer arrived, while the traffic officer separated the two parties and took their statements. The second man admitted touching the Complainant's truck but denied making any verbal threats. He asserted that the Complainant had in fact threatened him if he ever touched his car again. The officer admonished the second man that he should not be touching other people's vehicles. This appeared to the officer to resolve the dispute and neither party requested a report at that time.

A short while later, the Complainant went to the police station and spoke to the field supervisor, saying that he was displeased with how the officer had handled the case and that he felt he had not been taken seriously. He asked for a police report. The field supervisor asked the officer to write up a report of the dispute. In preparing the report, the officer re-contacted the Complainant and the second man and the second man's two companions and took statements from each. He determined that there were conflicting statements and no independent witnesses and he could not determine the primary aggressor. He listed the Complainant as the "reporting party" in the report and the second man as the "other party" in the report and submitted it to the District Attorney's office, which declined to file any charges.

When the Complainant requested a copy of the report, he was told he was not entitled to one by the Police Records desk because he was not a victim in the case but rather a reporting party. He then filed a complaint and in subsequent interviews alleged that the traffic officer had acted unprofessionally, had failed to perform his duties properly and had retaliated against the Complainant by not listing him in the report as a victim. The Department determined that each of these allegations was unfounded.

Recommendation: The Auditor reviewed the reports and listened to the interviews of this citizen complaint investigation. The initial follow up of the incident by the officer as well as the investigation of the complaint were thorough and pursued in an appropriate and even-handed manner. The Complainant however, remained highly frustrated by the process, apparently for two main reasons: he believed himself the unacknowledged victim of the other man's threats and he could not obtain a copy of the police report. The Department cannot promise anyone that it will take their side in a verbal dispute but it should take pains not to raise their expectations about access to its work product and explain why the other party's private information would have to be redacted from any disclosed document anyway. It appears that the designation of the Complainant as a "reporting party" rather than a "victim" was logical and appropriate given the contradictory state of the evidence. Nevertheless, the traffic officer said he assumed the Complainant would receive the report since that was one of the primary reasons he was preparing it. This points to the need for Department field personnel to familiarize themselves with the document disclosure policy. We recommend that the

Department ensure that the traffic officer and the field supervisor become conversant with this policy so that they do not make incorrect assumptions or inadvertently mislead members of the public who may anticipate obtaining a copy of a police report.

We agree with the findings that the allegations against the officer were unfounded.

Resolution/Corrective Action: The Department has notified the Complainant of the results of this investigation.

4. Complaint of Discourtesy and Excessive Length of Vehicle Stop #C 2011-004

Synopsis: An officer patrolling in the small hours of the morning observed a motorist weave within the lane, fail to stop behind a limit line at a red light, and leave her turn signal on for several blocks. He pulled the motorist over for a drunk driving investigation, approached her window, smelled her breath, conducted a test of her eye movements and decided to have her get out of the car and perform field sobriety tests. The motorist had a friend who remained in the car. The officer was joined by a back up officer who assisted with the tests. During the field sobriety tests, the motorist complained about the process, argued that she did not want to remove her high heels as the officers suggested and repeated that she was cold. At one point, she started to return to her vehicle to get a jacket and was called back by the officer. Shortly thereafter, the officer retrieved a jacket from her friend and gave it to the motorist. After the tests were complete, the motorist was allowed to sit in the back of the patrol car to keep warm while the officers waited for a preliminary alcohol screening device (PAS) to be brought to the scene. The PAS device did not appear to be reading properly at first, and then produced a .00 reading.[2] The officers decided that the evidence of the field sobriety tests and the device were inconclusive and that the motorist did not meet the criteria for a DUI arrest.

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[2] In recent months, PAPD officers discovered a flaw in some of the Department's PAS devices. This led the Department to engage in a dialogue with the manufacturer that led to an evaluation by the National Highway Traffic Safety Administration and a recall and redesign of certain devices. The Department also conferred with the District Attorney's office on the potential impact on a number of past investigations. We will report more fully on this episode and its outcomes in our next report.

She was released and allowed to drive home. The stop and DUI investigation lasted forty-one minutes.

One week later, the motorist filled out a formal complaint with an internal affairs investigator. She alleged that the officer who stopped her was rude and "rough" in his demeanor, took far too long with the investigation and did not allow her to put on a jacket against the cold. The investigator completed a thorough investigation, reviewed the MAV videos and radio traffic recordings, and interviewed the Complainant and all witnesses except for the motorist's friend who never responded to several requests for an interview except to say that she was planning to move shortly. The Department concluded that the allegations against the officer were unsupported by the evidence.

Recommendation: The Auditor agrees that the allegations should be deemed Unfounded. The MAV video and audio recordings show that both officers maintained a professional manner throughout the encounter. They appear to be attempting to pursue a standard DUI investigation protocol. The primary officer's actions are methodical but not excessively slow. Both officers exercised adequate diplomacy and patience with the Complainant who became argumentative and a bit erratic. Despite these conversational digressions and a balky PAS device, the entire investigation did not take an unusual amount of time. The Complainant was given a jacket fifteen minutes into the forty-one minute stop and allowed to spend some of that time in a heated patrol car.

It appears that the Complainant remembered some aspects of her DUI detention differently than what is clearly depicted on the MAV videos. We recommend that during or at the conclusion of these types of investigations, the Department offer to show the video to the complainant. [See also our discussion above of Case # 2011-02]

Resolution/Corrective Action: The Department has notified the Complainant of the results of this investigation.

5. **Complaint of Inadequate Service, False Statements in Reports and Improper Handling of Evidence #C 2011-05**

Synopsis: Two partners in a landscaping company performed work for a homeowner but had a dispute with the customer over payment. The homeowner subsequently complained to the police that she was receiving harassing phone calls from

the partners. A police officer investigated the case and the Department presented the case to the District Attorney's Office, which filed one misdemeanor count of repeated telephone calls with intent to annoy [Penal Code 653m(b)]. Numerous delays and pretrial motions caused the case to languish in the court system for a few years. Four years after the incident, one of the defendants left eight lengthy phone messages (a total of 32 minutes of dense declamation) with PAPD Internal Affairs during a two day period. These messages referred to events from 2007. The complainant surmised that a large number of civilians, police and members of the district attorney's office had conspired to suppress and ignore his claims related to a contract dispute over landscaping work for a local homeowner. He also alleged that the PAPD officer who had investigated the case had personally accepted documents he had brought to the police station, in contradiction of the officer's report which indicated another officer had accepted the documents from the Complainant, and had failed to submit the documents to court until months later.

The Internal Affairs investigator met with the Complainant and discussed the issues but stated that he would not commence investigating the allegations until after the resolution of the criminal case. A jury trial of the case was scheduled for the following week. The case was resolved two weeks later, without trial when the Complainant pleaded "no contest" to a reduced charge of trespass and his partner pleaded "no contest" to the harassing phone calls charge.

Following the plea, the investigator made several attempts to contact the Complainant but received no response. There was no phone message service either. The investigator was able to leave messages with the Complainant's business partner on two occasions but to no avail. The investigator nevertheless reviewed the telephone messages that the Complainant had left earlier and determined that the allegations that addressed the performance of the officer who had conducted the original criminal investigation could and should be addressed by an administrative investigation. The investigator performed a thorough review of all documentation of the original criminal investigation, including records of the calls for service and the shift duty rosters for the period of the Complainant's document delivery to the station. The evidence showed that, contrary to the Complainant's claims, the criminal case investigator was not the officer who accepted the documents from the Complainant and further that those documents were of such

peripheral relevance to the case that any delayed delivery was of no moment to the issues in the case.

Recommendation: The Department took action to conduct a complete investigation of the allegations concerning the original criminal investigator. The investigation was relatively thorough despite the fact that the Complainant ceased cooperating. In our experience with other law enforcement agencies, we have found that in too many occasions, when a complainant no longer cooperates with an internal investigation, such lack of cooperation presents a convenient justification for inactivating a case. In this case, to the Police Department's credit, such did not occur.

It was appropriate to hold the investigation in abeyance pending the resolution of the criminal case, especially since that matter was imminent. It was also appropriate for the Department to confine its investigation to those matters within its control and jurisdiction. The allegations concerning the District Attorney and the Court need be addressed through the criminal adjudication and internal processes of those two entities.

The Auditor reviewed the evidence in this case and concurred with the Department's conclusions. The false statement allegation is not supported by the evidence and should be Unfounded and the alleged document handling delay, while true did not result in a violation of policy and should be deemed Exonerated.

Resolution/Corrective Action: As delineated above, because of the inability of the complainant to respond to inquiries, the Department has not been able to inform the Complainant directly of the results of this investigation.

III. Cases Pending from Prior Report

There were no unresolved cases pending from our last report.

Table of Complaint and Internal Affairs Investigations Reviewed by the Auditor January 2011 Through July 2011

Case No.	Case/Investigation Type	Allegation	Results of Investigation	Resolution
C-2011-001	Citizen Complaint	Improper vehicle stop; biased policing	Pending evaluation by IPA	
C-2011-002	Citizen Complaint	Unlawful detention & search, property damage	Unfounded	Complainant informed of results
C-2011-003	Citizen Complaint	Discourtesy, failure to perform duties, and wrongful exercise of authority	Unfounded	Complainant informed of results
C-2011-004	Citizen Complaint	Discourtesy and excessive length of vehicle stop	Unfounded	Complainant informed of results
C-2011-005	Citizen Complaint	Inadequate service, false statements, improper evidence handling	Unfounded	Complainant could not be informed of results

Conclusion

We are informed that the Police Department anticipates several retirements of manager level personnel in the near future. This will pose a significant challenge to the continuity and continued high quality of internal affairs and citizen complaint investigations. We are hopeful that the Department gives thoughtful consideration to these issues when developing a transitional plan so that this important function is not undermined.