



Office of the
**INDEPENDENT
POLICE AUDITOR**

BAY AREA RAPID TRANSIT DISTRICT

MONTHLY REPORT

January 2023

Issue date: March 13, 2023

This report is filed pursuant to the BART Citizen Oversight Model, Chapter 1-05 (B), which requires the Office of the Independent Police Auditor (OIPA) to submit reports to the BART Police Citizen Review Board (BPCRB). This report provides information for the period **January 1, 2023 through January 31, 2023**.¹ (The Quantitative Report includes all complaints received and administrative investigations initiated by both OIPA and the BART Police Department (BPD) Internal Affairs Bureau (IA)).

QUANTITATIVE REPORT

	Cases Filed ²	Open Cases ³	Investigations Resolved	OIPA Investigations Concluded ⁴	Cases Appealed to OIPA ⁵	Cases Appealed by BPCRB ⁶
January 2022	4	84	7	1	0	0
February 2022	6	81	9	1	0	0
March 2022	6	73	14	1	0	0
April 2022	10	79	6	1	0	0
May 2022	14	86	6	1	0	0
June 2022	8	87	7	1	0	0
July 2022	10	91	5	0	0	0
August 2022	10	85	17	2	0	0
September 2022	11	90	7	0	0	0
October 2022	5	82	13	1	0	0
November 2022	5	84	3	1	0	0
December 2022	5	86	3	0	0	0
January 2023	6	87	5	0	0	0

TYPES OF CASES FILED

Citizen Complaints (Formal)	6
Informal Complaints ⁷	0
Administrative Investigations	0
Inquiries ⁸	0
TOTAL	6

CITIZEN COMPLAINTS RECEIVED PER DEPARTMENT⁹

OIPA	1
BART Police Department	5
TOTAL	6

COMPLAINTS/INVESTIGATIONS INITIATED DURING REPORTING PERIOD

During January 2023, **1 Citizen Complaint** was received by OIPA:

Complaint # (OIPA Case #) (IA Case #)	Nature of Complaint	Action Taken	Days Elapsed Since Complaint Filed
1 (OIPA #23-01) (IA2023-002)	Officers #1-2: <ul style="list-style-type: none"> • Bias-Based Policing • Arrest/Detention 	OIPA notified BPD which initiated an investigation.	63

During January 2023, **5 Citizen Complaints (Formal)** were received by BPD:

Complaint # IA Case #	Nature of Complaint	Action Taken	Days Elapsed Since Complaint Filed
1 (IA2023-001)	Officers #1-2: <ul style="list-style-type: none"> • Conduct Unbecoming an Officer 	BPD initiated an investigation.	69
2 (IA2023-003)	Officer #1: <ul style="list-style-type: none"> • Conduct Unbecoming an Officer 	BPD initiated an investigation.	64
3 (IA2023-004)	Officer #1: <ul style="list-style-type: none"> • Performance of Duty 	BPD initiated an investigation.	45
4 (IA2023-005)	Employee #1: <ul style="list-style-type: none"> • Courtesy 	BPD initiated an investigation.	44
5 (IA2023-006)	Officer #1: <ul style="list-style-type: none"> • Force 	BPD initiated an investigation.	46

COMPLAINTS/INVESTIGATIONS CONCLUDED DURING REPORTING PERIOD

During January 2023, **5 Citizen Complaints** were concluded by BPD:

(IA Case #)	Nature of Complaint	Disposition	Days Elapsed Since Complaint Filed	Days Taken to Complete Investigation
1 (IA2022-004)	Officers used excessive force, one officer verbally humiliated complainant, and one officer improperly searched complainant.	Officers #1-3: <ul style="list-style-type: none"> • Force – Exonerated Officer #2: <ul style="list-style-type: none"> • Performance of Duty – Exonerated Officer #3: <ul style="list-style-type: none"> • Conduct Unbecoming an Officer – Unfounded 	402	350

2 (IA2022-005)	Officer improperly detained and searched complainant and did so because of complainant's race and officer did not properly document a law enforcement contact.	Officer #1: <ul style="list-style-type: none"> • Bias-Based Policing – Unfounded* • Arrest/Detention – Sustained • Search/Seizure – Sustained • Policy/Procedure (Body Worn Camera) – Sustained 	223	177
3 (IA2022-006)	Officer cancelled complainant's pending medical care and smiled while doing so.	Officer #1: <ul style="list-style-type: none"> • Performance of Duty – Not Sustained • Conduct Unbecoming an Officer – Not Sustained 	223	177
4 (IA2022-011)	Officers were rude to complainant.	Officers #1-2: <ul style="list-style-type: none"> • Conduct Unbecoming an Officer – Unfounded 	375	330
5 (IA2022-012)	Officer was rude to complainant during a law enforcement contact.	Officer #1: <ul style="list-style-type: none"> • Conduct Unbecoming an Officer – Unfounded 	366	314

DISCIPLINE ISSUED DURING REPORTING PERIOD

During January 2023, BPD took the following actions in cases where one or more allegations of misconduct were sustained:

Case #	Nature of Sustained Allegation(s) †	Classification of Sustained Allegation(s)	Action Taken
1	Officer improperly detained and searched complainant and did not properly document a law enforcement contact.	Officer #1: <ul style="list-style-type: none"> • Arrest/Detention – Sustained • Search/Seizure – Sustained • Policy/Procedure (Body Worn Camera) – Sustained 	Officers #1-2: <ul style="list-style-type: none"> • Written Reprimand¹⁰

* OIPA requested a change to this investigative finding from Unfounded to Not Sustained. BPD agreed to the change but has not yet updated its records as of February 27, 2023. There are more details in the Additional Notes section of this report, below.

†Some details regarding the nature of sustained allegations may be withheld to avoid unintentionally breaching mandatory confidentiality requirements. In some instances, the relative infrequency of the alleged misconduct may tend to allow for identification of the subject officer in violation of the applicable CA Penal Code section (832.7).

ADDITIONAL NOTES

In accordance with the BART Citizen Oversight Model (Model), OIPA investigates certain complaints, conducts complainant-initiated appeals, and monitors and/or reviews complaint investigations conducted by BPD. Though potentially work-intensive, some complaint investigation reviews are completed informally, with any concerns being addressed through a conference with BPD's Internal Affairs investigators. Noting the various kinds of work that OIPA undertakes with regard to complaints and investigations, the following chart includes some of the pending cases in which OIPA is involved as of the end of this reporting period.

Investigations Being Conducted	7
Complainant-Initiated Appeals	0
BPD-Initiated Appeals	0
Investigations Being Monitored	18
Investigations Reviewed During Current Month	11†

†This number does not include all OIPA reviews, as OIPA commonly looks at a variety of cases in the Internal Affairs database to obtain updates on both pending and completed investigations.

The Model provides that OIPA shall have authority to require follow-up investigation into any citizen complaint or allegation that is handled by BPD.¹¹ The OIPA Monthly Report will reflect information regarding monitored cases with detail not to exceed that which is allowable under state law.

The investigations reviewed by OIPA during the period generated the following recommendations for revisions or additional investigation. OIPA identified issues related primarily to the performance of the BPD Office of Internal Affairs (IA). Specifically, OIPA detected some inconsistencies associated with the accuracy of investigative findings and allegations, and the maintenance of records in a small number of IA cases reviewed.

1. BPD Agreed to Change Investigative Finding from Unfounded to Exonerated

In one instance, OIPA opined that Internal Affairs (IA) inaccurately determined that an allegation of Conduct Unbecoming an Officer (CUBO) was Unfounded when the accurate determination should have been Exonerated.

The BPD Policy Manual provides that a personnel complaint shall be classified with an outcome of Unfounded when the investigation discloses that the alleged acts did not occur or did not involve department members. However, when the investigation discloses that the alleged act occurred but that the act was justified, lawful and/or proper the complaint shall be classified as Exonerated.

In IA case #IA2022-003, the subject officer did make the comments that were alleged by the complainant to be inappropriate, but IA determined that the officer's comments were not unbecoming and did not violate BPD policy.

OIPA conveyed its opinion to the Chief of Police that because the officer made the comments, a finding of Unfounded is inaccurate. OIPA requested that IA change the findings and notify both the complainant and the subject officer of the revised finding.

After being notified of OIPA's concerns, BPD Chief Ed Alvarez responded that IA would change the finding to Exonerated, notify the parties, and update the case file and IA database.

2. BPD Confirmed Delivery of Supervisor Referral to Officer Prior to Officer's Retirement

OIPA noted that IA resolved one complaint investigation as a Supervisor Referral (SR), which provides that in instances involving an Informal Complaint, an assigned supervisor will address the complaint informally with the involved employee and document the content of the conversation in a memorandum to the IA Unit.

In IA case #IA2022-092, OIPA noted that IA elected to handle the complaint via SR even though the subject officer had retired from the department.

After being advised of the concern by OIPA, Chief Alvarez advised OIPA that the SR had been delivered to the subject officer prior to the officer's retirement from the department.

Although this is a satisfactory outcome with regard to the delivery of the SR, it highlighted the fact that documentation, including the required SR memorandum, were not attached to the database more than one month after closure of the complaint. This is problematic because OIPA relies on the accuracy of the IA database for its required reporting and for its review of IA's work product. Additionally, if OIPA had not informed BPD of the missing documentation, the case may have remained closed with an incomplete documentary record.

After being advised of the issue by OIPA, IA subsequently uploaded the required documentation reflecting that the SR was properly issued and properly acknowledged by the subject officer.

3. BPD Corrected Inaccurate Allegations and Did Not Prematurely Close Complaint

In IA case #IA2022-095, OIPA noted that the complainant alleged Bias-Based Policing and Rudeness, and the summary in the IA database indicated that the complaint would be administratively closed.

Of initial concern to OIPA was the fact that the IA database record for this complaint reflected no allegations of misconduct or policy violations despite clear written allegations submitted by the complainant alleging Racial Profiling/Bias-Based fare enforcement activity. As noted above, OIPA and the public rely on the accuracy of the IA database to reflect the number and nature of complaints received by IA.

The BPD policy manual provides that some allegations, after being received and documented may be summarily closed after the Chief of Police or his/her designee determines, based on a preliminary investigation, that further investigation is not warranted. Under these circumstances, the complaint will be administratively closed and documented in a summary memorandum to the IA case file. Employees will be documented as witnesses only, not as subjects to the complaint, and IA will send a letter to the complainant notifying them that the case was closed following a preliminary investigation. A complaint may be closed in this manner under circumstances including but not limited to when the complaint lacks specificity and the complainant either refuses to cooperate or becomes unavailable to provide information necessary to investigate the incident.

Here, IA appeared to have documented leaving one voicemail message and sending one email to the complainant at the same time as the assigned investigator documented an intention to close the case administratively. The IA database record also reflected that the decision to administratively close the complaint of Bias-Based Policing was made without any effort to review available video evidence. OIPA believes that the available video may have enabled IA investigators to reach an investigative conclusion even without the complainant's further participation in the investigative process as the complainant had already provided certain details and information during the intake process.

OIPA recommended that in situations such as this, IA should accurately record all allegations and conduct a more thorough preliminary investigation to, minimally, attempt identify the involved officer or employee and obtain relevant body worn and/or fixed video camera footage before administratively closing any complaint. OIPA also recommended that IA supervisors provide additional guidance to IA investigators about mitigating the deficiencies noted above.

After OIPA conveyed these concerns to Chief Alvarez, IA updated the database to reflect an allegation of Bias-Based policing against one (as yet) unknown employee and mailed a letter to the complainant requesting an interview. BPD also advised OIPA that the initial entries in the IA

database should have noted that the complaint *may* have been a candidate for administrative closure pending additional investigation, and that additional clarifying language has now been added to the internal database.

4. BPD Added Appropriate Allegations and Identified All Subject Employees

Internal Affairs investigated one complaint (#IA2022-079) in which it was alleged that a Fare Inspection Officer used excessive force during a contact, but the investigation did not address additional allegations that the employee was disrespectful and rude and refused to provide identification upon request as required by BPD policy.

There were other BPD employees present during the contact who failed to activate their body worn cameras which should have generated additional allegations and investigation by IA (leading to the potential imposition of discipline), but the IA database did not reflect that these potential policy violations were detected, recorded, or addressed by IA.

After being informed of these concerns by OIPA, BPD responded by updating the IA database to reflect the appropriate allegations against all involved BPD employees and IA transmitted appropriate notifications to all subject employees.

5. BPD Agreed to Change Investigative Finding from Unfounded to Not Sustained

In Internal Affairs case #IA2022-005, the subject officer was alleged to have searched the complainant based on the complainant's race. It was OIPA's opinion that Internal Affairs relied too heavily on the officer's own assertion that race was not a factor in the officer's decision-making process while the officer disregarded available evidence and information indicating that the subject was not involved in any criminal activity.

OIPA suggested that a more appropriate finding given the absence of more determinative evidence and the absence of body worn camera video due to the officer's failure to record the law enforcement contact as required by policy should result in a finding of Not Sustained. Such a finding is appropriate, according to the BPD policy manual, when the investigation discloses that there is insufficient evidence to sustain the complaint or fully exonerate the subject of the complaint.

After being informed of OIPA's opinion and concerns about the investigatory outcome, Chief Alvarez agreed to change the determination to Not Sustained[‡] and to update the records accordingly. These adjustments remained pending as of February 25, 2023.

6. Policy Consideration – Definition of Bias-Based Policing Allegation as Compared with Racial Animus

In an administrative investigation initiated by BPD, OIPA noted that the BPD initiated allegations of Bias-Based policing which were related to conduct that occurred amongst BPD employees and which was not related to the provision of law enforcement services. For this reason, OIPA suggested to the Chief that the appropriate allegations could have been Racial Animus, however the definition of bias-based policing in the BPD policy manual does not actually require that the conduct be related to policing or law enforcement activity. Though OIPA does not believe that the language in the BPD policy manual requires any adjustments to the allegations in this case, OIPA suggested that going forward BPD may consider applying allegations of Racial Animus where the conduct is unrelated to

[‡] The BPD policy manual provides that a finding of Not Sustained is appropriate when the investigation discloses that there is insufficient evidence to sustain the complaint or fully exonerate the BPD employee.

the provision of law enforcement services and OIPA also suggested that BPD consider a policy revision incorporating this concept.

In summary, OIPA conveyed concerns and made recommendations related primarily and importantly to the following issues in connection with its review of Internal Affairs' performance during this period:

- Reaching findings of Unfounded is appropriate only when the alleged conduct did not occur and is inappropriate when the conduct occurred but was within policy.
- The importance of maintaining or updating the Internal Affairs database such that each record is accurate and complete and such that all relevant documentation is attached.
- Properly identifying, recording, and investigating all allegations lodged by a complainant or all allegations that may surface during the course of an investigation.

It's important to note that the process of review by OIPA provides for the detection of issues such as those identified above and allows both OIPA and BPD to thoughtfully address and rectify those issues in order to improve BPD's internal accountability systems.

Chief Ed Alvarez and Deputy Chief Kevin Franklin have been consistently attentive to OIPA's concerns and have made themselves available for comprehensive discussions about the particulars of each of the concerns raised herein.

OIPA will remain vigilant in its review of IA's work and will remain in close contact with Chief Alvarez to address any issues or concerns going forward. It is our expectation that by remaining watchful and attentive and by working to ensure that BPD's internal accountability measures, including IA investigative processes, are effective we can mitigate conditions that might allow for the type of systemic breakdowns that can undermine community trust and impede the performance of the Department.

¹ In addition to reporting on complaints received by the BART Police Department, the Citizen Oversight Model requires reporting on all complaints received by the "Citizen Board, Office of the District Secretary, and other District departments." As complaints received by the BART Police Citizen Review Board are customarily directed to OIPA for further action, such complaints are included in the Quantitative Report above; OIPA is also made aware of additional complaints about the BART Police Department by the Office of the District Secretary or other District departments.

² This number includes all Citizen Complaints filed against members of the BART Police Department, as well as Administrative Investigations generated internally by BART Police Department members (as opposed to being filed by a citizen). This number also includes previously completed cases that have been re-opened during the current reporting period.

³ This number indicates all investigations that are open as of the end of the reporting period. It includes Citizen Complaints (regardless of whether the investigation is being conducted by OIPA, the BART Police Department, or both) and Administrative Investigations.

⁴ This number includes all cases completed by OIPA during the reporting period for which OIPA's findings are required by the BART Citizen Oversight Model to be submitted to the BART Police Citizen Review Board. It therefore includes independent investigations, as well as reviews of completed BART Police Department investigations initiated via appeal from a complainant. Unless otherwise noted, it does not include reviews of BART Police Department investigations initiated at the discretion of OIPA, which happen commonly and do not always generate a formal report; it also does not include reviews conducted by OIPA of complaint investigations where the complaint was filed with OIPA but did not fall under OIPA's investigative jurisdiction.

⁵ This number refers to appeals filed with OIPA by complainants who have been issued the findings of the BART Police Department's internal investigation into their complaint regarding on-duty incidents. OIPA has a responsibility to review such appeals pursuant to the BART Citizen Oversight Model, Chapter 1-04 (E).

⁶ This number refers to all appeals initiated by the BART Police Citizen Review Board after receiving and reviewing the findings issued by OIPA in a given case. The routes of all such appeals are described in detail in the BART Citizen Oversight Model, Chapter 1-04 (B) (iv-v).

⁷ The BART Police Department defines an Informal Complaint as, “A comment on the actions of a Department employee, where the reporting party expressly states that he or she does not feel that the matter should be formally investigated with the understanding that an Informal Complaint does not hold the potential to result in disciplinary action against the employee.” (BART Police Department Policy Manual, Policy 1020.1.1(d)).

⁸ BPD policy provides that if a person alleges or raises an issue that does not constitute a violation of Department policy, procedure, rules, regulations, or the law, the Department will classify the issue as an inquiry.

⁹ It is important to note that OIPA does not separate citizen complaints it receives into “Formal” and “Informal” classifications. This chart reflects all citizen complaints received by OIPA and all Formal Complaints received by the BART Police Department.

¹⁰ Written Reprimand (first level of formal discipline): If there have been no re-occurrences at the end of the time frames as determined by the collective bargaining agreement (up to 3 years), the immediate supervisor shall meet with the employee and advise him/her that the progressive discipline has become inactive and has been removed from the employee’s personnel files.

¹¹ OIPA may submit recommendations to IA regarding minor clerical or record-keeping adjustments which are intended to maintain the integrity of the data collection and record-keeping processes at BPD. These are not considered by OIPA to be substantive recommendations requiring reporting herein.