



Office of the
**INDEPENDENT
POLICE AUDITOR**

BAY AREA RAPID TRANSIT DISTRICT

MONTHLY REPORT

November 2023

Issue date: January 8, 2024

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 **November 1, 2023 through November 30, 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
November 2022	5	84	3	1	0	0
December 2022	5	86	3	0	0	0
January 2023	6	87	5	0	0	0
February 2023	12	91	9	1	0	0
March 2023	10	98	4	1	0	0
April 2023	12	99	10	1	0	0
May 2023	10	101	6	1	1	0
June 2023	7	103	6	1	2	0
July 2023	18	106	7	1	0	0
August 2023	18	114	8	1	0	0
September 2023	11	115	11	1	0	0
October 2023	4	106	14	2	0	0
November 2023	6	109	3	0	0	0

TYPES OF CASES FILED

Citizen Complaints (Formal)	4
Informal Complaints ⁷	0
Administrative Investigations	2
Inquiries ⁸	0
TOTAL	6

CITIZEN COMPLAINTS RECEIVED PER DEPARTMENT⁹

OIPA	0
BART Police Department	4
TOTAL	4

COMPLAINTS/INVESTIGATIONS INITIATED DURING REPORTING PERIOD

During November 2023, **3 Citizen Complaints (Formal)** were received by BPD:

Complaint # IA Case #	Nature of Complaint	Action Taken	Days Elapsed Since Complaint Filed
1 (IA2023-104)	Officer #1: • Courtesy	BPD initiated an investigation.	68
2 (IA2023-105)	Officer #1: • Force	BPD initiated an investigation.	68
3 (IA2023-108)	Employee #1: • Courtesy	BPD initiated an investigation.	49

During November 2023, **2 Administrative Investigations** were initiated by BPD:

Complaint # IA Case #	Nature of Complaint	Action Taken	Days Elapsed Since Investigation Initiated
1 (IA2023-106)	Officer #1: • Policy/Procedure	BPD initiated an investigation.	62
2 (IA2023-109)	Officer #1: • Policy/Procedure	BPD initiated an investigation.	49

COMPLAINTS/INVESTIGATIONS INITIATED DURING A PRIOR REPORTING PERIOD

During August 2023, **1 Citizen Complaint** was received by BPD but not forwarded to Internal Affairs:

Complaint # IA Case #	Nature of Complaint	Action Taken	Days Elapsed Since Complaint Filed
1 (IA2023-107)	Officer #1: • Force	BPD initiated an investigation.	144*

*This case was initiated based on a complaint to a BPD supervisor during a use of force review. The supervisor failed to properly forward the complaint to IA as required by BPD policy.

COMPLAINTS/INVESTIGATIONS CONCLUDED DURING REPORTING PERIOD

During November 2023, **3 Citizen Complaints** were concluded by BPD:

(IA Case #)	Nature of Complaint	Disposition	Days Elapsed Since Complaint Filed	Days Taken to Complete Investigation
1 (IA2023-002)	Officers used excessive force during a detention for fare evasion.	Officers #1-3: • Bias-Based Policing – Administratively Closed ¹⁰ • Arrest/Detention – Administratively Closed	364	310
2 (IA2022-091)	Officer wrongfully arrested complainant.	Officer #1: • Arrest/Detention – Exonerated	402	339
3 (IA2022-088)	Officers used excessive force during a vehicle stop.	Officers #1-3: • Force – Exonerated • Detention – Exonerated • Bias-Based Policing – Unfounded • Conduct Unbecoming an Officer – Unfounded Officers #1-2: • Search/Seizure – Exonerated Officer #3: • Conduct Unbecoming an Officer (Unprofessionalism) – Unfounded	437	371

DISCIPLINE ISSUED DURING REPORTING PERIOD

During November 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 did not properly document a law enforcement contact.	Officer #1: • Policy/Procedure (Body Worn Camera)	Officer #1: • Letter of Discussion ¹¹ •
2	Officer did not properly document a law enforcement contact.	Officer #1: • Policy/Procedure (Body Worn Camera)	Officer #1: • Oral Counseling ¹²
3	Officer did not properly document a law enforcement contact.	Officer #1: • Policy/Procedure (Body Worn Camera)	Officer #1: • Letter of Discussion

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	5
Complainant-Initiated Appeals	3
BPD-Initiated Appeals	0
Investigations Being Monitored	23
Investigations Reviewed During Current Month	17†

†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.

ISSUES DETECTED

The Model provides that OIPA shall have authority to require follow-up investigation into any citizen complaint or allegation that is handled by BPD.¹³ The OIPA Monthly Report will reflect information regarding monitored cases, investigations, and contacts with detail not to exceed that which is allowable under state law. The investigations reviewed by OIPA

†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).

during this period generated the following recommendations for revisions or additional investigation.

In connection with one Internal Affairs (IA) complaint investigation, OIPA noted that IA personnel changed the allegations from what was identified in an OIPA intake memo but did not contact OIPA for discussion. Chief Franklin advised OIPA that he would instruct IA staff to review OIPA intake memos more carefully and to contact OIPA to discuss any approach to the investigation that does not incorporate the allegations identified by OIPA.

In another instance, IA identified only two officers as subjects, though other officers used force during the contact. Additionally, there was no clear discussion or analysis in the final IA report regarding whether the deployment of a TASER was appropriate during this detention/arrest. Further, there was no analysis about whether de-escalation efforts were applied as required by Policy 300. Notably, when Policy 300 is implicated, all uses of force by all officers are typically reviewed and analyzed to reach a fair, thorough, and objective outcome. Chief Franklin agreed to revisit the investigative approach with the IA team.

OIPA identified one instance in which an officer reported conducting a welfare check on a passenger prior to initiating a detention and arrest for penal code violations. OIPA opined that the officer initiated the detention absent the required reasonable suspicion of criminal activity. The Chief of Police and a Deputy Chief reviewed the contact and agreed that the detention was improper and issued a disciplinary Letter of Discussion to the involved officer. A BPD supervisor also reviewed the applicable policy language with the involved officer.

However, OIPA and BPD disagreed about whether the issuance of the discipline should be recorded in the Internal Affairs database. It is OIPA's opinion that the progressive discipline structure requires the maintenance of records for all issued discipline such that any subsequent policy violations may be properly and appropriately addressed. Any omission is particularly troubling because the subject officer has repeatedly disregarded instructions related to the proper development of reasonable suspicion in connection with the enforcement of the BART Proof of Payment Ordinance. To date, the fact that the discipline was issued is not reflected in the IA database.

OIPA reviewed one IA investigation in which IA personnel identified two subject officers and investigated whether those officers used excessive force. OIPA found that more than two officers used force during the contact and that it would be appropriate to address the other officers' use of force in the final investigative report. OIPA also noted that one officer's TASER deployment was not properly examined as required by BPD policy and there was no discussion in the report about whether the involved officers properly applied de-escalation tactics as required by BPD Policy 300.

The Chief of Police agreed to revisit the approach to this investigation via discussion with IA personnel.

Related to OIPA monitoring of IA investigations, OIPA investigators have identified issues regarding specific investigations and OIPA requested that these issues be promptly addressed. OIPA has identified that in some instances IA investigators and the IA supervisor have not incorporated the OIPA-identified allegations and/or subject officers, which information is included in OIPA intake memos that are transmitted to BPD in connection with all monitored investigations. The Chief of Police has committed to issuing a reminder to IA personnel about the value of reviewing OIPA intake memos prior to initiating an

investigation and the chief will further advise IA personnel and leadership to contact OIPA in the event that there is disagreement about the appropriate allegations or about the identification of subject officers.

One IA investigative report included inaccurate findings and questionable analyses. Although it appeared appropriate for IA not to sustain the allegations against the officers for the alleged misconduct, there were issues with the contents of the report.

IA's analysis properly reasoned a sustained finding for not performing investigative duties properly, but IA reached a "not sustained" finding in the final report. OIPA advised BPD that Not Sustained is an inconsistent and inaccurate outcome if the officers did not perform their duties as required. In the final report, IA wrote that the subject officers "**should have** off boarded the juveniles to validate their fare and determine whether a violation of BART Ordinance 2017-2.5.1 had occurred." (emphasis added). This reflects a finding of fact that the officers did **not** perform their duties as required, in violation of BPD policy.

The report included no articulation or factual finding that it "could not be determined whether the misconduct alleged by the complainant did or did not occur," which is the requirement for reaching a not sustained finding.

In the same investigative report, IA reached a finding of "not sustained" in connection with an allegation of Conduct Unbecoming an Officer (CUBO). The finding was not justified by the analysis because IA determined that "BWC footage does not support [complainant's] allegation that [subject officer] criticized and opined about the complainant's political beliefs. OIPA recommended that BPD consider whether it's appropriate to change this finding to "exonerated" since the alleged interaction did occur, even if the conduct was not violative of law or policy. The IA report did not articulate why a "not sustained" CUBO finding would be appropriate.

Lastly, OIPA identified a preliminary allegation of Policy/Procedure in the intake memo to IA, but that allegation is missing from the IAPro record and was not addressed in the final investigative report.

BPD agreed to review the report and the findings to determine whether revisions are appropriate.

In another investigative report completed by IA, the investigator reached a finding of "not sustained" for a non-activation of a body-worn camera (BWC). IA relied on an image from another officer's BWC in which it appears that the subject officer may have attempted to activate the camera. However, there was no video recorded by the subject officer and there was no explanation or investigation related to whether the lack of video might have been the result of a technical error or malfunction. Absent a determination that the unit malfunctioned, this is a clear policy violation regardless of whether the officer appeared to have attempted to activate her camera. OIPA recommended that BPD and IA review the report and the analyses and revise the finding to "sustained" for the non-activation.

BPD agreed to review the report and the findings to determine whether revisions are appropriate.

During this reporting period, BPD included in their Watch Commanders' Daily Log that officers contacted a transient subject for a welfare check on a Daly City bound train. The log entry noted that the subject did not have proof of payment and was detained. He was later taken to Santa Rita Jail in connection with other penal code violations and warrants.

After OIPA asked BPD to review the contact, a BPD Deputy Chief replied that the involved officers properly developed reasonable suspicion to request proof of payment, as required by the BPD Proof of Payment policy, when the subject improperly answered a question about his destination.

The involved officer reported asking the subject "...the standard welfare check questions and discovered he did not have a BART ticket in violation of PUC 99170(a)(6)." BPD has recently started using the cited Penal Code section to enforce the requirement to provide proof of payment in some counties, but the law still requires the development of specific and articulable reasonable suspicion. In this instance, further review revealed that the reasonable suspicion was deemed to be established when the subject stated that they were traveling to a destination which the train had already passed. OIPA requested that BPD advise Watch Commanders and supervisors that log entries absent any articulation of the reasonable suspicion should be more carefully reviewed and that Watch Commanders should be sure to include details about reasonable suspicion in the log entries to potentially obviate the need for deeper examination and review by OIPA staff.

This has been an infrequent, but recurring issue and the majority of OIPA-reviewed BPD proof of payment requests are compliant with the law and with BPD policy requirements.

Whistleblower Investigation Recommendations

OIPA reported in September 2023 regarding allegations received from an anonymous whistleblower alleging that BPD employees violated BPD policy because they had a personal relationship that resulted in a conflict of interest. The whistleblower's related allegations against BPD officers included sexual harassment, supervision, performance of duty (work schedule adherence/overtime abuse) and conduct unbecoming an officer. The investigation was complex and wide-ranging, and included numerous interviews with subjects and witnesses, as well as review of BPD personnel.

As was also reported in September, despite our determination that BPD personnel did not engage in conflict-of-interest violations or other BPD policy violations our investigation indicated that there were areas of concern within BPD that should be addressed.

Because these issues may negatively impact BPD should they remain uncorrected, the IPA offered several recommendations for improvement to the BART General Manager, Robert Powers. Again, these were not disciplinary recommendations, but suggestions intended to improve the police department's performance, practices, and culture.

Because the GM did not fully respond to two requests for responses regarding whether to accept and implement the recommendations, and in the interest of moving forward to address the problems uncovered during the investigation, OIPA submitted its recommendations to Chief Franklin on October 11, 2023 for his review and committed to generating a public report to memorialize the BPD response to the recommendations.

To date, Chief Franklin has not responded to OIPA regarding whether he agrees that the recommendations will ameliorate existing problems within the department and has not committed to implementing any recommendations, including those identified by the General Manager as potentially amenable.

A more detailed report about the process and the District's response to the recommendations is forthcoming.

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 Administrative Closure is defined as follows in the BPD Policy Manual: Allegations that are received and documented; however, 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 case file. Employees will be documented as witnesses only, not as subjects to the complaint. Internal Affairs will send a letter to the complainant notifying them that the case was closed following a preliminary investigation.

¹¹ Letter of Discussion (second level of pre-discipline): A letter of discussion may be the next step of the process of the informal process. It is a written memorandum to the employee making the

employee aware of the unacceptable behavior. A letter of discussion is pre-disciplinary, however, if the employee fails to correct the behavior, there will be cause to move to the next level of the process or to move to formal progressive discipline. An employee who may be issued a letter of discussion is entitled to appropriate representation. (BPD Policy Manual).

¹² Oral Counseling (third level of pre-discipline): An oral counseling may be the next step of the informal process. It is documented in a memorandum to the employee entitled "Oral Counseling." Prior to issuance, the supervisor should discuss the performance or infraction in detail with the employee. The purpose of the discussion is for the employee to be made aware of the unacceptable behavior. An employee who is covered by a collective bargaining agreement and who may be issued an Oral Counseling is entitled to appropriate association representation. An Oral Counseling is pre-disciplinary, however, if the employee fails to correct the behavior, there will be cause to move to progressive discipline.

¹³ 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.