



Office of the
**INDEPENDENT
POLICE AUDITOR**

BAY AREA RAPID TRANSIT DISTRICT

MONTHLY REPORT

February 2021

Issue date: March 8, 2021

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 **February 1, 2021 through February 28, 2021**.¹

(The Quantitative Report includes all complaints received and administrative investigations initiated by both OIPA and the BART Police Department (BPD) Internal Affairs Bureau (IAB)).

QUANTITATIVE REPORT

	Cases Filed ²	Open Cases ³	Investigations Resolved	OIPA Investigations Concluded ⁴	Cases Appealed to OIPA ⁵	Cases Appealed by BPCRB ⁶
February 2020	15	56	10	0	0	0
March 2020	9	54	11	1	0	0
April 2020	6	44	18	1	1	0
May 2020	4	40	6	1	0	0
June 2020	7	44	4	0	0	0
July 2020	1	41	3	1	0	0
August 2020	9	43	5	1	0	0
September 2020	10	45	8	1	0	0
October 2020	10	48	9	2	0	0
November 2020	11	51	7	2	0	0
December 2020	7	55	4	1	0	0
January 2021	8	61	5	2	0	0
February 2021	5	61	4	0	0	0

TYPES OF CASES FILED

Citizen Complaints (Formal)	5
Informal Complaints ⁷	0
Administrative Investigations	0
Inquiries ⁸	0
TOTAL	5

CITIZEN COMPLAINTS RECEIVED PER DEPARTMENT⁹

OIPA	0
BART Police Department	5
TOTAL	5

COMPLAINTS/INVESTIGATIONS INITIATED DURING REPORTING PERIOD

During February 2021, **5 Citizen Complaints (Formal)** were received by BPD:

(IA Case #)	Nature of Complaint	Action Taken	Days Elapsed Since Complaint Filed
1 (IA2021-009)	Officers #1-2: <ul style="list-style-type: none"> • Force • Conduct Unbecoming an Officer 	BPD initiated an investigation.	32
2 (IA2021-010)	Officers #1-2: <ul style="list-style-type: none"> • Force 	BPD initiated an investigation.	20
3 (IA2021-011)	Unknown # of Officers/Employees: <ul style="list-style-type: none"> • Performance of Duty 	BPD initiated an investigation.	22
4 (IA2021-012)	Officer #1: <ul style="list-style-type: none"> • Force • Bias-Based Policing 	BPD initiated an investigation.	19
5 (IA2021-013)	Officers #1-3: <ul style="list-style-type: none"> • Force 	BPD initiated an investigation.	20

COMPLAINTS/INVESTIGATIONS CONCLUDED DURING REPORTING PERIOD

During February 2021, **3 Citizen Complaints (Formal)** were concluded by BPD:

Complaint # (IA Case #)	Nature of Complaint	Disposition	Days Elapsed Since Complaint Filed	Days Taken to Complete Investigation
1 (IA2020-020)	Officers used excessive force during an arrest.	Officers #1-3: <ul style="list-style-type: none"> • Force – Exonerated 	383	365
2 (IA2020-027)	Two officers failed to properly secure a detainee, one employee used inappropriate language and injured complainant while using force on the detainee, and a supervisor failed to properly manage the scene and did not take appropriate disciplinary action against the involved officers for generating inaccurate reports.	Officers #1-2: <ul style="list-style-type: none"> • Performance of Duty – Exonerated Officer #3: <ul style="list-style-type: none"> • Force – Exonerated • Conduct Unbecoming – Unfounded Officer #2: <ul style="list-style-type: none"> • Policy/Procedure (AXON Camera) – Sustained Officer #4: <ul style="list-style-type: none"> • Supervision – Unfounded 	361	337
3 (IA2020-028)	Officers used excessive force during a detention.	Officers #1-2: <ul style="list-style-type: none"> • Force – Exonerated 	361	350

OIPA FINDINGS OVERTURNED BY THE BART GENERAL MANAGER AFTER APPEAL BY THE CHIEF OF POLICE*

During February 2021, the Chief of Police and the BART General Manager took the following action in a case where one allegation of misconduct was sustained by OIPA and approved unanimously by the BPCRB:

Complaint #	Nature of Complaint	REVISED Disposition	Days Elapsed Since Complaint Filed	Days Taken to Complete Investigation
1	Officer improperly cited subject for fare evasion.	Officer #1: • Arrest/Detention (Citation) – Not Sustained †	389	329

DISCIPLINE ISSUED DURING REPORTING PERIOD

During February 2021, 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 (AXON Camera)	Officer #1: • Letter of Discussion ¹⁰
2	Officers initiated an improper detention and used excessive force during the detention.	Officers #1-2: • Force • Arrest/Detention	Officer #1: • Informal Counseling (Not Documented) ¹¹ Officer #2: • Written Reprimand ¹²

* Details regarding the appeal process that was finalized during this reporting period are included in the narrative section below.

† OIPA reached a finding of **Sustained** for this allegation.

‡ 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 also 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	9
Complainant-Initiated Appeals	0
BPD-Initiated Appeals	0
Investigations Being Monitored	60
Investigations Reviewed During Current Month	8†

†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 addressed by BPD. The OIPA Monthly Report will reflect information regarding monitored or reviewed cases with detail not to exceed that which is allowable under state law.

The BPD Internal Affairs investigations, Supervisor Use of Force Reports (SUFRs), officer contacts, and body-worn camera recordings reviewed by OIPA during this reporting period generated recommendations for policy/practice revisions and requests for additional action.¹³

BPD Supervisor Use of Force Reports

OIPA's review of SUFRs during this reporting period, which are generated as required by BPD Policy 300 (Use of Force), prompted OIPA to recommend review by BPD Command Staff and the Office of Internal Affairs in some instances.

These referrals were related to:

- Late or failed AXON body-worn camera activations
 - Including late activations reported as "timely" by officers and reviewing supervisors
 - In one instance, discipline has yet to be issued in connection with this policy violation despite clear written instructions to the officer's supervising Lieutenant
- Discipline not properly recorded as required for an AXON body-worn camera policy violation
 - The progressive discipline system under which the Department operates requires proper documentation of issued discipline so that subsequent violations may be appropriately addressed
- Incomplete supervisory reviews
 - Including a use of force involving multiple baton strikes and a TASER activation

- A supervisor determined the force to be within policy without viewing available station video.
- Improper application and enforcement of the BART Proof of Payment (PoP) Ordinance
 - Some sworn BPD officers have initiated detentions by asking riders for proof of payment absent reasonable suspicion in violation of Constitutional protections from such detentions
 - This application of the PoP Ordinance does not reflect the systematic approach to enforcement that was proposed by BPD when the BART Board of Directors voted to approve the Ordinance
 - This practice may exacerbate existing racially disparate outcomes by allowing officers to decide whom to detain based solely on the officer's perceptions about who may be using the system without carrying valid proof of payment
- Mis-categorization of a use of force in BPD Blue Team
 - A supervisor described a use of force as "Handgun Draw" despite video evidence showing that the weapon was pointed at the subject.
 - There is a category for "Handgun Point"
- Officer's use of a face covering bearing graphics despite the Chief's prohibition
 - According to BPD Bulletin 20-269, officers may only wear a solid white, navy blue, light blue (surgical), or solid black mask with the word "Police" in white lettering.
 - The officer was wearing a face covering identifiable as a "flag design," though there is no clear indication that it was a "Thin Blue Line" flag design.
- Mis-categorization of body-worn camera video
 - After an internal BPD audit, an adjustment to video retention times to facilitate that audit, and updated instructions transmitted to all personnel via a Bulletin from the Chief, OIPA detected instances in which a Field Training Officer labeled his recordings as a required daily test of the equipment when they were, in fact, recordings of law enforcement contacts
 - These violations raise concerns about the efficacy of the training related to body-worn camera use

In response to OIPA's concerns related to the actual and potential policy violations listed above, BPD continues to examine the quality and scope of training for new supervisors while concurrently reviewing specific contacts flagged by OIPA.

As previously reported here, BPD command staff have committed to improving data collection efforts to better document the underlying reason for a contact that results in an arrest.

Improved data collection is expected to facilitate more effective analysis of contact outcomes related to low level criminal activity and the manner in which enforcement contributes to racially disparate outcomes.

I will continue to monitor the efforts of the department as they endeavor to make improvements.

BPD Appeals of OIPA Findings and Recommendations

In 2017 the BART Board of Directors approved an independent examination of the BART Citizen Oversight System to determine whether the need existed to make improvements to the system. This review was performed by the OIR Group and their final report, including 54 recommendations, was submitted to the Board of Directors in early 2018. The Board of Directors approved implementation of 50 OIR recommendations and rejected adoption of 4 recommendations.

The Model has always included a mechanism by which the BPD Chief of Police may appeal OIPA findings and recommendations after approval by a majority of the BPCRB. Prior to the 2018 Model revision, this process required only that the Chief communicate to the BART General Manager (GM) a desire to overturn the findings and the GM could then make a final determination absent any discussion with either the Independent Police Auditor (IPA) or the BART Police Citizen Review Board (BPCRB). Further, the GM was historically permitted to overturn the independent findings and recommendations without any explanation for the reversal or any factual or evidentiary analysis.

The revised Model still provides that the Chief may appeal OIPA findings and recommendations to the GM. Under the existing Model, however, the Chief must convey his intention to appeal to the GM who must then convene a confidential meeting including the IPA, the Chief of Police, and a representative of the BPCRB. The Chief is also now required to put forth the reasons and arguments for the appeal in writing, setting forth his disagreements and his own recommended findings.

OIPA received two citizen complaints on February 12 and February 21, 2020, respectively. After a thorough investigation, OIPA reached findings including sustained allegations and disciplinary recommendations for subject officers in each of the two cases.

Both investigative reports were presented to the BPCRB in closed session on January 11, 2021. The BPCRB approved OIPA's findings in both cases and a memo documenting the outcome was transmitted to the Chief on January 12, 2021.

State law requires that any discipline must be issued within one year of receipt of the associated complaint or the launch of an administrative investigation by the Department. At the time of OIPA's transmittal of the investigative findings, there was one month remaining within which discipline could be issued pursuant to state law. The transmittal email included an additional notification advising the Chief of the relatively small window of time within which to issue the discipline or appeal the findings.

The GM received one appeal memorandum from the Chief on February 5, 2021. This memo was forwarded to OIPA and to the Chair of the BPCRB on February 9, 2021. The GM also received a second appeal memorandum from the Chief on February 5, 2021 related to the second OIPA investigation. This memorandum was forwarded to OIPA and to the Chair of the BPCRB on February 8, 2021.

The GM convened a meeting on February 11, 2021. This meeting, described in the Model as a confidential meeting to include the GM, the Chief, the IPA, and a representative of the BPCRB, also included the BART Deputy General Manager.

On February 12, 2021, the GM issued a memo documenting his rejection of the Chief's appeal of one of the cases and leaving intact the findings of OIPA as approved by the BPCRB.

On February 16, 2021, the GM issued a second memo in which he overruled OIPA's finding related to one sustained allegation and a related recommendation for discipline. This memo documented the GM's imposition of a new disposition of Not Sustained.[§]

OIPA maintains that the factual analysis on which we relied warranted a Sustained finding and that sufficient facts were established and analyzed to reach that conclusion. It is my opinion that OIPA's findings were fully supported by the existing applicable BPD policy language that was not effectively refuted by the arguments put forth by the Chief. The Chief's appeal memo for this case included a recommendation for a finding of Exonerated, which was also rejected by the GM.

The OIR Group's appeal process revision recommendation was intended to allow the GM to make a "better-informed determination" based on input from the parties and to provide for a public accounting of the process and the outcomes. The language of the approved OIR recommendation related to this issue requires that the GM "set out her/his findings in writing." While the GM's memos of February 12 and February 16 are informative as to the outcome, the memos did not provide OIPA with any insight into the analysis or reasoning for the findings.

Mere disagreement with the outcome should not be considered sufficient to undermine the independence of the Citizen Oversight System, which includes checks and balances to ensure that OIPA's findings are supported by sound analysis and objective investigative processes.

This appeal process has reached its end and the GM's decision is final. The Model requires reporting on the outcome by OIPA. This Model provides, specifically, that where a final determination rescinds or modifies the initial disposition, OIPA is required to identify any systemic issues and/or the potential for the serious erosion of accountability related to such modifications.

Erosion of accountability and community trust are both of concern in light of these events. OIPA is prohibited by state law from revealing confidential information related to personnel matters, but it is important to identify that both the initiation of the appeal and the final determination necessarily implicate the Department's approach to enforcing fare evasion violations.

Communities served by BPD may reasonably bristle at an approach to enforcement that eliminates officers' responsibility to evaluate mitigating factors and evidence by treating fare evasion as a general intent crime for which intent to evade fare payment is not required.

This reversal empowers BPD officers to disregard evidence of accidental or mitigated entry/exit via fare gates, elevators, and emergency exits. That is, officers may determine that the criminal act of fare evasion is completed, and a citation may be issued based solely

[§] It is the practice of both OIPA and IA to apply a finding of Not Sustained where an investigation reveals that insufficient information or evidence was available to reach a reasoned finding of Sustained or Exonerated.

on the mere appearance of fare evasion, regardless of any mitigating factors or explanation provided by the rider (e.g. broken ticketing machine, malfunctioning fare gate, absent station agent, lost wallet, lost Clipper Card, medical emergency, etc.).

OIPA agrees that the Chief of Police should be provided an avenue to appeal OIPA outcomes that have been approved by the BPCRB. However, OIPA believes that the appeal should be centered firmly on an alternative and objective analysis of existing facts, and that officers must be consistently held to the requirements of the policy language in effect at the time of the contact at issue.

To maintain officer accountability and community trust in BART's system of civilian oversight of the police department, the GM should avoid changing findings reached via the independent police oversight system unless the Chief can provide a clear and reasoned argument as to the inaccuracy of OIPA's findings.

Unfortunately, absent additional transparency requirements related to the issuance of the GM's decision memo, it remains unclear how the GM analyzed the available evidence to reach a finding of Not Sustained.

Fare Evasion Enforcement Policy (#419)

Separate from consideration of the Chief's appeal, the GM has directed the Chief to revise BPD Policy #419 to exclude existing examples of fare evasion that contain the requirement of an intent element. The revised policy will include language instructing officers that the appearance of fare evasion, i.e. moving from the paid to free or free to paid area of a station, represents a completion of the criminal act fare evasion for which officers may issue a citation.

The existing policy language provides little guidance as to interpretation of an intent requirement in Penal Code Section (§640(C)(1)) and whether officers should or must consider available evidence and information which would allow them to make an evidence-based determination about whether the subject intended to evade payment.

It is my opinion that systematic and authorized disregard for available mitigating information and evidence dehumanizes these contacts and may undermine the Department's efforts to generate and maintain community trust.

The new policy language will allow officers to issue a citation to apparent fare evaders, at their discretion, regardless of any available evidence indicating an intent to pay. This approach may result in the issuance of citations to riders who intended to pay the District and is likely to raise concerns about the equitable application of that discretion.

Importantly, the application of discretion by officers has historically resulted in racially disparate outcomes at BART, including a significantly higher likelihood that Black people will be contacted, cited, detained, arrested, issued prohibition orders, and subjected to more use of force than any other racial group. Eliminating a requirement that officers minimally inquire or clarify available evidence to determine criminal intent undermines efforts to mitigate those racial disparities, which stands in contrast to the District's and the Department's commitment to racial equity and progressive policing.

OIPA disagrees with the propriety of this policy revision and will continue to illuminate areas where the Department and the District might do more to increase the trust of the communities we serve.

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 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)

¹¹ Informal Counseling (first level of pre-discipline): When warranted, an informal counseling may be the first step of the process. It is an informal discussion between a supervisor and an employee about conduct, attendance, or work performance. It is not documented and is pre-disciplinary.

¹² 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.

¹³ OIPA may submit recommendations to IAB 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.