

Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Barbara Attard

**SUBJECT: IPA Supplemental Memo Regarding
Proposed Revisions to SJPD Citizen
Complaint Process**

DATE: January 25, 2008

Council District: Citywide

RECOMMENDATIONS

The City Manager's Memo does not fulfill Council Referral #18 which expressly directs that "Final recommendations are to be brought back to the City Council within 6 months." The agenda item for Council action is merely receipt of a presentation;¹ no recommendations are made regarding the revision of the complaint process. Thus the IPA proposes that the Council:

1. Direct the City Manager to bring final recommendations on the revised complaint process to Council. An effective complaint process would include the following revisions to the non-misconduct complaint category:
 - a. Non-misconduct concern definition: "At intake, a person alleges or raises an issue that does not rise to the level of violation of Department/City policy, procedure, rules, regulations or the law."
 - b. Non-misconduct concern criteria:
 - i. Perception or question of Department member's conduct that is not an allegation regarding a violation of Department/City policy, procedure, rules, regulations or the law.
 - ii. Does not contain a misconduct allegation made by a member of the public.
 - iii. Is not a complaint.
 - c. Complaints resolved through preliminary investigation in the pre-classification stage will be classified as conduct complaints. Investigations, preliminary or full, will result in findings of unfounded, exonerated, not sustained, sustained, no finding or complaint withdrawn.
2. Reject the Memo's assertion that the IPA does not have authority to challenge classifications and confirm the Council's action of June 21st which acknowledges that the IPA can challenge classifications.
3. Direct the City Attorney to revisit the September 4, 2007 Opinion.

¹ The noticed agenda recommendation is "Receive presentation on the Police Department's revised definitions and objective criteria for the Citizen Complaint Process, as directed by the City Council at the June 21, 2007 Council Meeting." 1/29/08 Agenda, page 17 item 8.2(a). Office of the City Clerk, 2008 City Council Agenda and Synopses. <http://www.csj.gov/>

BACKGROUND

Over the last six months, representatives of the City Manager's Office (CMO), San Jose Police Department (SJPD), and the Independent Police Auditor (IPA) (Working Group) have met regularly to discuss revised definitions and objective criteria for the citizen complaint process. I would like to acknowledge the time and effort of the other Working Group members in proposing revisions and commend the CMO staff for completing the difficult task of summarizing the work product and writing the report.

As stated in the June 21, 2007 Council Referral #18, the purpose of the Working Group was "to develop a revised complaint process that determines classification based upon objective criteria and definitions for complaint categories."² Completion of the referral did not require unanimous agreement on all issues but necessitated thorough analysis and due diligence to assess the possible impacts of recommended changes on the overall complaint process.

The revision project was conducted with the stated outcome to streamline, update, clarify and improve the complaint process. While the process has been streamlined, the IPA is concerned about the benefit to the community and the negative implications of some of the recommended changes. The Administration's Memo (Memo) exceeds the parameters of the Council referral because the proposed changes have ramifications beyond mere revision of the current complaint process.

The stated goal of establishing objective criteria for the classification process has been widely missed. The Memo presents a replacement for the "inquiry" complaint category.³ This replacement is titled "non-misconduct concern" which is a discretionary category that continues the current "inquiry" practice of removing the officer's names from the shared database.

The proposed process outlined by the Memo gives the police department and City Manager discretion to assign complaint status and classifications, essentially replaces the "inquiry" category with "non-misconduct concern," and removes the IPA authority to challenge classifications. By doing so, the Memo reaches beyond the Council referral and the authority of the City Manager in that it re-evaluates, designates, and reduces IPA oversight of the complaint process.

The aspects of the Memo that restructure and limit the involvement of the IPA in crucial components of the complaint process are inappropriate. The revised complaint process includes semantic manipulations that undermine the ability of a member of the community to file a complaint and the IPA to receive the complaint. The revised process eliminates IPA review of, and challenges to, the classification of complaints. The Memo states that in the new process complainants can file only allegations, the IPA can only receive allegations, and that the SJPD and the CMO have unilateral authority over complaint classifications with no oversight by the IPA.⁴

The Memo states that the analysis of the authority of the IPA was determined through joint analysis/discussions by staff of the CMO and the City Attorney's office. The IPA was not in

² Council Referral #18, Memo, page 3.

³ Memo, pages 10 & 16.

⁴ Memo, page 9.

attendance at the meeting(s) and not consulted in the analysis.⁵ The Memo cites the City Attorney Opinion of September 4, 2007 (Opinion) advising that the Council does not have the authority to give the IPA additional authority, yet states that the City Manager and the Chief of Police can request/invite the IPA to engage in additional duties.⁶ This juxtaposition of authority over an “independent” council appointee is inherently contradictory.

ANALYSIS

Authority of IPA to Serve the Community in Jeopardy

The IPA was established to provide the community with an independent review of the complaint process to ensure the investigation was fair and complete, and to provide an alternate location for a citizen to file a complaint. Efforts to undermine the independence of the auditor in the performance of these duties and responsibilities are expressly prohibited in the San Jose Municipal Code.⁷ The proposed revision to the existing SJPD citizen complaint process includes modifications that negatively impact the responsibilities of the IPA, ultimately jeopardizing the ability of the IPA to serve the public and to perform mandated duties.

Though purporting to embody a narrow interpretation of the City Charter and Municipal Code, the Memo and Opinion contain inherent contradictions.⁸ In selected areas IPA activity is narrowly limited by strict construction of the Charter, but in other areas the Memo states that the IPA can take on activities by invitation of the City Manager and the Chief of Police.⁹ Providing authority for the City Manager and the Chief of Police to modify or limit the authority of the IPA, an office established to have independent oversight of the Police Department’s complaint process, presents a clear conflict of interest.

Authority to Receive Citizen Complaints Undermined

The San Jose Municipal Code Section 8.04.010 (C) (1) states, “Any person may, at his or her election, **file a complaint** against any member of the police department with the independent auditor for investigation by the police professional standards and conduct unit.” [Emphasis added]

Whereas the Municipal Code expressly allows the office of the IPA to receive complaints, by changing the process to receipt of “allegations” rather than complaints, the revised process

⁵ Memo, page 10.

⁶ Memo, page 10, paragraph 2.

⁷ San Jose Municipal Code Section 8.040.020 (B) Independence of the police auditor. (Attachment 1)

⁸ The City Attorney opinion limits the IPA authority to those duties explicitly stated in the Charter, restricting the IPA from engaging in any additional duties as assigned by Council. The IPA submitted a “Supplemental Response to City Attorney Opinion on IPA Authority-Council Direction on June 21, 2007” challenging the City Attorney’s analysis. This document and a letter from the ACLU to Mayor Reed and the Council dated September 17, 2008 are attached. (Attachment 2)

⁹ Memo, page 10, paragraph 2.

significantly reduces the responsibility and authority of the IPA and conflicts with the Municipal Code.¹⁰

The revision grants discretion to the SJPD to define and classify all complaints, further limiting the IPA span of authority. By charter, the IPA is mandated to audit the “investigation” of “complaints.” That authority is circumvented in the Memo by denying that a preliminary investigation is, in fact, an investigation and by giving the SJPD sole authority to discount a complaint by classifying it as a non-misconduct concern.

Authority to Challenge Classification of Complaints Curtailed

The classification of a complaint is inextricably tied to the investigation it will receive. The Memo states that the IPA has no authority to classify a complaint.¹¹ The position fails to address the distinction between the authority to classify and the authority to challenge the classification. The existing and historical practice of the IPA is consistent with both the Charter and the City Council action from June 21, 2007, which stated, “(1) Confirm the Independent Police Auditor’s (IPA) right to challenge the Police Department’s classification of complaints and inquiries, with ultimate resolution by the City Manager.”¹²

IPA authority to challenge classifications is consistent with the IPA’s duty to audit investigations; assignment to a classification involves a preliminary investigation and determines the level of additional investigation a complaint will receive. Therefore, authority to review an investigation of a complaint must include the authority to review the classification of that complaint. The IPA has the responsibility to request more investigation on any case where the investigation is incomplete, whether that investigation was completed in the pre-classification stage or later in the process, with final resolution by the City Manager.¹³

Non-Misconduct Criteria Not Objective

As stated previously, Council Referral #18 provided that the purpose of the Working Group was “to develop a revised complaint process that determines classification based upon objective criteria and definitions for complaint categories.”

The Working Group reduced the eight existing complaint classifications to three: conduct, policy and non-misconduct concern.¹⁴ While the simplification of complaint classifications and related objective criteria improves the existing system by making the categories easier to understand, the objective criteria for the non-misconduct concern presents serious flaws that negatively impact the mandated duty of the IPA to review complaint investigations.

¹⁰ The Memo defines a complaint as an expression of dissatisfaction that contains an allegation, which if true, demonstrates misconduct. An allegation, as defined in the Memo is an unproven accusation that a member of the Police Department violated a Department or City policy, procedure, rule, regulation or law. Memo, page 5. Memo, page 9.

¹¹ Memo, page 10, paragraph 1.

¹² See Attachment 3.

¹³ San Jose Municipal Code §8.04.010 (A)(4)

¹⁴ Memo, page 10.

When the Working Group originally discussed the non-misconduct concern category, its creation was acceptable in that it provided a category suitable for matters that upon initial intake¹⁵ did not contain allegations of misconduct. Both the IPA and SJPD are aware that a number of concerns are expressed by the public each year that simply do not represent misconduct matters, thus, a category such as non-misconduct concern is advisable.¹⁶

Agreement dissipated, however, when the non-misconduct concern category was changed in three critical ways:¹⁷

- The **pertinent timeframe** within which to determine the existence of a complaint was greatly expanded from “intake” to “during pre-classification.”
- The **definition of “allegation”** shifted from the concept of an “allegation of misconduct” as voiced by the citizen at intake to an “allegation of misconduct” as determined by the SJPD.¹⁸
- The **disqualifying criteria** of “does not contain a misconduct allegation” was changed to “a conduct allegation which does not rise to the level of misconduct.”¹⁹

As presented by the Memo, the non-misconduct concern definition and criteria are inappropriate. “Non-misconduct concern” is merely a replacement for the “inquiry” complaint category that has proved problematic in the past.²⁰

There is, however, a variety of cases that should be classified as conduct complaints even though a preliminary investigation may provide sufficient information to close. Examples would include allegations of unlawful searches of cars/homes and resisting arrest cases. In such examples, sufficient evidence may exist after a preliminary investigation to support a finding. Because sufficient evidence exists to resolve the complaint, a finding should be made and the officer name should be tracked to ensure the efficacy of the Early Warning System and compliance with the *Pitchess* discovery process. The IPA should be able to review that investigation to ensure that it was unbiased and thorough given the allegations made and the facts discovered.

¹⁵ Intake is defined as the initial conversation, whether in person or on the phone between a member of the public and the IPA or IA staff.

¹⁶ For example, a caller might allege that his Miranda rights were violated; however, within the span of this same phone call, the facts are apparent that the caller was neither “in custody” or “under interrogation” and Miranda rights would not attach to the interaction between the caller and the officer. Another example would be that mentioned in the city manager’s Memo regarding the person alleging that it was improper for an officer to stand in the middle of the road and direct cars to pull over to the side of the road to issue citations. These examples are non-misconduct concerns.

¹⁷ Memo, page 14.

¹⁸ Such a shift entirely discounts a citizen’s initial misconduct allegation when the SJPD “determines” after the fact that an allegation does not rise to the level of misconduct. The shift will effectively erase misconduct allegations initiated by the public rather than address them. A more balanced approach would be to document the allegations of misconduct and make a finding on those allegations after an investigation at the appropriate level. The proposed process undermines the authority of the IPA to review the matter to determine whether it was addressed appropriately.

¹⁹ The shifting of this definition creates a system in which the SJPD has unfettered discretion to determine what is or is not an allegation in that it alone determines what “rises” to the level of misconduct after some preliminary screening with that screening being inaccessible to the IPA for audit purposes.

²⁰ See IPA 2005 Year End Report at page 15 “The Rise in Cases Classified as Inquiries – An Analysis of Potential Impacts;” IPA 2006 Mid-Year Report at page 7 “the Problem with Inquiries” and IPA 2006 Year End Report at page 9 “Inquiry complaint classifications.”

If the non-misconduct concern classification is adopted as proposed, the existence of a complaint will not be determined by the allegation voiced by the complainant but instead will be controlled by whether or not the SJPD deems that the accusation rises to the level of misconduct. The non-misconduct concern classification will remain a discretionary category maintaining the current Inquiry practice of removing officer's names from the complaint and the shared database. Complaints of misconduct made by members of the community will be shielded from effective oversight because the IPA is expressly prohibited from reviewing non-complaints. Although the Memo is contradictory on this point, it expressly states the IPA cannot review non-misconduct issues.²¹

The proposed classification and terminology will undermine the ability of the IPA to perform audits to ensure objectivity in specific matters and to perform the reporting duty of tracking and reporting on trends/patterns arising from complaints. If a matter is labeled a non-misconduct concern, it will effectively and immediately be removed from IPA examination. Officers names will be removed making it impossible for the IPA to track officers with multiple complaints and report the information to the Council. The complaints will also be unavailable for *Pitchess* discovery in criminal cases. The classification of a citizen's complaint will become a moving target, vulnerable to change during a "preliminary screening" by the SJPD.

In conclusion, the Memo creates a system that allows the police to police its own and reduces public confidence in the process, ultimately jeopardizing the ability of the IPA to serve the public and to perform mandated duties.



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²¹ Memo, page 11, paragraph 1, and page 13, paragraph 5.

San Jose Municipal Code Chapter 8.04**INDEPENDENT POLICE AUDITOR****8.04.010 Duties and responsibilities.**

In addition to the functions, powers and duties set forth elsewhere in this code, the independent police auditor shall have the duties and responsibilities set forth in this section.

A. Review of internal investigation complaints. The police auditor shall review police professional standards and conduct unit investigations of complaints against police officers to determine if the investigation was complete, thorough, objective and fair.

1. The minimal number of complaints to be reviewed annually are:

a. All complaints against police officers which allege excessive or unnecessary force; and

b. No less than twenty percent of all other complaints.

2. The police auditor may interview any civilian witnesses in the course of the review of police professional standards and conduct unit investigations.

3. The police auditor may attend the police professional standards and conduct unit interview of any witness including, but not limited to, police officers. The police auditor shall not directly participate in the questioning of any such witness but may suggest questions to the police professional standards and conduct unit interviewer.

4. The police auditor shall make a request, in writing, to the police chief for further investigation whenever the police auditor concludes that further investigation is warranted. Unless the police auditor receives a satisfactory written response from the police chief, the police auditor shall make a request, in writing, for further investigation to the city manager.

B. Review of officer-involved shootings. The police auditor shall participate in the police department's review of officer involved shootings.

C. Community function.

1. Any person may, at his or her election, file a complaint against any member of the police department with the independent auditor for investigation by the police professional standards and conduct unit.

2. The independent police auditor shall provide timely updates on the progress of police professional standards and conduct unit investigations to any complainant who so requests.

D. Reporting function. The police auditor shall file annual public reports with the city clerk for transmittal to the city council which shall:

1. Include a statistical analysis, documenting the number of complaints by category, the number of complaints sustained and the actions taken.

2. Analyze trends and patterns.

3. Make recommendations.

E. Confidentiality. The police auditor shall comply with all state laws requiring the confidentiality of police department records and information as well as the privacy rights of all individuals involved in the process. No report to the city council shall contain the name of any individual police officer.

(Ords. 25213, 25274, 25922.)

8.04.020 Independence of the police auditor.

- A. The police auditor shall, at all times, be totally independent and requests for further investigations, recommendations and reports shall reflect the views of the police auditor alone.
- B. No person shall attempt to undermine the independence of the police auditor in the performance of the duties and responsibilities set forth in Section 8.04.010, above. (Ord. 25213.)

San Jose City Charter § 809.

OFFICE OF THE INDEPENDENT POLICE AUDITOR

The Office of the Independent Police Auditor is hereby established. The Independent Police Auditor shall be appointed by the Council. Each such appointment shall be made as soon as such can reasonably be done after the expiration of the latest incumbent's term of office. Each such appointment shall be for a term ending four (4) years from and after the date of expiration of the immediately preceding term; provided, that if a vacancy should occur in such office before the expiration of the former incumbent's terms, the Council shall appoint a successor to serve only for the remainder of said former incumbent's term.

The office of Independent Police Auditor shall become vacant upon the happening before the expiration of his or her term of any of the events set forth in subsections (a), (b), (c), (d), (e), (h), (i), (j), (k) and (l) of Section 409 of this Charter. The Council, by resolution adopted by not less than ten (10) of its members may remove an incumbent from the office of the Independent Police Auditor, before the expiration of his or her term, for misconduct, inefficiency, incompetence, inability or failure to perform the duties of such office or negligence in the performance of such duties, provided it first states in writing the reasons for such removal and gives the incumbent an opportunity to be heard before the Council in his or her own defense; otherwise, the Council may not remove an incumbent from such office before the expiration of his or her term.

The Independent Police Auditor shall have the following powers and duties:

- (a) Review Police Department investigations of complaints against police officers to determine if the investigation was complete, thorough, objective and fair.
- (b) Make recommendations with regard to Police Department policies and procedures based on the Independent Police Auditor's review of investigations of complaints against police officers.
- (c) Conduct public outreach to educate the community on the role of the Independent Police Auditor and to assist the community with the process and procedures for investigation of complaints against police officers.

Added at election November 5, 1996

§ 809.1. Independent Police Auditor; Power Of Appointment.

(a) The Independent Police Auditor may appoint and prescribe the duties of the professional and technical employees employed in the Office of the Independent Police Auditor. Such appointed professional and technical employees shall serve in unclassified positions at the pleasure of the Independent Police Auditor. The Council shall determine whether a particular employee is a "professional" or "technical" employee who may be appointed by the Independent Police Auditor pursuant to these Subsections.

(b) In addition, subject to the Civil Service provisions of this Charter and of any Civil Service Rules adopted pursuant thereto, the Independent Police Auditor shall appoint all clerical employees employed in the Office of the Independent Police Auditor, and when the Independent Police Auditor deems it necessary for the good of the service he or she may, subject to the above-mentioned limitations, suspend without pay, demote, discharge, remove or discipline any such employee whom he or she is empowered to appoint.

(c) Neither the Council nor any of its members nor the Mayor shall in any manner dictate the appointment or removal of any such officer or employee whom the Independent Police Auditor is empowered to appoint, but the Council may express its views and fully and freely discuss with the Independent Police Auditor anything pertaining to the appointment and removal of such officers and employees.

Added at election November 5, 1996



COUNCIL AGENDA: 09-18-2007
ITEM: 8.1

Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Barbara Attard

SUBJECT: Supplemental Response to City
Attorney Opinion on IPA Authority
-Council Direction on June 21, 2007

DATE: September 14, 2007

RECOMMENDATION

That the City Council approve the recommendation of the Independent Police Auditor to direct the City Manager to direct the SJPD to conduct administrative investigations in all critical incidents in which a death occurs after an officer's use of force or any other department action, and mandate that the IPA review the administrative investigation of all such critical incidents.

BACKGROUND

At the Special Council meeting on June 21, 2007, Council requested action on several items. The Council confirmed the IPA's existing authority to review officer-involved shooting and in-custody death cases. The Council directed the City Attorney to return to the City Council (1) with a report on the litigation impacts of moving all in-custody death cases that are a result of a use of force to the same level of auditing by the IPA as officer-involved shootings; and (2) analyze the countywide protocol for in-custody deaths and clarify the distinction between in-custody deaths and critical incidents.

The City Attorney's council memo dated September 4, 2007, sets forth a legislative history of the creation of the IPA, indicating that such history is relevant to the issue of determining what additional duties may be added to the authority and responsibilities of the IPA. The analysis in the council memo differs from past practice and past direction given by the City Attorney as to the steps needed to make changes to the authority of the Independent Police Auditor. The City Attorney now advises that current authority granted to the IPA by the City Council on April 27, 2004, i.e. to audit Internal Affairs administrative investigations of officer-involved shooting cases, contradicts the authority granted to the IPA in the City Charter. The City Attorney also states that granting the IPA authority to audit critical incidents involving death is not consistent with the provisions of the Charter. The IPA disagrees with the City Attorney's analysis based upon further review of the Municipal Code and the City Charter.

ATTORNEY'S ANALYSIS OF IPA AUTHORITY IN THE CHARTER

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The City Attorney's analysis of the legislative history pertaining to the establishment of the IPA states that it is a, "Well established principle that 'any power not expressly forbidden may be exercised by the municipality, and any limitations on its exercise are those that have been specified in the charter.'" Yet, when considering granting the IPA authority to audit non-complaint death cases, the memo states that, "The lack of such an express permissive provision for the granting of additional powers, duties and functions in Charter Section 809, together with a consistent history of IPA duties and responsibilities described as a complaint review and future policy recommendation function that is memorialized in an agreement with the SJPOA, indicates that the Council's specifications of duties, responsibilities, functions or tasks of the Office of the Independent Police Auditor must be specific and narrowly drawn, in order to fit within the parameters of the Charter, and may not contradict the complaint review function granted to the IPA in the Charter." This conclusion is mistaken.

The analysis overlooks the authority granted to the Independent Police Auditor under Municipal Code §2.04 et seq. defining the functions, powers and duties of the IPA, granted concurrent with the addition of the office to the City Charter under section 807.

Section 807 of the City Charter identifies departments established by the initial Charter. Section 807 (c) provides that "additional departments may be created by council from time to time pursuant to Section 800 (c). Each department shall have such functions, powers and duties as Council may from time to time prescribe." (Appendix I and II)

Pursuant to City Charter Section 800 and 807 the City established the Office of the Independent Police Auditor. Although Section 809 (Appendix III) does not contain specific additional language that the Auditor "shall perform such other functions consistent with this Charter, as may be required by council," Section 807 (c) provides this condition.

The San Jose Municipal Code Sections 2.04.1000 through 2.04.1020 establish the Office of the Independent Police Auditor. Section 2.04.1020 specifically states that "In addition to those general functions, powers and duties given to the department head by this chapter and other provisions of this Code, the independent police auditor **"shall perform all other functions and duties, consistent with the Charter, assigned by act of the city council."** (Emphasis added) (Appendix IV)

In 1999 the City Council accepted the IPA recommendation that the police auditor participate in the police department's review of officer-involved shootings. In 2004 the City Council authorized the police auditor to respond to the scene of officer-involved shootings and to receive a copy of the IA administrative investigation document for auditing purposes. Most recently, in June 2006 the City Council approved the IPA recommendation that the IPA receive copies of the homicide report for officer-involved shootings and in-custody deaths. These Council actions support the understanding that expansion of, or additions to, the responsibilities granted to the IPA are not only intended by the City Council, but also within the Council's scope of authority.

The 2004 Municipal Code amendment was passed without legal challenge because the authority being granted by the City Council was the expansion of the responsibilities and authority of a

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Charter Department added in 1996. Nothing in the Charter expressly prohibits the City Council from expanding the responsibilities of the IPA, and the City Attorney does not present evidence that such action is outside the authority of the City Council under the City Charter. The authority of the City Council to expand or add responsibilities to the Office of the Independent Police Auditor was granted at its creation.

In arguing that the City may not grant or expand additional powers to a department it had the authority to create, the City Attorney appears to misconstrue the authority of the City Council to expand the responsibilities of the IPA. The expanded authority at issue here is not prohibited by, or in conflict with, the State Constitution or the Charter. Though Charter Section 809 does not contain the language to include “other duties consistent with this Charter as may be required of him or her by the Council,” the authority is not only implied, but stated in related Charter and Municipal Code sections. The suggestion that Council may not expand the responsibilities and duties of the Office of the Independent Police Auditor is not supported by established law.

CONFIRMATION OF THE IPA’S AUTHORITY

Council direction called for a confirmation of the IPA’s authority to review officer-involved shooting and in-custody death cases.

The authority of the IPA to review officer-involved shooting cases derives from the following:

- A 1999 Municipal Code amendment which stated that “the police auditor shall participate in the police department’s review of Officer-Involved Shootings.”
- Council action on April 27, 2004 which approved IPA recommendations including:
 - The IPA will be notified immediately after an officer-involved shooting by the Internal Affairs Commander;
 - The IPA may respond to the scene of the officer-involved shooting and contact the Internal Affairs Commander at the outer perimeter of the crime scene;
 - The IPA and Internal Affairs Commander will then be briefed as to the details of the incident by on-scene personnel;
 - The IPA will be provided with a copy of the Internal Affairs administrative investigation document of the officer-involved shooting *for auditing purposes* as soon as practical after the criminal case has been concluded, but prior to the closing of the administrative investigation; (emphasis added)
 - The IPA will coordinate outreach efforts immediately after an officer-involved shooting incident and the SJPD will ensure that it participates in these forums.
- Council action on February 28, 2006 which approved a recommendation that the IPA receive copies of the homicide report for SJPD officer-involved shooting and in-custody death incidents.

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At the direction of the City Attorney, the IPA 2006 Year End Report expressly requested that the City Council take action to update the Municipal Code to reflect the authority granted to the IPA by the City Council in 2004 and 2006.

City Attorney's Analysis of IPA Authority to Audit Officer-Involved Shootings

The City Attorney's report states that the "IPA does not conduct audits of officer-involved shootings or, in the language of the Charter, review of officer-involved shootings in the absence of a complaint, but participates in the Shooting Incident Training Review Panel."

City Council action on April 27, 2004 included the item:

The IPA will be provided with a copy of the Internal Affairs administrative investigation document of the officer-involved shooting *for auditing purposes* as soon as practical after the criminal case has been concluded, but prior to the closing of the administrative investigation.

Since April 2004, the IPA has conducted audits of the administrative investigations that determine whether the officer's actions were within policy in all officer-involved shooting cases. These audits, as with audits conducted in police misconduct complaints, are conducted to determine whether the investigation was complete, thorough, objective, and fair.

The City Attorney recommended language for the IPA 2006 Year End Report asking Council to update the Municipal Code to reflect the Council authorized changes to the IPA authority:

The IPA recommends that the Municipal Code accurately reflect the IPA participation in such events, namely IA notification to the IPA of an officer-involved shooting, IPA authority to respond to the crime scene for briefing by on-scene personnel, IPA receipt of the IA investigation document for audit purposes, and IPA receipt of homicide reports for officer-involved shooting and in-custody death.

LITIGATION IMPACTS

Definition of "Critical Incidents"

The City Attorney rightly focuses on the threshold issue of defining the term "critical incident." A critical incident may be defined as an incident in which a death occurs after an officer's use of force or other Department action.¹

¹ Law Enforcement Administrative Investigations; A Manual Guide, provides examples of critical incidents including: shootings involving a death, a hit, or a miss; an accidental or unintentional firearm discharge; animal dispatch by use of a firearm; in-custody death or major injury; detention death or major injury; and police related traffic deaths or major injury including pursuits, forcible stops and collisions. Law Enforcement Administrative Investigations; A Manual Guide, 3d edition (2006) by Lou Reiter

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The City Attorney's opinion asserts that the IPA is not qualified to determine cause of death. Though true, this is not relevant to the purpose of the IPA audit. The review of such incidents by the IPA should occur regardless of the cause of death and would not re-evaluate the cause or manner of death; it would focus exclusively on whether the actions of the SJPD officers were within policy as defined by the duty manual, training bulletins, etc.

Benefits from Administrative Review

The City Attorney's memorandum states that the risk in civil litigation is where multiple investigations present inconsistent or inconclusive results, possibly creating jury confusion and added risk to the City. Without more information it is difficult to determine whether the risks outweigh the benefits gained by such review. The City Attorney's argument does not consider the positive effect on litigation engendered by an administrative review followed by an independent auditor's evaluation. The argument can also be made that the Department's administrative review of the officer's conduct, and an audit by the IPA supporting a thorough, fair and objective review, would provide a benefit to the City in the event of litigation.²

Although several legal investigations could conceivably be conducted, the indispensable investigation that should occur is the administrative review conducted by the employer as to whether its employees acted within policy. A fatal critical incident should trigger an administrative review to meet standards of best practices of a professional police department. The Department has the professional expertise to make this decision because it crafts policies and procedures specifically for its department, trains its employees on these tailored policies, and monitors the performance of its employees. The possibility that another expert might review the Department's investigation does not abrogate the unique ability and responsibility of the Department to provide its own administrative review. If the Department, after a vigorous investigation, determined that conduct was within policy, then the City is at an advantage to determine with greater reliability and speed that a plaintiff's claim or demand is reasonable or unreasonable. Effective management arising out of an administrative review would provide methods to more effectively manage risks identified and thus avoid or reduce the occurrence of unnecessary or controversial incidents.

Impact of Current IPA Authority

On the question of the litigation impact of moving all in-custody death cases involving a use of force to the same level of auditing by the IPA as officer-involved shootings, analysis of this question should start with developing the baseline. The baseline would quantify or qualify what are or have been the litigation impacts of the IPA auditing officer-involved shootings. Only when that baseline is defined can one move to a comparison regarding in-custody death cases.

² Citing recommendations made in The Kolts Report prepared for the LA County Sheriff, a review of SO liability and risk management found "the relationship between them is clear: The more effectively risks are identified, managed, and controlled, the less likely that costly litigation will ensue." The Los Angeles County Sheriff's Department 3rd Semiannual Report by Special Counsel Merrick J. Bob; December 1994, Page 7

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- Participation of IPA on Shooting Review Panel

In August 1999, the Municipal Code was amended to allow the IPA to participate on the Officer-Involved Shooting Incident Training Review Panel.

There were eight officer-involved-shooting cases in 1999, five in 2000, four in 2001, none in 2002, four in 2003, six in 2004, two in 2005 and three in 2006.³ According to protocol, a shooting review panel was convened in most of these cases and the IPA participated in some, if not all, of those panels. Some of these thirty-two cases resulted in civil litigation filed against the City. The City Attorney offers nothing to suggest the involvement of the IPA had any impact on subsequent litigation.

- IPA Auditing of Officer-Involved-Shooting Cases

In April 2004, the City Council approved several recommendations concerning the office of the IPA including a specific recommendation that the IPA be provided with a copy of the Internal Affairs administrative investigation of the officer-involved shooting *for auditing purposes* as soon as practical after the criminal case had been concluded, but prior to the closing of the administrative investigation. The plain meaning of the phrase “*for auditing purposes*” is that the IPA will perform its usual audit function of determining whether the investigation was complete and supported the findings.

The IPA has audited the officer-involved shootings cases that have occurred since April 2004 to determine whether the investigation was complete and supported the findings. Some of these cases resulted in civil litigation filed against the City. The City Attorney presents no evidence that the auditing function of the IPA presented any unusual issues or reason for concern, or that it has had any negative impact on litigation.

CONCLUSION

Since 1993 the Office of the Independent Police Auditor has provided the San Jose community with an independent review and audit of complaints about officer misconduct, and an avenue for public outreach and information.

In 2004 the City Council authorized the IPA to be briefed on officer-involved shooting events in real time, audit the Internal Affairs administrative investigation for thoroughness and fairness and provide community outreach immediately following an officer-involved shooting. The IPA has reviewed and audited 11 incidents, without disagreement, and without generating additional issues of concern or any impact on litigation reported by the City Attorney, the City Council or the Police Department. To deny the authority to audit officer-involved shootings would be a serious setback for the IPA and the City, and would undermine community confidence in the process.

³ These figures are taken from the IPA annual reports for year 2003, 2004, 2005 and 2006.

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The IPA requests that the City Council reaffirm the authority of the IPA to audit officer-involved shooting cases, direct the SJPD to conduct administrative investigations in all critical incidents in which a death occurs after an officer's use of force or other department action, and expand the authority of the IPA to audit such critical incidents.



BARBARA J. ATTARD
Independent Police Auditor

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APPENDIX I

SAN JOSE CITY CHARTER

As Amended through March 2, 2004

ARTICLE VIII

ADMINISTRATIVE ORGANIZATION

SECTION 800. Administrative Organization; General Provisions.

Subject to the limitations hereinafter specified in this section, the Council shall have the following powers and duties:

(a) The Council, in its discretion, may at any time establish such City offices, departments and agencies, in addition to those established by this Charter, as it may desire; and shall prescribe the respective functions, powers and duties of such additional offices, departments and agencies. The Council shall also prescribe the respective functions, powers and duties of those departments which are established by Section 807 of this Charter. The Council may at any time add to, take away, reduce or otherwise change the respective functions, powers and duties of any of the above mentioned offices, departments and agencies. The Council may at any time abolish or discontinue any office, department or agency other than those established by this Charter. The Council may also, at any time, prescribe additional functions, powers or duties for those offices and departments specified in Sections 803 to 807, inclusive, and may at any time take away, reduce or otherwise change all or any of such additional functions, powers or duties;

(b) Subject to the limitations hereinafter specified in subsection (c) of this Section, the Council may:

(1) Contract with any "public agency" for the exercise or performance by a "public agency" for or on behalf of the City, of any of the powers, duties or functions of any office, department or agency of the City established by or pursuant to the provisions of this article;

(2) Contract with any "public agency" for the exercise or performance by the City, for or on behalf of any "public agency" of any of the powers, duties or functions of any "public agency";

(3) Contract with any "public agency" for the joint exercise or performance by such "public agency" and the City, for or on behalf of any "public agency" and/or the City, of any of the powers, duties or functions of any office, department or agency of the City established by or pursuant to the provisions of this article and/or of any of the powers, duties or functions of any "public agency";

(4) Contract with any "private agency" for the exercise or performance by a "private agency" or jointly by a "private agency" and the City for or on behalf of the City, of any of the powers, duties or functions of any office, department or agency established by or pursuant to the provisions of this article;

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(5) Contract with any “public agency” for the purchase or acquisition by a “public agency” by the City, or jointly by both, for or on behalf of the City, a “public agency” or both, of any real or personal property, or for the construction or making by a “public agency,” by the City, or jointly by both, for or on behalf of the City, a “public agency” or both, of any public works project or public improvement.

Each such contract, excepting contracts for specific improvements or projects, and also excepting contracts for specific studies or reports to be completed within five years, shall be terminable by the City at any time following the expiration of one (1) year from and after the date of such contract or at any time following the expiration of such shorter period of time as may be specified in the contract.

In case of and during the term of any such contract, any provisions of this Charter, or of any ordinance, resolution or other City regulation, providing for the exercise or performance of said powers, duties or functions by a City office, department or agency established by or pursuant to the provisions of this article, or specifying a procedure for or otherwise controlling or regulating the manner in which such powers, duties or functions may be exercised or performed by any City office, department or agency established by or pursuant to this article, shall be deemed suspended to the extent that they are inconsistent with the performance or exercise by a “public agency” or “private agency” of any of such powers, duties or functions pursuant to or as provided by such contract. Also, the provisions of Section 1217 of this Charter, and of any City ordinance, resolution or other regulation relating to the matters mentioned in said Section 1217, shall not apply to any acquisitions or purchases of property, nor to any public works projects or improvements, made, constructed or done by a “public agency” for or on behalf of the City pursuant to any contract above mentioned in sub-paragraph (5) of this sub-section (b), provided that the “public agency,” in doing such things for or on behalf of the City, complies with such procedural requirements as would be applicable to it if it were to do such things for or on behalf of itself.

As used in this sub-paragraph (b), “public agency” means the United States of America, the State of California, any division, department, office, agency or political or administrative subdivision of the United States or of the State of California, or any county, municipal corporation (other than the City of San Jose), district, authority or other governmental body or organization; and, as used in this sub-section (b), “private agency” means any private corporation, firm, association, organization or person.

(c) Anything hereinabove in this section to the contrary notwithstanding, unless authorized by other sections of this Charter, no power, duty or function assigned by this Charter to the office of City Clerk, City Attorney, City Auditor, Independent Police Auditor or to the Finance Department, shall be discontinued or assigned or transferred to any other office, department or agency of the City nor to any “public agency” or “private agency” as said terms are hereinabove defined; excepting, however, that the Council may provide for the furnishing or performance of special services by another office, department or agency or by a “public agency” or a “private agency” to assist the office of City Clerk, City Attorney, City Auditor, Independent Police Auditor or the Department of Finance in the exercise or performance by them of those powers, duties and functions which are assigned to them by this Charter if and when such assistance or service is requested or recommended by the head of such office or department.

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Amended at election November 4, 1986

Amended at election November 3, 1992

Amended at election November 5, 1996

APPENDIX II

SAN JOSE CITY CHARTER

As Amended through March 2, 2004

ARTICLE VIII

ADMINISTRATIVE ORGANIZATION

SECTION 807. Administrative Organization; Other Departments.

(a) The following Charter departments are hereby established: A Police Department, a Fire Department, a Public Works Department, a Parks and Recreation Department, a Personnel Department, a Planning Department, an Airport Department and a Library Department.

(b) Additional departments may be created by Council from time to time pursuant to Section 800.

(c) Each department shall have such functions, powers and duties as Council may from time to time prescribe.

Amended at election November 4, 1986

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APPENDIX III

SAN JOSE CITY CHARTER

As Amended through March 2, 2004

ARTICLE VIII

ADMINISTRATIVE ORGANIZATION

SECTION 809. Office of the Independent Police Auditor

The Office of the Independent Police Auditor is hereby established. The Independent Police Auditor shall be appointed by the Council. Each such appointment shall be made as soon as such can reasonably be done after the expiration of the latest incumbent's term of office. Each such appointment shall be for a term ending four (4) years from and after the date of expiration of the immediately preceding term; provided, that if a vacancy should occur in such office before the expiration of the former incumbent's terms, the Council shall appoint a successor to serve only for the remainder of said former incumbent's term.

The office of Independent Police Auditor shall become vacant upon the happening before the expiration of his or her term of any of the events set forth in subsections (a), (b), (c), (d), (e), (h), (i), (j), (k) and (l) of Section 409 of this Charter. The Council, by resolution adopted by not less than ten (10) of its members may remove an incumbent from the office of the Independent Police Auditor, before the expiration of his or her term, for misconduct, inefficiency, incompetence, inability or failure to perform the duties of such office or negligence in the performance of such duties, provided it first states in writing the reasons for such removal and gives the incumbent an opportunity to be heard before the Council in his or her own defense; otherwise, the Council may not remove an incumbent from such office before the expiration of his or her term.

The Independent Police Auditor shall have the following powers and duties:

- (a) Review Police Department investigations of complaints against police officers to determine if the investigation was complete, thorough, objective and fair.
- (b) Make recommendations with regard to Police Department policies and procedures based on the Independent Police Auditor's review of investigations of complaints against police officers.
- (c) Conduct public outreach to educate the community on the role of the Independent Police Auditor and to assist the community with the process and procedures for investigation of complaints against police officers.

Added at election November 5, 1996

HONORABLE MAYOR AND CITY COUNCIL

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Subject: Supplemental Response to City Attorney Opinion on IPA Authority

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APPENDIX IV

SAN JOSÉ MUNICIPAL CODE

This code is current through Ord. 27626, adopted 12-13-05

TITLE 2

ADMINISTRATION

Part 10

OFFICE OF THE INDEPENDENT POLICE AUDITOR

Sections:

2.04.1000 Establishment.

2.04.1010 Department head.

2.04.1020 Functions, powers and duties.

2.04.1000 Establishment.

The office of the independent police auditor is established by Charter Section 809. It shall be treated as a department for the purposes of this chapter. The office of the independent police auditor shall be totally independent from the police department.
(Ord. 25209.)

2.04.1010 Department head.

The independent police auditor shall be the head of the office of the independent police auditor.
(Ord. 25209.)

2.04.1020 Functions, powers and duties.

In addition to those general functions, powers and duties given to the department head by this chapter and other provisions of this Code, the independent police auditor shall:

- A. Act as department head in the supervision of the office of the independent police auditor.
- B. Perform all other functions and duties, consistent with the Charter, assigned by act of the city council.

(Ord. 25209.)



San Jose Mayor Chuck Reed
San Jose City Council Members
200 East Santa Clara Street
San Jose, CA 95113

September 17, 2007

VIA FACSIMILE

Re: IPA Authority to Review Deaths Following Police Use of Force

Dear Mayor Reed, and Council Members,

We are writing on behalf of the American Civil Liberties Union of Northern California (ACLU-NC) to urge your approval of recommendations by the Independent Police Auditor (IPA). We also write to point out specific flaws in the City Attorney's memorandum. We urge you to reject the conclusions of the City Attorney's memo.

Implement IPA Recommendations:

We urge you to approve the following recommendations of the IPA:

1. That the Police Department conduct an administrative investigation for all deaths in police custody or following use of force by the San Jose Police Department (SJPD), and
2. That the Independent Police Auditor (IPA) be granted authority to audit and review such investigations

We weighed in to support this recommendation with a letter prior to the June 21, 2007 Council meeting. Administrative review with an IPA audit is essential to providing the public with an independent analysis of how and why a member of the public dies following an altercation with members of the SJPD. The IPA currently has authority, granted by city council, to audit deaths following officer-involved shootings. There is no reason a death following the use of a Taser or some other use of force should be treated any differently.

M. QUINN DELANEY, CHAIRPERSON | ROBERT CAPISTRANO, SUSAN FREIWALD, LISA HONIG, NATALIE WORMELL, VICE CHAIRPERSONS | NANCY PEMBERTON, SECRETARY/TREASURER
MAYA HARRIS, EXECUTIVE DIRECTOR | CHERI BRYANT, DEVELOPMENT DIRECTOR | ERIKA CLARK, COMMUNICATIONS DIRECTOR | JUSTINE SARVER, ORGANIZING DIRECTOR | ALAN SCHLOSSER, LEGAL DIRECTOR
ANN BRICK, MARGARET C. CROSBY, TAMARA LANGE, JULIA HARUMI MASS, MICHAEL RISHER, JORY STEELE, STAFF ATTORNEYS | NATASHA MINSKER, NICOLE A. OZER, MARK SCHLOSBERG, POLICY DIRECTORS
STEPHEN V. BONSE, GENERAL COUNSEL



At the June Council meeting, you requested the City Attorney to look at whether there were liability issues surrounding granting the IPA this authority. Rather than focusing on this issue, the City Attorney has written a lengthy memo outlining why you as a Council lack the power to grant the IPA such authority.

As explained below, the City Attorney memorandum is incomplete and incorrect in its analysis. Council most certainly does have the authority to legislate in this area of municipal affairs and should exercise its authority to provide for the reviews and audits requested by the IPA.

The City Council Has Authority to Provide the IPA Audit Authority over Death Cases

The City Attorney's position essentially is that the City Council cannot grant the IPA the audit authority requested because to do so would conflict with the City Charter. To reach this conclusion, the City Attorney conducts a strained analysis to imply a conflict where none exists, and misconstrues the law regarding the power of local legislative bodies to regulate municipal affairs.

As the City Attorney states in his memorandum

It is a well-established principle in municipal law that charter cities have broad authority with regard to municipal affairs. A typical statement of this principle is that the "enumeration of specified powers in a city charter does not result in the exclusion or limitation of powers not otherwise specified. Any such power *not expressly forbidden* may be exercised by the municipality, and any limitations on its exercise are those only that have been specified in the charter." *City Attorney Memorandum*, p. 5.

In other words, unless the Charter contains language specifically stating that the IPA shall not have a role in reviewing deaths following the police use of force, the Council has the authority to authorize such audits or reviews. The charter contains no such language.

Instead the City Attorney seeks to imply a conflict by looking at various provisions of the City Charter and history surrounding the adoption of the IPA ordinance. There are several reasons why his analysis fails.

First, the courts have generally held that so long as the grant of authority is not inconsistent with the Charter, conflicts will not be implied. Illustrative is *Domar Electric v. City of Los Angeles*, 9 Cal.4th 161 (1994). There, the California Supreme Court considered an ordinance that required subcontractor outreach and whether that provision conflicted with charter provisions governing competitive bidding. The court held that it did not, citing the principle that "Charter provisions are construed in favor of the exercise

ATTACHMENT 2b

of the power over municipal affairs and 'against the existence of any limitation or restriction thereon which is not expressly stated in the charter' [citations]. Thus 'restrictions on a charter city's power may not be implied.' *Domar*, 9 Cal.4th at 171.

Further, the court found that "where the words of a charter are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the charter or from its legislative history." *Domar*, 9 Cal.4th at 172. Courts consider a conflict in relation to the purpose of the charter amendment. *Id.* at 173.

Other cases reach similar conclusions. In *Miller v. City of Sacramento*, for example, plaintiff taxpayers sued the city and the City Council for exceeding their authority in creating the position of council budget analyst. The court found that the City Charter authorized the creation of the position unless the Council was expressly barred from creating such a position by the Charter. *Miller v. City of Sacramento*, 66 Cal. App. 3d 863 (1977); see also *City of Oakland v. Williams*, 15 Cal. 2d 542 (1940), Cal. Const., Art. §§5(a), 6(b).

In addition, California courts have held that restrictions on the exercise of municipal powers may not be implied. In *Santa Monica v. Grubb*, the City Council adopted an ordinance authorizing the City Council to issue and sell revenue bonds for water purposes. While this was not explicitly included as within the City Council's power in the Charter, it neither conflicted with the Charter nor the California Constitution. The court held that, because revenue bonds could be considered necessary to the carrying out of municipal affairs, the selling of bonds for water purposes could be deemed a permissible exercise of power. *Santa Monica v. Grubb*, 245 Cal. App. 2d 718 (1966).

The purpose of creating the IPA, according to the City Attorney's memo, was to provide for the "complete, thorough, objective and fair" investigation of complaints against peace officers. The Charter Amendment addressing the IPA was not intended to expand the IPA's authority beyond the ordinance that previously existed, but there is no indication in the legislative history that that it was intended to further restrict City Councils from delegating additional tasks to the IPA in the future.

In fact, the ability of City Council to delegate authority to the IPA is expressly provided under Municipal Code §2.04.1020. The Municipal Code states: "[i]n addition to those general functions, powers and duties given to the department head by this chapter and other provisions of this Code, the independent police auditor 'shall perform all other functions and duties consistent with the Charter, assigned by the act of the City Council.'" *San Jose Municipal Code* §2.04.1020. This provision has existed without, to our knowledge, any legal challenge.

Further, granting the IPA authority to audit deaths following police use of force, is entirely consistent with the IPA's role of ensuring "complete, thorough, objective and fair" investigations by the police department and is no way inconsistent with its current roles.

ATTACHMENT 2b

Second, the City Charter grants the City Council the authority and broad latitude to legislate in municipal affairs and create additional powers and responsibilities for departments. San Jose's Charter states in Section 200:

The City of San Jose shall have the power to make and enforce all laws and regulations in respect to municipal affairs, subject only to such restrictions and limitations as may be provided in this Charter and in the Constitution of the State of California. The City shall also have all other rights, powers and privileges which are not prohibited by, or in conflict with, the State Constitution or the Charter and which it would be proper to specifically set forth in this Charter even though such are not herein set forth. It shall also have the power to exercise any and all rights, powers and privileges heretofore or hereafter established, granted or prescribed by any law of the State, by this Charter or by other lawful authority, or which a municipal corporation might or could exercise under the Constitution and laws of the State of California.

The enumeration or specification in this Charter of any particular power shall not be held to be exclusive of or any limitation upon the generality of the foregoing provisions.

In addition, the California Constitution, art. XI § 5 states that a charter city has complete power over municipal affairs, and, unless limited by the charter, the City Council may exercise all powers not in conflict with the California Constitution. Courts have construed this in favor of the exercise of power by City Councils, thereby implying no restriction by the Charter in cases not explicitly in conflict with Charter provisions.

While it is true that the Charter lacks explicit language regarding the expansion of IPA responsibility, there is no language in the Charter that in any way prohibits the City Council from expanding IPA's current authority. Further, while section 807 does not mention the IPA under subsection (a), it does include a provision under subsection (b) that additional departments may be created by Council. Subsection (c) then sets forth that "[e]ach department shall have functions, powers and duties as Council may from time to time prescribe." This Section, therefore, ensures that City Council is intended to have authority over departments not listed in subsection (a).

Third, the City Attorney's opinion is inconsistent with past City Council action. According to the IPA, three times, in 1999, 2004, and 2006 the City Council passed resolutions or ordinances expanding the duties of the IPA. In April 27, 2004, for example, the Council passed the following:

The IPA will be provided with a copy of the Internal Affairs administrative document of the officer-involved shooting for auditing purposes as soon as practical after the criminal case has been concluded, but prior to the closing of the administrative investigation. *IPA Memorandum*, p. 4.

According to the IPA report, the IPA has been conducting such audits since. There is no reason why the request to grant the IPA similar authority over deaths that follow other uses of force other than a firearm would raise any additional legal issues or otherwise be inconsistent with the Charter.

In asserting that the proposed action conflicts with the Charter, the City Attorney is making an argument inconsistent with the weight of California law and the past practice of this Council. His memo should therefore be rejected and the IPA recommendations adopted.

The City Attorney Ignores Study Suggesting Greater Oversight Decreases Liability Risk

The City Attorney in his memorandum speculates about a number of ways that IPA review may increase liability risk to the city, yet concludes that "the risk of additional liability in this area is very difficult to quantify." He speculates that "it is possible that the complexities potentially added to litigation from such reviews would negatively affect the City's exposure an increase the cost and length of litigation."

While the City Attorney devotes one short paragraph on the possibility that IPA review could improve risk management, he ignores one major study done by Merrick Bobb, Director of the Police Assessment Resource Center and Independent Monitor to the Los Angeles County Sheriff Department. In it, Bobb reviewed several measures of liability declined as the result of external review. See Merrick Bobb, *Los Angeles County Sheriff's Department 19th Semiannual Report*, February 2005, p. 29-52.

We presented this information to City Attorney Doyle prior to his memorandum being issued and invited him to talk with Mr. Bobb about his findings and study. We are disappointed that this information has not been included in the City Attorney's report.

September 14, 2007 Memo From Mayor's Office is Flawed and Ineffective

We are perplexed by the meaning Mayor Reed, Vice Mayor Cortese, and Council Member Constance's recent memo recommending the acceptance of the City Attorney's memorandum on the Independent Police Auditor's Authority and Legal Issues, while also directing the IPA to have a role in reviewing in custody deaths. The City Attorney's office was clear that any expansion of IPA authority would need to go to the voters or a charter amendment. Accepting this opinion will effectively forestall reforms.

It would be ineffective to delegate to the Police Chief to determine how the IPA would be involved in reviewing these cases for the following reasons:

ATTACHMENT 2b

First, the Chief has been clear that he is not in favor of IPA review. Thus this will only serve to delay the issue further. Ultimately, the City Council will have to consider this issue again.

Second, the Chief has been equally clear that he does not consider deaths following the use of a Taser to be "in custody deaths." The proposed memorandum, therefore, does not begin to address the very issues that brought us here to begin with.

Third, the memorandum suffers from an internal contradiction. The memo suggests that the April 27 2004 council approved process for auditing deaths following an officer involved shooting be incorporated into the municipal code. Simultaneously, the memo accepts the City Attorney memorandum, which states that the City Council does not have the authority to authorize additional audits by the IPA. In this sense, the proposed memorandum is contradictory and ineffective.

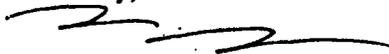
Conclusion

This issue has been under consideration by the City Council for some time now and we strongly recommend that you move forward to approve the recommendation of the Independent Police Auditor.

The IPA recommendations are modest, yet will improve oversight in a critical area. Such improved oversight will increase community confidence in the San Jose Police Department and its own investigations. Even though the police chief is resisting this change, the recommendations will ultimately benefit the police department. Public trust is essential to good police community relations and good relations with the community are ultimately necessary for police to fulfill their primary mission – investigating and solving crimes.

Thank you for your consideration. If you have any questions, please give us a call at 415-621-2493 ext. 316. I look forward to seeing you all at tomorrow's City Council meeting.

Sincerely,



Mark Schlosberg
Police Practices Policy Director

Sanjeev Bery
San Jose Director
ACLU of Northern California

Documentation of Historical Classification Review by IPA Excerpts from IPA Reports

1993 Office of the Independent Police Auditor First Quarterly Report

III. CONCERNS AND RECOMMENDATIONS Pg. 8

The organization and responsibilities of the Office of the Independent Police Auditor necessitate that the Office will have more contact with the Internal Affairs Unit than with any other division of the San Jose Police Department.

While the interaction between the Office of the Independent Police Auditor and Internal Affairs has largely been very positive, the relationship has produced and exposed some problems.

A. Procedural Complaints

During the first month of operation of the Office of the Independent Police Auditor, a substantial amount of time was spent examining the statistics compiled by the San Jose Police Department concerning the number of complaints filed by citizens. It was immediately recognized that the Department had a surprisingly small number of complaints for a large police department in a city with a population of over 800,000. The Office was able to identify the problem after complaints, which were received by the Office, were forwarded to the Internal Affairs Unit for investigation. As Internal Affairs completed the investigations and returned those complaints to the Office, several had been classified by Internal Affairs as .Procedural. complaints. A series of meetings between the staff of the Office of the Independent Police Auditor and Internal Affairs revealed a two-prong classification process which Internal Affairs uses to classify a complaint as procedural or misconduct prior to extensively investigating those complaints.

The problematic distinction between misconduct and procedural complaints creates a perception of impropriety on the part of the San Jose Police Department. This is the most important issue, which has been identified during the first quarter of operation of the Office of the Independent Police Auditor.

1. Defining a Procedural Complaint

CONCERN: The Internal Affairs Unit employs a distinction between .misconduct and .procedural complaints which is the source of complicated and confusing problems for citizens and for the Office the Independent Police Auditor.

A misconduct complaint is one, which alleges a violation of Department policy or a violation of law. The problems arise surrounding the classification of a complaint as .procedural. The San Jose Police Department employs the following guidelines in defining a procedural complaint:

In order to make a determination as to whether a complaint is labeled a Procedural Complaint, the investigator must show that the actions complained about pertained to *an established procedure, properly employed by a Department member*, which the complainant understands but believes is inappropriate or not valid.¹⁶ (emphasis added)

It has been the experience of the Office of the Independent Police Auditor, through interacting with Internal Affairs and reviewing their cases that the use of the Procedural classification needs to be revised.

An audit of the complaints filed by citizens with the Office of the Independent Police Auditor and subsequently investigated by Internal Affairs has revealed that some complaints which allege misconduct are inappropriately classified by Internal Affairs as procedural.

RECOMMENDATION: It is recommended that the procedural classification should only be used where the officer followed Department procedure, but the complaining citizen disagrees *with the procedure itself* and not with the *application of that procedure*. The procedural classification should not be used to classify any complaint where the facts provided by the complaining citizen allege misconduct.

The reformation of the Procedural classification would be facilitated by the creation of clear and uniform guidelines and definitions for the Internal Affairs officers to follow in making the distinction between misconduct and procedural complaints. Additionally, when an Internal Affairs Officer faces a situation in which it is difficult to determine whether to make a complaint, a formal misconduct complaint or a procedural complaint, the officer should choose the most careful and thorough path, make the complaint formal, and have it appropriately investigated as a misconduct complaint.

1994 Second Quarter

In twenty-two of the remaining cases, the complainants were not contacted because they had either moved, had the phone disconnected or after repeated attempts did not return the phone calls. Since January 15, 1994, Internal Affairs has been using the Informal Complaint system.

This office has conducted an audit of this new classification system by personally contacting the complainants to verify if they were satisfied with the informal handling of their complaints. In 22 cases, we successfully contacted the complainants. In six cases, we were unable to contact the complainant. In one case, the complaint did not involve the San Jose Police Department.

Of those complainants contacted, the survey indicated that the allegations stated were compatible with the allegations in the Informal Log. Fifteen of the 22 complainants were satisfied with the informal handling of their complaints. Of the four complainants who were dissatisfied with the handling of their Informal Complaint, one person will seek to formalize the complaint and the three other complainants indicated that they did not wish to further pursue the matter. One person was unable to say if he/she was satisfied with the informal handling of his/ her complaint. Another person contacted changed his/her Informal Complaint to a formal handling of the complaint. Finally, one other complaint involved a San Jose police dispatcher.

This audit revealed that the Informal Complaints as defined have been properly identified and handled. There were no complaints of undue pressure from Internal Affairs to have their complaints filed as Informal. Furthermore, the audit revealed that Internal Affairs investigators took time to explain to the complainants their options of filing a Formal or Informal Complaint.

The Auditor will continue to monitor these complaints to ensure that the complainants are not pressured into accepting this less formal method of handling their cases. The Auditor will also review these cases closely to ensure that only minor transgressions are addressed in this manner. In addition, under this new system, the Unit Commander must approve the classification of a complaint as Informal. This will standardize the classification process so that there is uniformity in the Internal Affairs Unit.

Mid Year 1996 Not available on line

Page 9

C. Complaint Classification

Complaint classification continues to be a concern to the IPA. The IPA recently recognized a problem with the classification of Discrimination/Harassment allegations. Some complainants that raised allegations of racial discrimination only received Rude Conduct allegation instead of the appropriate Discrimination/Harassment allegation. This involved a number of cases where a complainant was called a racially derogatory name yet, the allegation attached to the complaint only “rude Conduct” as an allegation. After the concern was raised with the PSCU, several of the affected complaint allegations were changed to accurately list the Discrimination/Harassment allegation. The IPA will be monitoring allegations closely.

The IPA’s databases enable the IPA to accurately assess and track complaints from initial intake through case closure. Of those complaints initiated at the IPA, the IPA is able to determine if complainant concerns are addressed by comparing the IPA intake statement to the PSCU intake statement and its associated allegations. In order to effectively track potential allegations and emerging trends, the IPA is creating a more accurate database of those complaints filed at the IPA. The IPA intake will list and track potential allegations and emerging trends for comparison to the actual PSCU classification. If a discrepancy is noted, the PSCU liaison will be contacted for clarification. The IPA is working to improve its database system in order to raise concerns with the PSCU in a timely manner and, where possible, before complaint closure. The IPA and the PSCU continue to work together to implement a systematic and thorough approach to complaint classification.

1995 Year End Rpeort

Classification of complaints. p 15:

An area that requires special attention is the classification of complaints. There has been a continuous evolution to perfect the classification system. Some errors were noted in the classification of the Informal and Procedural type of complaints because the PSCU first completes the investigations and then sends it to the IPA for review, unlike Formal complaints which are classified and a copy immediately sent to the IPA prior to the investigation. The classification of a complaint is more difficult to resolve after the completion of an investigation. The PSCU and the IPA will work toward implementing a more systematic approach to classifying complaints.