



Office of the Independent  
Police Auditor

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ANNUAL REPORT  
2012 - 2013



BAY AREA RAPID TRANSIT DISTRICT





**Office of the Independent Police Auditor**  
**Annual Report 2012 – 2013**

Mark P. Smith  
Independent Police Auditor



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## MESSAGE FROM THE INDEPENDENT POLICE AUDITOR

In 2011 the Office of the Independent Police Auditor (OIPA) opened its doors in an effort to fulfill a role that was previously absent at the Bay Area Rapid Transit District (BART). That role, which forms the basis for OIPA's mission, is to provide all members of the public with effective and independent oversight of the BART Police Department (BPD). OIPA attempts to fulfill its mandate through unbiased and thorough independent investigations and reviews of police department investigations, making policy recommendations to improve the performance of the police department, and maintaining continual communication with members of the public in the BART service area.

Beyond this central goal, OIPA's specific authorities and responsibilities are set forth in the BART Citizen Oversight Model (Model), adopted by BART's Board of Directors. Some of the most substantive responsibilities are:

- I. Receive complaints from victims of or witnesses to on-duty misconduct by officers
- II. Investigate those allegations that involve unnecessary or excessive use of force, racial profiling, sexual orientation bias, sexual harassment, the use of deadly force, and suspicious and wrongful deaths; reach an independent finding and recommend discipline where warranted
- III. Review BPD internal affairs investigations for completion
- IV. Establish an alternative dispute resolution process
- V. Conduct complainant-initiated appeals of BPD internal affairs findings
- VI. Respond to officer-involved shooting incidents and monitor the ensuing investigation
- VII. Draft recommendations regarding BPD procedures, practices, and training
- VIII. Develop a regular program of community outreach
- IX. Prepare monthly reports to the BART Citizen Review Board (CRB)
- X. Provide staff support to, and facilitate training for, the CRB

OIPA has taken some important strides toward meeting all of its responsibilities as effectively and efficiently as possible during its second year of operation. Amongst these are an expanded program of community outreach, a deeper investment in developmental training, and the successful completion of OIPA's first wave of investigations, appeals, and reviews which were initiated during the previous reporting year. Additionally, OIPA released its first formal policy recommendation this year, and we have also made a commitment to conduct at least one formal policy review per quarter going forward.

Along with these advancements, we acknowledge that there is still more work to be done in order to meet all of our responsibilities as outlined in the Model. The accomplishments OIPA has made, and the goals it continues to strive for, are the primary focus of this report.

I am pleased to present this second Annual Report of the Office of the Independent Police Auditor, for the year 2012-2013.

MARK P. SMITH  
Independent Police Auditor  
September 2013





## AREAS OF FOCUS FOR THE OFFICE OF THE INDEPENDENT POLICE AUDITOR 2012-2013

### Expanded Program of Community Outreach

One of the first responsibilities tackled by the Office of the Independent Police Auditor when it began operating was to meet with a variety of different stakeholders and community groups around the Bay Area in order to establish open and effective channels of communication. It is crucial for OIPA to listen carefully to the concerns of the public, which this office was created to serve. Over this past year, OIPA has sought to not only keep its momentum going with respect to its community outreach, but to expand on it as well.

In 2012-2013, some of the groups that OIPA was able to meet with are:

- Chinatown Community Development Center (at 3 of its residential locations in San Francisco)
- Block by Block, Downtown Oakland Association Community Development District
- West Oakland Neighborhood Crime Prevention Council
- Oakland Mayor's Commission on Persons with Disabilities
- Student Advisory Committee, San Francisco Unified School District
- San Francisco Youth Commission
- Oakland Youth Commission

The last three examples in this list are indicative of a concerted effort by OIPA to target more of its outreach directly at youth and youth-based organizations throughout the Bay Area. OIPA feels strongly that it can play a vital and often-overlooked role in educating youth about their rights and responsibilities when interacting with law enforcement. Effective education of this sort should, in turn, help decrease the instances of negative interactions or other confrontations between those two groups. OIPA continues to work toward its goal of focusing a portion of its community outreach directly on the Bay Area's young people.

In addition to these more individualized outreach efforts, OIPA continued its series of community forums in different parts of the Bay Area, hosted jointly with the BART Citizen Review Board. These forums are open invitations to any member of the public who may want to voice an opinion on civilian oversight of law enforcement at BART, learn more about the oversight system, raise a specific complaint, etc. They provide a great opportunity for people to meet face to face with OIPA's staff, as well as with the CRB members who are charged with directly representing their interests within the civilian oversight system at BART. To date, each of these forums has yielded a sincerely meaningful dialogue about the crucial issues of concern to the public in their interactions with the BART Police Department, such as the use of force, racial profiling, officer-involved shootings, discipline for misconduct, etc.

In 2012-2013, OIPA held community forums at the following 3 venues:

- City of Richmond, Recreation Center Social Hall
- San Francisco Main Library
- Youth UpRising (East Oakland)

OIPA also maintains its ongoing connections with other stakeholders in the oversight of the BART Police Department, such as the BART Accessibility Task Force, and we look forward to continuing our commitment to maintaining active outreach throughout the Bay Area.

### **Draft Recommendations Regarding Bart Police Department Procedures, Practices, and Training**

In May 2013, the Office of the Independent Police Auditor issued its first formal recommendation regarding a BART Police Department policy.<sup>1</sup> Over the course of the last year, BPD began the process of deploying on-body cameras, referred to as Mobile Video Recorders (MVRs), to all of its sworn patrol personnel. The deployment involved consideration of various equipment and vendor options as well as substantial testing through a pilot program in which cameras were tested by a selected group of officers. In conjunction with the deployment of the MVRs, BPD developed a policy to be added to its manual that states the authorities and responsibilities of all officers as they utilize this new equipment.

One of OIPA's responsibilities under the Citizen Oversight Model is to develop specific recommendations regarding BPD policies, with the goal of achieving improved professionalism, safety, effectiveness, and accountability on the part of BPD. As OIPA felt there were portions of the new BPD policy regarding MVRs that could be improved upon, we chose to formally recommend some changes to it.

Possibly the most substantive change recommended by OIPA has to do with whether and when officers should be allowed to have access to video recorded by the MVRs. BPD's policy allows an officer to view recordings from his/her MVR except in circumstances prohibited by statute or at the direction of the Chief of Police. OIPA, on the other hand, feels that an officer should be prohibited from viewing recordings of an incident when the officer knows, or reasonably should know, that he/she is either a subject officer or a witness officer with regard to an allegation of misconduct arising out of the incident that was recorded. In other words, once it is apparent that a misconduct investigation about a particular incident is forthcoming, OIPA feels that all involved officers should be prohibited from viewing MVR recordings of the incident.

OIPA feels that such a restriction would assist in minimizing the chance that an officer's account of what occurred during the underlying incident will be, either intentionally or unintentionally, contaminated by what is depicted on the video. In a misconduct investigation, OIPA believes that such contamination threatens to diminish the integrity of the investigation, as it is preferable to receive witness accounts independently rather than accounts that may have been mixed together. Only when the witness accounts have been received independently from each other can they be accurately weighed for their respective relevance to the investigation by a trained investigator. As OIPA feels that MVR recordings are essentially witness accounts of an incident (albeit non-human ones), for the purposes of the BPD policy governing MVRs, OIPA feels that the noted viewing restrictions are in order.

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<sup>1</sup> It is not uncommon for OIPA, during the regular course of its work, to informally discuss policies with BPD and to make suggestions for alternatives or improvements. Much of OIPA's work is comprised of determining whether a given policy was violated in a specific instance, and discussions about policy and possible changes to it are therefore to be expected. However, it is important for OIPA to also take advantage of its responsibility to publicly issue recommendations on BPD policy, particularly where the underlying issue is likely to be of interest to members of the public, so that they may be informed and reach their own conclusions regarding the matter.

Pursuant to its responsibilities in the Model, OIPA presented its recommendation to the Citizen Review Board for review and comment. The recommendation is also available to the public on OIPA's webpage, so that anyone who is interested may draw his/her own conclusion with regard to how the policy should be crafted. For further detail about BPD's policy on MVRs, as well as OIPA's complete recommendation regarding that policy, see Appendix A.

### **Training for the Office of the Independent Police Auditor and the Citizen Review Board**

One of the responsibilities assigned to the Office of the Independent Police Auditor in the Citizen Oversight Model is to facilitate training for the Citizen Review Board. OIPA recognizes that it is equally important to take advantage of training opportunities for its own staff as well. In 2012-2013, OIPA increased its efforts with regard to each of these areas of training, and we anticipate a further expansion of these efforts to continue.

Last year, OIPA facilitated training for the CRB on a handful of relevant topics, including the definitions of administrative investigation findings that are regularly subject to CRB review, the laws surrounding consensual encounters and detentions initiated by law enforcement, and the confidentiality of administrative complaint investigations involving sworn peace officers. OIPA continues to work with the CRB to identify those training topics that will be of greatest interest and benefit to them as they carry out their duties.

OIPA's staff participated in a variety of valuable training opportunities as well. It is important for OIPA to engage in some training alongside BART Police Department officers, so that we are able to understand first-hand what they are being taught and what standards are the appropriate ones by which they should be evaluated; it is equally important for us to seek training external to BPD so that we can continue to cultivate and expand our own oversight skills and abilities. In light of these considerations, some of the training OIPA was able to participate in this past year includes the following:

- BPD Mobile Video Recorder Training<sup>2</sup>
- BPD Advanced Officer Training on Racial Profiling/Diversity
- California Peace Officers' Association Legislative Update Training
- Mental Health First Aid Training
- Walk-along with BPD officers
- Law Enforcement Auditors Symposium
- BPD Racial Profiling Update Training
- Technology's Impact on Critical Incident Investigations
- Leadership & Accountability: LAPD's Rampart Scandal
- Suicide by Cop: Understanding the Impact on Communities, Families, and Law Enforcement
- BPD Telestaff Training<sup>3</sup>
- Observation of Integrated Security Response Center/BPD Dispatch Operations

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<sup>2</sup> Mobile Video Recorders (MVRs) are on-body cameras worn by BPD patrol officers.

<sup>3</sup> Telestaff is a newly-implemented public safety scheduling software that BPD is utilizing for its personnel. It is important for OIPA to be able to effectively identify BPD work schedules for a number of reasons. Knowing when a BPD employee will be available (or unavailable) for an interview, for instance, may have a significant effect on OIPA's ability to complete an investigation as efficiently as possible.

## **Developing the Investigative Toolkit of the Office of the Independent Police Auditor**

Just as the Office of the Independent Police Auditor seeks to stay abreast of best practices regarding law enforcement and civilian oversight via training, we also strive to ensure that we are equipped with all of the necessary tools to be effective and efficient in carrying out our investigative responsibilities. As new products and technologies are employed by the BART Police Department, for instance, OIPA must make sure it has the information and the access that will be necessary to incorporate those products and technologies into our investigations of BPD personnel.

This year, one of the most important additions to OIPA's toolkit was obtained in the form of direct access to the digital evidence management system that is being used to retain all of BPD's Mobile Video Recorder data. OIPA has the access and the authority to go directly to this system (as opposed to requesting that an authorized member of BPD access the system on OIPA's behalf, for instance) to search for, review, and retrieve video recorded by any BPD officer during his or her shift. Relevant video can then be relied upon by OIPA as evidence for its investigative findings.

Also this year, OIPA gained access to, and received training on, scheduling software called Telestaff that was recently deployed by BPD. While BPD deployed Telestaff to assist it with efficiently managing the schedules and assignments of its officers, the system is very important to OIPA as well as we will rely on it to help identify officers who might have been present during an incident that gave rise to a complaint. We will also use it to assist us in scheduling officers involved in complaint investigations for interviews, helping us ensure that the investigations are completed as quickly and efficiently as possible.

Another tool OIPA gained access to this year is BART's ArcGIS<sup>4</sup> system. This advanced mapping technology has the potential to assist OIPA in rapidly and accurately determining the precise location of an incident giving rise to a complaint, particularly if it occurs outside of BART property and if it is otherwise challenging to locate due to limited information from a complainant. Verifying the location of an incident that gave rise to a complaint is always an important starting point in a thorough investigation, and this is one additional tool OIPA can now rely upon if needed.

## **Maintaining Connections with Outside Organizations**

As a new oversight agency in 2011, the Office of the Independent Police Auditor was acutely aware of the benefits to be gained through shared learning and meaningful connections with certain local agencies and organizations outside of BART. From community groups to criminal justice agencies to our local counterparts engaged in the civilian oversight of law enforcement, OIPA quickly worked to establish connections with a number of these organizations as our office began its operations.

OIPA continues to see substantial benefits from maintaining its connections to other related organizations, and we have intensified our focus on these relationships over the course of the past year. In particular, as we have gained knowledge and experience related to the startup and operation of a new oversight agency, we have increasingly found ourselves in a position to share what we have learned with colleagues from a variety of different backgrounds and locations. For instance, OIPA has been called upon to provide phone consultations to one California municipality that is considering the

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<sup>4</sup> ArcGIS is a geographic information system that allows an organization such as BART to create and tailor a wide variety of geographic maps.

prospect of civilian oversight of its police department, a second California municipality that currently has oversight but seeks to enhance its outreach to the local community, as well as the California Commission on Peace Officer Standards and Training, which sought a deeper understanding of the various forms of civilian oversight of law enforcement that exist throughout the state and the country.

In addition to these opportunities, OIPA was asked to participate on an informational panel at each of two conferences that addressed the oversight of police. First, at the 2012 Annual Conference of the National Association for the Civilian Oversight of Law Enforcement, OIPA was honored to take part in a presentation titled, “Civilian Oversight: Getting Started Without Getting Stuck.” Later, at the American Public Transit Association’s (APTA’s) 2013 Risk Management Seminar, OIPA shared its experiences as part of a presentation called, “Impact of a Police Shooting: A Perfect Storm.” For an abridged version of OIPA’s presentation to the APTA risk management professionals, see Appendix B.



*OIPA Presentation, Community Forum at Youth UpRising*



*CRB Members, Community Forum at San Francisco Main Library*



## 2012-2013 BY THE NUMBERS

The BART Citizen Oversight Model dictates that this report shall include a breakdown of cases filed over the course of the last year, including complaints about the police received by the Office of the Independent Police Auditor, the BART Police Department, or any other District departments. The following tables are designed to satisfy the specific reporting requirements as stated in Chapter 1-04(J) of the Model.

It is important to note that the nature of the data being reported is one that lends itself to occasional change. For example, a case that was initially labeled as a Citizen Complaint during the month it was received (and initially reported as such) might later be determined to be a Comment of Non-Complaint during a subsequent month. The data reported here is aggregated from OIPA's monthly reports filed with the Citizen Review Board and generally reflects cases as they were initially received; it therefore might not reflect some changes that have taken place since. Importantly, OIPA has met with BPD Internal Affairs each month since OIPA started its periodic reporting; at these meetings we take the opportunity to reconcile every case and discuss any changes to cases, such as the one in the example above, so that no case is unaccounted for and that every change made can be explained and justified.

### *Total Number of Cases Filed or Reopened; Number of Pending Cases at Month-End*

	Number of Cases Filed <sup>5</sup>	Number of Open Cases <sup>6</sup>
July 2012	7	58
August 2012	13	60
September 2012	8	57
October 2012	9	49
November 2012	17	57
December 2012	12	52
January 2013	6	49
February 2013	10	46
March 2013	10	46
April 2013	11	47
May 2013	7	42
June 2013	8	38
<b>TOTALS</b>	<b>118</b>	

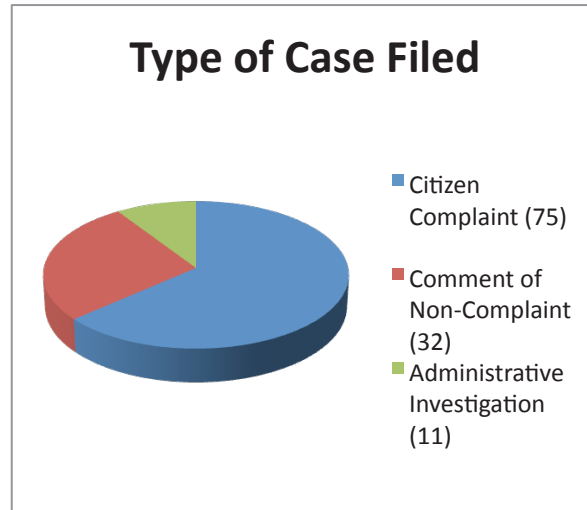
The number of cases filed or reopened this year represents an increase of 15 cases, or 15%, from 2011-2012.

<sup>5</sup> This number includes all Citizen Complaints filed against members of the BART Police Department, whether with OIPA or BPD, as well as Comments of Non-Complaint filed with BPD and Administrative Investigations initiated internally by BART Police Department members. It also includes any previously-closed cases that were reopened during the reporting period for further investigation. This number refers to individual cases, each of which could potentially have more than one allegation of misconduct subject to investigation, and each of which could also potentially involve more than one accused BPD employee.

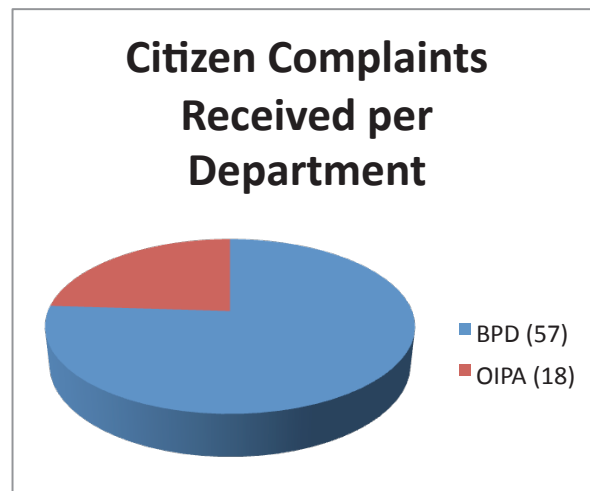
<sup>6</sup> This number indicates all investigations that are open as of the end of each reporting period. It includes Citizen Complaints (regardless of whether the investigation is being conducted by OIPA, the BART Police Department, or both), Comments of Non-Complaint, and Administrative Investigations.

*Types of Cases Filed or Reopened/Citizen Complaints Received per Department*

Out of the 118<sup>7</sup> cases alleging misconduct against BPD officers that were filed or reopened during the 2012-2013 reporting period, 75 were Citizen Complaints, 32 were received by BPD as Comments of Non-Complaint,<sup>8</sup> and 11 were Administrative Investigations<sup>9</sup> internally initiated by BPD.



Of the 75 Citizen Complaints that were filed or reopened, 18 (or 24%) of them were initiated through OIPA. The number of complaints received by OIPA increased by 5, or 38%, from 2011-2012 and the share of all incoming complaints received by OIPA (as opposed to BPD) increased by 4%.



<sup>7</sup> This number includes one case re-opened by BPD for further investigation at the request of OIPA. The case is included in OIPA's total in the table titled "Citizen Complaints Received per Department."

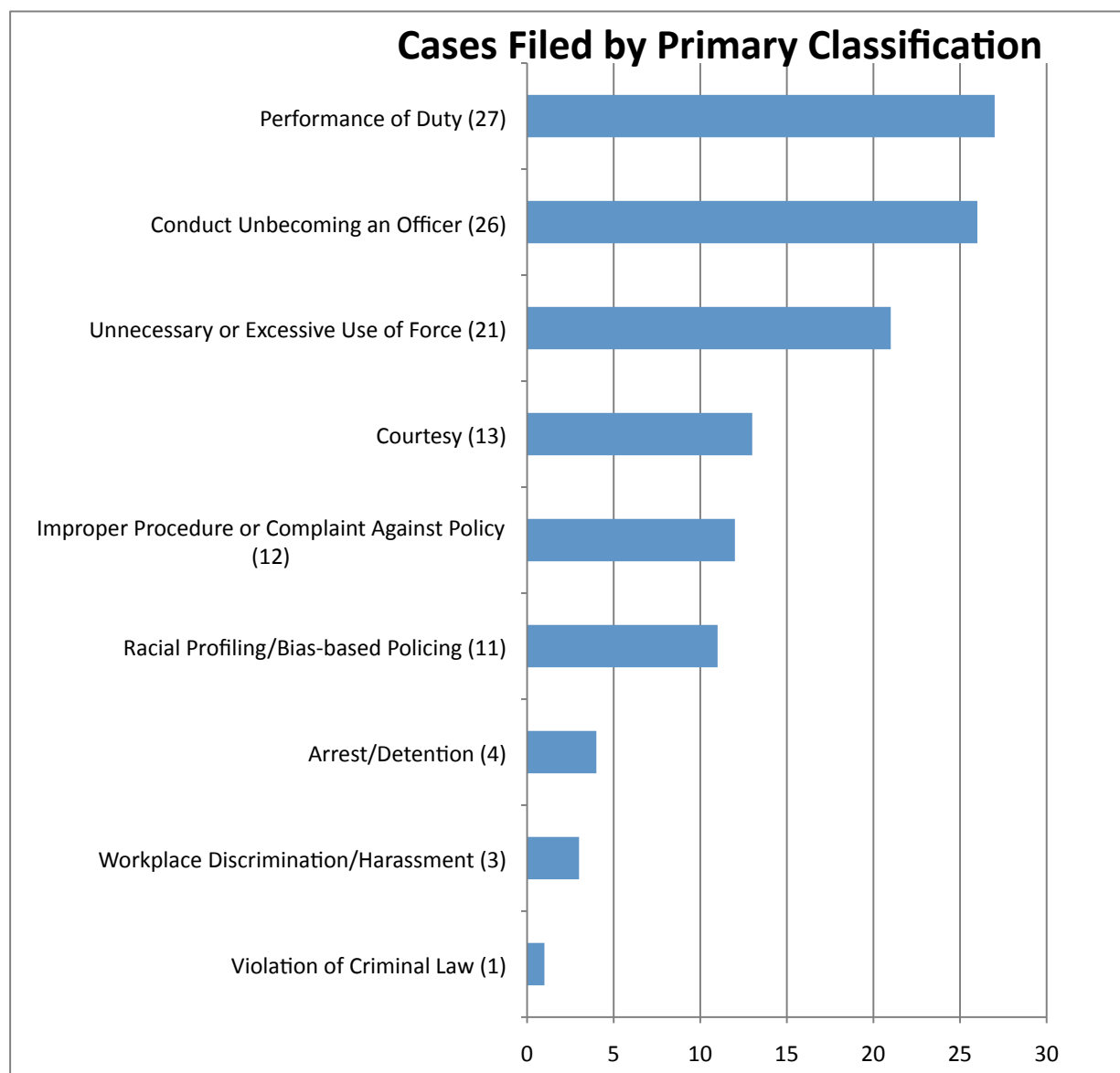
<sup>8</sup> As defined by BPD, a Comment of Non-Complaint is, "A comment on the actions of a Department employee, where the reporting party expressly states that they do not want to make a complaint." (BPD Policy Manual, Policy 1020.1.1(e)).

<sup>9</sup> Administrative Investigations are those generated internally, by BPD, as opposed to by a complainant or other external reporting party.



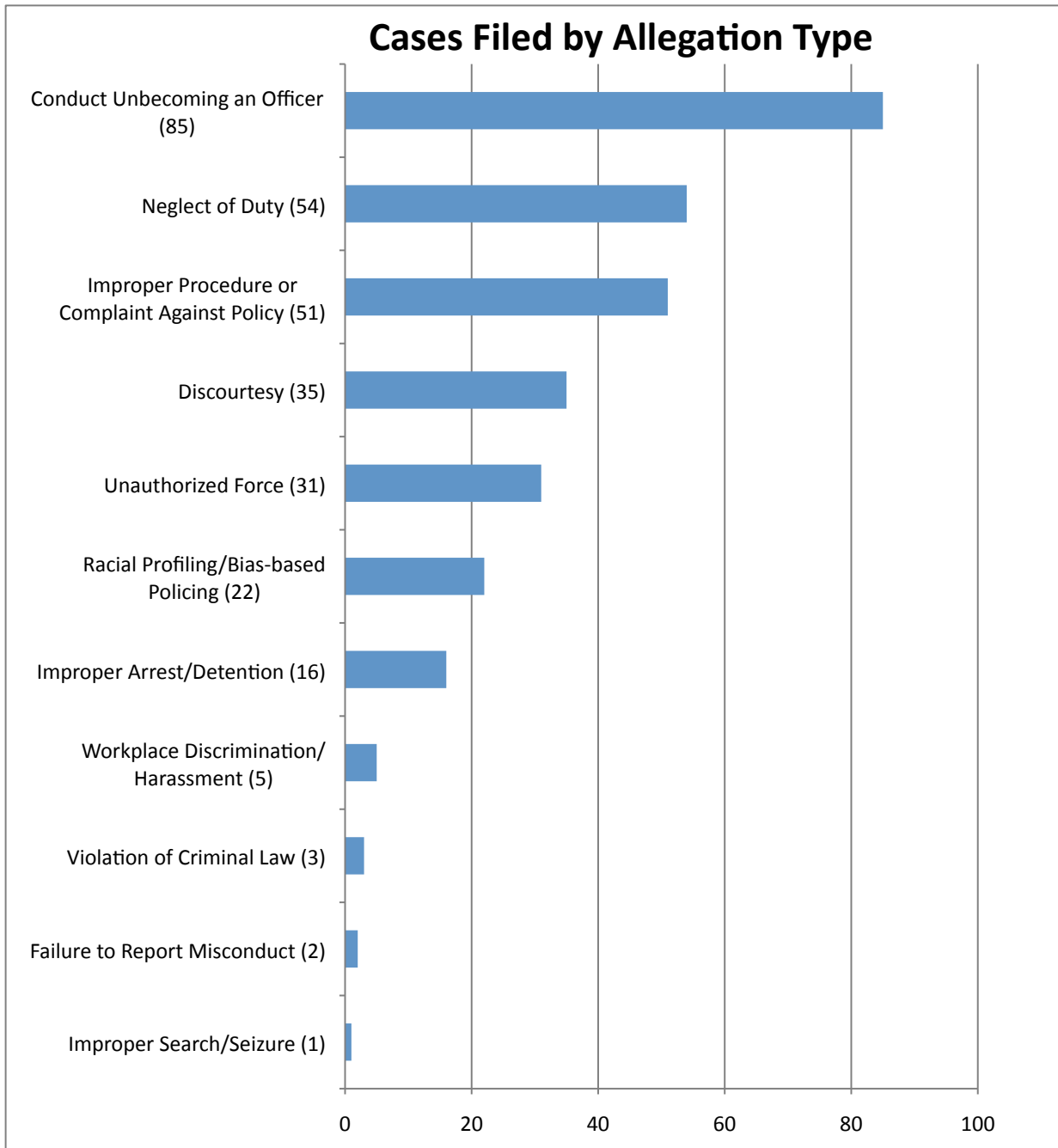
Complaints of misconduct are classified by the specific allegations they have raised. As complaints commonly include multiple types of allegations, they are also given a primary classification; the primary classification is generally the most serious type of misconduct that has been alleged. Following is a breakdown of the 118 cases alleging misconduct that were filed or reopened during the 2012-2013 reporting period, separated by primary classification.

Note that classifications can sometimes change over the course of an investigation for a variety of reasons. For example, as investigators uncover more information about a complaint, they may learn that more serious allegations than those initially raised are involved. Additionally, it is important to note that for cases that have been both initiated and completed within the current reporting period, the primary classification is determined by the findings of the case instead of the initial allegations that were raised (i.e. – the most serious *Sustained* allegation would become the primary overall classification).<sup>10</sup>



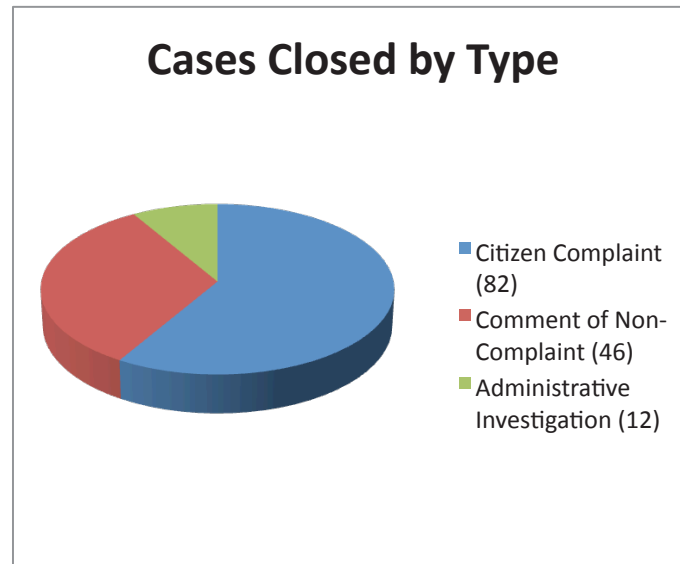
<sup>10</sup> For more information on the hierarchy of findings, see Page 11 of this report.

Following is a breakdown of allegation types for the 118 cases alleging misconduct that were filed or reopened during the 2012-2013 reporting period. Each case may include multiple allegations and/or multiple involved officers, which is why the total number of allegation types is significantly greater than the total number of cases. Once again, allegations are commonly added to or removed from a case during the course of an investigation for a variety of reasons; a significant number of the allegations reported here may have been changed or removed over the course of the year. This chart is therefore most appropriately seen as a reflection of all of the allegations that were raised during 2012-2013, whether they ultimately survived to the end of an investigation or not.



### *Disposition of Cases Completed*

During the 2012-2013 reporting period, 140 investigations were completed.<sup>11</sup> 82 of these investigations were Citizen Complaints, 46 were Comments of Non-Complaint, and 12 were Administrative Investigations.<sup>12</sup> It should be noted that, with a few exceptions, the cases reported on here were completed by BPD; this is largely a reflection of OIPA's investigative jurisdiction which, as dictated by the Citizen Oversight Model, is substantially smaller than that of BPD's.



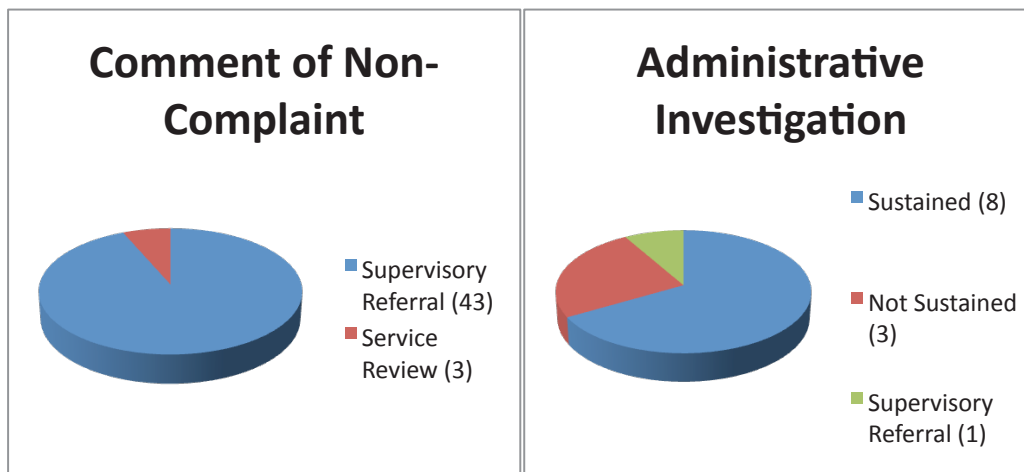
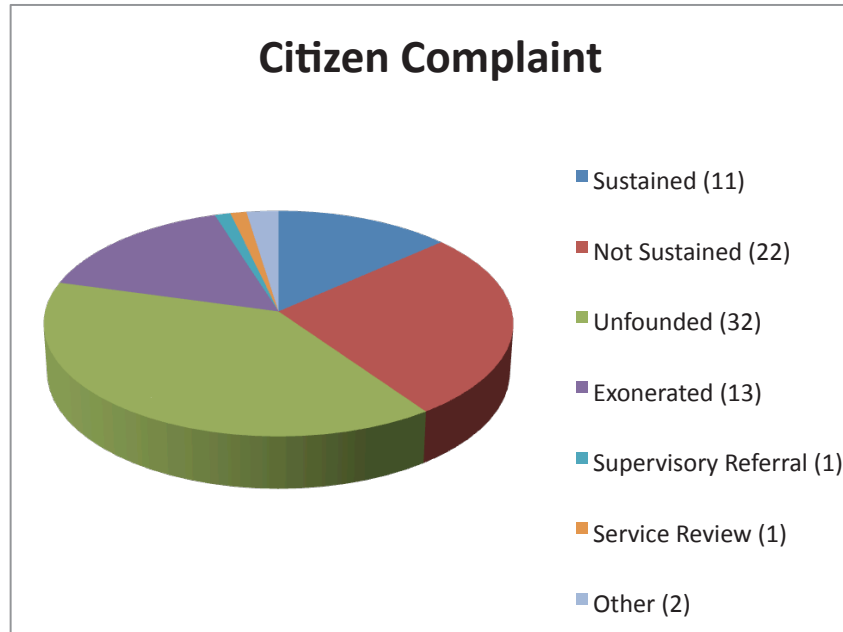
These same 140 completed cases are reported on in further detail below. First, these completed cases have been separated by type (Citizen Complaint, Comment of Non-Complaint, or Administrative Investigation) and overall finding. As with classifications, overall findings are generally assigned to a case according to a hierarchy and depend upon which finding has been reached for each allegation included in a case. If any allegation in the case has been *Sustained*, that will dictate the overall finding as *Sustained* regardless of the findings of all other allegations. This means that a case may be deemed *Sustained* solely on the basis of an allegation other than the most egregious one.

This hierarchy, and the resulting overall finding, is the same when any allegation in a case has been *Not Sustained* (absent any *Sustained* allegations, of course). If all allegations in a case are adjudicated as *Unfounded* and/or *Exonerated*, then the overall finding will be the one linked to the case's most egregious allegation. Two additional overall findings utilized by BPD for allegations of misconduct are *Supervisory Referral*<sup>13</sup> and *Service Review*.<sup>14</sup> Absent any other findings in a case, either of these two will become the overall finding.

<sup>11</sup> This number includes one case that was re-closed during the reporting period after having been reopened by BPD for further investigation at the request of OIPA.

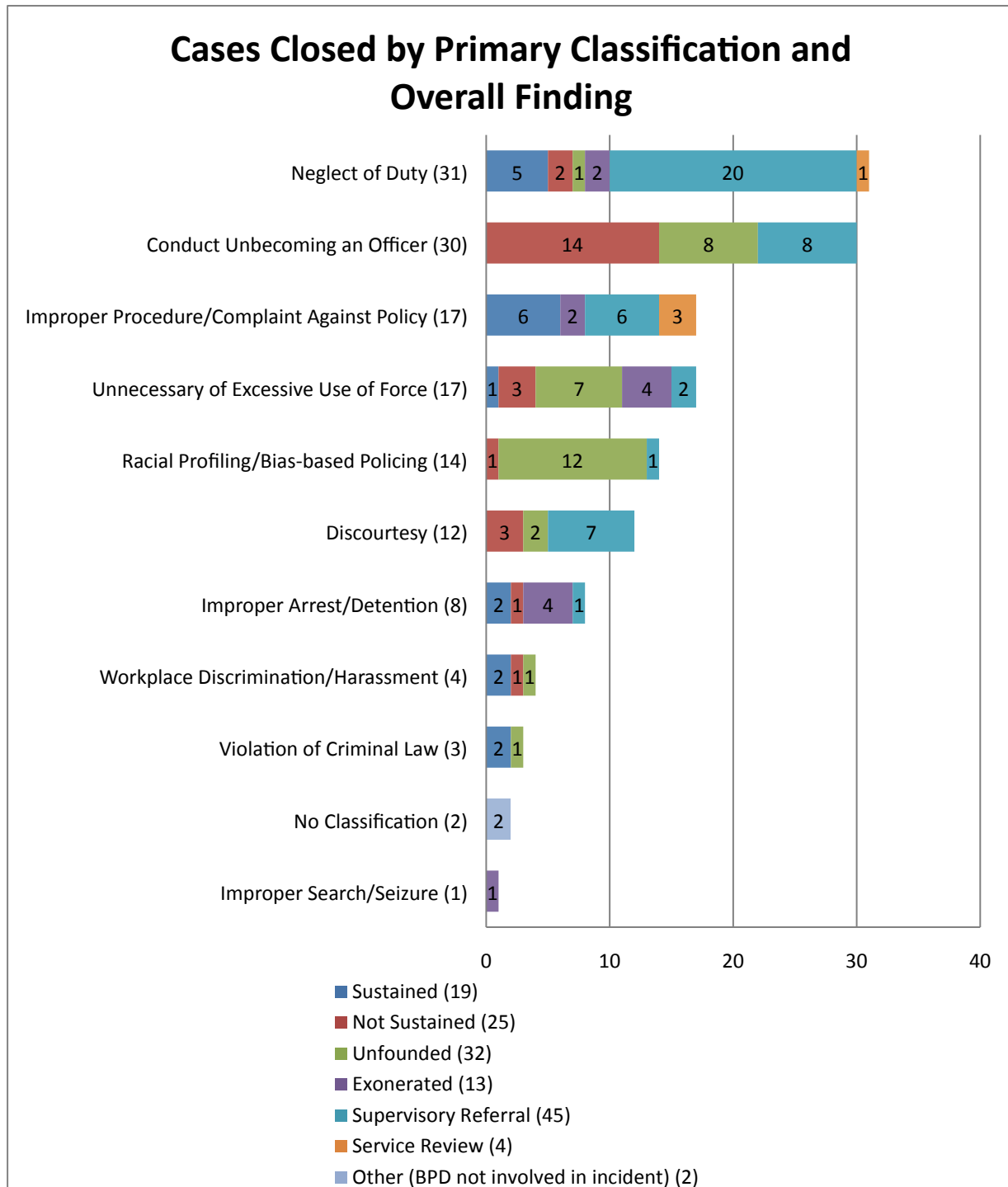
<sup>12</sup> Two of the Citizen Complaints involved separate investigations by both OIPA and BPD. As these investigations and their findings each stand alone, they have been counted separately in the data presented here.

<sup>13</sup> In defining a Supervisory Referral, the BPD Manual indicates that an assigned supervisor will address the issue informally with the involved employee and document the content of the conversation in a memorandum to the Internal Affairs Section. (BPD Policy Manual, Policy 1020.1.1(f)).



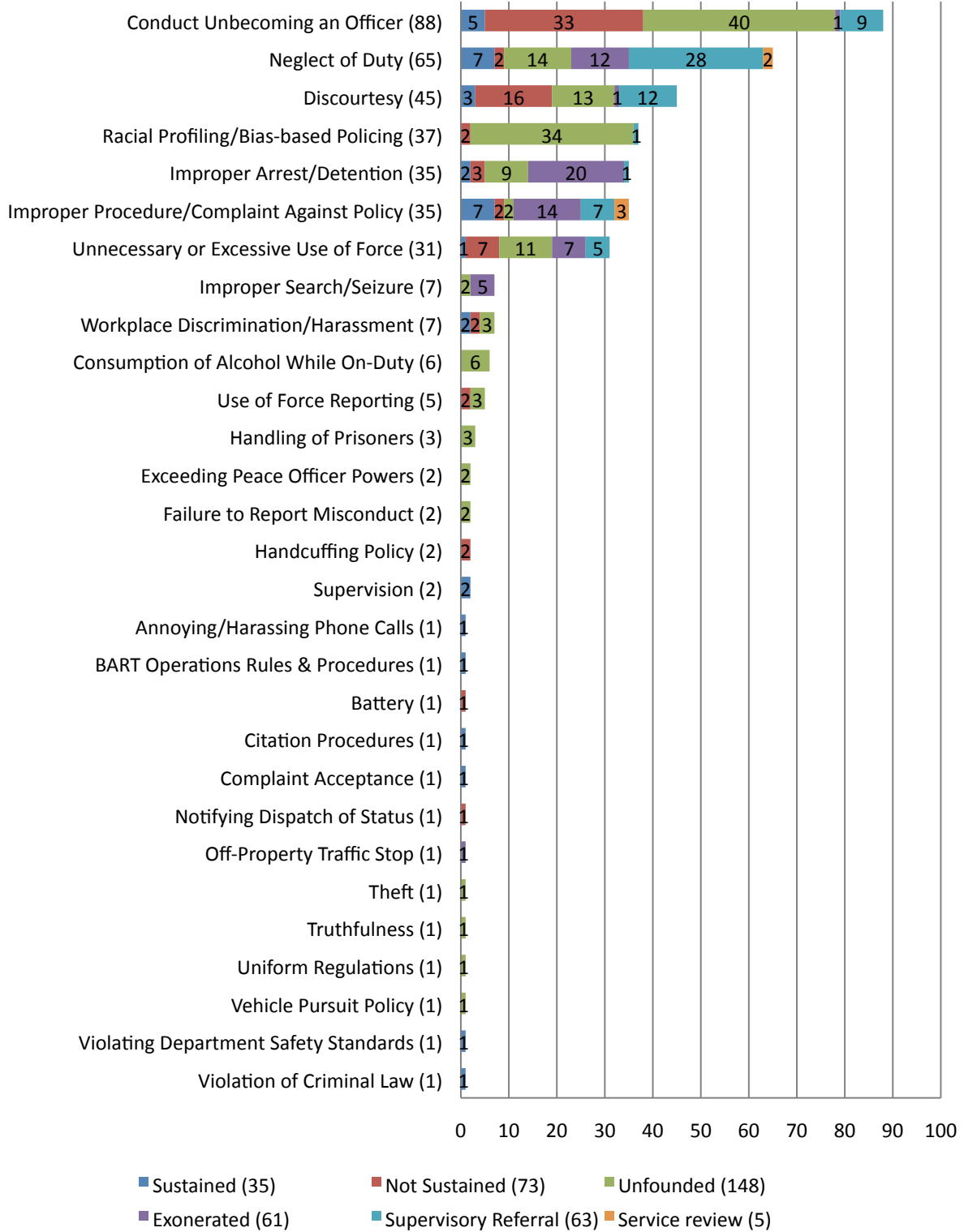
The next chart is a breakdown of the 140 cases completed during the 2012-2013 reporting period separated by primary classification and overall finding. A *Sustained* allegation in a case will also become the primary classification of the case, regardless of whether there are more egregious allegations that have not been *Sustained*, and regardless of what the previous primary classification of the case might have been. If multiple allegations in a case have been *Sustained*, then the most egregious one will dictate the primary classification of the case. This is also true when any allegation in a case has been *Not Sustained* (absent any *Sustained* allegations, of course). If all allegations in a case are adjudicated as *Unfounded* and/or *Exonerated*, then the primary classification will be the one linked to the most egregious allegation.

<sup>14</sup> According to BPD, when an individual raises a concern pertaining to a global practice throughout the Department, such as Department policy, procedure, or tactics, the concern may be addressed through a Service Review conducted by Internal Affairs, a designated review committee, or a member of the Command Staff. Depending on the circumstances, a Service Review could yield a change to Department policy, training, or tactics.



As mentioned previously, each closed case may include multiple different allegations of misconduct, each of which receives its own finding; furthermore, there may be only one category of misconduct alleged in a case, but it could be alleged against multiple different officers who each subsequently receive an individual finding. The next chart shows a breakdown of each allegation that received a finding as part of a completed case during the 2012-2013 reporting period. Note that the number of individual allegations with a finding far exceeds the number of closed cases in the previous chart.

## Allegations Completed by Classification and Finding



### Report on Discipline

As can be seen in the charts above, 19 investigations over the course of the year were concluded with at least one allegation of misconduct adjudicated as *Sustained*. Below is an account of each *Sustained* allegation in those cases as well as the discipline that was issued by BPD as a result.

Case #	Nature of Sustained Allegation(s) <sup>15</sup>	Classification of Sustained Allegation(s)	Action Taken
1	Officer unnecessarily placed himself in a dangerous position during a traffic stop and, after doing so, drew his firearm and pointed it at subject.	<u>Officer #1</u> <ul style="list-style-type: none"> <li>• Excessive / Improper Use of Force</li> <li>• Violating Department Safety Standards</li> </ul>	<u>Officer #1</u> Written Reprimand
2	Employee mailed a parking citation to subject instead of leaving it on subject's car as was required.	<u>Civilian #1</u> <ul style="list-style-type: none"> <li>• Citation Procedures (Mailing Parking Citations)</li> </ul>	<u>Civilian #1</u> Informal Counseling
3	Officer unnecessarily placed himself in a dangerous position during a traffic stop. Officer detained subject for an improper reason, was rude, and questioned subject's language ability.	<u>Officer #1</u> <ul style="list-style-type: none"> <li>• Discourtesy</li> <li>• Conduct Unbecoming an Officer</li> <li>• Improper Detention</li> <li>• Violating Department Safety Standards</li> </ul>	<u>Officer #1</u> Letter of Discussion <sup>16</sup>
4	Officer made harassing phone calls to subject after being dissatisfied with a private business transaction with subject.	<u>Officer #1</u> <ul style="list-style-type: none"> <li>• Annoying / Harassing Phone Calls</li> <li>• Conduct Unbecoming an Officer</li> </ul>	<u>Officer #1</u> None – officer retired prior to completion of investigation

<sup>15</sup> Although male pronouns ("him," "his," etc.) have been used in the descriptions of alleged misconduct in this chart, they do not necessarily indicate the gender of the actual subject officer in each description.

<sup>16</sup> A "Letter of Discussion" is defined by BPD as "informal" discipline and consists of a written memorandum to the subject employee making him or her aware of some unacceptable behavior. The memorandum is presented to the subject employee for signature and placed into his or her personnel file for a period of up to six months, at which time it is purged. (BPD Policy Manual, Policy 340.3.1(b)).

5	Officers used improper procedure to manage a queue of cases in a database and failed to identify the issue through supervision. Another employee did not properly report the issue.	<u>Officer #1</u> <ul style="list-style-type: none"> <li>• Performance of Duty</li> <li>• Supervision</li> </ul> <u>Officer #2</u> <ul style="list-style-type: none"> <li>• Performance of Duty</li> </ul> <u>Civilian #1</u> <ul style="list-style-type: none"> <li>• Performance of Duty</li> </ul>	<u>Officers #1 and #2, and Civilian #1</u> None – punitive action not proposed before statutory time limit expired <sup>17</sup>
6	Officer did not respond appropriately to subject’s request to make a complaint.	<u>Officer #1</u> <ul style="list-style-type: none"> <li>• Complaint Acceptance</li> </ul>	<u>Officer #1</u> None – officer retired prior to completion of investigation
7	Officer did not provide proper supervision during an instance when another officer consumed alcohol during on-duty training.	<u>Officer #1</u> <ul style="list-style-type: none"> <li>• Supervision</li> </ul>	<u>Officer #1</u> 40-hour suspension, in abeyance <sup>18</sup>
8	Officer made offensive comments while in the workplace.	<u>Officer #1</u> <ul style="list-style-type: none"> <li>• Discrimination / Harassment</li> <li>• Courtesy</li> <li>• Conduct Unbecoming an Officer</li> </ul>	<u>Officer #1</u> Written Reprimand
9	Officer responded to a dispute between two parties but did not sufficiently investigate the matter.	<u>Officer #1</u> <ul style="list-style-type: none"> <li>• Performance of Duty</li> </ul>	<u>Officer #1</u> Letter of Discussion

<sup>17</sup> The Public Safety Officers Procedural Bill of Rights Act states that, with some exceptions, no punitive action may be undertaken against a public safety officer for misconduct if the investigation of the conduct is not completed within one year of the conduct’s discovery by a person authorized to initiate an investigation. Furthermore, in the event that the agency employing the subject public safety officer determines that discipline may be taken, the agency shall notify the public safety officer of its proposed discipline “that year.” (California Government Code, Section 3304(d)(1)).

<sup>18</sup> The disciplinary action noted here was held in abeyance for up to two years. If, during that two year period, the subject employee was not served with any other notice of intended formal discipline (from a separate instance of alleged misconduct, for instance), then the noted suspension would be converted to a Written Reprimand. If there was another notice of intended formal discipline, on the other hand, then the original noted suspension would be implemented.



10	When subject interfered with BART train operations, employee improperly became involved leading to an altercation.	<u>Civilian #1</u> • BART Operations Rules and Procedures	<u>Civilian #1</u> Informal Counseling
11	Officer did not supply his name or badge number upon subject's request.	<u>Officer #1</u> • Policy / Procedure – Failure to Provide Name / Badge Upon Request	<u>Officer #1</u> Letter of Discussion
12	Officer did not properly document a contact with a member of the public regarding fare evasion.	<u>Officer #1</u> • Policy / Procedure	<u>Officer #1</u> Letter of Discussion
13	Officer approved an incomplete report filed by another officer.	<u>Officer #1</u> • Performance of Duty	<u>Officer #1</u> None – punitive action not proposed before statutory time limit expired <sup>19</sup>
14	Officer did not file a report about an incident in a timely manner.	<u>Officer #1</u> • Policy / Procedure	<u>Officer #1</u> Informal Counseling
15	Officer made an inappropriate statement about subjects and failed to follow up on a report of an injury to one subject.	<u>Officer #1</u> • Courtesy • Conduct Unbecoming an Officer • Performance of Duty	<u>Officer #1</u> 40-hour suspension, in abeyance <sup>20</sup>

<sup>19</sup> See Note 17.

<sup>20</sup> See Note 18.

16	Officer improperly detained subject after previously releasing him with a verbal warning, and officer also did not document contact with subject. Another officer did not follow up with subject regarding a complaint.	<u>Officer #1</u> <ul style="list-style-type: none"> <li>• Arrest / Detention</li> <li>• Policy / Procedure</li> </ul> <u>Officer #2</u> <ul style="list-style-type: none"> <li>• Policy / Procedure</li> </ul>	<u>Officer #1</u> Letter of Discussion  <u>Officer #2</u> Letter of Discussion
17	Officer made an offensive comment to another officer while in the workplace.	<u>Officer #1</u> <ul style="list-style-type: none"> <li>• Workplace Discrimination</li> </ul>	<u>Officer #1</u> None – officer retired prior to completion of investigation
18	Off-duty officer drove recklessly and under the influence of alcohol, and he did not notify BPD of his contact with other law enforcement agencies.	<u>Officer #1</u> <ul style="list-style-type: none"> <li>• Criminal</li> <li>• Conduct Unbecoming an Officer</li> <li>• Policy / Procedure</li> </ul>	<u>Officer #1</u> Written Reprimand
19	Officer did not respond to a call for service.	<u>Officer #1</u> <ul style="list-style-type: none"> <li>• Performance of Duty</li> </ul>	<u>Officer #1</u> Oral Counseling

#### *Cases Being Appealed*

Separate from the 118 incoming cases reported on earlier, OIPA received 4 appeals of cases that were previously investigated by BPD. This is double the number of appeals received during the previous reporting period. All appeals undergo a comprehensive review, and OIPA may conduct its own additional investigation into the underlying incident, beyond that which was originally completed by BPD.

OIPA submitted its findings in 3 completed appeal cases to the CRB this year. We agreed that all of the findings reached by BPD in 2 of those cases were appropriate. In the 3<sup>rd</sup> case, OIPA agreed with 6 of 7 findings reached by BPD, but reached a different outcome with regard to the remaining finding. In each case, the CRB met in closed session to review OIPA's conclusions. The CRB voted, by majority, to adopt OIPA's final conclusions in all 3 cases.

OIPA also tracks the number of instances when it submits its own findings to the CRB, and the CRB disagrees with those conclusions by appealing to the BART Chief of Police. Out of a total of 6 cases (including the 3 appeals mentioned above as well as 3 original investigations independently conducted by OIPA), no such appeals occurred during this reporting period.

*Cases Reviewed/Monitored by OIPA*

OIPA reviews misconduct investigations conducted by BPD in a variety of different ways. Though work-intensive, some reviews are completed informally, with any concerns being addressed through a conversation with BPD Internal Affairs investigators. It is this type of review that occurs each month when OIPA prepares a periodic report for the CRB. OIPA performs a review of some sort on each new case that came in during the month, and each closed case that was completed during the month. Therefore, without accounting for any of the other instances when OIPA finds reason to examine a particular BPD investigation, OIPA reviewed more than 260 cases in this fashion in 2012-2013.

In addition, OIPA actively monitors those cases that are initiated through our office, even though they do not fall within our investigative jurisdiction. We have a responsibility to ensure that those cases are investigated in a timely, thorough, complete, objective, and fair manner. During the 2012-2013 reporting period, OIPA monitored 16 such cases.<sup>21</sup>

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<sup>21</sup> These cases overlap with the number of reviewed cases mentioned earlier. These cases, however, receive a higher level of scrutiny from OIPA than some others that are reviewed more informally.



## LOOKING FORWARD

As the investigations, appeals, and other reviews initiated with the Office of the Independent Police Auditor during its first full year of operation have now begun reaching completion, we have been able to develop a more regular workflow comprised of initiating new complaints, completing investigations of older ones, and submitting our investigative findings to the Citizen Review Board as required. As we work to manage our growing caseload, we also remain focused on a few important goals in the near future.

OIPA plans to continue its increased focus on outreach specifically targeted toward youth throughout the Bay Area. We have found a variety of youth audiences so far that were both interested in learning about the oversight of the BART Police Department and appreciative of our efforts to communicate with them directly, so we will keep working to make young people a priority within our broader outreach efforts. One new tool OIPA anticipates utilizing in furtherance of this goal is an introductory video about OIPA that will be quickly distributable on the internet and via social media.

Regarding outreach in general, OIPA also anticipates that it will soon be able to substantially increase BART patrons' familiarity with our office through an informational poster that can be affixed inside BART's train cars. We believe that this increase in familiarity may lead to an increase in the number of contacts made with our office by patrons. With our intake and investigation procedures solidly established, we feel we are well-equipped to handle any such increase effectively and efficiently.

OIPA is proud to have released its first formal policy recommendation this year, and we would now like to start conducting policy reviews on a more common basis. We view our authority to put forth recommendations on policies as a uniquely proactive way to address certain types of issues we find with how BPD is operating, and how we think they might be able to improve. Therefore, we will strive to review one policy per quarter going forward, and we will continue the important practice of making our recommendations public so that interested people can draw their own conclusions with regard to how BPD should operate.

Toward the end of this reporting period, OIPA began crafting a program of mediation to address certain complaints of misconduct involving BPD. We continue to feel that such a program can be of benefit to both officers and complainants, and we are therefore excited to play an integral role in its formation. After collaborating with the CRB, the BPD employee unions, and BPD command staff, OIPA will push the program forward toward implementation.



## **APPENDICES**

### **APPENDIX A**

OIPA Policy Recommendation for BPD Policy 450

### **APPENDIX B**

OIPA Presentation at APTA Risk Management Seminar





**APPENDIX A**

OIPA Policy Recommendation for BPD Policy 450



SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

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MEMORANDUM

TO: BART Citizen Review Board

DATE: May 8, 2013

FROM: Independent Police Auditor

SUBJECT: **Policy Recommendation – BPD Policy 450**

Chapter 1-04(G) of the Citizen Oversight Model (Model) states that the Office of the Independent Police Auditor (OIPA) shall develop recommendations concerning General Orders and Directives, procedures, practices, and training of the BART Police Department (BPD), with the goal of improving professionalism, safety, effectiveness, and accountability. In accordance with this section of the Model, OIPA has developed a recommendation with regard to *BPD Policy 450 – Use of Video and Audio Recorders*.

The most recent version of Policy 450 was issued on November 10, 2012 in the form of Special Order #12-03, and in conjunction with the deployment, over time, of Mobile Video Recorders (MVRs) to all BPD patrol officers and sergeants. It is OIPA's understanding that Policy 450 will, in the near future, be more directly incorporated into the BPD Policy Manual; further, it is acknowledged that some adjustments to the most recently-issued policy (both in format and content) might appear in the finalized version that is incorporated into the manual.

BPD consulted with its two police unions as well as the BART Citizen Review Board (CRB) prior to implementation of this policy. At the October 2012 CRB meeting, BPD discussed its then-prospective policy and received feedback from the CRB members. Also at this meeting, OIPA took the opportunity to participate in the discussion and verbally raise some of the concerns that are detailed further in writing here.

As OIPA discussed at the October CRB meeting, it has a number of suggested edits to what has now become BPD policy. Some of the edits are less substantive than others, but each one bears some importance in the view of OIPA. One suggestion in particular, however, presents a significant departure from the substance of Policy 450. As specified in the suggested language (*see edits to policy Section 450.6 and 450.8*), OIPA recommends restricting the access to review recorded media in any circumstance when an officer knows or reasonably should know that he or she is the subject of, or a witness to, alleged misconduct involving an incident that might have been recorded.

OIPA feels that the most prudent way to think about a video recording of an incident is to consider it a separate witness account of what occurred. Just as with other witness accounts

given by people at the scene or by police officers involved in the encounter, the video recording should be one factor in the attempt by an investigator to determine what transpired.<sup>1</sup>

Any good investigation seeks to minimize the circumstances in which one witness statement contaminates another; that is, it is preferable to receive each witness account independently such that one witness does not conflate his or her observations with those of any other witness, whether knowingly or unknowingly. It is only by avoiding such contamination that an investigator may receive the most complete account of what transpired when all statements are taken together in aggregate. Therefore, as a video recording of an incident is essentially another witness account of what occurred, it is preferable to minimize the circumstances in which it might contaminate the recollection of another witness, such as the officer who made the recording.

Based on this reasoning, OIPA feels that stricter limitations must be incorporated into Policy 450 regarding when an officer may have access to view a recording he or she has made. At minimum, as indicated by the suggested edits, an officer should be prohibited from viewing any recorded media that might have captured any part of an incident about which the officer knows or reasonably should know that he or she is the subject of, or a witness to, alleged misconduct.

Following is an unmarked copy of Policy 450, as issued under Special Order #12-03; an annotated copy of Policy 450, displaying the edits suggested by OIPA as well as explanations for those edits (with regard to the suggested changes in the restrictions on accessing recorded video, the reasoning is that which has already been stated here); and a copy of what Policy 450 would look like after incorporating the edits suggested by OIPA.



Mark P. Smith  
BART Independent Police Auditor

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<sup>1</sup> OIPA also acknowledges, of course, that there are other important similarities and differences between video recordings and eyewitness accounts of an incident. They are different, for instance, in that video recordings do not change over time in the same manner that a person's recollection sometimes does, whether due to the passage of time or to (often unintentional) contamination from other witnesses' statements or media reports. Yet they are similar in that they usually only provide only a partial account of an incident, as neither a camera nor a person can always capture every angle or viewpoint that might bear some importance in determining what occurred.



**BART POLICE DEPARTMENT**  
**KENTON W. RAINEY, CHIEF OF POLICE**

**SPECIAL ORDER NO** 12-03  
**DATE OF ISSUE:** 11/10/12

**Policy 450 -Use of Video and Audio Recorders**

**450.1 PURPOSE AND SCOPE**

The San Francisco Bay Area Rapid Transit District Police Department (BART) is providing each of its sworn sergeants and officers with a wearable Mobile Video Recorder (MVR) for use while on-duty. The MVR is designed to record both video and audio activity of members during the course of their official police duties. The MVR is intended to assist officers in the performance of their duties by providing an objective, unbiased video and audio record of a contact and/or incident.

The use of the MVR provides documentary evidence for criminal investigations, civil litigation, and allegations of officer misconduct. Video documentation shall be maintained by the Police Department if it supports a criminal investigation based on reason to believe the subject of the investigation is or may be involved in criminal conduct, or for purposes of an administrative investigation on the conduct of a member(s) of the Police Department.

Officers shall utilize the MVR in accordance with the provision of this Policy in order to maximize the effectiveness of the device, enhance transparency, and ensure the integrity of evidence.

**450.2 DEFINITIONS**

- A. **“Mobile Video Recorder” (MVR)** This refers to any system that captures audio and video signals that is capable of installation in a vehicle or individually worn by officers and that includes at a minimum a recorder, microphone, and paired monitoring device.
- B. **“Audio Recording”** is the electronic recording of conversation or other spoken words.
- C. **“Evidence.com”** is the online web-based digital media storage facility. The virtual warehouse stores digitally-encrypted data (photographs, audio and video recordings) in a highly secure environment. The digital recordings are accessible to authorized personnel based upon a security clearance and maintain an audit trail of user activity.
- D. **“Evidence Transfer Manager” (ETM)** is a docking station that simultaneously recharges the AXON Flex Camera and AXON Flex Controller and uploads all data captured from the camera’s point of view during officer’s shift to bartpd.evidence.com. The ETM ensures that evidence handling is secured and cannot be altered.
- E. **“AXON Flex Camera** connects to the AXON Flex Controller. The Flex Camera manages the video compression and storage and is capable of playback via a Bluetooth paired smart device. The AXON Flex Camera ensures that evidence handling is secured and cannot be

- altered. Once plugged into the docking station, the AXON Flex Camera will upload digitally-encrypted data through the Evidence Transfer Manager to bartpd.evidence.com.
- F. **“AXON Controller”** is the battery pack for the AXON Flex Camera and connects to the Flex Camera via a small gage wire.
  - G. **“MVR Technician”** The Community Service Officer(s) assigned to administrative services that assign, oversee, and track Department equipment. The CSO(s) shall oversee needed repairs or replacement of the MVR and Evidence Transfer Manager equipment through Taser AXON representatives.
  - H. **“System Administrator”** The Administrative Services Supervisor will be the bartpd.evidence.com system administrator with full access to user rights who controls passwords, coordinates with the MVR Technician, and acts as liaison with Taser AXON representatives.
  - I. **“Video Recording”** is the electronic recording of visual images with or without audio component.
  - J. **“Impound”** is the process by which video and audio files are uploaded to Evidence.com by docking the MVR to the Evidence Transfer Manager thereby ensuring files are secure and unable to be altered.

#### **450.2a CATEGORIES AND RETENTION PERIODS**

The BART Police Department has nine (9) categories to tag and retain our cases in Evidence.Com. Each one is listed below with the current retention cycle. It should be noted that retention times can be extended at any time by a Supervisor, Internal Affairs, Evidence Specialist, BPD System Administrator for evidence.com, or by the Chief of Police or his/her designee. Categories can also be added if needed.

- 01) COLD REPORT- 1 YEAR
- 02) CONSENSUAL CONTACTS -1 YEAR
- 03) DETENTIONS- 2 YEARS
- 04) INFRACTION VIOLATIONS 2 YEARS
- 05) ARREST – MISDEMEANOR / FELONY 3 YEARS
- 06) STATEMENT – VICTIM / SUSPECT / WITNESS 3 YEARS
- 07) USE OF FORCE – UNTIL MANUALLY DELETED
- 08) SICK / INJURED PATRON – 3 YEARS
- 09) UNATTENDED DEATH / HOMICIDE – UNTIL MANUALLY DELETED

#### **450.3 UNIFORMED OFFICER RESPONSIBILITIES**

Prior to going into service, each uniformed patrol officer equipped with a Department issued MVR will be responsible for making sure that the MVR is in good working order. The MVR shall be conspicuously placed on the officer’s person in one of the Department approved mounting positions, which are limited to an eye glass clip, ear mount, collar clip, or epaulet clip.

The MVR shall be worn in such a way as to provide an unobstructed camera view of officer/citizen contacts. . The camera shall be considered mounted correctly if it is mounted in one of the department approved mounting positions.

Members of the Department that are assigned an MVR shall receive mobile video training prior to deployment of the device in an operational setting. At this training, each officer will be provided a standard checklist of steps they are required to complete in order to ensure their MVR's and MVR mounting systems are in good working order. Officers will conduct the following steps prior to going into service:

1. Officers shall insure that the battery is fully charged
  - a. Depress the battery status button on the front of the controller and observe that the light is green
2. Officers shall insure that the camera is able to be activated and is functioning
  - a. Connect the battery cable from the battery to the camera
  - b. Turn the camera on by clicking the On switch
  - c. Observe the indicator lights are correct (blinking green)
  - d. Double tap button to activate recording
  - e. Observe that indication lights are correct (blinking red)
  - f. Press and hold to end recording
  - g. Observe that indicator lights are correct (blinking green)
3. Officer shall insure that the player is properly paired
4. Officer shall insure that the field of view for the camera is correct
  - a. Activate the Samsung Galaxy player
  - b. Activate the Live Preview feature

#### **450.4 NON-UNIFORMED OFFICER RESPONSIBILITIES**

Any officer assigned to a non-uniformed position may carry a Department-issued MVR at any time the officer believes that such a device may be utilized in order to assist the officer in the performance of their duties by providing an objective, unbiased video and audio record of a contact and/or incident. However, whenever a non-uniformed officer is working a uniformed patrol assignment he/she shall wear a Department - issued MVR in accordance with this policy.

#### **450.5 ACTIVATION OF THE VIDEO/AUDIO RECORDER**

Penal Code Section 632 prohibits any individual from surreptitiously recording any conversation (confidential communication) in which any party to the conversation has a reasonable belief that the conversation is private or confidential. This excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded. However Penal Code Section 633 expressly exempts law enforcement from this prohibition during the course of a criminal investigation as follows:

- (a) No member of the Department may surreptitiously record a contact with or conversation of any other member of this Department without the expressed knowledge and consent of all parties present, including the member whose acts or conversation are being recorded. Nothing in this Section is intended to interfere with an officer's right to openly record any interrogation pursuant to Government Code Section 3303(g).
- ~~(b) Any member of the Department may surreptitiously record any conversation during the course of a criminal investigation in which the officer reasonably believes that such a recording will be beneficial to the investigation:~~
- (1) For the purpose of this Policy, any officer contacting an individual suspected of violating any law or during the course of any official, law enforcement-related activity shall be presumed to be engaged in a criminal investigation. This presumption shall not apply to contacts with other employees conducted solely for administrative purposes.
  - (2) For the purpose of this Policy, it shall further be presumed that any individual contacted by a uniformed officer wearing a conspicuously mounted MVR will have knowledge that such a contact is being recorded. This subsection shall not apply to contact between a member of the Department wearing a conspicuously mounted MVR and other member(s) of the Department. For purposes of this policy, contact between members of this Department is governed by section 450.5(a), and 450.5(b)(1).
- (c) All on-scene officers (inclusive of all initiating and witness officers) equipped with an MVR shall activate their cameras prior to making contact with individuals in any of the following circumstances:
- (1) Any enforcement contact e.g. detentions, vehicle stops, walking stops (officers are encouraged to activate their MVR on consensual encounters also), as outlined in Policy section 322.3.
  - (2) Probation and parole searches
  - (3) Service of a search or arrest warrant
  - (4) Any contact with a subject suspected of criminal behavior
- (d) Members of the Department are expected to activate their MVRs any time they reasonably believe that a recording of an on-duty contact with a member of the public may be of future benefit to the Department.
- (1) At no time should an officer jeopardize his/her safety or the safety of another in order to activate their MVR.
  - (2) Members of the Department are expressly prohibited from utilizing Department recorders and recorded media for personal use.
  - (3) Members of the Department will not make copies of any recordings for their personal use and are prohibited from using a recording device (such as a phone camera or



secondary video camera) to record media from bartpd.evidence.com or the AXON Flex Camera unit. Nothing in this policy shall be construed as limiting an officer's right to carry and use a personal device such as a smart-phone, however officers shall not carry or use another mobile video recorder in addition to the District issued MVR without express approval of the Chief of Police.

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#### **450.6 MOBILE VIDEO OPERATING PROCEDURES**

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Members of the Department that are assigned an MVR shall receive mobile video training prior to deployment of the device in an operational setting.

1. Prior to going into service each officer shall perform an inspection, consisting of the steps set forth in section 450.3 and provided to each officer at their initial MVR training, to ensure that his/her MVR is operational. If problems are encountered with any component of the system, the MVR equipment will not be used.
2. The officers shall report malfunctions, damage, loss or theft of an MVR to their immediate supervisor prior to placing the unit out of service. The officer placing the MVR unit out of service shall notify the MVR Technician in writing of the suspected cause of equipment failure and/or recommendations for corrective action. If the officer does not know what the suspected cause of equipment failure is and/or has no recommendations for corrective action, they may indicate this in writing to the MVR technician. In case of loss or theft of an MVR, the officer shall notify the MVR technician and their immediate supervisor as soon as they become aware of the loss or theft of the device. When so notified, the MVR technician shall immediately deactivate the device. The assigned officer shall document the status of the device, including all relevant circumstances via the appropriate Departmental report. A spare MVR shall be issued to an officer through a supervisor with the Watch Commander's approval prior to going into service. The Watch Commander shall log the assignment of a spare MVR with the Department MVR Technician.
3. Once the MVR is activated it should remain on until the incident or contact of interest has reached a conclusion and/or the officer leaves the scene, whichever occurs first. Where the officer reasonably believes the incident or contact of interest is over, they may shut the MVR record mode off. If the incident resumes following the officer's termination of the MVR recording, the officer shall re-activate their MVR.
4. When the MVR is used in any incident, investigation, or during a traffic stop, this fact will be documented on any relevant citation and/or report prepared regarding the incident. Conversely, when the MVR is not used in any incident, investigation, or during a traffic stop, the reason for non-use will be documented on any relevant citation and/or report prepared regarding the incident.
5. Except in circumstances prohibited by statute, or as directed by the Chief of Police, or his or her designee, an officer may have access to review his/her recordings when preparing written reports and/or statements relevant to any incident, to help ensure accuracy and consistency of accounts. To prevent damage, original recordings shall

not be viewed in any equipment other than the equipment issued or authorized by the MVR manufacturer.

6. Department personnel shall not intentionally erase, alter, reuse, modify or tamper with audio-video recordings, nor shall they attempt to erase, alter, reuse, modify or tamper with audio-video recordings.
7. If the MVR is accidentally activated, an officer may submit a written memorandum to his or her immediate supervisor requesting the recording be deleted. The request shall be routed via the chain of command to the requesting officer's Deputy Chief. The Deputy Chief shall either approve or deny the request in writing, after they ensure the recording has been reviewed and contains nothing of evidentiary value. (For purposes of this section "in writing" means checking the appropriate box and signing the form).
- 8.

#### **450.7 MOBILE VIDEO RECORDER IMPOUNDING PROCEDURE**

At the end of each shift, officers shall place the MVRs into an assigned open slot on the Evidence Transfer Manager (docking station). This will allow the data to be transferred from the MVR, via the docking station, to bartpd.evidence.com. The data is considered impounded at this point and the MVR is cleared of existing data.

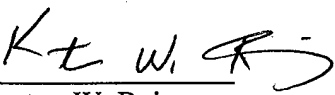
#### **450.8 REVIEW OF RECORDED MEDIA**

Recorded files shall be reviewed in any of the following situations:

- (a) By a supervisor investigating a specific incident, issue, and/or act of officer conduct.
- (b) By any member of the Department who is authorized to participate in an official investigation in the following type of cases only: personnel complaints, administrative investigations, or criminal investigations.
- (c) Pursuant to a lawful process or by members of the District Attorney's office or court personnel otherwise authorized to review evidence in a related case.
- (d) By the Independent BART Police Auditor or his/her investigator.
- (e) With the expressed permission of the Chief of Police or authorized designee.

#### **450.9 MOBILE VIDEO RECORDERS**

The Department assigned MVR (Taser Axon Flex) shall be the only mobile video recorder allowed for Department employees while on-duty. Any other mobile video recorder shall only be used with the expressed permission of the Chief of Police.

  
Kenton W. Rainey  
Chief of Police

# Use of Video and Audio Recorders

## 450.1 PURPOSE AND SCOPE

The San Francisco Bay Area Rapid Transit District Police Department (BART) is providing each of its sworn sergeants and officers with a wearable Mobile Video Recorder (MVR) for use while on-duty. The MVR is designed to record both video and audio activity of members during the course of their official police duties. The MVR is intended to assist officers in the performance of their duties by providing an objective, unbiased video and audio record of a contact and/or incident.

The use of the MVR provides documentary evidence for criminal investigations, civil litigation, and allegations of officer misconduct. ~~Video documentation~~ Such evidence shall be maintained by the Police Department if it supports a criminal investigation based on reason to believe the subject of the investigation is or may be involved in criminal conduct, or for purposes of an administrative investigation on the conduct of a member(s) of the Police Department.

Officers shall utilize the MVR in accordance with the provision of this Policy in order to maximize the effectiveness of the device, enhance transparency, and ensure the integrity of evidence.

**Comment [OIPA1]:** OIPA feels that the term "Video documentation" in this sentence is too restrictive, as all evidence obtained via the use of the MVR should be maintained in the same manner, regardless of whether it is video, audio, or otherwise.

A simpler and more inclusive way to begin the sentence would be to reference the previous sentence by saying, "Such evidence shall be maintained..."

## 450.2 DEFINITIONS

- A. **"Mobile Video Recorder" (MVR)** This refers to any system that captures audio and video signals that is capable of installation in a vehicle or individually worn by officers and that includes at a minimum a recorder, microphone, and paired monitoring device.
- B. **"Audio Recording"** is the electronic recording of ~~conversation or other spoken words~~ sound.
- C. **"Evidence.com"** is the online web-based digital media storage facility. The virtual warehouse stores digitally-encrypted data (photographs, audio and video recordings) in a highly secure environment. The digital recordings are accessible to authorized personnel based upon a security clearance and maintain an audit trail of user activity.
- D. **"Evidence Transfer Manager" (ETM)** is a docking station that simultaneously recharges the AXON Flex Camera and AXON Flex Controller and uploads all data captured from the camera's point of view during officer's shift to bartpd.evidence.com. The ETM ensures that evidence handling is secured and cannot be altered.
- E. **"AXON Flex Camera"** connects to the AXON Flex Controller. The Flex Camera manages the video compression and storage and is capable of playback via a Bluetooth paired smart device. The AXON Flex Camera ensures that evidence handling is secured and cannot be altered. Once plugged into the docking station, the AXON Flex Camera will upload digitally-encrypted data through the Evidence Transfer Manager to bartpd.evidence.com.

**Comment [OIPA2]:** OIPA feels that a definition of "Audio Recording" that is limited only to conversation or spoken words is unnecessarily restrictive, as audio recordings may commonly contain a multitude of other sounds that could prove relevant in a variety of circumstances. If "Audio Recording" is to be defined here, OIPA feels that the definition should simply say that it "is the electronic recording of sounds." OIPA further believes that the suggested definition is a more appropriate and equivalent counterpart to the definition of "Video Recording" in Section 450.2.1 of this policy.

- F. **“AXON Controller”** is the battery pack for the AXON Flex Camera and connects to the Flex Camera via a small gage wire.
- G. **“MVR Technician”** The Community Service Officer(s) assigned to administrative services that assign, oversee, and track Department equipment. The CSO(s) shall oversee needed repairs or replacement of the MVR and Evidence Transfer Manager equipment through Taser AXON representatives.
- H. **“System Administrator”** The Administrative Services Supervisor will be the bartpd.evidence.com system administrator with full access to user rights who controls passwords, coordinates with the MVR Technician, and acts as liaison with Taser AXON representatives.
- I. **“Video Recording”** is the electronic recording of visual images with or without audio component.
- J. **“Impound”** is the process by which video and audio files are uploaded to Evidence.com by docking the MVR to the Evidence Transfer Manager thereby ensuring files are secure and unable to be altered.

#### **450.2a CATEGORIES AND RETENTION PERIODS**

The BART Police Department has nine (9) categories to tag and retain our cases in Evidence.Com. Each one is listed below with the current retention cycle. It should be noted that retention times can be extended at any time by a Supervisor, Internal Affairs, Evidence Specialist, BPD System Administrator for evidence.com, or by the Chief of Police or his/her designee. Categories can also be added if needed.

- 01) COLD REPORT- 1 YEAR
- 02) CONSENSUAL CONTACTS -1 YEAR
- 03) DETENTIONS- 2 YEARS
- 04) INFRACTION VIOLATIONS 2 YEARS
- 05) ARREST – MISDEMEANOR / FELONY 3 YEARS
- 06) STATEMENT – VICTIM / SUSPECT / WITNESS 3 YEARS
- 07) USE OF FORCE – UNTIL MANUALLY DELETED
- 08) SICK / INJURED PATRON – 3 YEARS
- 09) UNATTENDED DEATH / HOMICIDE – UNTIL MANUALLY DELETED

#### **450.3 UNIFORMED OFFICER RESPONSIBILITIES**

Prior to going into service, each uniformed patrol officer equipped with a Department issued MVR will be responsible for making sure that the MVR is in good working order. The MVR shall be conspicuously placed on the officer’s person in one of the Department approved mounting positions, which are limited to an eye glass clip, ear mount, collar clip, or epaulet clip. The MVR shall be worn in such a way as to provide an unobstructed camera view of

officer/citizen contacts. . The camera shall be considered mounted correctly if it is mounted in one of the department approved mounting positions.

Members of the Department that are assigned an MVR shall receive mobile video training prior to deployment of the device in an operational setting. At this training, each officer will be provided a standard checklist of steps they are required to complete in order to ensure their MVR's and MVR mounting systems are in good working order. Officers will conduct the following steps prior to going into service:

1. Officers shall insure that the battery is fully charged
  - a. Depress the battery status button on the front of the controller and observe that the light is green
2. Officers shall insure that the camera is able to be activated and is functioning
  - a. Connect the battery cable from the battery to the camera
  - b. Turn the camera on by clicking the On switch
  - c. Observe the indicator lights are correct (blinking green)
  - d. Double tap button to activate recording
  - e. Observe that indication lights are correct (blinking red)
  - f. Press and hold to end recording
  - g. Observe that indicator lights are correct (blinking green)
3. Officer shall insure that the player is properly paired
4. Officer shall insure that the field of view for the camera is correct
  - a. Activate the Samsung Galaxy player
  - b. Activate the Live Preview feature

#### **450.4 NON-UNIFORMED OFFICER RESPONSIBILITIES**

Any officer assigned to a non-uniformed position may carry a Department-issued MVR at any time the officer believes that such a device may be utilized in order to assist the officer in the performance of their duties by providing an objective, unbiased video and audio record of a contact and/or incident. However, whenever a non-uniformed officer is working a uniformed patrol assignment he/she shall wear a Department - issued MVR in accordance with this policy.

#### **450.5 ACTIVATION OF THE VIDEO/AUDIO RECORDER**

Penal Code Section 632 prohibits any individual from surreptitiously recording any conversation (confidential communication) in which any party to the conversation has a reasonable belief that the conversation is private or confidential. This excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded. However Penal Code Section 633 expressly exempts law enforcement from this prohibition during the course of a criminal investigation as follows:

- (a) No member of the Department may surreptitiously record a contact with or conversation of any other member of this Department without the expressed knowledge and consent of all parties present, including the member whose acts or conversation are being recorded. Nothing in this Section is intended to interfere with an officer's right to openly record any interrogation pursuant to Government Code Section 3303(g).
- (b) Any member of the Department may surreptitiously record any conversation during the course of a criminal investigation in which the officer reasonably believes that such a recording will be beneficial to the investigation:
- (1) For the purpose of this Policy, any officer contacting an individual suspected of violating any law or during the course of any official, law enforcement-related activity shall be presumed to be engaged in a criminal investigation. This presumption shall not apply to contacts with other employees conducted solely for administrative purposes.
  - (2) For the purpose of this Policy, it shall further be presumed that any individual contacted by a uniformed officer wearing a conspicuously mounted MVR will have knowledge that such a contact is being recorded. This subsection shall not apply to contact between a member of the Department wearing a conspicuously mounted MVR and other member(s) of the Department. For purposes of this policy, contact between members of this Department is governed by section 450.5(a), and 450.5(b)(1).
- (c) All on-scene officers (inclusive of all initiating and witness officers) equipped with an MVR shall activate their cameras prior to making contact with individuals in any of the following circumstances:
- (1) Any enforcement contact e.g. detentions, vehicle stops, walking stops (officers are encouraged to activate their MVR on consensual encounters also), as outlined in Policy section 322.3.
  - (2) Probation and parole searches
  - (3) Service of a search or arrest warrant
  - (4) Any contact with a subject suspected of criminal behavior
- (d) Members of the Department are expected to activate their MVRs any time they reasonably believe that a recording of an on-duty contact with a member of the public may be of future benefit to the Department.
- (1) At no time should an officer jeopardize his/her safety or the safety of another in order to activate their MVR.
  - (2) Members of the Department are expressly prohibited from utilizing Department recorders and recorded media for personal use.

- (3) Members of the Department will not make copies of any recordings for their personal use and are prohibited from using a recording device (such as a phone camera or secondary video camera) to record media from bartpd.evidence.com or the AXON Flex Camera unit. Nothing in this policy shall be construed as limiting an officer's right to carry and use a personal device such as a smart-phone, however officers shall not carry or use another mobile video recorder in addition to the District issued MVR without express approval of the Chief of Police.

#### 450.6 MOBILE VIDEO OPERATING PROCEDURES

Members of the Department that are assigned an MVR shall receive mobile video training prior to deployment of the device in an operational setting.

1. ~~Prior to going into service each officer shall perform an inspection, consisting of the steps set forth in section 450.3 and provided to each officer at their initial MVR training, to ensure that his/her MVR is operational. If problems are encountered with any component of the system, the MVR equipment will not be used. The officer to whom the problematic equipment is assigned shall report the problem to his/her immediate supervisor upon becoming aware of it. A spare MVR shall be issued to that officer through a supervisor with the Watch Commander's approval prior to the officer going into service. The Watch Commander shall log the assignment of a spare MVR with the Department MVR Technician.~~
2. ~~The officers shall report malfunctions, damage, loss or theft of an MVR to their immediate supervisor prior to placing the unit out of service. The officer placing the MVR unit out of service shall notify the MVR Technician in writing of the suspected cause of equipment failure and/or recommendations for corrective action. If the officer does not know what the suspected cause of equipment failure is and/or has no recommendations for corrective action, they may indicate this in writing to the MVR technician. In case of loss or theft of an MVR, the officer shall notify the MVR technician and their immediate supervisor as soon as they become aware of the loss or theft of the device. When so notified, the MVR technician shall immediately deactivate the device. The assigned officer shall document the status of the device, including all relevant circumstances via the appropriate Departmental report. A spare MVR shall be issued to an officer through a supervisor with the Watch Commander's approval prior to going into service. The Watch Commander shall log the assignment of a spare MVR with the Department MVR Technician.~~
3. ~~Once the MVR is activated it should remain on until the incident or contact of interest has reached a conclusion and/or the officer leaves the scene, whichever occurs first. Where the officer reasonably believes the incident or contact of interest is over, they may shut the MVR record mode off. If the incident resumes following the officer's termination of the MVR recording, the officer shall re-activate their MVR. Once the MVR is activated pursuant to Section 450.5 of this policy, it shall remain on until the event giving rise to the activation has reached a conclusion and/or the officer leaves the scene of the event, whichever occurs first. When the~~

**Comment [OIPA3]:** OIPA feels that Sections 450.6.1 and 450.6.2 are not as clear as they could be, specifically with regard to the need for replacement of a non-functioning MVR before an officer is allowed to go into service. To be more clear, OIPA suggests moving some of the wording from Section 450.6.2 (with slight modifications) to the end of Section 450.6.1.

**Comment [OIPA4]:** OIPA believes that the intent of Section 450.6.3 is apparent, but that the language used leaves some room for interpretation that could plausibly be cited as a source of confusion in the future. The circumstances during which the MVR must be activated are listed in Section 450.5, and that section could be explicitly referenced here to avoid confusion as to the meaning of "incident or contact of interest".

officer reasonably believes the event giving rise to the activation is over, he/she may deactivate the MVR from recording mode. If the event giving rise to the activation resumes following the officer's termination of the MVR recording, the officer shall reactivate his/her MVR.

4. When the MVR is used in any incident, investigation, or during a traffic stop, this fact will be documented on any relevant citation and/or report prepared regarding the incident. Conversely, when the MVR is not used in any incident, investigation, or during a traffic stop, the reason for non-use will be documented on any relevant citation and/or report prepared regarding the incident. Whenever the MVR is activated pursuant to Section 450.5 of this policy, this fact will be documented on any relevant citation and/or report prepared regarding the event that gave rise to the activation. Conversely, whenever the MVR is not activated as required by Section 450.5 of this policy, the reason for the lack of activation will be documented on any relevant citation and/or report prepared regarding the event that otherwise would have given rise to an activation.

**Comment [OIPAS]:** Similar to the previous subsection, OIPA feels that the language used here with regard to incident, investigation or traffic stop could potentially be misconstrued as a limitation.

5. Except in circumstances prohibited by statute, or as directed by the Chief of Police, or his or her designee, an officer may have access to review his/her recordings when preparing written reports and/or statements relevant to any incident, to help ensure accuracy and consistency of accounts. Except in circumstances prohibited by statute, as directed by the Chief of Police or his/her designee, or as further described within this section, an officer may have access to review his/her recordings when preparing written reports and/or statements relevant to any incident, to help ensure accuracy. However, as soon as an officer becomes aware, or reasonably should be aware, that an allegation of misconduct has been made against him/her related to any incident that was recorded, in part or in whole, by an MVR, that officer shall not review any MVR recordings related to the incident unless and until receiving permission from a supervisor to do so. Similarly, as soon as an officer becomes aware, or reasonably should be aware, that he/she is a witness to alleged misconduct related to any incident that was recorded, in part or in whole, by an MVR, that officer shall not review any MVR recordings related to the incident unless and until receiving permission from a supervisor to do so.

**Comment [OIPA6]:** As specified in the suggested language, OIPA recommends restricting the access to review recorded media in any circumstance when an officer knows or reasonably should know that he or she is the subject of, or a witness to, alleged misconduct involving an incident that might have been recorded.

OIPA feels that the most prudent way to think about a video recording of an incident is to consider it a separate witness account of what occurred. Just as with other witness accounts given by people at the scene or by police officers involved in the encounter, the video recording should be one factor in the attempt by an investigator to determine what transpired.

Any good investigation seeks to minimize the circumstances in which one witness statement contaminates another; that is, it is preferable to receive each witness account independently such that one witness does not conflate his or her observations with those of any other witness, whether knowingly or unknowingly. It is only by avoiding such contamination that an investigator may receive the most complete account of what transpired when all statements are taken together in aggregate. Therefore, as a video recording of an incident is essentially another witness account of what occurred, it is preferable to minimize the circumstances in which it might contaminate the recollection of another witness, such as the officer who made the recording.

Based on this reasoning, OIPA feels that stricter limitations must be incorporated into Policy 450 regarding when an officer may have access to view a recording he or she has made. At minimum, as indicated by the suggested edits, an officer should be prohibited from viewing any recorded media that might have captured any part of an incident about which the officer knows or reasonably should know that he or she is the subject of, or a witness to, alleged misconduct.

Supervisors shall not grant such permission until verifying with all entities involved in investigating the allegation of misconduct that it is acceptable for the involved officer to review his/her recordings related to the incident that gave rise to the allegation.

Additionally, immediately upon receiving a request, in any form, from a supervisor, a member of the Department's Office of Internal Affairs, or an employee of the Office of the Independent Police Auditor, an officer shall cease reviewing those recordings indicated by the requester unless and until subsequently receiving



permission from the requester to review them. To prevent damage, original recordings shall not be viewed in any equipment other than the equipment issued or authorized by the MVR manufacturer.

~~5-6.~~ Department personnel shall not intentionally erase, alter, reuse, modify or tamper with audio-video recordings, nor shall they attempt to erase, alter, reuse, modify or tamper with audio-video recordings.

~~6-7.~~ If the MVR is accidentally activated, an officer may submit a written memorandum to his or her immediate supervisor requesting the recording be deleted. The request shall be routed via the chain of command to the requesting officer's Deputy Chief. The Deputy Chief shall either approve or deny the request in writing, after they ensure the recording has been reviewed and contains nothing of evidentiary value. (For purposes of this section "in writing" means checking the appropriate box and signing the form).

#### 450.7 MOBILE VIDEO RECORDER IMPOUNDING PROCEDURE

At the end of each shift, officers shall place the MVRs into an assigned open slot on the Evidence Transfer Manager (docking station). This will allow the data to be transferred from the MVR, via the docking station, to bartpd.evidence.com. The data is considered impounded at this point and the MVR is cleared of existing data.

#### 450.8 REVIEW OF RECORDED MEDIA

Recorded files shall be reviewed in any of the following situations. In circumstances not already covered by Section 450.6.5 of this policy, MVR recordings may be reviewed only in the following situations or by the following persons:

- (a) By a supervisor investigating a specific incident, issue, and/or act of officer conduct.
- (b) By any member of the Department who is authorized to participate in an official investigation in the following type of cases only: personnel complaints, administrative investigations, or criminal investigations.
- (c) Pursuant to a lawful process or by members of the District Attorney's office or court personnel otherwise authorized to review evidence in a related case.
- (d) By the Independent BART Police Auditor or his/her investigator.
- (e) With the expressed permission of the Chief of Police or authorized designee.

**Comment [OIPA7]:** OIPA is unclear on the intent of this section of the policy. It appears that it may be intended as a restraint on who may review recorded media and in what situations. Along these lines, OIPA feels that the suggested phrase will be more effective as an introduction to the section.

#### 450.9 MOBILE VIDEO RECORDERS

The Department assigned MVR (Taser Axon Flex) shall be the only mobile video recorder allowed for Department employees while on-duty. Any other mobile video recorder shall only be used with the expressed permission of the Chief of Police.

# Use of Video and Audio Recorders

## 450.1 PURPOSE AND SCOPE

The San Francisco Bay Area Rapid Transit District Police Department (BART) is providing each of its sworn sergeants and officers with a wearable Mobile Video Recorder (MVR) for use while on-duty. The MVR is designed to record both video and audio activity of members during the course of their official police duties. The MVR is intended to assist officers in the performance of their duties by providing an objective, unbiased video and audio record of a contact and/or incident.

The use of the MVR provides documentary evidence for criminal investigations, civil litigation, and allegations of officer misconduct. **Such evidence** shall be maintained by the Police Department if it supports a criminal investigation based on reason to believe the subject of the investigation is or may be involved in criminal conduct, or for purposes of an administrative investigation on the conduct of a member(s) of the Police Department.

Officers shall utilize the MVR in accordance with the provision of this Policy in order to maximize the effectiveness of the device, enhance transparency, and ensure the integrity of evidence.

## 450.2 DEFINITIONS

- A. **“Mobile Video Recorder” (MVR)** This refers to any system that captures audio and video signals that is capable of installation in a vehicle or individually worn by officers and that includes at a minimum a recorder, microphone, and paired monitoring device.
- B. **“Audio Recording”** is the electronic recording of **sound**.
- C. **“Evidence.com”** is the online web-based digital media storage facility. The virtual warehouse stores digitally-encrypted data (photographs, audio and video recordings) in a highly secure environment. The digital recordings are accessible to authorized personnel based upon a security clearance and maintain an audit trail of user activity.
- D. **“Evidence Transfer Manager” (ETM)** is a docking station that simultaneously recharges the AXON Flex Camera and AXON Flex Controller and uploads all data captured from the camera’s point of view during officer’s shift to bartpd.evidence.com. The ETM ensures that evidence handling is secured and cannot be altered.
- E. **“AXON Flex Camera** connects to the AXON Flex Controller. The Flex Camera manages the video compression and storage and is capable of playback via a Bluetooth paired smart device. The AXON Flex Camera ensures that evidence handling is secured and cannot be altered. Once plugged into the docking station, the AXON Flex Camera will upload digitally-encrypted data through the Evidence Transfer Manager to bartpd.evidence.com.
- F. **“AXON Controller”** is the battery pack for the AXON Flex Camera and connects to the Flex Camera via a small gage wire.

- G. **“MVR Technician”** The Community Service Officer(s) assigned to administrative services that assign, oversee, and track Department equipment. The CSO(s) shall oversee needed repairs or replacement of the MVR and Evidence Transfer Manager equipment through Taser AXON representatives.
- H. **“System Administrator”** The Administrative Services Supervisor will be the bartpd.evidence.com system administrator with full access to user rights who controls passwords, coordinates with the MVR Technician, and acts as liaison with Taser AXON representatives.
- I. **“Video Recording”** is the electronic recording of visual images with or without audio component.
- J. **“Impound”** is the process by which video and audio files are uploaded to Evidence.com by docking the MVR to the Evidence Transfer Manager thereby ensuring files are secure and unable to be altered.

**450.2a CATEGORIES AND RETENTION PERIODS**

The BART Police Department has nine (9) categories to tag and retain our cases in Evidence.Com. Each one is listed below with the current retention cycle. It should be noted that retention times can be extended at any time by a Supervisor, Internal Affairs, Evidence Specialist, BPD System Administrator for evidence.com, or by the Chief of Police or his/her designee. Categories can also be added if needed.

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- 06) STATEMENT – VICTIM / SUSPECT / WITNESS 3 YEARS
- 07) USE OF FORCE – UNTIL MANUALLY DELETED
- 08) SICK / INJURED PATRON – 3 YEARS
- 09) UNATTENDED DEATH / HOMICIDE – UNTIL MANUALLY DELETED

**450.3 UNIFORMED OFFICER RESPONSIBILITIES**

Prior to going into service, each uniformed patrol officer equipped with a Department issued MVR will be responsible for making sure that the MVR is in good working order. The MVR shall be conspicuously placed on the officer’s person in one of the Department approved mounting positions, which are limited to an eye glass clip, ear mount, collar clip, or epaulet clip. The MVR shall be worn in such a way as to provide an unobstructed camera view of officer/citizen contacts. . The camera shall be considered mounted correctly if it is mounted in one of the department approved mounting positions.

Members of the Department that are assigned an MVR shall receive mobile video training prior to deployment of the device in an operational setting. At this training, each officer will be provided a standard checklist of steps they are required to complete in order to ensure their MVR's and MVR mounting systems are in good working order. Officers will conduct the following steps prior to going into service:

1. Officers shall insure that the battery is fully charged
  - a. Depress the battery status button on the front of the controller and observe that the light is green
2. Officers shall insure that the camera is able to be activated and is functioning
  - a. Connect the battery cable from the battery to the camera
  - b. Turn the camera on by clicking the On switch
  - c. Observe the indicator lights are correct (blinking green)
  - d. Double tap button to activate recording
  - e. Observe that indication lights are correct (blinking red)
  - f. Press and hold to end recording
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3. Officer shall insure that the player is properly paired
4. Officer shall insure that the field of view for the camera is correct
  - a. Activate the Samsung Galaxy player
  - b. Activate the Live Preview feature

#### **450.4 NON-UNIFORMED OFFICER RESPONSIBILITIES**

Any officer assigned to a non-uniformed position may carry a Department-issued MVR at any time the officer believes that such a device may be utilized in order to assist the officer in the performance of their duties by providing an objective, unbiased video and audio record of a contact and/or incident. However, whenever a non-uniformed officer is working a uniformed patrol assignment he/she shall wear a Department - issued MVR in accordance with this policy.

#### **450.5 ACTIVATION OF THE VIDEO/AUDIO RECORDER**

Penal Code Section 632 prohibits any individual from surreptitiously recording any conversation (confidential communication) in which any party to the conversation has a reasonable belief that the conversation is private or confidential. This excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded. However Penal Code Section 633 expressly exempts law enforcement from this prohibition during the course of a criminal investigation as follows:

- (a) No member of the Department may surreptitiously record a contact with or conversation of any other member of this Department without the expressed knowledge and consent of all parties present, including the member whose acts or conversation are being recorded. Nothing in this Section is intended to interfere with an officer's right to openly record any interrogation pursuant to Government Code Section 3303(g).
- (b) Any member of the Department may surreptitiously record any conversation during the course of a criminal investigation in which the officer reasonably believes that such a recording will be beneficial to the investigation:
- (1) For the purpose of this Policy, any officer contacting an individual suspected of violating any law or during the course of any official, law enforcement-related activity shall be presumed to be engaged in a criminal investigation. This presumption shall not apply to contacts with other employees conducted solely for administrative purposes.
  - (2) For the purpose of this Policy, it shall further be presumed that any individual contacted by a uniformed officer wearing a conspicuously mounted MVR will have knowledge that such a contact is being recorded. This subsection shall not apply to contact between a member of the Department wearing a conspicuously mounted MVR and other member(s) of the Department. For purposes of this policy, contact between members of this Department is governed by section 450.5(a), and 450.5(b)(1).
- (c) All on-scene officers (inclusive of all initiating and witness officers) equipped with an MVR shall activate their cameras prior to making contact with individuals in any of the following circumstances:
- (1) Any enforcement contact e.g. detentions, vehicle stops, walking stops (officers are encouraged to activate their MVR on consensual encounters also), as outlined in Policy section 322.3.
  - (2) Probation and parole searches
  - (3) Service of a search or arrest warrant
  - (4) Any contact with a subject suspected of criminal behavior
- (d) Members of the Department are expected to activate their MVRs any time they reasonably believe that a recording of an on-duty contact with a member of the public may be of future benefit to the Department.
- (1) At no time should an officer jeopardize his/her safety or the safety of another in order to activate their MVR.
  - (2) Members of the Department are expressly prohibited from utilizing Department recorders and recorded media for personal use.

- (3) Members of the Department will not make copies of any recordings for their personal use and are prohibited from using a recording device (such as a phone camera or secondary video camera) to record media from bartpd.evidence.com or the AXON Flex Camera unit. Nothing in this policy shall be construed as limiting an officer's right to carry and use a personal device such as a smart-phone, however officers shall not carry or use another mobile video recorder in addition to the District issued MVR without express approval of the Chief of Police.

#### 450.6 MOBILE VIDEO OPERATING PROCEDURES

Members of the Department that are assigned an MVR shall receive mobile video training prior to deployment of the device in an operational setting.

1. Prior to going into service each officer shall perform an inspection, consisting of the steps set forth in section 450.3 and provided to each officer at their initial MVR training, to ensure that his/her MVR is operational. If problems are encountered with any component of the system, the MVR equipment will not be used. The officer to whom the problematic equipment is assigned shall report the problem to his/her immediate supervisor upon becoming aware of it. A spare MVR shall be issued to that officer through a supervisor with the Watch Commander's approval prior to the officer going into service. The Watch Commander shall log the assignment of a spare MVR with the Department MVR Technician.
2. The officers shall report malfunctions, damage, loss or theft of an MVR to their immediate supervisor prior to placing the unit out of service. The officer placing the MVR unit out of service shall notify the MVR Technician in writing of the suspected cause of equipment failure and/or recommendations for corrective action. If the officer does not know what the suspected cause of equipment failure is and/or has no recommendations for corrective action, they may indicate this in writing to the MVR technician. In case of loss or theft of an MVR, the officer shall notify the MVR technician and their immediate supervisor as soon as they become aware of the loss or theft of the device. When so notified, the MVR technician shall immediately deactivate the device. The assigned officer shall document the status of the device, including all relevant circumstances via the appropriate Departmental report.
3. Once the MVR is activated pursuant to Section 450.5 of this policy, it shall remain on until the event giving rise to the activation has reached a conclusion and/or the officer leaves the scene of the event, whichever occurs first. When the officer reasonably believes the event giving rise to the activation is over, he/she may deactivate the MVR from recording mode. If the event giving rise to the activation resumes following the officer's termination of the MVR recording, the officer shall reactivate his/her MVR.
4. Whenever the MVR is activated pursuant to Section 450.5 of this policy, this fact will be documented on any relevant citation and/or report prepared regarding the event that gave rise to the activation. Conversely, whenever the MVR is not

activated as required by Section 450.5 of this policy, the reason for the lack of activation will be documented on any relevant citation and/or report prepared regarding the event that otherwise would have given rise to an activation.

5. Except in circumstances prohibited by statute, as directed by the Chief of Police or his/her designee, or as further described within this section, an officer may have access to review his/her recordings when preparing written reports and/or statements relevant to any incident, to help ensure accuracy. However, as soon as an officer becomes aware, or reasonably should be aware, that an allegation of misconduct has been made against him/her related to any incident that was recorded, in part or in whole, by an MVR, that officer shall not review any MVR recordings related to the incident unless and until receiving permission from a supervisor to do so. Similarly, as soon as an officer becomes aware, or reasonably should be aware, that he/she is a witness to alleged misconduct related to any incident that was recorded, in part or in whole, by an MVR, that officer shall not review any MVR recordings related to the incident unless and until receiving permission from a supervisor to do so.

Supervisors shall not grant such permission until verifying with all entities involved in investigating the allegation of misconduct that it is acceptable for the involved officer to review his/her recordings related to the incident that gave rise to the allegation.

Additionally, immediately upon receiving a request, in any form, from a supervisor, a member of the Department's Office of Internal Affairs, or an employee of the Office of the Independent Police Auditor, an officer shall cease reviewing those recordings indicated by the requester unless and until subsequently receiving permission from the requester to review them. To prevent damage, original recordings shall not be viewed in any equipment other than the equipment issued or authorized by the MVR manufacturer.

- ~~5.6.~~ Department personnel shall not intentionally erase, alter, reuse, modify or tamper with audio-video recordings, nor shall they attempt to erase, alter, reuse, modify or tamper with audio-video recordings.

- ~~6.7.~~ If the MVR is accidentally activated, an officer may submit a written memorandum to his or her immediate supervisor requesting the recording be deleted. The request shall be routed via the chain of command to the requesting officer's Deputy Chief. The Deputy Chief shall either approve or deny the request in writing, after they ensure the recording has been reviewed and contains nothing of evidentiary value. (For purposes of this section "in writing" means checking the appropriate box and signing the form).

#### **450.7 MOBILE VIDEO RECORDER IMPOUNDING PROCEDURE**

At the end of each shift, officers shall place the MVRs into an assigned open slot on the Evidence Transfer Manager (docking station). This will allow the data to be transferred from the MVR, via the docking station, to bartpd.evidence.com. The data is considered impounded at this point and the MVR is cleared of existing data.

#### **450.8 REVIEW OF RECORDED MEDIA**

In circumstances not already covered by Section 450.6.5 of this policy, MVR recordings may be reviewed only in the following situations or by the following persons:

- (a) By a supervisor investigating a specific incident, issue, and/or act of officer conduct.
- (b) By any member of the Department who is authorized to participate in an official investigation in the following type of cases only: personnel complaints, administrative investigations, or criminal investigations.
- (c) Pursuant to a lawful process or by members of the District Attorney's office or court personnel otherwise authorized to review evidence in a related case.
- (d) By the Independent BART Police Auditor or his/her investigator.
- (e) With the expressed permission of the Chief of Police or authorized designee.

#### **450.9 MOBILE VIDEO RECORDERS**

The Department assigned MVR (Taser Axon Flex) shall be the only mobile video recorder allowed for Department employees while on-duty. Any other mobile video recorder shall only be used with the expressed permission of the Chief of Police.



**APPENDIX B**

OIPA Presentation at APTA Risk Management Seminar

**APPENDIX B  
OIPA PRESENTATION AT APTA  
RISK MANAGEMENT SEMINAR**



# Office of the Independent Police Auditor



Office of the  
**INDEPENDENT  
POLICE AUDITOR**

BAY AREA RAPID TRANSIT DISTRICT

Mark P. Smith  
Independent Police Auditor

*APTA Risk Management Seminar  
June 10, 2013*



# Civilian Oversight of Law Enforcement

*A growing trend?*

- New York City
- Chicago
- Los Angeles (City)
- Los Angeles (County)
- San Francisco
- Washington, DC
- Atlanta
- Boston
- Boise
- Cambridge
- Honolulu
- Syracuse
- Sacramento
- Austin
- Providence
- Eugene



# Types of Civilian Oversight

- Investigative • Monitoring • Auditing
  - Investigate complaints and reach findings, possibly including discipline
  - Review completed investigations from Internal Affairs, recommend different outcomes
  - Focus more on quantitative analysis to identify problematic trends or areas for improvement



# Importance of Civilian Oversight

- Can a police department police itself?
  - *Should* a police department police itself?
  - *Should* a police department police itself *alone*?
- Controversial incidents lead to:
  - Public mistrust
- Independent, civilian oversight leads to:
  - Objectivity
  - Accountability
  - Transparency
  - Opportunity to reestablish trust



## OIPA's Mission

- Provide all members of the public with effective and independent oversight of the BART Police Department
  - Conduct unbiased and thorough independent investigations and reviews of police department investigations
  - Make policy recommendations to improve the performance of the police department
  - Maintain continual communication with members of the public in the BART service area.



# OIPA's Responsibilities

- Citizen Oversight Model
  - Intake complaints from the public
  - Investigate complaints regarding excessive force, racial profiling, sexual orientation bias, sexual harassment, use of deadly force, wrongful deaths
  - Review Internal Affairs investigations
  - Mediation





## OIPA's Responsibilities (Cont'd)

- Facilitate appeals of Internal Affairs conclusions
- Monitor officer-involved shooting investigations
- Develop policy and training recommendations
- Meet with the BART police associations
- Conduct community outreach
- Submit monthly and annual activity reports



## OIPA's Responsibilities (Cont'd)

- Facilitate application process and coordinate selection process for Citizen Review Board
- Provide staff support to the Citizen Review Board
- Facilitate training for the Citizen Review Board



# Who Works at OIPA?

- Independent Police Auditor
- Independent Police Investigator
- Senior Administrative Analyst



## Key Elements of OIPA

- Independent of BART PD
- “Unfettered access” to police reports and police personnel records
  - Written into **Citizen Oversight Model**
- Can recommend revisions to policy and training
- Chief of Police cannot unilaterally overrule OIPA findings



# OIPA's Challenges

- Publicity
- Skepticism from BPD
- Skepticism from public
- Inherent resistance to spotlighting issues and/or deficiencies



# Relationship with the Police Department

- Good leadership acknowledges when there is need for reform
- Recognize the similarities between Internal Affairs and civilian oversight, where possible
- Meet with unions early on
- Talk directly to the officers themselves



# Progress Made

- Community outreach
- CRB meeting regularly
- Website/brochure
- Production of reports
- OIPA/CRB involvement in officer recruitment
- Complaint intake/investigation/review



## Looking Forward...

- Continuing to develop outreach
- Developing an ADR system
- Reviews of BART PD training and policies
- Educating more officers about oversight system
- Evaluating the oversight system





## Civilian Oversight - Summing Up

- As an agency, take whatever steps can be reasonably taken to minimize the chances that a controversial incident will occur
- Put yourself in the best possible position to react and rebuild trust in case such an incident does occur



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