



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Shivaun Nurre
Independent Police Auditor

SUBJECT: See below

DATE: December 2, 2022

Approved

Date

SUBJECT: IPA RESPONSE TO REPORT – INVESTIGATION OF POLICE MISCONDUCT IN SAN JOSE BY MOEEL LAH FAKHOURY, LLP

RECOMMENDATION

- (a) Accept the report on the Investigations of Police Misconduct in San Jose By Moeel Lah Fakhoury, LLP.
- (b) Refer responses to the Investigations of Police Misconduct in San José report from the Independent Police Auditor and the Administration to the Public Safety, Finance and Strategic Support Committee meeting in April 2023 and direct staff to provide additional analysis.

BACKGROUND

Following the May 25, 2020 death of George Floyd, protests raged across cities nationwide. San José was no exception. In response, the Mayor and City Councilmembers proposed a variety of police reform directives. A detailed Police Reforms Workplan was created, and most of the twenty items have either been completed or are still in progress.¹

Under the Police Reforms Workplan, the Independent Police Auditor (IPA) and the City Manager were directed² to outline a methodology and workplan to:

- Reallocate resources to introduce investigatory capacity within the IPA;
- Enable the IPA to make factual findings based on its investigations of misconduct allegations; and
- Enable the IPA to continue to report concerns between her factual findings and the Police Department's disciplinary decisions to the Council and public.

¹ For more detail on all directives, please see "Police Reforms Work Plan Update" (Memorandum, City of San José, March 22, 2022) <https://www.sanjoseca.gov/home/showpublisheddocument/83486/637835537085230000>

² San José City Council's Rules Committee meeting of November 18, 2020.

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In exploring the possibility of transferring all or partial responsibility for investigations involving sworn police personnel out of the Internal Affairs (IA) Unit of the San José Police Department (SJPD), the IPA and the City Manager sought the services of a professional consulting firm with expertise and experience in evaluating both Internal Affairs models and civilian police oversight models. If the consultant recommended moving some or all investigations out of IA, the consultant was tasked with providing a written report to that effect including an implementation roadmap. If the consultant recommended keeping some or all investigations within the IA Unit, the consultant was to provide a written report outlining options to improve IA Unit's current policies and procedures.

A formal request for proposals (RFP) for a Report on *Police Misconduct Investigation Options for the City of San José* was issued on January 21, 2022 (see addendum A for summary of scope).³ Four proposers submitted bids; each of which met the minimum requirements. The evaluation panel⁴ recommended Moeel Lah Fakhoury LLP (MLF) as the best value vendor. A contract with MLF was finalized in June 2022. MLF provided its final report ("Report") to the IPA and the City Manager in November 2022.

ANALYSIS

Under San José's existing oversight model, the IPA monitors the activities of SJPD's Internal Affairs Unit (IA). The IPA does not have the authority to independently investigate allegations of misconduct; that responsibility falls principally to IA.

MFL has accurately captured the gravity of this project in the following description:

Officer misconduct is an important concern for the City and its Police Department, as it brings direct harm to the very individuals law enforcement is in place to serve and protect; and it negatively affects the public's perception of the Department, which, in turn, can damage officer morale and diminish their ability to safely execute their duties. Objective investigations of officer misconduct are essential for the Department to demonstrate to the community and internal stakeholders that it is committed to the highest level of accountability.⁵

Given that the proposed recommendation is to have staff provide a detailed analysis of the Report's recommendation at the April 2023 PSFSS Committee meeting, the IPA will not delve into the individual components of each at this time. However, the IPA will share some general impressions.

³ San Jose Solicitation Number 22-IPA-01

⁴ The panel was comprised of representatives from the IPA office, Command Staff, the Office of Employee Relations, and the Office of Racial Equity.

⁵ MLF Report at page 7.

The boldest and core recommendation is creating an *Investigations Unit* within the current IPA structure. The unit would be staffed with an experienced Investigative Supervisor and two knowledgeable investigators. The Unit would have full, unfettered access to investigative tools in order to conduct investigations. It is **bold** in that the concept of investigators outside of IA has not been implemented since the 1993 inception of the IPA office. However, the use of such personnel to investigate police misconduct is a practice currently being implemented in increasing jurisdictions throughout the state and the nation. This recommendation is **core** in that most, if not all, of the Report's recommendations stem from the creation of an investigation unit within the IPA office. It is a recommendation that the IPA fully agrees with.

We believe that the concept of utilizing non-IA investigators should be embraced. In our opinion, the MFL Report approach to this change is tempered and measured. The Report does not advocate for the dismantling of the IA Unit Staff; according to MLF, most investigations would remain inside the IA Unit. Currently the IA Unit has **one** commander, **seven** investigating sergeants and **six** investigating officers. MFL is proposing supplementing IPA staff with **one** investigating supervisor and **two** investigators.

We acknowledge that some SJPD sworn employees oppose the use of civilian investigators because of the nuances of use-of-force investigations.⁶ However, we agree with Chief Mata that civilians with a background in law enforcement oversight and a commitment to becoming educated *can learn enough about policing to provide valuable input in connection with accountability processes.*⁷ Our mutual interest is ensuring that police misconduct investigations are complete and thorough, conducted by persons knowledgeable about solid investigative techniques and capable of reaching fair and objective findings. As stated in the Report,

It is imperative that both the IPA investigators and incoming IA investigators have prior investigative experience, as well as strong interviewing skills, demonstrated objectivity, and the ability to analyze policies and write clear reports In addition, to fill out their skill set, incoming IA and IPA investigators must undertake or will undertake shortly after joining all of the appropriate law enforcement and investigative training courses/workshops, as well as equity training in trauma-informed approaches and best practices.⁸

We believe that the high qualifications and skills apply equally to both IA investigators and IPA investigators. We believe that IA should work toward reducing the frequency of IA staff and

⁶ MLF report at page 19.

⁷ MLF report at page 19

⁸ incoming IA and IPA investigators must undertake or will undertake shortly after joining all of the appropriate law enforcement and investigative training courses/workshops, as well as equity training in trauma-informed approaches and best practices as expressed by the National Association for Civilian Oversight of Law Enforcement (NACOLE). The investigators should attend the training that SJPD is sending its IA investigators to regarding biased-based policing.. report at page 41. The IPA We strongly urge that this directive includes training that is specifically tailored toward investigation of police misconduct. Some general training on the history of policing in America and the development of civilian oversight would be helpful.

leadership turnover. Currently there is a two-year term for IA officers, IA sergeants and IA lieutenants assigned to the IA Unit. From our experience, it generally takes about one year for IA sworn staff to become highly proficient at conducting misconduct investigations. As we move forward to discuss the skill set required of persons assigned to police misconduct investigations, it is imperative that the skill set be uniform regardless of when one enters the IA Unit or is employed by the IPA.

We believe that some complaints should remain solely investigated by IA investigators, namely criminal investigations⁹ and department-initiated investigations. However, we contend that the IPA should have the discretion to investigate all complaints filed by members of the community, whether filed at the IA Unit or at the IPA office.¹⁰

Lastly, the Report contains a significant departure from the current model of the appeals process. Under current City Ordinance, the IPA may appeal first to the Chief of Police and then, if warranted, to the City Manager. MLF recommends limiting the appeal process to the Chief of Police in all instances. This change would eliminate all appeals to the City Manager. In our opinion, limiting appeals for any item to the Chief of Police fails to appreciate the independence of the IPA from SJPD. It would limit the ability of the IPA to have multiple opportunities to present the issues she finds with individual cases that are egregious in nature. In short, the IPA cannot agree with this recommendation as it would further stymie the independence of the IPA as well possibly reducing community confidence in the process.

In sum, the IPA believes that this Report provides a long-awaited jumping-off point for future discussions about moving some investigations out of the IA Unit. The Report wisely contains a mechanism whereby the structure and effectiveness of investigations, both at IA and IPA, is evaluated every three years. Possible outcomes of these changes are that it could engender a healthier confidence in the investigations process as well as allowing SJPD sworn staff to return to patrol or other duties in greater measure.¹¹ While the actual results of implementing the Report's recommendations are unseen, we are satisfied knowing that we are one step further in fulfilling the community's call regarding this issue. The IPA believes is a positive step in the right direction for the City of San José.

⁹ We agree that IA continue investigating alleged criminal conduct by SJPD officers unless the District Attorney or the State Attorney General desires to take on that responsibility

¹⁰ The MLF's proposal limiting the ability of the IPA to investigate to solely those cases filed at the IPA Office unduly constrains the process. We believe this limit should be removed. It is contrary to MFL's assertion that *under the proposed model, the IPA will be able to assume greater responsibility for particular types of cases or cases of significant public interest.* Page 8

¹¹ Such a move could provide fiscal saving for the City since IPA investigators presumably would have a pay/benefit package different from IA investigators. Savings may be found in pension costs, overtime, mandatory training for perishable skills, uniform and associated equipment (firearm, taser, baton, etc)

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CONCLUSION

The IPA thanks Moeel Lah Fakhoury, LLP along with subject matter experts Russell Bloom, the Independent Police Auditor for the Bay Area Rapid Transit District, and Rania Adwan, former Chief of Staff for the San Francisco and Oakland Police Commissions, for its report entitled *Investigations of Police Misconduct in San José* and the recommendations contained therein. If so directed by the City Council, the IPA will bring forward an analysis of the report recommendation at the April 2023 PSFSS Committee meeting.

EVALUATION AND FOLLOW-UP

The IPA agrees with the City Manager that analysis of the MLF recommendations should be referred to the April 2023 PSFSS meeting. We believe the MLF report warrants particular consideration because its subject matter was the substance of a number of entities who weighed in on police reforms, namely the City Council, the Mayor, RiPS, the Charter Review Commission, and the CNA Report on 21st Century Policing. The convergence of such focused interest supports elevating this project to an associated but individual process.

Measure G, that passed in November 2020, stated that the city council is able to change the IPA's duties without a public vote. There is considerable discussion as to whether this provision allows the council to add investigatory authority to the IPA officer without a change to the San José Charter. We suggest that this issue should be resolved expeditiously as the outcome has a great impact on facilitating frank discussions moving forward.

CLIMATE SMART SAN JOSE

The recommendation in this memo has no effect on Climate Smart San José energy, water, or mobility goals.

PUBLIC OUTREACH

This memorandum will be posted on the City's agenda website for the December 13, 2022 City Council meeting.

COMMISSION RECOMMENDATIONS/INPUT

No commission recommendation or input is associated with this action.

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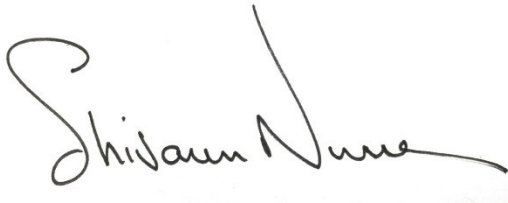
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CEQA

Not a Project, File No. PP17-008, General Procedure & Policy Making, resulting in no changes to the physical environment.

A handwritten signature in black ink that reads "Shivaun Nurre". The signature is written in a cursive style with a large initial 'S' and a long horizontal stroke at the end.

SHIVAUN NURRE
Independent Police Auditor

For questions, please contact Shivaun Nurre, Independent Police Auditor, at IPA@sanjoseca.gov
or (408) 794-6226.

ATTACHMENT A – MFL REPORT RECOMMENDATIONS

1. Maintain Current Entities and Supplement IPA with Investigators

1.1 Create an Investigations Unit within the current IPA structure. The existing IA and IPA structures should largely remain in place, aside from the proposed recommendations.

1.2 Hire an experienced Investigative Supervisor and investigators (2).

1.3 Provide funding for the new unit, including salaries, physical space, and administrative support.

1.4 Ensure that the IPA has full, unfettered access to investigative tools.

2. Staffing for IPA and IA

2.1 Create three experienced investigator positions to serve in the IPA's Investigative Unit, preferably with some language qualifications.

2.2 Ensure both IA and IPA new investigators have taken appropriate investigative training courses.

2.3 IA should work toward reducing the frequency of IA staff and leadership turnover to enhance continuity of operations.

3. Periodic Oversight Structure Review

3.1 Ensure systematic reviews for the proposed structure every three years

3.2 Utilize the reviews to gauge performance and make adjustments as the review determines appropriate.

4. Schedule Regular Community Outreach

4.1 Mandatory, periodic communication programs may increase community understanding of the investigative process and its limitations.

5. Ensure Coordination between the IPA and IA/SJPD

- 5.1 Ensure that communication between the two agencies is timely and responsive in order to ensure effective coordination.
- 5.2 Engage in joint trainings as appropriate.

6. Ensure All Evidence is Captured in IAPro

- 6.1 IA should ensure that any obtained evidence and reports are updated in a timely manner in IAPro.

7. Revise IA Duty Manual as Appropriate and Create an IPA Procedure Manual

- 7.1 The new IPA unit should create an investigative procedures manual.
- 7.2 SJPD should revise the duty manual to account for the changes to administrative investigations. Examples of initial amendments might include:
 - Amending Sections 1712 and 1721 to include the Investigative Supervisor in determining allegations and referring conduct complaints to the Bureau level.
 - Amending Section 1716 to allow IA investigators to reach any appropriate findings.
 - Amending Section 1722 to require IA to notify the Investigative Supervisor when a DII is initiated.
 - Amending the IA Unit Guidelines to correspond to these changes to the Duty Manual.

8. Determining Allegations

- 8.1 Investigate allegations of CUBO violations (after addressing the appropriateness of including the allegation).

9. Determining Investigative Authority

- 9.1 Jointly establish which allegations to investigate at the front end, adjusting appropriately as investigations develop.
- 9.2 Create a hybrid approach whereby IA continues to investigate criminal and administrative complaints and the IPA investigates certain categories outlined in the report or where the IPA appoints investigators.

10. Proposed Investigative Steps

10.1 Provide the IPA with discretion to monitor or investigate complaints, following the procedures outlined in the Report and adjusting as appropriate.

11. Investigative Tools

11.1 Provide the IPA with appropriate investigative tools, including but not limited to unfettered access to IAPro and evidence.com.

12. Record Keeping

12.1 SJPDP will remain custodian of records for personnel complaints.

13. Reporting

13.1 Create timeframes for the IPA to investigate cases and forward to the Chief, ensuring statutes of limitations are met.

13.2 The IPA should be required to publicly report on the outcome of its investigations to City Council, maintaining confidentiality as required.

14. Discipline Recorded in IA Pro

ATTACHMENT B - SCOPE OF CONSULTANT'S WORK AS OUTLINED IN RFP

- **Background research**

The consultant was directed to review relevant materials including:

- San José Municipal Code,
- San José Police Department Duty Manual sections and the IA Unit Guidelines,
- IPA Year End Reports, the Police Department's Response to those IPA reports and SJPD Reports on Department-Initiated investigations,
- Union contract and side letter agreements between the City of San José and the San José Police Officers' Association (POA),
- The Public Safety Officers' Procedural Bill of Rights Act (California Government Code Sections 3300-3313) and other California laws, regulations and pending legislation governing peace officer employment and civilian oversight operations,
- Materials outlining best practices of other jurisdictions in investigating allegations of police misconduct, including those that use sworn investigators, those that use civilian investigators and those that use a combination of both;
- Reports prepared by the City's Charter Review Commission and the Reimagining Public Safety Community Advisory Committee addressing investigating police misconduct and civilian oversight.

- **Interviews/Community Engagement**

The consultant was directed to interview specific persons and conduct engagement efforts:

- Current and former IA Unit Commanders employed by SJPD,
- SJPD Command Staff,
- Current Staff from the IPA Office and at least two (2) former San José Independent Police Auditors,
- Staff from the OER Office,
- Persons from the POA Board of Directors,
- The District Attorney,
- Persons from other jurisdictions about the use of sworn investigators and/or civilian investigators;
- stakeholders and other community members to ensure so that the proposed recommendations are informed by a range of perspectives.

- **Report**

The consultant was directed to provide a report for council consideration.

The report would evaluate whether responsibility for criminal and/or administrative investigations involving sworn police personnel should remain with IA, be transferred from IA to the IPA or alternative entity (or entities) or a

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hybrid model. The evaluation must include an implementation roadmap that identifies the actions, timelines and resources necessary to accomplish these recommendations. recommendations on how to go about accomplishing this should the decision be made to do so. The structure must maintain the confidence of both the community and San José officers that the process is fair, objective and unbiased.