



COUNCIL AGENDA: 11/14/2023

ITEM: 4.2

FILE NO: 23-1549

# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** Toni J. Taber, CMC  
City Clerk

**SUBJECT:** SEE BELOW

**DATE:** November 14, 2023

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**SUBJECT: Response to the Investigations of Police Misconduct in San José Report by Moeel, Lah, Fakhoury, LLP.**

### Recommendation

As referred by the Public Safety, Finance and Strategic Support Committee on October 19, 2023, do not accept the report responding to the Investigations of Police Misconduct in San José report by Moeel, Lah, Fakhoury, LLP.

CEQA: Not a Project, File No. PP17-009, Staff Reports, Assessments, Annual Reports, and Informational Memorandums that involve no approvals of any City action. (City Manager/Independent Police Auditor)

[Public Safety, Finance, and Strategic Support Committee on 10/19/2023 - Item (d)4]



# Memorandum

**TO:** PUBLIC SAFETY, FINANCE AND  
STRATEGIC SUPPORT COMMITTEE

**FROM:** Jennifer A. Maguire  
Karyn Sinunu-Towery

**SUBJECT:** SEE BELOW

**DATE:** October 5, 2023

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**SUBJECT: RESPONSE TO THE INVESTIGATIONS OF POLICE MISCONDUCT IN  
SAN JOSÉ REPORT BY MOEEL, LAH, FAKHOURY, LLP**

## **RECOMMENDATION**

- (a) Accept a report responding to the *Investigations of Police Misconduct in San José* report by Moeel, Lah, Fakhoury, LLP.
- (b) Cross-reference this report to the November 14, 2023 City Council Meeting.

## **SUMMARY AND OUTCOME**

This memorandum provides analysis of the *Investigations of Police Misconduct in San José* report prepared for the City by Moeel, Lah, Fakhoury, LLP (MLF). Through their report, MLF recommends that the City adopt a Hybrid Model for police oversight. Under this model, the City would add investigative staff under the Independent Police Auditor (IPA) who would conduct police oversight investigations, while at the same time retaining the existing Internal Affairs Unit within the Police Department (“the Department,” hereafter), which currently investigates police misconduct. This memorandum summarizes MLF’s proposed Hybrid Model and sets out a work plan for implementing the Hybrid Model, should the City Council direct staff to proceed with this option. As requested by City Council at a December 2022 City Council meeting, this memorandum also outlines a set of alternative policy options intended to enhance the effectiveness of police oversight, including options for process improvements and an option for increasing civilian participation in police oversight.

## **BACKGROUND**

At the August 5, 2020 meeting of the Rules and Open Government Committee, Mayor Liccardo and Councilmembers Jones, Diep, and Carrasco brought forward a memorandum entitled *Actions Related to Police Reform, Reimagining Police, and Strengthening the Investigative Authority of*

*the Office of the Independent Police Auditor.*<sup>1</sup> The memorandum was referred to the City Council meeting on August 18, 2020.<sup>2</sup> This memorandum was approved by City Council and directed the IPA and the City Manager to:

*Provide Council with specific recommendations for how the IPA would take over investigations of police misconduct from SJPD's internal affairs that would incorporate the following elements:*

- 1) Reallocating resources to introduce investigatory capacity within the IPA by the conclusion of negotiations;*
- 2) Enabling the IPA to make factual findings based on its investigations of misconduct allegations; and*
- 3) Enabling the IPA to continue to report concerns between her factual findings and the Department's disciplinary decisions to the Council and public.*

In response, the IPA contracted with MLF to complete the report entitled *Investigations of Police Misconduct in San José* ("the Report," hereafter). The consultant completed the Report in November 2022. It is included as Attachment A to this memorandum.

On December 13, 2022, the City Manager and the IPA brought the report forward to the City Council and recommended that the Council direct staff to return to the PSFSS Committee with additional analysis of the report. Under this item, Mayor Liccardo issued a memorandum with five recommendations.<sup>3</sup> The City Council approved this memorandum with several modifications, including the deletion of Recommendation 1, which recommended specific edits to the final text of the Report, and replacement of Recommendations 2 and 3. The original Recommendation 2 directed the City Manager to begin the meet and confer process with the San Jose Police Officer's Association (SJPOA) should meet and confer be necessary, and Recommendation 3 directed the City Manager and IPA to proceed with implementation of the Hybrid Model recommended in the Report once negotiations with the SJPOA concluded. The City Council revised these recommendations to instead direct staff to explore the legal, practical, and other implications of the MLF report and bring a report back to the PSFSS Committee. The final direction approved by the City Council was as follows:

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<sup>1</sup> Details from the August 5, 2020 Rules and Open Government Committee meeting may be found here: <https://sanjose.legistar.com/LegislationDetail.aspx?ID=4603968&GUID=93027AE2-9D1E-466B-87F7-C28C5BAAE115&Options=&Search=>

<sup>2</sup> Details from August 18, 2020 City Council meeting may be found here: <https://sanjose.legistar.com/LegislationDetail.aspx?ID=4613740&GUID=3D6EDE25-62D3-4920-BAB0-80D071820F58&Options=&Search=>

<sup>3</sup> Details from the December 13, 2020 City Council meeting may be found here: <https://sanjose.legistar.com/LegislationDetail.aspx?ID=5950832&GUID=BC95DFB1-B5AC-49A2-B9D1-46ACD55A9B15&Options=ID|Text|&Search=police>

- *Staff should explore the legal, practical and other implications of the MLF report and bring a report back to the PSFSS Committee. (This direction replaced Recommendations 2 and 3 from Mayor Liccardo's memorandum.)*
- *As the IPA urges (December 2, 2022 IPA report p.4), decline to accept any recommendation that might implicitly or explicitly limit the IPA's ability to appeal a decision by the Chief of Police (MLF Report p.54), and continue the current model whereby the IPA may appeal first to the Chief of Police and then, if warranted, to the City Manager. (This is Recommendation 4 from Mayor Liccardo's memorandum.)*
- *Refer the proposed hybrid workplan to the Public Safety, Finance and Strategic Support (PSFSS) Committee meeting in April 2023, and upon approval of an initial workplan, return to PSFSS in one year with their results in a report that will be cross-referenced to the full City Council. (This is Recommendation 5 from Mayor Liccardo's memorandum.)*

This memorandum responds to the above direction.

## **ANALYSIS**

### **MLF Report Recommendations**

The Report evaluates three models for investigating alleged police misconduct, which are described as follows:

- Internal Affairs Model – in which investigations of alleged misconduct are conducted by sworn law enforcement personnel (this is San José's current model);
- Civilian Oversight Investigations Model – in which investigations of alleged misconduct are conducted by professional civilian investigators who are independent of the Police Department; and
- A Hybrid Model – in which some investigations are completed by law enforcement personnel and other investigations are completed by professional civilian investigators who are independent of the Police Department.

The Internal Affairs Model is the City's current approach to police oversight. Under this model, the Internal Affairs Unit within the Department conducts investigations into police misconduct. The IPA, in turn, audits Internal Affairs investigations to determine whether they are complete, thorough, objective, and fair. It is important to note that the IPA does not currently conduct their own investigations; their role is limited to auditing investigations conducted by Internal Affairs. Note, under the current model, IPA is allowed to: (1) give input regarding the allegations to be investigated; (2) participate in all investigative interviews; and (3) request additional witnesses to

be interviewed, and have access to all recordings and documents which make up the investigation.

The Report recommends that the City adopt the Hybrid Model. Under this model, the IPA's role would expand to include investigation, not just auditing. The IPA would retain the ability to audit investigations conducted by Internal Affairs but would take on the additional responsibility of conducting their own investigations, independent of Internal Affairs, for some portion of misconduct complaints. The Internal Affairs Unit would also retain the ability to conduct investigations, the result being that both the Department and the IPA would conduct investigations into police misconduct. The Report makes 24 discrete recommendations, organized into 14 categories, intended to implement the Hybrid Model.

Specifically, the report recommends adding three new investigator positions within the IPA's Office, one of which would be an investigative supervisor. Using these investigative positions, the IPA would have the option of conducting investigations of misconduct complaints submitted to the IPA. The IPA would choose which misconduct complaints submitted to their office they would investigate; any complaints not investigated by the IPA would be investigated by the Department. Any criminal complaints would continue to be investigated by the Department and prosecuted, if warranted, by the District Attorney.

Once an IPA investigation is complete, the IPA would forward a report with their findings to the Chief of Police. The Chief would then decide to either agree or disagree with the IPA's findings. If the Chief agrees with the findings and the findings merit discipline, the Chief would make a recommendation for discipline to the City Manager's Office of Employee Relations (OER), which is responsible for effectuating formal disciplinary action of employees under the City Manager's appointing authority. If the Chief disagrees, the Chief would document the disagreement in a memorandum.

Staff would offer one clarification to the investigative process as described in the Report. Under the City's current oversight model, if the IPA disagrees with the findings that result from an Internal Affairs investigation, the Municipal Code allows the IPA to submit to the Chief of Police a written request for further investigation and, subsequently, to the City Manager. In several instances the Report acknowledges the IPA's ability to seek further investigation from the Chief but does not acknowledge the IPA's ability to seek further investigation from the City Manager. As an example, take this passage from page 40 of the report: "Under the proposed model, the role of the IPA in reviewing investigations completed by the IA would remain, as would the IPA's ability to appeal those determinations to the Chief." As outlined in the Background section of this memorandum, the City Council approved Recommendation 4 from Mayor Liccardo's memorandum for the December 13, 2022 City Council meeting, which directed that staff "continue the current model whereby the IPA may appeal first to the Chief of Police and then, if warranted, to the City Manager." Based on this direction, and unless otherwise directed by the City Council, the Administration and the IPA would not pursue removal of the IPA's ability to request further investigation from the City Manager.

The Report also provides an explanation of why MLF recommends the Hybrid Model, offering that the hybrid model combines the advantages of the Internal Affairs model and the Civilian Oversight model, as misconduct could be investigated by either Internal Affairs or the IPA. It describes the advantages of the model on page 32 as follows:

*Having some investigations conducted by sworn personnel increases the perception of legitimacy of the process among members of the department. The model leverages the training, experience, and knowledge of police practices that sworn law enforcement personnel possess, as well as their familiarity with the Department's policies. Additionally, a hybrid model supports the heightened objectivity associated with neutral civilian investigators as well as the community's perception of objectivity. Overall, it allows for more effective system of checks and balances against both sworn and civilian employees.*

The report does not suggest who would audit the IPA's work under the Hybrid Model.

At the December 13, 2022 meeting, the City Council also directed staff to assess the "legal, practical, and other implications" of the report's recommendations. To that end, it is important to note that California law requires that public agencies meet and confer with recognized employee organizations regarding changes to wages, hours and other terms and conditions of employment. Implementation of the MLF Hybrid Model would trigger this meet and confer obligation, requiring the City to meet and confer with the SJPOA. Before commencing implementation of the Hybrid Model, the City must complete the meet and confer process, including the exhaustion of applicable impasse resolution procedures.

In addition to directing staff to assess the legal, practical, and other implications of the report's recommendations, City Council also requested that staff explore policy alternatives. Given the significant length of time it can take to proceed through the meet and confer process and the potential that the City would not be able to reach agreement on the Hybrid Model with the SJPOA, the Administration and the IPA collaborated to develop options for improving the current investigative process and enhancing civilian oversight that could be implemented on a shorter time span and with greater certainty than the Hybrid Model as proposed in the Report.

The remainder of this report is divided into two sections. First, should the City Council desire to pursue the Hybrid Model, staff has prepared a work plan to show the steps necessary to implement that option. Second, the report lays out policy alternatives including both improvements to the current investigative process and options for expanding civilian oversight of the Police Department. Most of these alternatives do not entail a meet and confer requirement and could thus be implemented with greater ease. City Council direction is required to proceed with any option.

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**Hybrid Model Work Plan**

Pursuant to Recommendation 5 from Mayor Liccardo’s memorandum for the December 13, 2022 City Council meeting, as approved by the City Council, the below matrix provides a work plan for implementation of MLF’s proposed Hybrid Model. Importantly, the timeline for this work plan is uncertain, as the meet and confer process described under Stage 1 below can be lengthy and of uncertain duration, and must be completed before implementation can proceed to subsequent stages. If the City Council desires to proceed with this option, the Council may direct the City Manager and the IPA to commence the meet and confer process with the SJPOA.

*MLF Hybrid Model Implementation Work Plan*

Stage	Title	Description	Estimated Timeframe
1	Meet and Confer Process	California law requires that public agencies meet and confer with recognized employee organizations regarding changes to wages, hours and other terms and conditions of employment. Implementation of the Hybrid Model would trigger this meet and confer obligation, requiring the City to meet and confer with the SJPOA. Before commencing implementation of the Hybrid Model, the City would need to complete the meet and confer process, including the exhaustion of applicable impasse resolution procedures, absent agreement reached between the parties.	7 –12 months  Note that the duration of the meet and confer process, including any necessary impasse resolution procedures, is difficult to predict and could vary from the above estimate.

Stage	Title	Description	Estimated Timeframe
2	Budget Analysis and Actions	Upon completion of the meet and confer process, staff would return to the City Council with proposed budget actions to implement the resulting oversight model. The Hybrid Model as recommended in the report would entail the addition of three investigative positions in the IPA's Office. The City does not currently maintain job classifications that fit the potential duties of these positions; as such, the Human Resources Department would conduct a study of compensation for similar positions in other jurisdictions to determine appropriate pay rates and attendant budget costs. With the addition of three staff members, the IPA would also need to secure new, larger office space to accommodate the larger staff.	It is unlikely that the meet and confer process would be concluded in time for these budget actions to occur as part of the 2024-2025 Budget process. Staff would return to the City Council with proposed budget actions after the meet and confer process is complete.
3	Definition of Policies and Procedures	Prior to implementation of the MLF Hybrid Model, the IPA and the Department would come to agreement on standard operating procedures—including process timelines, guidelines for determining allegations, and required staff training—and memorialize those procedures in writing. This coordination would ensure that both the IPA and the Department would have a clear and consistent understanding of how the MLF Hybrid Model would operate.	3 months
4	Report to PSFSS	The City Manager and the IPA would provide a joint report to the PSFSS Committee on the implementation plan for the MLF Hybrid Model, including the planned policies and procedures described in Stage 3 above.	1 month
5	Hiring Investigative Staff	The IPA would hire and train investigative staff and secure larger office space in preparation for implementation of the MLF Hybrid Model.	5 months
6	Commence Implementation	Both the IPA and IA would commence implementation of the MLF Hybrid Model.	Workplan Completed



**Alternative Policy Options to Implementing the Hybrid Model**

In response to City Council direction, to provide the PSFSS Committee and City Council with the widest possible range of policy options, the Administration and the IPA have collaborated to identify (1) process improvements to the current police oversight model and, (2) additional resources for oversight that would expand the capacity of the IPA's Office to provide oversight and also expand civilian oversight of police misconduct through OER.

*(1) Process Improvements to the Current Oversight Model*

The below matrix describes possible process improvements to the current oversight model. Several of these options were adapted from recommendations included in the MLF report that aimed to improve current processes (as opposed to implementing the Hybrid Model); one of them was already completed, others are pending. If the City Council wishes to pursue these options, it may direct the Administration and the IPA to implement them. No additional resources are needed for these efforts.

<b>Title</b>	<b>Description</b>	<b>May be Meet and Confer</b>	<b>Status</b>
IPA Document Access	Give the IPA unfettered access to any document related to an incident that is being investigated. This recommendation is not subject to meet and confer so long as the records pertain to an event/issue that is being investigated. This recommendation aligns with Recommendation 11.1 from the Report.	No	Complete
Policies, Procedures, and Timelines	To ensure close coordination between the IPA and IA, both parties would strive to agree on standard operating procedures--including process timelines, guidelines for determining allegations, and required staff training--and memorialize those procedures in the IA Duty Manual and through the creation of an IPA procedure manual. Both offices would collect performance data on compliance with the procedures and timelines established pursuant to the agreement and would evaluate resource needs in the IPA and IA based on performance.	No	Pending

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Title	Description	May be Meet and Confer	Status
Turnover in IA	To address turnover in IA, set a minimum term of two years for IA officers, sergeants, and lieutenants. (Tenure could still potentially be shorter than two years due to promotion or reassignment due to performance.) It aligns with Recommendation 2.3 in the Report.	Yes	Pending
Outreach	Schedule regular community outreach on the topic of police oversight. The Police Department and the IPA would coordinate to develop an outreach strategy to inform the public of the City's police oversight processes.	No	Pending

*(2) Expansion of Resources in the IPA's Office and OER*

As an alternative to implementing the Hybrid Model, the Administration and the IPA collaborated to develop a joint plan for City Council consideration to, first, increase resources in the IPA's Office to carry out the IPA's function under the office's existing scope, and second, increase resources in OER to expand civilian oversight of the Police Department. Neither of these options would require the City to meet and confer with the SJPOA. If the City Council wishes to pursue these alternatives, they could give direction to prioritize the additional funding needed to implement the recommendations provided below through their approval of the Mayor's March Budget Message for Fiscal Year 2024-2025, subject to available ongoing budgetary capacity of the General Fund and other important City Council priorities.

First, with respect to the IPA, City Council could add an additional Analyst I/II position in the Independent Police Auditor's Office at an estimated cost of \$160,000. The IPA Office currently includes seven staff members—The IPA, the Assistant IPA, a Senior Analyst, two Analyst I/II positions, and an Office Specialist. An additional Analyst I/II position would bring the total staff in the office to eight, but would not require the IPA to find larger office space.

This position would expand the IPA's capacity to carry out the functions currently within the scope of the IPA's office. One of the most valuable tools the IPA has in the audit process is the ability to pose questions during IA interviews. However, given the current caseload, the auditors are not able to attend every interview. Additionally, one of the most valuable services to the community is education and outreach, but given the current caseloads, community outreach is minimal. If an Analyst I/II position was added, it would have the effect of increasing capacity for interviews and other auditing functions, as well as freeing up existing staff capacity to conduct community outreach.

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Second, City Council could make adjustments to existing classifications and add two additional staff within OER thereby increasing office capacity to take on a greater number of investigations of sworn members of the Police Department. The City estimates this would result in an approximate annual expense of \$600,000. One of OER's core missions is to investigate allegations of misconduct against City employees. In this capacity, OER already takes responsibility for a limited number of misconduct investigations of sworn police personnel. As a part of the City Manager's Office, OER is staffed by civilians and is independent of the Police Department's command structure. As such, adding staff to OER for the purpose of increasing the number of investigations of police officers that it conducts would be a means of increasing civilian oversight of the Department. Unlike the Hybrid Model recommended in the MLF report, this approach would not require the City to meet and confer with the SJPOA as this is a function that OER already performs, nor would it necessitate a Charter change as the investigative function would remain under the City Manager's appointing authority.

With these additional staff, OER could take on a greater role in Police Department investigations into alleged misconduct that, if true, would be in violation of the City's Discrimination and Harassment Policy, Code of Ethics, other sections of the City Administrative Policy Manual, or other investigations deemed appropriate by the City Manager, Director of Employee Relations, or the Chief of Police. Given that OER does not have specific expertise in policing, it would not conduct investigations that require detailed knowledge of police tactics, such as investigations into use of force.

Investigations led by OER would include OER conducting interviews, producing the written investigative report, and reaching a conclusion as to whether the alleged misconduct occurred. Should it be determined that misconduct occurred, the normal disciplinary procedures would apply, including the Chief of Police making a recommendation to OER regarding the appropriate level of disciplinary action to be taken.

Staff believes that, with these additional resources, both the capacity of the IPA and of OER could be expanded to provide independent oversight of the Police Department.

### **EVALUATION AND FOLLOW-UP**

Staff is recommending cross-referencing this item to the November 14, 2023 City Council Meeting. Staff will pursue implementation of any policy options as directed by the City Council at that meeting and will provide status updates on implementation progress through the PSFSS Committee.

### **COORDINATION**

This memorandum was coordinated with the Police Department, the City Attorney's Office, and the City Manager's Budget Office.

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### **PUBLIC OUTREACH**

This memorandum will be posted on the PSFSS Committee Agenda for the October 19, 2023 Committee meeting, and, if cross-referenced to the City Council, will be posted on the City's Council Agenda website for November 14, 2023.

### **COMMISSION RECOMMENDATION AND INPUT**

No commission recommendations or input is associated with this item.

### **CEQA**

Staff Reports, Assessments, Annual Reports, and Informational Memos that involve no approvals of any City action. Public Project number PP17-009.

### **PUBLIC SUBSIDY REPORTING**

This item does not include a public subsidy as defined in section 53083 or 53083.1 of the California Government Code or the City's Open Government Resolution.



JENNIFER A. MAGUIRE  
City Manager

/s/

KARYN SINUNU-TOWERY  
Interim Independent Police Auditor

For questions, please contact Lee Wilcox, Assistant City Manager, at [leland.wilcox@sanjoseca.gov](mailto:leland.wilcox@sanjoseca.gov).

### **ATTACHMENT**

Investigations of Police Misconduct in San José Report