San José Charter Review Commission Recommendation Memo

Drafted April 19th, 2021; Revised July 2nd, 2021

Proposal to create a Police Commission, to convert the Office of the Independent Police Auditor to the Office of the Independent Investigations Department, and to create the Office of the Inspector General.

1) Proposal Name

Proposal Name:	1. Creating and adding a ***Police Commission*** to the City Charter; 2. Converting the Independent Police Auditor Office to the ***Independent Investigations Department***, with powers of subpoena, and full and unredacted access to all documents in the possession of the San Jose Police Department; 3. Creating an ***Office of the Inspector General*** to assist the Police Oversight Commission in conducting reviews of patterns, practice, trends, systems, and policies at the Police Department.
Submitted by:	Accountability, Inclusion, Policing, and Municipal Law Subcommittee, Commissioners Segol, Callender, and Segura and in coordination with Reimagining Public Community Advisory Committee.
Date submitted:	11/12/21

2) Proposal Details

1) What problem(s) are you trying to address? *Before suggesting a solution, it is important to be clear about the problem you aim to solve.*	There is a history of policing practices, which has resulted in excessive and unnecessary force towards residents of San Jose ultimately causing our citizens to distrust the police. This distrust has caused concerns regarding police hiring, training, accountability, mental health awareness, and lack of basic care for the people they are sworn to protect. San Jose lacks a robust police oversight structure that, in turn, lacks credibility and legitimacy among impacted communities. The oversight structure does not promote community empowerment and engagement and does not promote prevention of systemic issues or accountability of police management. It is

largely reactive, focused on individual officer accountability, not fully independent, and depends upon the IPA Office itself to affirmatively engage community input.

Specifically, San Jose does not have a police inspector general with broad access to records, nor an oversight commission made up of community members interested in participating in police oversight. The cities and/or counties that have one or both of these entities include San Francisco (both), Oakland (both), Davis (commission), San Diego (commission), Orange County (IG) and Los Angeles (both), BART (both), among many others in California and the United States.

San Jose only has an outdated Independent Police Auditor model, which audits records from the San Jose police department's internal affairs, and our Independent Police Auditor has no authority to independently investigate complaints. Nor does the IPA have authority to review issues in the police department outside of specific complaints filed by members of the community. For example, the IPA cannot review patterns or trends relating to stops, responses to certain types of crimes, officer discipline, etc. (Measure G provided some limited additional access related to use of force, but those records are redacted and IPA requests must be accompanied by justification – such limits are without precedent in other jurisdictions).

Citizen groups in San Jose are interested in seeing stronger community safety oversight and would like to participate in that oversight process by being on a Commission, or one of its subcommittees, that reviews police conduct, policies, practices, training, and other aspects they deem important to modern community safety. Excluding the public in decision-making about the largest department in the City, and about the department that exercises force and control over residents, is inconsistent with procedural justice, democratic norms, and good governance. San Jose is a local outlier, different from all our neighboring big cities, and many small ones, in this regard, as other large cities involve the community in policy making and decisions over who leads the police department.

Finally, boards and commissions proliferate in San Jose, including boards and commissions with actual authority. For example, San Jose has a library commission, but not a police commission. Policing is an exception to this widely used mechanism for public engagement and input. When the City has allowed public participation, it has fumbled in its approach, e.g., when the first

	iteration of the Reimagining Public Safety committee collapsed because members of the committee felt disempowered and censored by the City's attempts to control the process and thus control the potential final recommendations. The public should have formal input into policing in light of the current state of distrust and the enormous power that police have. This power has manifested in significant uses of force, including causing serious injury, during the protests following the murder of George Floyd, but there have also been documented disparities in stops and treatment during stops in the last 5-10 years and at least one federal jury finding of an unjustified officer-involved shooting. The IPA routinely makes policy recommendations in light of deficiencies that the office identifies, and it is critical that a body oversees adoption and implementation of such changes. A supplementary IG could also utilize its access to monitor improved policies and practices.
2) How has this problem possibly benefited or burdened people, especially BIPOC, low-income, undocumented and immigrant, those experiencing houselessness, etc.? *Is there data that speaks to the impact of this problem? What does the disaggregated data tell us?*	Our black and brown communities have been severely impacted by over policing and excessive use of force. Because of police officers' lack of understanding and approachability, these communities who are already underserved, believe that police are more prone to causing the problem than solving it. This leads to residents exhibiting fear and restlessness when interacting with the police, and this also leads to hesitancy when in situations they should call the police. Moreover, this disconnect creates an environment where there are two entities (police and residents) who have distrust for one another, instead of acting as one whole community. There are complaints of under policing in some neighborhoods, over policing in some neighborhoods, complaints of excessive use of force, racial profiling, different use of force depending on race, and no **independent** investigatory body of the policing in San Jose. People complain that police do not come to respond to drug houses, abandoned cars, reports of theft, reports of trespassing, and other complaints. [The District Attorney does investigate alleged criminal behavior on the part of San Jose police officers. This includes if an officer is accused of murder, sexual assault, sex with a minor, theft, domestic violence, and other crimes. This is not considered to be independent, investigatory oversight of San Jose policing.] There are complaints of officers smiling and laughing with each other after pulling residents over during traffic stops (appearing to be laughing at the person they have pulled over).

	Injuries caused by the San Jose Police Department have cost over 26 million dollars in lawsuits since 2010. This money could have been used to fund our schools instead of being diverted to pay for police misconduct. In prior recent years, there have been documented disparities. https://www2.sjpd.org/crimestats/forceanalysis.asp, https://www.utep.edu/newsfeed/campus/UTEP-Researchers-Study-Racial-Bias-in-Police-Stops.html The lack of a permanent commission also has a disproportionate impact on marginalized communities. While other commissions exist, the exclusion of a police commission, affects BIPOC and other marginalized communities because of the disproportionate impact of policing on those communities.
3) What change are you proposing? *Describe the revision to San José's Charter that you are proposing. Include relevant Charter section numbers.*	**A. Police Commission.** 1. Review, with expertise and assistance from an Inspector General's Office, and through the use of its access authority: a. Training b. Patterns or Practice c. Use of Force, stops/detentions, other practices d. Policies and Procedures e. Supervision and management f. Hire/Fire/Appraise Chief of Police, Inspector General (IG) and the Independent Investigative Department Head (IID) g. Recommend SJPD Budgeting to City Council 2. Conduct regular (e.g. monthly) public hearings on Department policies, rules, practices, customs, and General Orders. The Commission shall determine which Police Department policies, rules, practices, customs, or General Orders shall be the subject of the hearing. The Commission shall be authorized to convene subcommittees to study specific topics or policies and shall ensure broad community participation in those subcommittees. 3. It shall have an investigative/monitoring function: It shall have

	the same level of access to San Jose records as the Inspector General (discussed below) and authority to issue subpoenas to compel the production of books, papers and documents and take testimony on any matter pending before it except that the Commission shall not have any authority to issue subpoenas for the purpose of investigating any City employee, including an Agency employee, who is not a police officer. If any person subpoenaed fails or refuses to appear or to produce required documents or to testify, the majority of the members of the Commission may find him in contempt, and shall have power to take proceedings on that behalf provided by the general law of the State. 4. Propose changes at its discretion or upon direction, by adoption of a resolution, of the City Council, including modifications to the Department's proposed changes, to any policy, procedure, custom, or General Order of the Department which governs use of force, use of force review boards, profiling/discrimination based on any of the protected characteristics identified by federal, state, or local law, other constitutional issues (e.g., stops, detentions, searches) or First Amendment assemblies, or which contains elements expressly listed in federal court orders or federal court settlements which pertain to the Department and are such federal court orders and settlements remain in effect. All such proposed changes and modifications shall be submitted by the Commission Chair or her or his designee to the City Council for review, approval or rejection. If the City Council does not approve, modify and approve, or reject the Commission's proposed changes or modifications within one hundred and twenty (120) days of the Commission's vote on the proposed changes, then the Commission's proposed changes or modifications will become final. 5. Approve or reject the Department's proposed changes to all policies, procedures, customs, and General Orders of the Department which govern the topics/issues identified above. If the Commission does not approve or reject the Department's proposed changes within one hundred and twenty (120) days of the Department's submission of the proposed changes to the Commission, the Department's proposed changes will become final. If the Commission rejects the Department's proposed changes, notice of the Commission's rejection, together with the Department's proposed changes, shall be submitted by the Commission Chair or her or his designee to the City Council for review.

The City Council shall consider the Commission's decision within one hundred and twenty (120) days of the Commission's vote on the Department's proposed changes, and may approve or reject the decision. If the Council does not approve or reject the Commission's decision, the Commission's decision will become final.

6. Review and comment on, at its discretion, other policies, procedures, customs, and General Orders of the Department. All such comments shall be submitted to the Chief of Police. The Chief of Police shall provide a written response to the Commission upon the Commission's request.

7. Review the City of San Jose's proposed budget to determine whether budgetary allocations for the Department are aligned with the Department's policies, procedures, and customs. The Commission shall conduct at least one public hearing on the Department budget per budget cycle and shall forward to the City Council any recommendations for change.

8. Require the Chief of Police or his or her designee, to attend Commission meetings and require the Chief of Police to submit an annual report to the Commission regarding such matters as the Commission shall require, including. but not limited to a description of Department expenditures on community priorities as identified by the Commission. The Chief of Police, or her or his designee, shall also respond to requests made by the Commission, through the Chairperson, by a majority vote of those present. The Chief of Police, or her or his designee, shall provide to the Commission Chair an estimate of the time required to respond to the Commission's requests.

9. Report at least once a year to the Mayor, the City Council, and to the public to the extent permissible by law, the information contained in the Chiefs report in addition to such other matters as are relevant to the functions and duties of the Commission.

10. The Police Commission has the role of recommending candidates to the City Council for the hiring of a police chief. Hiring the police chief shall involve interviews with community panels and selecting finalists to send to the City. A representative from the Police Commission shall be on the community panel, as the Commission is expected to engage with the public during the selection process. Individual city councilmembers may add candidate names for a vote so long as the community panel has

had an opportunity to weigh in on the candidate. Further, the Commission has the role of appraising the police chief's performance in the form of regular performance evaluations. The police chief reports to the Police Commission.

The City Council may fire the police chief without cause by a 2/3 vote, and with cause by a majority vote. The Commission may fire the police chief by a majority vote for cause, and what counts as cause shall be defined by ordinance. The Commission may not fire the police chief without cause. The City Council may block the firing of the police chief by the Commission with a 2/3 vote, within 15 days of the Commission's vote, or it becomes law. Commission shall appoint an acting chief who already works for the SJPD during the 15 days and until a new chief is hired through the hiring process.

The City Manager no longer has the role of hiring, appraising, and firing the police chief.

11. Composition of Police Commission and How They Are Selected and Removed:

> Each councilmember, and the mayor, shall select one applicant for a four-year term, for a maximum of 2 terms if the applicant so desires once selected by a councilperson. Half of the initial applicant pool shall serve a two-year term so that at any given time only half the commission needs to be replaced. Former or current law enforcement, and those affiliated with law enforcement or police unions shall not be eligible to serve on the Commission. Disclosures shall be made regarding any immediate family members who are or have served as law enforcement, and immediate family members who are or were affiliated with a police union. Additionally, no city staff is eligible for this Commission. Each commissioner may create any number of subcommittees of which members of the public will be eligible to be appointed to by the commissioner who is a subcommittee lead.
>
> Commissioners may be removed for cause, as defined by ordinance, by the City Council by a majority vote. Commissioners may not be removed for political reasons, and the elements of "cause" shall exclude politics to the extent it can.

12. Oversee and review the investigations department (discussed below) and the Office of the Inspector General (discussed below).

This includes hiring and termination (with cause) of the IID and OIG agency heads. Selection shall involve interview panels with community members and organizations.

B. Create an office of the Inspector General, with subpoena authority and full unfettered and unredacted access to the documents contained by any city department or employee relating to SJPD. This includes full access to anything and everything that the police department's Internal Affairs has, as well as all body-worn camera footage, recordings, transcripts, data, police reports, use of force reports, stop data, police communications, disciplinary histories, force reviews, training, etc. All documents shall be unredacted to the extent permitted by current State and Federal laws.

The IG shall have the existing powers of the IPA, but with additional access and authority. Its IPA authorities should also include a role in whether a case should be sustained and in the disciplinary decisions (currently, it only provides input into whether a case should be more thoroughly investigated).

The IG shall also have access to IID (see below) materials. The IG will report directly to the police commission, outside the police department's chain of command. The office can initiate an investigation into any area. The IG is authorized to compel any SJPD employee, including the Police Chief, to submit to an IG investigation. An IG investigation can only be stopped by a majority vote of the commissioners in a public session. The IG shall have the authority to access all of SJPD's facilities, as well as its documents, audio, and video evidence.

The Commission would direct the IG's reviews and receive reports and recommendations from the IG. The Commission would utilize these reports and recommendations, as well as its own access, to craft policy changes and review the performance of police management.

C. Convert the IPA Office to an Independent Investigations Department (IID), with subpoena power. The IID reports directly to and can be hired/fired/appraised by the Commission. Rather than audit Internal Affairs' investigations of complaints as the IPA currently does, IID would conduct the investigations itself. The Commission, through a subcommittee on discipline, would play a limited role in adjudicating disagreements between the Chief and IID as to whether to sustain an allegation and as to the level of discipline issued in a particular case. The Commission

	would also have access to all IID cases (both directly and through the Office of Inspector General). IID shall issue annual reports. IID shall have sufficient staffing based on a formula relating to caseloads/number of complaints. The IID shall have full unfettered and unredacted access to the documents contained by any city department or employee relating to SJPD. This includes full access to anything and everything that the police department's Internal Affairs has, as well as all body-worn camera footage, recordings, transcripts, data, police reports, use of force reports, stop data, police communications, disciplinary histories, force reviews, training, etc. All documents shall be unredacted to the extent permitted by current State and Federal laws. D. Independent counsel. The IID, the IG, and the Police Commission shall have their own attorneys (in addition to other staffing), not just the City Attorney because the City Attorney also represents the police department, and the City as a whole, and only describes what the law is and whether a proposed action is legal or not. One or two City Attorneys shall physically work at the office of Inspector General and no longer do other work for other departments. E. Policy Recommendation: All investigators in the SJPD Internal Affairs shall have at least 10 years of experience as a police officer or an investigator. Lessor experienced officers shall no longer investigate complaints against officers, because they then have to work as officers in the street with those whom they have investigated. This is problematic for substantiating a complaint and then having to work with the officers they have substantiated the complaint against. The City Attorney shall review the City Charter and recommend the removal of all portions inconsistent with this recommendation (such as Section 809), and recommend language that is consistent with this recommendation.

4) Is this change feasible? *Think through the revision you are proposing. Is it legally possible? Is it practical? If there are questions you cannot answer, list them here.*	Yes, this is the direction the entire nation is moving in, and most large cities on the West Coast have moved in. Both Oakland and San Francisco have this structure, as do other local cities. Also, police oversight currently sits in the Charter so any change or additional oversight requires a Charter Change.
5) Who might benefit from or be burdened by this change? *Is there data that speaks to the potential impact of this change? What are the potential unintended consequences of this change?*	Expanded oversight will benefit all San Joseans but will have a disproportionate benefit for BIPOC community members and community members who belong to other marginalized communities, including those with disabilities, the unhoused, and the LGBTQ+ community. This is because of the historical realities of policing affecting those communities most, and the historical distrust between these communities and police. 1. Oversight can help hold the police department accountable for officers' actions 2. Oversight bodies can help improve the quality of the department's internal investigations of alleged misconduct. **A commission can provide a community voice into that process and evaluate broader policies and systemic issues**. 3. The community at large can be reassured that discipline is being imposed when appropriate, while also increasing the transparency of the disciplinary process. Greater access than the IPA currently has is required. 4. When the oversight agency confirms a complainant's allegation(s), the complainants may feel validated. 5. Similarly, when the oversight agency exonerates the officer, the officer may feel vindicated. 6. Oversight agencies can help improve community relations by fostering **communication** between the community and police agencies. This is particularly the case where a public body provides a regular venue and has a diverse representation of the communities most impacted by policing. 7. Oversight agencies can help reduce public concern about high profile incidents. 8. Oversight agencies can help increase the public's understanding of law enforcement **policies** and procedures, and why they are a particular way. 9. Oversight agencies can improve department policies and procedures. Policy recommendations based on data and review of records can prevent issues by identifying areas of concern and subsequently offering options to improve

	policing. IG-type access is essential. 10. Oversight agencies can assist a jurisdiction in liability management and reduce the likelihood of costly litigation by identifying problems and proposing corrective measures before a lawsuit is filed. Access to unredacted records and data (IG model) is essential. 11. Mediation has multiple benefits to both citizens and police officers. If the oversight agency provides mediated solutions, it can help complainants feel satisfied through being able to express their concerns to the specific police officer in a neutral environment. Mediation can also help police officers better understand how their words, behaviors and attitudes can unknowingly affect public perceptions. 12. By establishing a strong, modern oversight system that reflects best practices. Public officials are provided the opportunity to demonstrate their desire for increased police accountability and the need to eliminate misconduct. All of these potential benefits help to support the goals of **community-oriented policing, which seeks to utilize problem solving techniques to work in a cooperative effort with the community to proactively address concerns.**
6) What are the arguments against this proposal? *Summarize the arguments you expect or data you have found in opposition to this recommendation.*	The argument against it is that some people affiliated with the police union, and otherwise may say that the San Jose Police Department should police itself and no one in the community should interfere in police policies and practices.

7) Must this be a Charter revision? *Can this problem be addressed without changing the charter (e.g., Council action, cultural change)? If not, should this be a policy recommendation to be included in the Commission's report?*	Yes, because police oversight currently sits in San Jose's City Charter in Section 809.
8) Are there other examples of this change? *If you have found other examples of this change, please share them and any outcomes that have been observed.*	Yes: San Francisco, Oakland, Davis, Los Angeles, Orange County, San Diego County **are all examples this Commission has studied** and has had the actual oversight agencies present during study sessions. **We have had 11 speakers total.**

3) Proposal Research & Citations

List below the results of any research conducted to inform this memo.

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Any speakers who presented to the subcommittee must be listed. *Include name, title, affiliations, etc., along with a brief summary of the information presented by them.*	With Appreciation To Our 11 Speakers: 1. Sergio Perez, Executive Director, County of Orange Office of Independent Review; 2. John Alden, Executive Director, City of Oakland, Community Police Review Agency; 3. Russell Bloom, Independent Police Auditor, BART; 4. Erin Armstrong, Chair, BART Police Citizen Review Board; 5. Shivaun Nurre, San Jose Office of the Independent Police Auditor; 6. Mark P. Smith, Inspector General, Los Angeles Police Commission; 7. Mica Estramera, Deputy Public Defender, Santa Clara County Office of the Public Defender; President of La Raza Lawyers local chapter; 8. Brian Corr, Immediate Past President, National Association for Civilian Oversight of Law Enforcement; 9. Paul R. Parker III, Executive Officer, San Diego County Citizens' Law Enforcement Review Board (CLERB); 10. Michael Gennaco, Principal of OIR Group and City of Davis Independent Police Auditor; San Jose review of police conduct during George Flyod protests; 11. Aaron Zisser, former San Jose Independent Police Auditor, and current Chief of Staff at the Oakland Community Police Review Agency.

Relevant Links *Provide links or locations of the information in this research as much as possible, otherwise provide attachments.*	1. This is an article to the report Mark Smith mentioned the the Commission on 148 arrests (sometimes called "contempt of cop"). https://www.latimes.com/local/lanow/la-me-lapd-resisting-arrest-20180827-story.html?utm_source=dlvr.it&utm_medium=twitter 2. LOS ANGELES POLICE COMMISSION REVIEW OF ARRESTS FOR VIOLATIONS OF CALIFORNIA PENAL CODE SECTION 148(A)(1) Conducted by the OFFICE OF THE INSPECTOR GENERAL MARK P. SMITH Inspector General https://a27e0481-a3d0-44b8-8142-1376cfbb6e32.filesusr.com/ugd/b2dd23_4c3e1e1c762845ae9bcb6375a88dd974.pdf 3. Jennifer Eberhardt A study finds racial disparities in police officers' use of language https://engineering.stanford.edu/magazine/article/study-finds-racial-disparities-police-officers-use-language https://www.pbs.org/newshour/science/police-respect-whites-blacks-traffic-stops-language-analysis-finds 4. Some information on legal settlements following alleged police misconduct. Cities Spend Millions On Police Misconduct Every Year. Here's Why It's So Difficult to Hold Departments Accountable. FiveThirtyEight Feb. 22, 2021 https://fivethirtyeight.com/features/police-misconduct-costs-cities-millions-every-year-but-thats-where-the-accountability-ends/ Police Settlements: How The Cost Of Misconduct Impacts Cities And Taxpayers. National Public Radio. Sept. 19, 2020 https://www.npr.org/2020/09/19/914170214/police-settlements-how-the-cost-of-misconduct-impacts-cities-and-taxpayers This interactive dashboard in Chicago reflects settlements for police misconduct stopped in early 2017. Details include neighborhood, payment amount, type of interaction, type of weapon and type of misconduct. https://projects.chicagoreporter.com/settlements/search/cases

Assembly Bill 603, currently pending in Sacramento would *require municipalities, as defined, to annually post on their internet websites specified information relating to settlements and judgments resulting from allegations of improper police conduct, including, among other information, amounts paid, broken down by individual settlement and judgment, information on bonds used to finance use of force settlement and judgment payments, and premiums paid for insurance against settlements or judgments resulting from allegations of improper police conduct.*
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB603

In its most recent annual report, the IPA recommended that the Police Department open an administrative investigation when an officer is named as a defendant. (see pages 60-62)
Law enforcement accountability is a system of checks and balances aimed at ensuring that police carry out their duties properly and are held responsible if they fail to do so. Such a system strives to uphold police integrity, deter misconduct, and enhance public confidence in policing. Complaints lodged with the IPA or IA are not the only avenue for our community to voice their concerns about police conduct. Civil lawsuits in both state and federal courts also reflect allegations that officers engaged in misconduct. However, the Department currently does not have a system that initiates an administrative investigation when an SJPD officer is named in a lawsuit. We recommend that it does so in cases alleging misconduct by on-duty officers or alleging an off-duty officer engaged in misconduct under color of law. We recommend the Department explore best practices employed by other enforcement agencies in this regard. A civil suit does not result in any discipline of a police officer. Discipline can only be imposed by the Police Chief after an internal administrative investigation is complete.
https://www.sanjoseca.gov/home/showpublisheddocument/75181/637608196115570000

5. Phoenix sues state over new law that undermines its long-sought police accountability office.

https://www.azcentral.com/story/news/local/phoenix/2021/08/

	17/phoenix-sues-arizona-over-limiting-police-accountability-office/8172737002/ 6. Houston Has A New Deputy Inspector General For Police Accountability. https://www.houstonpublicmedia.org/articles/news/in-depth/2021/08/17/406167/houston-has-a-new-deputy-inspector-general-for-police-reform-heres-what-she-does/ 7. Activists call on San Diego Sheriff's to do more to prevent excessive force instances https://www.10news.com/news/team-10/activists-call-on-san-diego-sheriffs-to-do-more-to-prevent-excessive-force-instances 8. Transition to San Diego's new police oversight commission underway after Measure B's big win https://www.sandiegouniontribune.com/news/public-safety/story/2020-11-30/transition-to-san-diegos-new-police-oversight-commission-underway-after-measure-bs-big-win 9. San Diego city attorney proposes outside counsel help revise draft of police commission ordinance - The San Diego Union-Tribune https://www.sandiegouniontribune.com/news/public-safety/story/2021-07-19/san-diego-city-attorney-proposes-outside-counsel-help-rework-police-commission-ordinance