

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

MEMORANDUM

TO: BART Police Department, Chief of Police

DATE: February 10, 2014

FROM: Independent Police Auditor

SUBJECT: **Policy Recommendation – BPD Policy 402**

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 402 – Racial- or Bias-Based Profiling*.

It is important to begin by describing how BPD's policy regarding this matter has undergone fairly recent changes, and by acknowledging that OIPA feels the current policy is already a notable improvement over prior ones. One of OIPA's complaint investigations, which was concluded on September 7, 2012, involved an allegation of Racial/Bias Based Profiling.

Note: "Racial/Bias Based Profiling" was the title of BPD Policy 402 at the time of the incident that gave rise to the complaint. It is slightly different than BPD's current title for Policy 402. Further discussion about the most appropriate title for the policy, in OIPA's opinion, is described below.

In its conclusion, OIPA noted that BPD's Racial/Bias Based Profiling policy (at the time) focused too narrowly on detaining an individual on an improperly discriminatory basis. OIPA recommended that BPD broaden its policy to prohibit other law enforcement actions in addition to detentions, and even to prohibit the omission of taking an action, if such omission is based on an improperly discriminatory justification.

As OIPA was working on its investigation, OIPA staff and BPD staff both attended a training seminar focused on "Fair and Impartial Policing." The seminar spent a substantial amount of time fostering debate about how to arrive at the best title and definition of what BPD now refers to as "Racial- or Bias-Based Profiling," as well as the importance and the challenge of arriving at that definition and title for any law enforcement agency. Policies from a handful of agencies throughout the country were compared and contrasted. Some were more narrowly tailored, while others were far broader in their prohibitions against certain biased activity; some had titles that used the term, "Racial Profiling," while others favored terms like, "Biased Policing." While there were not necessarily any absolute truths or easy answers uncovered, in OIPA's opinion the

debate helped clarify some of the issues to be considered by a law enforcement agency in crafting its policy to address inappropriately biased activity on the part of its employees.

On June 13, 2013, as previously alluded to, BPD made some substantial changes to Policy 402. The title remained essentially the same, but the definition of “Racial- or Bias-Based Profiling” was significantly clarified and broadened. It was clarified largely through the inclusion of a non-exhaustive list of the types of factors that were prohibited from being used as the basis for providing differing levels of law enforcement service, including race, ethnicity, nationality, etc. It was broadened by abandoning its limitation to improperly “detaining a suspect” and instead prohibiting improper decisions about “whether to take law enforcement action or to provide service.”

The changes made by BPD to Policy 402 were important ones, and they satisfied the primary concern that OIPA originally raised in the conclusion to its investigation as described above. However, OIPA feels that the current policy can be made even stronger with some additional edits. First, OIPA believes that a better title for this policy would be “Racial Profiling or Bias-Based Policing.”

OIPA feels that although racial profiling often describes the type of activity BPD’s policy aims to prohibit, it arguably leaves room for other inappropriately biased conduct that would not necessarily be described as “profiling” on the part of an officer. “Bias-Based Policing” is a term that is intended to broaden the types of improper law enforcement actions (or omissions to act) that are prohibited beyond solely those which could be classified as “profiling.” It is also intended to more broadly prohibit all types of improper bias, whether race-based or not.

As expressed by members of the BART Citizen Review Board at its January 13, 2014 regular meeting, however, there is good cause to refrain from simply abandoning the term “racial profiling” altogether in the title and body of this policy. The continued inclusion of that term may prove to be of substantial assistance to individuals who are already familiar with it and are seeking to initiate a complaint of misconduct on that basis. For these reasons, OIPA favors the use of both “Racial Profiling” and “Bias-Based Policing” for the title of BPD Policy 402.

One other notable suggested change to BPD Policy 402 is an addition to the non-exhaustive list of factors which are prohibited from being used as the basis for providing differing levels of law enforcement service (including race, ethnicity, national origin, etc.). In comparing similar lists from different jurisdictions, OIPA feels that BPD’s list is relatively extensive and mindful of the multi-faceted diversity that exists in the Bay Area. One important addition, however, would be the term “gender identity.”

As noted by the San Francisco Human Rights Commission, transgender people have been subjected to discrimination in a variety of arenas.¹ As such, the San Francisco Administrative Codes and Police Codes were amended to prohibit discrimination based on gender identity.² In a place as rich in diversity as the Bay Area, it seems sensible to explicitly include this factor

¹ See <http://www.sf-hrc.org/index.aspx?page=29>.

² See San Francisco Administrative Code, Chapter 12A, Section 12A.2. and San Francisco Police Code, Article 33, Section 3302.

amongst the list of factors that are prohibited from being used as the basis for providing differing levels of law enforcement service.

Any police department's policy prohibiting improper bias by its employees in the fulfillment of their responsibilities is bound to be one of its most important because it immediately and directly affects the level of confidence that various segments of the public have in the department's commitment to protecting and serving them as fully and fairly as other segments of the public are being protected and served. When such trust erodes, even amongst only some segments of the public, a police department begins to lose credibility and also falls short of meeting its responsibility to those it is meant to serve. OIPA feels that the current BPD Policy 402 is a good policy, and that it is certainly a vast improvement over the previous version. Based on the above reasoning, however, OIPA also feels that this important policy can be made even stronger with a few edits.

Following is an unmarked copy of Policy 402, as issued; an annotated copy of Policy 402, displaying the edits suggested by OIPA as well as explanations for those edits; and a copy of what Policy 402 would look like after incorporating the edits suggested by OIPA.


Mark P. Smith
BART Independent Police Auditor

Racial- or Bias-Based Profiling

402.1 PURPOSE AND SCOPE

This policy provides guidance to department members and establishes appropriate controls to ensure that employees of the Bay Area Rapid Transit Police Department do not engage in racial- or bias-based profiling or violate any related laws while serving the community.

402.1.1 DEFINITION

Definitions related to this policy include:

Racial- or bias-based profiling - An inappropriate reliance on factors such as race, ethnicity, national origin, religion, sex, sexual orientation, economic status, age, cultural group, disability or affiliation with any other similar identifiable group as a factor in deciding whether to take law enforcement action or to provide service.

402.2 POLICY

The Bay Area Rapid Transit Police Department is committed to providing law enforcement services to the community with due regard for the racial, cultural or other differences of those served. It is the policy of this department to provide law enforcement services and to enforce the law equally, fairly and without discrimination toward any individual or group.

Race, ethnicity or nationality, religion, sex, sexual orientation, economic status, age, cultural group, disability or affiliation with any other similar identifiable group shall not be used as the basis for providing differing levels of law enforcement service or the enforcement of the law.

402.3 RACIAL- OR BIAS-BASED PROFILING PROHIBITED

Racial- or bias-based profiling is strictly prohibited. However, nothing in this policy is intended to prohibit an officer from considering factors such as race or ethnicity in combination with other legitimate factors to establish reasonable suspicion or probable cause (e.g., suspect description is limited to a specific race or group).

402.4 MEMBER RESPONSIBILITY

Every member of this department shall perform his/her duties in a fair and objective manner and is responsible for promptly reporting any known instances of racial- or bias-based profiling to a supervisor.

402.4.1 REASON FOR DETENTION

Officers detaining a person shall be prepared to articulate sufficient reasonable suspicion to justify a detention, independent of the individual's membership in a protected class.

To the extent that written documentation would otherwise be completed (e.g., arrest report, Field Interview (FI) card), the involved officer should include those facts giving rise to the officer's reasonable suspicion or probable cause for the detention, as applicable.

Nothing in this policy shall require any officer to document a contact that would not otherwise require reporting.

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Racial- or Bias-Based Profiling

402.4.2 REPORTING TRAFFIC STOPS

Each time an officer makes a traffic stop, the officer shall report any information required in the Traffic Function and Responsibility Policy.

402.5 SUPERVISOR RESPONSIBILITY

Supervisors shall monitor those individuals under their command for any behavior that may conflict with the purpose of this policy and shall handle any alleged or observed violation of this policy in accordance with the Personnel Complaints Policy.

- (a) Supervisors should discuss any issues with the involved officer and his/her supervisor in a timely manner.
- (b) Supervisors should periodically review MAV recordings, MDC data and any other available resource used to document contact between officers and the public to ensure compliance with the policy.
 - 1. Supervisors should document these periodic reviews.
 - 2. Recordings that capture a potential instance of racial- or bias-based profiling should be appropriately retained for administrative investigation purposes.
- (c) Supervisors shall initiate investigations of any actual or alleged violations of this policy.
- (d) Supervisors should ensure that no retaliatory action is taken against any member of this department who discloses information concerning racial- or bias-based profiling.

402.6 ADMINISTRATION

Each year, the Patrol Bureau Commander shall review the efforts of the Department to prevent racial- or bias-based profiling and submit an overview, including public concerns and complaints, to the Chief of Police.

This report should not contain any identifying information regarding any specific complaint, citizen or officers. It should be reviewed by the Chief of Police to identify any changes in training or operations that should be made to improve service.

Supervisors shall review the annual report and discuss the results with those they are assigned to supervise.

402.7 TRAINING

Training on racial- or bias-based profiling and review of this policy should be conducted as directed by the Personnel and Training Section.

- (a) All sworn members of this department will be scheduled to attend Peace Officer Standards and Training (POST)-approved training on the subject of racial- or bias-based profiling.
- (b) Pending participation in such POST-approved training and at all times, all members of this department are encouraged to familiarize themselves with and consider racial and cultural differences among members of this community.
- (c) Each sworn member of this department who received initial racial- or bias-based profiling training will thereafter be required to complete an approved refresher course every five years, or sooner if deemed necessary, in order to keep current with changing racial and cultural trends (Penal Code § 13519.4(i)).

~~Racial or Bias-Based Profiling~~ **Racial Profiling or Bias-Based Policing**

402.1 PURPOSE AND SCOPE

This policy provides guidance to department members and establishes appropriate controls to ensure that employees of the Bay Area Rapid Transit Police Department do not engage in ~~racial or bias-based profiling~~ **racial profiling or bias-based policing** or violate any related laws while serving the community.

402.1.1 DEFINITION

Definitions related to this policy include:

~~Racial or bias-based profiling~~ **Racial Profiling or Bias-Based Policing** - An inappropriate reliance on factors, ~~whether actual or perceived~~, such as race, ethnicity, national origin, religion, sex, sexual orientation, ~~gender identity~~, economic status, age, cultural group, disability or affiliation with any other similar identifiable group as a factor in deciding ~~whether~~ **and/or how** to take law enforcement action or ~~to otherwise provide service of any kind~~.

402.2 POLICY

The Bay Area Rapid Transit Police Department is committed to providing law enforcement services to the community with due regard for the racial, cultural or other differences of those served. It is the policy of this department to provide law enforcement services and to enforce the law equally, fairly and without discrimination toward any individual or group.

~~Except as provided for by Section 402.3 of this policy, Race, ethnicity or nationality, religion, sex, sexual orientation, gender identity, economic status, age, cultural group, disability or affiliation with any other similar identifiable group shall not be used as thea basis for providing differing levels of law enforcement service or the enforcement of the law in determining whether and/or how to take law enforcement action or otherwise provide service of any kind.~~

402.3 ~~RACIAL OR BIAS-BASED PROFILING~~ **RACIAL PROFILING AND BIAS-BASED POLICING PROHIBITED**

~~Racial or bias-based profiling~~ **Racial profiling and bias-based policing** ~~is~~ **are** strictly prohibited. However, nothing in this policy is intended to prohibit an officer from considering factors such as race or ethnicity in combination with other legitimate factors to establish reasonable suspicion or probable cause (e.g., ~~when a suspect~~ **suspect's** description is limited to a specific race or group).

402.4 MEMBER RESPONSIBILITY

Every member of this department shall perform his/her duties in a fair and objective manner and is responsible for promptly reporting any known instances of ~~racial or bias-based profiling~~ **racial profiling or bias-based policing** to a supervisor.

Comment [OIPA1]: When used in addition to the term "Racial Profiling," OIPA feels that the term "Bias-Based Policing" is better suited to a policy that prohibits improper bias of any kind, whether it is race-based or not; it also is better suited to address any kind of law enforcement action, inaction, or other decision that is based on an improper bias, whether that decision involves the act of profiling or not. As noted by the marked edits, OIPA's suggestion is to replace the term "Bias-Based Profiling" globally throughout the policy.

Comment [OIPA2]: It is important to specify that the inappropriate reliance on a perceived characteristic, even if the perception is ultimately determined to be inaccurate, is just as prohibited as the inappropriate reliance on an accurate characteristic.

Comment [OIPA3]: Recognizing that transgender people have been discriminated against in a variety of arenas, OIPA feels it is appropriate to add "gender identity" to this list of factors that are prohibited from being used as the basis for providing differing levels of law enforcement service.

Comment [OIPA4]: OIPA feels that these edits clarify and broaden the definition of Racial Profiling or Bias-Based Policing.

Comment [OIPA5]: In Section 402.3 of this policy, BPD appropriately gives an example of how factors such as race, ethnicity, etc., may appropriately be used by employees in the course of carrying out their law enforcement responsibilities. This edit references that section for the sake of clarity.

Comment [OIPA6]: See Comment #3.

Comment [OIPA7]: OIPA feels that these edits clarify and broaden the prohibition against Racial Profiling and Bias-Based Policing, in part by utilizing the same wording as was used above in the definition section.

Comment [OIPA8]: This is meant merely as clarifying language.

402.4.1 REASON FOR DETENTION

Officers detaining a person shall be prepared to articulate sufficient reasonable suspicion to justify a detention, independent of the individual's membership in a protected class.

To the extent that written documentation would otherwise be completed (e.g., arrest report, Field Interview (FI) card), the involved officer should include those facts giving rise to the officer's reasonable suspicion or probable cause for the detention, as applicable.

Nothing in this policy shall require any officer to document a contact that would not otherwise require reporting.

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~~Racial or Bias-Based Profiling~~ Racial Profiling or Bias-Based Policing

402.4.2 REPORTING TRAFFIC STOPS

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402.5 SUPERVISOR RESPONSIBILITY

Supervisors shall monitor those individuals under their command for any behavior that may conflict with the purpose of this policy and shall handle any alleged or observed violation of this policy in accordance with the Personnel Complaints Policy.

- (a) Supervisors should discuss any issues with the involved officer and his/her supervisor in a timely manner.
- (b) Supervisors should periodically review MAV recordings, MDC data and any other available resource used to document contact between officers and the public to ensure compliance with the policy.
 1. Supervisors should document these periodic reviews.
 2. Recordings that capture a potential instance of ~~racial or bias-based profiling~~ racial profiling or bias-based policing should be appropriately retained for administrative investigation purposes.
- (c) Supervisors shall initiate investigations of any actual or alleged violations of this policy.
- (d) Supervisors should ensure that no retaliatory action is taken against any member of this department who ~~witnesses an instance of racial profiling or bias-based policing and discloses information concerning racial or bias-based profiling~~ reports it in accordance with Section 402.4 of this policy.

402.6 ADMINISTRATION

Each year, the Patrol Bureau Commander shall review the efforts of the Department to prevent ~~racial or bias-based profiling~~ racial profiling and bias-based policing and submit an overview, including public concerns and complaints, to the Chief of Police.

This report should not contain any identifying information regarding any specific complaint, citizen or officers. It should be reviewed by the Chief of Police to identify any changes in training or operations that should be made to improve service.

Supervisors shall review the annual report and discuss the results with those they are assigned to supervise.

402.7 TRAINING

Training on ~~racial or bias-based profiling~~ racial profiling and bias-based policing and review of this policy should be conducted as directed by the Personnel and Training Section.

- (a) All sworn members of this department will be scheduled to attend Peace Officer Standards and Training (POST)-approved training on the subject of ~~racial profiling or racial or bias-based profiling~~ bias-based policing.
- (b) Pending participation in such POST-approved training and at all times, all members of this department are encouraged to familiarize themselves with and consider racial and cultural differences among members of this community.
- (c) Each sworn member of this department who received initial ~~racial profiling~~ racial profiling

Comment [OIPA9]: Although no retaliatory action should be condoned against an employee who meets his/her responsibility of reporting bias-based policing to a supervisor, OIPA feels that the potential for disciplinary action (which is viewed by OIPA as separate from retaliation, but might not be viewed as such by BPD employees) should not be precluded against an employee who discloses information about bias-based policing outside the bounds of this policy. In other words, an employee who ultimately provides information about an instance of bias-based policing after initially attempting to "cover up" that instance instead of reporting it to a supervisor as required, should not be immune from potential discipline. This edit seeks to account for such a circumstance, as well as similar ones, by explicitly referring to the reporting requirements contained in Section 402.4.

| ~~or racial or bias-based profiling~~ **bias-based policing** training will thereafter be required to complete an approved refresher course every five years, or sooner if deemed necessary, in order to keep current with changing racial and cultural trends (Penal Code § 13519.4(i)).

OIPA Policy Recommendation - BPD Policy 402 (Annotated)

Racial Profiling or Bias-Based Policing

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This policy provides guidance to department members and establishes appropriate controls to ensure that employees of the Bay Area Rapid Transit Police Department do not engage in [racial profiling or bias-based policing](#) or violate any related laws while serving the community.

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Definitions related to this policy include:

Racial Profiling or Bias-Based Policing - An inappropriate reliance on factors, whether actual or perceived, such as race, ethnicity, national origin, religion, sex, sexual orientation, [gender identity](#), economic status, age, cultural group, disability or affiliation with any other similar identifiable group as a factor in deciding whether [and/or how](#) to take law enforcement action or [otherwise](#) provide service [of any kind](#).

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The Bay Area Rapid Transit Police Department is committed to providing law enforcement services to the community with due regard for the racial, cultural or other differences of those served. It is the policy of this department to provide law enforcement services and to enforce the law equally, fairly and without discrimination toward any individual or group.

[Except as provided for by Section 402.3 of this policy](#), race, ethnicity or nationality, religion, sex, sexual orientation, [gender identity](#), economic status, age, cultural group, disability or affiliation with any other similar identifiable group shall not be used as a basis [in determining whether and/or how to take law enforcement action or otherwise provide service of any kind](#).

402.3 RACIAL PROFILING AND BIAS-BASED POLICING PROHIBITED

[Racial profiling and bias-based policing](#) are strictly prohibited. However, nothing in this policy is intended to prohibit an officer from considering factors such as race or ethnicity in combination with other legitimate factors to establish reasonable suspicion or probable cause (e.g., [when a suspect's](#) description is limited to a specific race or group).

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Every member of this department shall perform his/her duties in a fair and objective manner and is responsible for promptly reporting any known instances of [racial profiling or bias-based policing](#) to a supervisor.

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OIPA Policy Recommendation - BPD Policy 402

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Racial Profiling or Bias-Based Policing

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- (d) Supervisors should ensure that no retaliatory action is taken against any member of this department who [witnesses an instance of racial profiling or bias-based policing and reports it in accordance with Section 402.4 of this policy](#).

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Each year, the Patrol Bureau Commander shall review the efforts of the Department to prevent [racial profiling and bias-based policing](#) and submit an overview, including public concerns and complaints, to the Chief of Police.

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- (c) Each sworn member of this department who received initial [racial profiling or bias-based policing](#) training will thereafter be required to complete an approved refresher course every five years, or sooner if deemed necessary, in order to

keep current with changing racial and cultural trends (Penal Code § 13519.4(i)).

OIPA Policy Recommendation - BPD Policy 402