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# Policing That Matters: Making Civilian Oversight Work

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# *POLICING THAT MATTERS*

Making Civilian Oversight Work

*Sofia L. Aguilar*

*University of San Francisco | Urban Affairs Masters Thesis*

# Table of Contents

Acknowledgments _____	a
Abstract _____	b
Introduction _____	1
Research Methods _____	5
I. Background:	
Policing in America and SF _____	7
The Role of Civilian Oversight Agencies _____	10
II. The Department of Police Accountability:	
History _____	12
How they Operate _____	15
The Complaint Process _____	20
Officer Involved Shooting Investigations _____	23
III. Missing the Mark: The DPA’s Findings on the Alex Nieto Case	
Justice and Love for Alex Nieto _____	26
IV. Under the Microscope: Reform Efforts by the Department of Police Accountability	
Proposition D. _____	32
The Zisser Report _____	34
Proposition G. _____	36
Summary _____	36
V. Recommendations:	
The Peace Officers Bill of Rights _____	38
Copley Press vs. Supreme Court _____	42
City and County of San Francisco Charter amendment _____	45
The DPA Executive Director _____	46
VI. Conclusion and Analytical Reflection _____	47
Appendix:	
Appendix A _____	51
Bibliography _____	52

## Acknowledgements

I would like to dedicate this project to the families and friends of those who've died at the hands of the San Francisco Police Department. May you find comfort and peace from those around you willing to fight for justice and honor in the name of your loved ones.

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I love you all very much.

## **Abstract**

Since 2015, there have been 8 fatal shootings by the San Francisco Police Department and no officers have faced any administrative discipline. This paper works to demonstrate how the San Francisco Police Department escapes administrative discipline in situations of officer involved shootings (OIS) through the combination of flawed accountability procedures, state laws and government leaders who fail to push against these protective forces. My project will show how the combination of little authoritative power from the Department of Police Accountability and protective state laws in favor of police privacy complicate the investigation procedures that determine whether or not officers face accountability for their actions in officer involved shootings. Through understanding the history of policing and the legacy of discretionary practices in the San Francisco Police Department, we better understand why our civilian oversight agency's implementation into San Francisco police culture has resulted in a non threatening oversight body that is operated on nonaggressive policies.

This project analyzes the 2016 police reform efforts that produced a recommendation report and two ballot measures that directly shape the Department of Police Accountability. My research shows how these new policies fail to combat the stronger policies and procedures in place that contribute to poor DPA officer involved shooting investigations, which typically result in unsustained findings. I offer recommendations that directly address the laws and policies that allow these institutions to continue to release officers with no sustained findings that result in administrative charges. I will show how the policies pertaining to police accountability in San Francisco, although they appear strong on paper, and not upheld within the SFPD and thus perpetuate a police culture that allows officers to act with no threat of civilian monitoring.

## **Introduction**

As national attention around officer involved shootings (OIS) continues to grow, accountability by officers in these instances is still considered a rarity. Attention given to civilian deaths by police officers highlights repercussions of communal outrage and raises questions about the moments leading up to confrontation between officers and victims. The coverage surrounding what happens to officers following these situations often remains undiscussed on national news. In recent years, we have seen how a lack of legal accountability by involved officers produces mass discussions and protests around police brutality, raising the question: why is it that officers face no real discipline for taking life from the communities they're sworn to protect?

Moments in history like the 1992 LA protests following the Rodney King trial and the Ferguson protests in 2014 following Mike Brown's trial show how the lack of accountability by law enforcement reveals a larger system of inequality, one that does not reprimand police officers for the death of communities of color. In both cases of police brutality and others like them, the questionable circumstances in which officers act with excessive use of force are investigated by oversight agencies and still found to be within compliance of department policies by courts. But the frequency in which officers are being let off for these killings all around the country is controversial. This trend forces us to question the investigation process and protocols that determines if officers face systematic discipline or not. Understanding how OIS cases are investigated is necessary in order to understand what legally determines whether officers are held accountable for their actions or not. Officer involved shootings are handled in a similar way across the nation and questioning ways we handle these tragic situations calls for working at a local level

by examining how our city contributes to a greater problem. This proves to be a challenge the San Francisco local community.

On a local radar, the San Francisco Police Department stirred communal attention around their high rates of OIS and low record of officers facing either criminal or administrative discipline for their actions. According to police data, between 2000 and 2015 there were 95 reported shootings involving SFPD, including 40 fatal ones.<sup>1</sup> Between 2015 to 2017, six people have been killed by SFPD, the highest count in more than 15 years, and of these cases, no officers have faced criminal or administrative discipline. Each of these shootings took place in either the Mission or Bayview district, calling attention to the role race plays into OIS as white officers are not reprimanded for killing people of color. When we talk about police brutality in San Francisco, familiar names like Alex Nieto, Mario Woods and Jessica Williams come up when discussing what reform is necessary for SFPD to reduce its body count. These victims, along with others and the exception of Alex Nieto, are examples of men and women who were shot under questionable circumstances that require intensive investigation that's yet to be concluded. This high level of OIS frequency by the San Francisco Police Department is upsetting, but the lack of accountability for each case also proves to be just as alarming because it shows how a normalized lack of overall monitoring on officer conduct perpetuates a cycle of continued violence and distrust between community and law enforcement.

Officer involved shootings are an ugly reality for police departments, but their occurrences are a separate project that would look at use of force protocols and officer training methods. My project follows the process of what happens after an officer involved shooting takes place. There

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<sup>1</sup> Joaquin Palomino, "SF's police-involved shootings: practices and patterns," *San Francisco Chronicle*, May 22, 2016, <http://www.sfchronicle.com/crime/article/SF-s-police-involved-shootings-practices-and-7921829.php>.

are two San Francisco agencies responsible for investigations of officer misconduct, including officer involved shootings. They are the District Attorney's Office and the Department of Police Accountability (DPA), once known as the Office of Citizen Complaints (OCC). The District Attorney's Office is responsible for filing criminal charges against police officers while the Department of Police Accountability offers administrative discipline in a complex indirect way. The focus of my project examines the roles and limitations of the Department of Police Accountability in their investigative authority over officer involved shootings.

In effort to change local approval of the San Francisco Police Department, the Police Commission initiated a reform during 2016 that would change leaders and policies used to direct the overall culture of the SFPD. These changes, as I'll discuss later in my project, range from hiring a new Chief of Police to updating outdated use of force policies that determine when and how inflicting violence on civilians is appropriate. Through a combination of local elections and Police Commission appointments, the reform effort changed the powers of the DPA and their authoritative role in officer involved shooting cases. The installment of Proposition D now requires the DPA to investigate any incident in which an officer fires a gun and kills or injures someone. The DPA may now initiate OIS investigations as soon as they occur, which makes chances of finding substantial evidence higher and more useful in supporting administrative charges against officers. Although overall reform efforts aimed to give more power to the DPA, none of the proposed legislations address the actual charter structure determining *how* the Department of Police Accountability is allowed to administer discipline. The SFPD reform effort of 2016 proved there was an attempt to better the policing system but as my paper will show, many of these changes around the DPA fail to tackle the real roadblocks the agency faces in their attempt to charge officers with administrative discipline.



In the death of Alex Nieto, a local San Francisco resident shot by SFPD, laws governing how the then OCC determined the findings of the case proved limiting, making it difficult for OCC investigators to offer any substantial information to convict officers of acting outside policy. Alex Nieto's death was adopted by the local community and transformed into a movement that called for the accountability of the four officers responsible for shooting at Alex 58 times in the span of less than 30 seconds. The then OCC's inability to produce an investigation that challenged officer proceedings and behavior in the case of Alex's death was a low point in the local community's confidence in the civilian oversight agency, calling into question whether or not the protective body really does have say over who is allowed to patrol the streets. My project questions the existing policies that protect police officers from administrative discipline in cases of officer involved shootings. I investigate whether existing policy helps the Department of Police Accountability (DPA) promote effective administrative discipline, and I explore ways to make the DPA more effective in administering discipline. Examining the new policies of the 2016 reform, I argue that these new laws, although making strong attempt at reform, do not address the major state laws and key local policies and charter structures that protect officers from thorough OIS investigations. The reforms do not allow the DPA to fully administer discipline, keeping the DPA ineffective and largely unable to hold officers accountable. I later offer recommendations that would strengthen the DPA's capacity to develop real oversight and to hold officers accountable for their role in officer involved shootings.

First, the paper assesses the historical context of policing in America, specifically looking at the San Francisco Police Department. Then, the paper looks at the background of civilian oversight agencies' emergence in modern policing. This paper assesses the San Francisco Department of Police Accountability and their role in the city's Police Department structure. I

examine the current DPA complaint process and show how in the case of Alex Nieto, the DPA investigation failed the mission of the civilian oversight agency, showing how the current system we have does not work. Then, my paper analyzes the 2016 reform efforts related to the Department of Police Accountability to show how the reforms do not address the limitations the DPA faces in situations of OIS investigations. I then offer recommendations that directly address these limitations; these recommendations directly address the Peace Officer's Bill of Rights, *Copley v. Supreme Court* and the City and County of San Francisco's charter. I offer recommendations on how to better the structure of the SF charter that determines how the DPA is allowed to administer discipline to police officers.

### **Research Methodology and Approach**

The primary research method I used to over the course of my research was participant observation. My goal was to fully understand the current policing system we have in San Francisco by developing a solid understanding of communal and agency representative attitudes towards the police given the political climate of today. I made an effort to attend community gatherings around the latest issues of officer involved shootings, such as protests for Mothers on the March Against Police Murders and protest rallies for the deaths of Luis Gongorra and Alex Nieto. Through these experiences, I was able to meet the families of the latest OIS victims and the community organizers working to obtain justice through the criminal justice system. Meeting the people who are directly effected by this policing crisis helped me ground my research in a heartfelt place that recognizes what this project discusses has real life implications for San Francisco communities. In attempt to develop a well rounded understanding of how policing is handled in San Francisco, I also attended

different open Police Commission meetings to witness the organization in action, and observe how decisions are evaluated and talked about. By immersing myself as much as possible in a city wide discussion, I gained a first hand account of how severe this topic really is for the city of San Francisco.

A major research method I used over the course of my research project was conducting one-on-one interviews with policing experts and SF Police Department officials to learn more information on the inner workings of the large organization. I was able to connect the different narratives of key players involved to create a better understanding of the relationships between government agencies that are involved during instances of officer involved shootings. I was fortunate enough to meet with representatives from the Department of Police Accountability, the Police Commission, and the Police Officer's Association, as well as other community experts in civilian oversight and police brutality.

Through the relationships I developed with different organizers involved with SFPD officer involved shootings, I was able to gain better insight on the inner workings of the Department of Police Accountability. I spent much of my research time looking through openness reports, evaluating public letters from the DPA and reading various articles written about the organization. I used current events stories and local publications to gather information on the DPA and its executive director. I did this in order to develop a "real life" understanding of what San Francisco residents really thought about to DPA, in order to determine in what ways can we better the organization to gain respect in the eyes of the people it serves.

I worked to understand the structural authority in officer involved shootings that comes from the Department of Police Accountability and the Police Commission by reading through the San Francisco charter. A large amount of my information came from evaluating and reading

through the three major external investigations on the SFPD from 2016. This was a major research component of my project, these reports are:

1. “Into the Open: Opportunities for More Timely and Transparent Investigations of Fatal San Francisco Police Department Officer-Involved Shootings” by the Civil Grand Jury, 2012-2016
2. “Report of The Blue Ribbon Panel on Transparency, Accountability, and Fairness in Law Enforcement” by The Blue Ribbon Panel, selected by the District Attorney of San Francisco, George Gascon.
3. “Collaborative Reform Initiative: An Assessment of the San Francisco Police Department” by Community Oriented Policing Services (COPS), U.S Department of Justice

These research initiatives all provide important information on the state of practices used by the SFPD that were in need of review. Understanding the findings on officer involved shooting protocols allowed me draw connections to the recent reform measures of 2016 and ultimately helped me determine what works for the Department of Police Accountability and what does not

## **I. Background: Policing in America and Policing in SF**

This section focuses on the foundational roots of American policing and discusses the legacies this model has instilled in the San Francisco Police Department. Then, I discuss the rise of civilian oversight agencies and what their presence meant for police bodies and issues of misconduct. Modern American policing is rooted in a history of white supremacy, as it followed the development of policing in England to serve as criminal regulation for growing urbanization. In the article “Policing and Oppression Have a Long History,” Stephen L. Carter discusses these

historical roots of continuing mistrust between law enforcement and communities of color. Carter explains that in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries, most Northern communities used a night watch system, adopted from England, to keep order in the mixed race communities they watched.<sup>2</sup> The night watchman system required watchmen to stay at their posts and summoned watchmen only when a crime occurred. Carter says, “As late as the early 19<sup>th</sup> century, law enforcement remained largely in the hands of citizens, who would band together to pursue miscreants. Unified police departments were not formed in Northern cities until the gang wars of the 1840s created the necessity.”<sup>3</sup> Slave patrollers, by contrast was a similar system that existed throughout the South. Slave patrols or “paterollers,” were remembered for tracking down runaway slaves and ferreting out potential uprisings. Immigrants in the North saw the police as an institution created to keep them in their place, the same way black Southerners viewed slave patrols. Carter argues these slave patrols provided the template for contemporary policing, whereas when the Northern police forces finally began to grow, they were organized on the model pioneered by the South.<sup>4</sup>

The growth of cities necessitated the development of local centralized, bureaucratic police forces. As Dr. Gary Potter argues in his essay “The History of Policing in the United States,” it was the growth of cities and pace of urbanization that old informal watch system could no longer be considered adequate for controlling social disorder.<sup>5</sup> This shift of racial demographics concentrating in urban centers fueled the belief that increasing crime would take place at higher

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<sup>2</sup> Stephen L. Carter, “Policing and Oppression Have a Long History,” *Bloomberg View*, October 29, 2015, <https://www.bloomberg.com/view/articles/2015-10-29/policing-and-oppression-have-a-long-history>.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Dr. Gary Potter, “The History of Policing in the United States, Part 1,” Eastern Kentucky University, June 25, 2013, <http://plsonline.eku.edu/insidelook/history-policing-united-states-part-1>.

rates and for that reason, police departments were thought of as necessary to control to social moral of cities.

The beginning of the professionalization of the police began during the American Progressive Era, with the establishment of formal training, police academies and the incorporation of management politics. In Christopher Lowen Agee's book *The Streets of San Francisco*, Agee discusses the emergence of urban police departments following World War II period as products on an earlier machine-politics era.<sup>6</sup> According to Agee, police reformers attempted to introduce military models to law enforcement during the early twentieth century, but the urban police departments of the late 1940s retained many of the same principles of the first forces of the mid nineteenth century.<sup>7</sup> In San Francisco, the national understanding of community policing was adopted by the San Francisco Police Department (SFPD). Agee argues, it was the machine politicians of San Francisco that expected the police department to act as the "electioning arm" of the machine, by appointing loyal police officers to powerful managerial positions and encouraging officers to maintain their autonomy from City Hall.<sup>8</sup> Agee says, "as a result, officials cultivated a decentralized bureaucratic police arrangement in which authority over policy (and with it the authority to make decisions regarding graft) resided with district station captains and the chief of inspectors, not with the chief of police."<sup>9</sup> At the same time, city officials allowed police officers to determine for themselves how and when to enforce law, creating a historic department culture that practiced autonomous discretionary policing. Agee shows in his text, the ways in which throughout San Francisco history discretionary policing resulted in the criminalization of people

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<sup>6</sup> Christopher Lowen Agee, "Streets of San Francisco: Policing and the Creation of a Cosmopolitan Liberal Politics, 1950-1972," *The University of Chicago Press*, 2014.

<sup>7</sup> *Ibid.*, 8.

<sup>8</sup> *Ibid.*, 8.

<sup>9</sup> *Ibid.*, 9.

of color, activists, and gay communities on a day-to-day basis by a largely all-white, all-Catholic, all-male police force.<sup>10</sup>

### **The Role of Civilian Oversight Agencies**

Civilian oversight bodies emerged in large cities during the middle of the 20th century. According to a report by the National Association for Civilian Oversight of Law Enforcement titled *Civilian Oversight of Law Enforcement*, between the 1920s and the 1960s, early efforts at establishing modern oversight to combat lawlessness in law enforcement came about.<sup>11</sup> The first wave of civilian oversight agencies were organized around volunteer boards that reviewed complaints and completed internal police investigations of community complaints filed against officers. The basic idea of civilian groups holding officers accountable to follow local law enforcement's own high standards of conduct has remained the foundation of oversight agencies all these years later. Decades of change and innovation have propelled this idea forward into what they are today, but at their foundation oversight agencies' main purpose was to reinforce and uphold accountability through a review board model.

*Civilian Oversight of Law Enforcement* presents a history of the emergence of civilian oversight agencies in police structures, breaking down types of systemic oversight models as they form through decades. In the middle of the 20th century, oversight mechanisms were strongly influenced by the civil rights movements emerging throughout the country and other local crises

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<sup>10</sup> Ibid., 9.

<sup>11</sup> Joseph Angelis, Richard Rosenthal, Brian Buchner, "Civilian Oversight of Law Enforcement: A Review of the Strengths and Weaknesses of Various Models", *National Association for Civilian Oversight of Law Enforcement*, September 2016.

that came from police misuse of force in communities of color.<sup>12</sup> Between 1970s-1980s, in the emergence of the second wave of oversight agencies following years of innovative thought on how to improve civilian oversight, the agencies grew stronger in their resources, durability and expanded what they could do in their organizational authority.<sup>13</sup> For example, oversight agencies in their second wave were given the power to conduct investigations for received complaints that were independent of the police. In Berkeley, CA 1973, a city ordinance created the Police Review Commission (PRC), creating the first agency with the ability to independently investigate complaints filed by members of the public against police officers. The independent, investigative authority is what made the second wave of oversight agencies stronger because it created a method of accountability that involved citizen testimony against word of the police.

According to *Civilian Oversight of Law Enforcement*, the third wave of development began in the 1990s as the expansion of police oversight agencies spread throughout the country. This third wave saw the emergence of the auditor/monitor model which unlike the other models of oversight that relied on review and investigation of individual complaints, the new auditor/monitor model had the authority to conduct broad pattern evaluations in order to offer data driven recommendations for improving police policies, practices and training. Key strengths of the auditor/monitor model of oversight are that this model has a more robust reporting practice than other forms of oversight and are generally less expensive than full investigative agencies, but more expensive than review focused agencies.<sup>14</sup>

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<sup>12</sup> Ibid., 4.

<sup>13</sup> Ibid., 4.

<sup>14</sup> Ibid., 11.



## II. The Department of Police Accountability: History

In this section, I present a contextual description of the San Francisco Department of Police Accountability. I also describe their jurisdiction in investigations regarding officer involved shootings and their shortcomings as an organization. San Francisco's civilian oversight agency, the Department of Police Accountability aims to reaffirm all local citizens' concerns regarding police behavior. The Department of Police Accountability (DPA), originally known as the Office of Citizen Complaints (OCC) is an independent civilian oversight agency that acts as an extra pair of eyes to the Police Commission to review complaints of police misconduct.<sup>15</sup> The DPA exists to investigate citizen filed complaints against SFPD officers. Complaints are filed with the DPA when anyone feels a member of the Police Department has acted improperly in the course of their work. This can include discourteous treatment, unjustified arrests, unnecessary force and in some cases lethal use of force. The DPA offers discipline recommendations to the chief of police when reinforcing evidence shows officers acted outside of police policies; the agency's powers include authority to submit administrative charges against officers directly to the Police Commission if the Chief of Police refuses to administer discipline the DPA Director feels is necessary. The Department of Police Accountability's mission statement affirms the agency's commitment to, "promptly, fairly, and impartially investigate complaints against San Francisco police officers, make policy recommendations regarding police practices and conduct periodic audits of the San Francisco Police Department."<sup>16</sup>

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<sup>15</sup> The Office of Citizen Complaints, *The Office of Citizen Complaints Pamphlet: an agency reporting to the San Francisco Police Commission*. (San Francisco: OCC).

<sup>16</sup> "About Us," Department of Police Accountability, Accessed March 29, 2016, <http://sfgov.org/occ/>.

The Department of Police Accountability, originally called the Office of Citizen Complaints, was created as a separate city department by an amendment to the San Francisco City Charter (section 4.127) in 1982 and placed under direct supervision of the Police Commission.<sup>17</sup> In an interview, Barbara Attard, a Bay Area based civilian oversight expert and former OCC employee, described the history of the OCC's origins as coming from a unity between San Francisco coalitions that faced regular, un-denounced mistreatment from police officers. According to Attard's historical account, in late 70s early 80s, Black and Latino groups independently organized around police brutality issues they each faced but it wasn't until two separate events occurred that brought police misconduct to the forefront to the minds of white and gay communities in the city.<sup>18</sup> In 1978, the murder of Mayor George Moscone and Supervisor Harvey Milk by fellow Supervisor Dan White, an ex police officer, sparked community outrage over how the murder case was handled by the police department. Dan White resigned from his position on the Board of Supervisor and following his resignation, his police department supporters advised him to change his mind. White asked Mayor Moscone to rescind his resignation but when the mayor turned down his request, White retaliated and murdered Moscone and Supervisor Harvey Milk. This was a devastating moment for the City of San Francisco, especially the gay community, which mourned the loss of a major political icon. Attard says the case against Dan White was not investigated well by the police department and on May 21, 1979, he was found guilty of only voluntary manslaughter instead of first-degree murder.<sup>19</sup> White was sentenced to a maximum of seven years in prison, outraging the city's gay community. This demonstration of

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<sup>17</sup> Ibid.

<sup>18</sup> Barbara Attard (former OCC employee), interview by Sofia Aguilar in San Francisco, March 3, 2017.

<sup>19</sup> Ibid.

public anger became known as the “White Night Riots,” a series of protests and public demonstrations streaming from the Castro District to Civic Center. During these demonstrations, violence erupted during demonstrations between participants and SFPD. Police used heavy amounts of excessive force against protestors in front of City Hall, perpetuating community concern over police behavior.

According to Attard, the Super Bowl victory of 1982 was the second event that sparked communal demand for police oversight.<sup>20</sup> After the San Francisco 49ers victory in 1982 Super Bowl, a celebratory parade commenced in the streets. The parade crowds estimated well over 500,000 people attended the parade but following the celebration, there was a high amount of complaints against officers using unnecessary excessive force against rowdy locals. These two moments in San Francisco history would pave the road for police reformers to create a plan that could inspire hope for the people of San Francisco concerned with police misconduct.

These two events commenced a broader coalition of diverse groups, all wanting stronger civilian oversight over SFPD. Leading up to the local election in November 1982, Supervisor Harry Britt spearheaded the campaign for a ballot measure that would create the Office of Citizen Complaints, a civilian oversight agency that would monitor the behavior of SFPD that minority groups had been concerned about for years. The ballot measure won with overwhelming support and the following year, the Office of Citizen Complaints was implemented into San Francisco government. According to Angelis, Rosenthal, and Buchner, the Office of Citizen Complaints completely replaced the police internal affairs function in relation to citizen complaints and was

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<sup>20</sup> Ibid.

granted the authority to both receive and investigate all citizen complaints, while the police department continued to investigate internally-generated complaints against officers.<sup>21</sup>

### **The Department of Police Accountability: How It Operates**

Under the San Francisco charter amendment, the Department of Police Accountability was placed under direct supervision of the Police Commission. The Police Commission is a volunteer civilian body of seven members; four members are nominated by the mayor and three members are nominated by the Board of Supervisors. Because the DPA operates under the structure of the Police Commission, the Police Commission has the power to appoint the director of the DPA, subject to approval by the mayor and the Board of Supervisors.<sup>22</sup> This also means the Police Commission holds the power to terminate the services of the DPA's director. The director of the DPA is required to attend the Police Commission's weekly meetings and is also responsible for overseeing the investigations of the agency and reporting findings and recommendations to the chief of police or the Police Commission when there's a disagreement between the DPA director and the chief over findings. By Charter, the Police Commission holds the power to manage, organize and reorganize the DPA and in practice, these powers are generally carried out by the Police Commission through the DPA Director.

On paper, the San Francisco Department of Police Accountability has one of the strongest investigative models of oversight in the country. A DPA investigation begins with complaint intake, which initiates investigation and calls for findings on civilian complaints of on-duty

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<sup>21</sup> Ibid.

<sup>22</sup> "Frequently Asked Questions," *Department of Police Accountability*, accessed February 2, 2017, <http://sfgov.org/occ/frequently-asked-questions>.

misconduct by sworn members of the San Francisco Police Department. *Overview of Civilian Oversight of Law Enforcement in the United States* by Barbara Attard and Kathryn Olson analyzes the investigative model that the San Francisco Department of Police Accountability is modeled after. According to Attard and Olson, agencies that have a community board or commission as the adjudicatory body, the civilian staff typically conducts fact-finding investigations and hearings that are held before the commission or review board to determine findings.<sup>23</sup> They describe, “The investigative model process follows the tasks of classifying complaints, framing the misconduct issues by delineating allegations, identifying witnesses to be interviewed and questioned and then determining relevant evidence for further review.”<sup>24</sup> The importance of agency independence is significant in this investigation process because as Attard and Olson suggest, witnesses may be more willing to be involved in an investigation if it is conducted separate from the law enforcement agency. In many instances, civilians are reluctant to work with oversight agencies out of fear of retaliation from law enforcement.

Independence is one of many components that create a successful oversight agency. Successful oversight bodies require independence from special interest groups, police, and elected and other government officials.<sup>25</sup> Independence promotes faith from the community and law enforcement alike, in trusting that the oversight agency will conduct itself in a fair and unbiased manner. Independence within the investigation and conclusion processes allows for uncensored and non-controlled findings that are not determined to favor any specific side, allowing the

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<sup>23</sup> Barbara Attard, Kathryn Olson, “Overview of Civilian Oversight of Law Enforcement in the United States,” *Accountability Associates*, accessed February 14, 2017, <http://accountabilityassociates.org/wp-content/uploads/Oversight-in-the-US-...FINAL.pdf>.

<sup>24</sup> *Ibid.*, 3.

<sup>25</sup> *Ibid.*, 6.

empowerment of the oversight agency to make independent judgments about cases and policy issues without fear of reprisal.

Attard and Olson suggest there also needs to be a strong form of political will to support independent oversight. Strong political will comes from politicians and those in power who are willing to listen to the findings of oversight agencies and address the most pressing problems in law enforcement that agencies bring to light. Government officials with strong political will uphold the foundational intention of oversight agencies as existing as an accountability mechanism.<sup>26</sup> The Department of Police Accountabilities most recent director Joyce Hicks has been in charge of the oversight agency for the last nine years, making her the one of the longest serving heads in department history. Before Hicks was department head, she had experience serving as Deputy Director of the Oakland Citizens Review Board, where she also served as director for four years. During her time as San Francisco DPA director, Hicks has received heavy criticisms from civilians as well as internal staff concerning her lack of a firm fist around filing sustained findings with the Police Commission if the the Chief of Police disagrees. Joyce Hicks announced her retirement from her Executive Director position in April 2017.<sup>27</sup> This newfound search for department director by the Police Commission will need to consider indications of strength by demonstrations of political will in potential director candidates.

Oversight agencies must have adequate funding and spending authority in order to hire an adequate amount of skilled staff to complete thorough and effective investigations. Staff must be able to analyze investigations and prepare documents in a timely manner for reports, appeals,

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<sup>26</sup> Ibid., 6.

<sup>27</sup> Jonah Owen Lamb, "SFPD watchdog's head to retire after long tenure," *SF Examiner* (San Francisco, CA), April 18, 2017

public disclosure, litigation, and other purposes.<sup>28</sup> The *Collaborative Reform Initiative: An Assessment of the San Francisco Police Department* outlined a breakdown of DPA budget in correlation with staffing. In San Francisco, the DPA's approved budget for fiscal year 2015-2016 was \$5,562,081.<sup>29</sup> In an interview, Executive Director Joyce Hicks said "The DPA has strong jurisdiction but has never been funded in a way that satisfies it's mission."<sup>30</sup> Hicks alluded to the ways in which budgeting directly effects the DPA's staffing, raising the point that for all the responsibilities the DPA is tasked with, the amount of investigators and attorneys should be sufficient enough to handle its workload without a shortage of support that's needed for the data riven agency.<sup>31</sup>

Staffing for DPA is established by city charter, requiring the DPA to consist of no less than one line investigator for every 150 sworn SFPD members.<sup>32</sup> According to the City Charter, the police staffing minimum threshold is 1,971 officers.<sup>33</sup> According to the DPA's 2016 Second Quarter Statistical Report, the DPA's budget provides for 18 line investigators, four senior investigators, and a deputy director/chief of investigations.<sup>34</sup> By the close of the second quarter, 18 employees staffed the 23 investigator positions, making the agency technically where it needs to be in terms staffing. Depending on the frequency of filled complaints with the DPA, the success

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<sup>28</sup> Ibid., 8.

<sup>29</sup> COPS Office, "Collaborative Reform Initiative: An Assessment of the San Francisco Police Department" U.S Department of Justice, October 2016.

<sup>30</sup> Joyce Hicks (Department of Police Accountability Director), interview by Sofia Aguilar in San Francisco, March 7, 2017.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid., 130.

<sup>33</sup> Ibid., 130.

<sup>34</sup> Department of Police Accountability, "Office of Citizen Complaints 2016 Second Quarter Statistical Report," *City and County of San Francisco*, August 10, 2016, [http://sfgov.org/occ/sites/default/files/OCC\\_2Q16.pdf](http://sfgov.org/occ/sites/default/files/OCC_2Q16.pdf).

of the agency's investigative finding lies in its adequate staff and access to the materials and information needed to carry out their duties.

Civilian oversight was an adjustment to the SF police culture built on a legacy of discretionary force practices and separatism from City Hall regulation. The DPA director and the Police Officers Association, the union that represents and protects members in all officer investigations, have a difficult relationship. Since the DPA's purpose is to determine whether or not officers should be charged if they've acted in misconduct, the police chief and the POA often fight with the DPA director over discipline recommendations. The police chief is often reluctant to impose discipline on his officers, having full backing by the POA not to. Policies have been created to combat these poor relationships from getting in the way of rightful discipline. A report by SPUR gives the history of city policies aimed to combat these police tensions with an external regulation agency. For example in 2003, Proposition H was put on the ballot by the Board of Supervisors in attempts to collect more power for the DPA, a necessity spurred from a history of non-cooperation by the police department.<sup>35</sup> Prop. H allowed the Office of Citizen Complaints to file disciplinary charges with the Police Commission, subject to limitation but at the time was a power that was solely vested in the police chief, giving the agency more authority and independence in fulfilling effective oversight. The measure also expanded the size of the Police Commission from five to seven members, creating a bigger panel of city wide leaders to help regulate the police department. This measure finally gave the DPA the administrative leverage it needed, to file disciplinary charges directly to the Police Commission, which by their decision can determine appropriate discipline level, such as retraining, suspension or termination.

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<sup>35</sup> SPUR, "Proposition H: Police Commission/Office of Citizen Complaints," *SPUR*, November 1, 2016, <http://www.spur.org/publications/voter-guide/2003-11-01/proposition-h-police-commissionoffice-citizen-complaints>.



In an effort to maintain open and transparent communication with the general public, the Department of Police Accountability publishes “openness reports,” which give general information about the types of complaints received that quarter and the findings of each complaint following the completion of each investigation. In these openness reports, the officers and complainants are not named. California law protects the confidentiality of peace officer personnel records as I will discuss later in my paper. Observing the trends of the recent years in openness reports, there is a large percentage of the reports that have inconclusive findings. A total of 14 cases were sustained in the second quarter of 2016, a 10% sustained rate, combined with 17 sustained cases in the first quarter of 2016, a 10% sustained rate.<sup>36</sup> There have been no sustained findings in investigations of complaints against officer involved shootings in recent history by the Department of Police Accountability.

### **The Department of Police Accountability: The Complaint Process**

This section of the paper shows the ways in which the Department of Police Accountability complaint process for cases of officer misconduct is a major source of work for the department but arguably the most important aspect of the DPA to understand. This process is where investigators have the authority to look into filed complaints, evaluate evidence and interview witnesses involved with the situation to determine what will administratively happen to an officer.

Through the DPA complaint process, every initiated investigation on officer misconduct has the potential to reveal evidence against officers that proves whether officers act outside of policy. Appendix A shows a detailed graphic of the DPA complaint process, including key players

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<sup>36</sup> Ibid., 5.

and general information of where the cases go to.<sup>37</sup> DPA intervention begins with a complaint that should be filed when a citizen feels that a member of SFPD acted improperly. These complaint reasons range from discourteous treatment, failure to take action, unnecessary force etc. After complaint intake, the case may either go to a mediation program, which allows complainants to resolve their issues with the accused officer in a face-to-face resolution setting, or the case will go into investigation. In a DPA investigation, there are a series of interviews that happen between the complainant, the officer(s), and witnesses. The investigators are responsible for reviewing relevant Police Department records, policies, and procedures, while offering applying legal analysis to the situation. The investigator then compiles their findings and presents them to the senior investigator and the deputy director so that this team may ensure accuracy and consistency in the findings that are within Police Commission standards. This report is then reviewed by the DPA director, who decides what action to take. Then they send preliminary disposition letters to both complainant and the accused officer. The three decisions to be made around complaints following investigation are: (1) Sustained, (2) Not Policy, or (3) Training Failure.<sup>38</sup>

The second half of complaint procedure is complex. If and when the DPA director determines the complaint findings as “sustained,” they then have authority to file these findings with the Police Chief. There are 5 proceedings that can occur from this meeting, they are the following:

- (1): The DPA Director *recommends* discipline level
- (2): The Police Chief determines discipline level up to 10 days’ suspension
- (3): The Police Chief can decline to impose discipline. The case concludes
- (4): The DPA Director recommendation that on Chief’s behalf OCC files charges with the Police Commission

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<sup>37</sup> See Appendix A

<sup>38</sup> See Appendix A.

- (5) If the Police Chief disagrees (with #4), the DPA Director can directly file charges with Police Commission.

Proceedings 2 and 3 put authority in the hands of the police chief to determine discipline of officers. It is important to note that following discipline, the accused officer has the right to request a chief's hearing in which they can challenge the police chief and the DPA's prosecution, which afterwards he or she may still appeal to the Police Commission. Looking at steps 4 and 5, charges are then filed with the Police Commission, which has the authority to make a decision on both officer appeals from the chief's level discipline and determine discipline greater than 10-days suspension and up to termination.

In regards to this complaint process, the Department of Police Accountability deals with criticisms over whether this process makes it easy or not for the chief of police to disregard recommended discipline. I argue there is conflict that comes from a disciplinary department that is only authorized to *recommend* discipline if there are sustained findings of an officers' misconduct. This structure by charter makes it so that discipline is dependent on how aggressive the Department of Police Accountability director is. As openness reports have shown, very rarely does the current director challenge the chief of police by actually bringing sustained charges to the Police Commission. This process also shows how discipline is really left to the chief of police's discretion.

As my paper demonstrates, blame does not completely fall on the DPA for its lack of effectiveness. Many people don't understand the structural limitations that the DPA faces when attempting to investigate misconduct complaints. A better understanding of limitations as to what the DPA can and cannot do helps us realize the hurdles DPA faces and better informs us on how we can work to properly address these power structure and laws that guide them.

## Department of Police Accountability: Officer Involved Shooting Investigations

The DPA's complaint process for cases of misconduct remains almost the same as its investigations of complaints of officer involved shootings. According to the DPA's 2016 Second Quarter Statistical Report, there are four officer involved shooting complaints that remain open at the end of the second quarter 2016. The DPA is still investigating the complaints around the deaths of Luis Gongora, Jessica Williams, Amilcar Perez-Lopez and Mario Woods.<sup>39</sup> In San Francisco, community demonstrations demanding justice for these deaths puts a heavy pressure on the DPA to justly investigate these OIS cases, but what are the protocols that determine how the DPA can "justly" investigate these incidents? Justice coalitions and local police reform advocates demand investigations that produce findings that determine the involved officers did not act within SFPD policy for killing the civilians the ways they did. Despite these heavy community pressures, the DPA has a poor history of producing sustained findings that show officers acted wrongly in OIS. Understanding the structural and legal limitations the DPA faces in its investigation process helps us better understand why it is the DPA's findings in these cases rarely lead to serious administrative discipline for SFPD officers.

Officer involved shooting cases are followed by two separate but congruent investigations; they are criminal and administrative investigations. The DPA is responsible for administrative investigations, which are conducted to determine whether officers involved violated any SFPD policy or procedure during the shooting.<sup>40</sup> The 2016 Civil Grand Jury report "Into the Open"

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<sup>39</sup> Ibid., 10.

<sup>40</sup> Civil Grand Jury, "Into the Open: Opportunities for More Timely and Transparent Investigations of Fatal San Francisco Police Department Officer-Involved Shootings," *City and County of San Francisco Civil Grand Jury*, June 2015, <http://civilgrandjury.sfgov.org/report.html>.

summarizes the DPA research focus during their investigations to ask: *“Did the officers act in accordance with SFPD policy and procedure and use appropriate law enforcement tactics under the circumstances or should the officers be disciplined, retrained or fired because of their actions?”*<sup>41</sup> In recent high profile cases of San Francisco OIS, most would argue these cases are all similar in that they share questionable circumstances under which officers discharged their weapons. In the Mario Woods case for example, there is video evidence showing five officers surrounding an African American man holding a knife, moments before they shot as many as 15 rounds on him, killing Woods on the spot. This case outraged San Francisco community members and raised questions around how five armed officers could fear for their lives against one man who may have been mentally ill. In an OIS case like the Woods example, the DPA is responsible for showing a preponderance of evidence that proves officers acted improperly. Before the June 2016 charter amendment that now allows the DPA to launch their own investigations on OIS, the DPA conducted their own independent administrative investigations in the following way: (1) sending their own department investigators to the OIS scene to observe; (2) conducting an independent review and analysis of evidence it received from the SFPD Homicide Detail, who originally collects it; and (3) performing any additional investigative tasks and interviews that it deems necessary to conduct thorough investigations of the incident.<sup>42</sup>

The division in criminal and administrative investigations is because, as the Civil Grand Jury report explains, “while police officers receive due process protections and Fifth Amendment rights against self-incrimination as subjects of a criminal investigation, along with specific protections under the Peace Officer’s Bill of Rights, police officers can be compelled by their

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<sup>41</sup> Ibid. 23.

<sup>42</sup> Ibid., 23.

employer to make a “statement against interests” as subjects on an administrative investigation.”<sup>43</sup> Therefore, it’s necessary for involved investigatory bodies to maintain a “one-way flow” of information. This means investigators from administrative investigations like the DPA must receive all of their evidence and information from the criminal investigation while the criminal investigation can receive no information from the administrative investigations. An administrative investigation can not be concluded and no disciplinary proceedings can happen until the criminal investigation is completed and the DA’s Office has issued its charging decision letter.

The DPA protocol for evidence collection in OIS is damaging to the investigations they produce. As a government body with responsibility to investigate misconduct, the DPA has been given a major opportunity to change the way it is perceived by the greater community, dependent on how aggressive they will be in their newfound authority to investigate officer involved shootings. But so long as this protocol around how evidence is gathered remains the same, I argue that OIS investigations will continue to produce no sustained findings that uphold accountability in OIS cases. I will specifically focus on how the DPA was involved with the Alex Nieto case and then examine what the Alex Nieto case reveals about this investigation process.

### **III. Missing the Mark: The DPA’s findings on the Alex Nieto case**

This section of my project presents a recent example of how an officer involved shooting investigation by the Department of Police Accountability failed in it’s investigation to include critical evidence information that would have produced different administrative outcomes for the police officers involved. I discuss how the death of Alex Nieto revealed the structural limitations

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<sup>43</sup> Ibid.,23.

that the Department of Police Accountability faces in OIS investigations. In the case of OIS incidents that the Department of Police Accountability investigates, the information on findings to the cases are very difficult to locate publically. Only by poring through a series of “openness reports” on the DPA website can summaries of OIS investigations be found but even then, the summaries were vague so as not to reveal the identities of individuals shot or the SFPD officers involved. I present the situational context of the Nieto case in order to show how the DPA’s openness report ultimately failed to capture the side of the story that would have changed the course of the verdict. The Nieto movement demanded accountability from the police department responsible for the loss of a young man who died in an unjustifiable way in the eyes of his community.

### **Justice and Love for Alex Nieto**

Alejandro “Alex” Nieto, a San Francisco native and Mission District local, was shot and killed by four San Francisco police officers on March 21, 2014 at the bottom of Bernal Hill park. Alex was eating dinner at the park as he regularly did before work; Alex was a security guard at El Toro nightclub. A dog walker called 911 in complaint of a suspicious looking man who had a gun. What the witness saw was Nieto’s stun gun that he had permission to carry. Alex was leaving the park when four police officers were waiting for him at the bottom of Bernal Hill. In a short span of time, the situation escalated and the four officers drew their weapons and collectively fired 58 shots at Alex, hitting him 15 times. Alex was 28 years old at the time of his death.

On March 25, 2014, days after the shooting, Chief of Police Greg Suhr told ABC 7 News, “It’s an unbelievable tragedy, but I think the officers did what they felt they had to do.” District

Attorney George Gascon filed no charges against the four officers, calling the shooting “lawful and constitutional.”<sup>44</sup> This statement represents the systematic support by law enforcement of a deeply questionable situation, which rallied a heavy uproar of protest from the community following the shooting. Given the many complexities of this story, it’s one that is familiar to most communities of color, in the sense there is a shared consensus that Alex didn’t have to die the way he did.

The Nieto family filed a civil lawsuit. All four police officers who shot Nieto testified that he drew his weapon on them, causing them to be in fear of their lives. In court, it was the duty of the plaintiff to prove that the shooting was unjustified. What is a justifiable shooting in the eyes of the police department? Under Direct General Order 5.01 The Use of Force Directive, police officers are permitted to shoot a firearm, the highest level of use of force, if and when the officer feels his or her life and/or the lives of other civilians is in imminent danger.<sup>45</sup> During the Nieto trial, the Nieto family’s attorney Adante Pointer challenged this idea of “feeling threatened” in court, he says, “You can’t say something’s a threat, it has to be credible threat, an imminent threat, is reasonable? An officer is not allowed to just say because someone is a threat that makes it a threat. So it has to be evaluated. Is that something that’s reasonable or credible or not.”<sup>46</sup> According to the OCC openness report, all four officers stated this threat led them to draw their guns and ordered Nieto to show them his hands.<sup>47</sup> The officers testified that Nieto aggressively walked

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<sup>44</sup> Dan Noyes, “New Info Surfaces in SFPD Shooting of Alex Nieto,” *ABC 7 News*, February 25, 2016, <http://abc7news.com/news/i-team-new-info-surfaces-in-sfpd-shooting-of-alex-nieto/1219762/>.

<sup>45</sup> “SFPD General Order 5.02,” *San Francisco Police Department*, accessed February 18, 2016, <http://sanfranciscopolice.org/dgo>.

<sup>46</sup> Dan Noyes, “San Francisco Officers Testify in Alex Nieto Civil Trial,” *ABC 7 News*, March 2, 2016, <http://abc7news.com/news/i-team-sf-cops-testify-in-alex-nieto-civil-trial/1228651/>.

<sup>47</sup> OCC, “Complaint Summary Report,” *Office of Citizen Complaints*, August 13, 2015.



towards them, drew his Taser and yelled, “You show me your hands!,” and proceeded to get into a “weaver stance,” appearing like he was about to use his weapon.<sup>48</sup> Although the police officers claim Nieto drew his weapon at them, not a single officer said they saw it fired, nor did any of the officers see Taser wires, blaming the wind for blowing away the evidence.<sup>49</sup> Ultimately, there were more than a few reasons that made this OIS case questionable, questioning the evidence that led officers to feel “threatened” in a situation that lasted less than two minutes.

The biggest shock in the Nieto trial came from a witness testimony that directly contradicted the testimony the four officers gave. Tim Redmond, reporter for 48 Hills, tells in an article on the Nieto trial that a new witness to the case, named Antonio Theodore, said that Nieto never drew a weapon, saw Nieto’s hands were in his pockets, and testified that he never heard the officers yell “show me your hands.”<sup>50</sup> Theodore testified that the two officers who started the shooting opened fire after a one word warning, “stop” and continued to fire at Nieto after he was already on the ground. Antonio Theodore was the only other eyewitness to the shooting besides the police officers who shot Nieto, and while Theodore had no motive to lie in his testimony, the officers involved did. On March 10, 2016, a largely white, suburban jury found that the involved police officers acted properly and violated no policies in their encounter with Alex Nieto concluding the trial.

A year has passed since the verdict and Alex Nieto’s death continues to serve as a major example of the wrongful deaths SFPD is responsible for. Before the final verdict of the trial was released, the then Office of Citizen Complaints completed their 20-page complaint summary report

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<sup>48</sup> Ibid., 6.

<sup>49</sup> “Death By Gentrification,” *Democracy Now!*, April 12, 2016, [https://www.democracynow.org/2016/4/12/death\\_by\\_gentrification\\_alex\\_nieto\\_killed](https://www.democracynow.org/2016/4/12/death_by_gentrification_alex_nieto_killed).

<sup>50</sup> Tim Redmond, “Nieto case witness directly contradicts everything the cops have said,” *48 Hills*, March 3, 2016, <http://48hills.org/2016/03/03/nietocasedaythree/>.

on Alex Nieto's death, initiated by a complaint that was filed by his father Refugio Nieto. In this report, the OCC cleared the officers involved from all the following allegations with the identified findings:

- (#1-4) The officers used unnecessary force by discharging their firearms: **Proper Conduct**
- (#5-8) The officers failed to properly investigate: **Proper Conduct**
- (#9-12) The officers failed to take required actions: officers failed to recognize the decedent's weapon as a Taser: **Proper Conduct**
- (#13) Members of the San Francisco Police Department behaved inappropriately and made inappropriate comments: **Not Sustained**
- (#14) The officer failed to take required action: **Unfounded**
- (#15) The officer searched the decedent's room: **Unfounded**
- (#16) The officer towed the decedent's car without cause: **Proper Conduct**

As the openness report shows, the OCC found that the four officers involved in Alex Nieto's death did not violate any of their Direct General Orders and in some of these allegations, the OCC did not have enough evidence to determine otherwise, leaving all four officers to go on with their careers facing no forms of administrative discipline for what they did. A major criticism of the openness report that reflects a bigger flaw to the structure of OIS investigational operations lies in the fact that the OCC investigators did not include Antonio Theodore's eyewitness testimony into their report. How could investigators leave out such a critical account to a "thorough" report? As I explained earlier on how the Department of Police Accountability investigates officer involved shootings, the DPA conducts their "independent" administrative investigations by conducting an independent review and analysis of evidence that is originally collected by the SFPD Homicide Detail, an internal agency to to police. This means the DPA investigators never actually collect evidence for themselves, they rely on the skills of the SFPD to investigate their own shooting

cases, which could cause room for suspicion and error by a police department who doesn't want to be found guilty for breaking general orders. This is a one-way flow of information where investigators from the administrative investigation get all their information and evidence obtained from the criminal investigation, but the criminal investigation receives no information from the administrative investigation.<sup>51</sup> All the questionable circumstances of evidence and the new eyewitness lawyer Adante Pointer brought out during the trial were not incorporated into the administrative investigation because none of that information was gathered by SFPD Homicide Detail, where the DPA received its investigatory sources. This investigatory protocol is limited to the administrative investigation because it actually ensures that the investigation not be independent at all, but rather *dependent* on whatever sources the SFPD gives the DPA to determine findings with. The reason for this investigatory protocol comes from a California government code that gives police officers due process protections against self-incrimination so that they may not be compelled by their employer to make "statements against their interest" as subjects of an administrative investigation.<sup>52</sup> I will discuss this law in further detail later in the recommendations section, but as I have shown, this due process protection for police officers creates a questionable system in which administrative investigations are allowed to gather evidence. In the case of Alex Nieto, in which all trial evidence shows there was a believable chance officers acted against general orders, the evidence by which the DPA could make that call restricted them to say otherwise.

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<sup>51</sup> Ibid., 23.

<sup>52</sup> Ibid., 24.

#### **IV. Under the Microscope: Reform Efforts of the Department of Police Accountability**

In this section, I discuss San Francisco's year of police department reform and highlight various methods the Police Commission used to both research and instill needed changes to the department. I analyze the recent reforms efforts to the DPA to show where recommendation reports and new policies fall short in administering real change and essentially perpetuate the same lack of discipline to police officers we've seen in past officer involved shooting cases. In light of scandals the San Francisco Police Department faced last year, these controversies sparked the major reform effort by the Police Commission to transform the department. This effort was seen in Mayor Ed Lee's decision to appoint former Los Angeles Police Deputy Chief William "Bill" Scott as the new chief of the San Francisco Police Department. The former Chief Greg Surh, who served his position for 6 years, resigned after the death of Jessica Williams, a 29-year-old African American female who was shot in a car by police officers in the Bayview District. Surh faced community pressure to resign following the series of officer-involved shootings that year. Mayor Ed Lee and the Police Commission's decision to bring in an "outsider" into the department was seen as an attempt to bring change and new way of thinking for a department that's rooted in legacy and comradery around union membership. Chief Scott was sworn into his position in January 2017.

In 2016, three external investigations were conducted around the policies and practices of the San Francisco Police Department. A federal investigation into our police department by the U.S Department of Justice evaluated the department as a whole, offering 272 federal recommendations aimed at reducing bias, improving accountability, and changing the department

culture through revamped hiring and training.<sup>53</sup> The other two SFPD investigative reports done by the Blue Ribbon Task Force, a special task force compiled by the District Attorney, and the Civil Grand Jury, both give insight on how the SFPD truly operates around OIS cases in a way that needs an outside agency auditing it. Years of controversy that plagued the department led to the findings of these external investigations. I argue that although these external investigations did the City and County of San Francisco a huge justice in producing concise compilations of our shortcomings, the reform measures spurred from them still do not change the structures and laws that hinder the DPA authority in OIS investigations. Here, I discuss these reform measures to the DPA:

#### **Proposition D: San Francisco Citizen Complaints Office Investigations of Police Shootings**

In June of 2016, San Francisco voters overwhelmingly supported Proposition D, a measure that was a direct response to community concerns around officer involved shootings. This measure changed the San Francisco charter to require the Department of Police Accountability to investigate every officer involved shooting and in custody deaths, instead of just shootings when a complaint is made. According to SPUR's June 2016 election guide, Prop. D was placed on the ballot by four San Francisco supervisors at the height of public concern over use of force incidents by police officers – both nationally and locally.<sup>54</sup> The SF Chronicle says it was DPA Director Joyce Hicks who worked closely with Supervisor Malia Cohen on the legislation, as a way to give

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<sup>53</sup> Ted Goldberg, "No DOJ, No Problem: Commission President Says SFPD Will Reform With or Without Feds," *KQED News*, April 5, 2017, <https://ww2.kqed.org/news/2017/04/04/no-doj-no-problem-commission-president-says-sfpd-will-reform-with-or-without-feds/>.

<sup>54</sup> SPUR, "San Francisco Voter Guide June 2016: Ballot analysis and recommendations," *SPUR*, accessed April 25, 2017, <http://www.spur.org/spur-voter-guides>.

the DPA “a jump start on the most serious investigations”, instead of waiting days, or weeks to receive a complaint and then play “catch-up.”<sup>55</sup> Supervisor Cohen spearheaded the ballot measure during election season, assuring voters that this process change would, “send a clear message to everyone near and far that we value transparency and accountability.”<sup>56</sup>

Proposition D did not run into major opposition, even from the DPA’s longtime counter agency, the POA. In an interview with POA Director Marty Halloran discussing the Police Officer’s Association’s stance on Prop. D, he said, “We [the POA] did not support it nor did we oppose it. The POA has no problem with the DPA doing a full, independent investigation on any and all office involved shooting and in custody deaths.” Halloran’s response to the measure calls into question the nature of its potential effect on OIS investigations. If no stakeholder is getting angry or passionate about the policy, then perhaps not much changes. The opinions against Prop. D said this measure could potentially create more paperwork for the DPA, which already has a large caseload. In 2016, the DPA investigated almost 700 cases, proving how busy the department really is.<sup>57</sup>

Proposition D now requires for the DPA to be ready and prepared any moment an officer involved shooting happens. Now that the DPA is recognized as another agency fully participating and involved with the investigative processes for OIS cases, there are multiple factors to consider when trying to collect quality evidence. Barbara Attard says, “The OCC should now have someone on call to roll out to police shootings. They should be able to immediately take photographs and be there for the evidence collection. Protocols are needed for the OCC’s interview process with

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<sup>55</sup> Vivian Ho, “SF Prop. D would extend agency probes to all police,” *San Francisco Chronicle*, April 26, 2016, <http://www.sfchronicle.com/crime/article/SF-Prop-D-would-extend-agency-probes-to-all-7377150.php>.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

the cops and if they're going to be effective in investigating these cases, they're going to need to train a bunch of people for that level of investigation.”<sup>58</sup> This newfound authority truly calls for the DPA to revamp their protocols and reassess their resources.

Overall, Prop. D gives the DPA a seat at the table. This measure gives the DPA a new responsibility to the people of San Francisco but ultimately, the policy does not address how evidence is collected by the homicide unit and internal affairs unit. There are multiple bodies involved with OIS initial investigation processes but the policies that determine who these agencies are do not shape what happens after the investigation, in terms of what the DPA does with their findings.

### **The Zisser Report**

In light of overall SFPD reform, the Department of Police Accountability also initiated a review effort to evaluate their current agency operations. The DPA hired Aaron Zisser, a former U.S Department of Justice trial lawyer to author an internal review of OCC policies and practices and provide recommendations for improvements in their investigation process.<sup>59</sup> In the report, Zisser says, “In order to fulfill its crucial oversight role, OCC must ensure that its heretofore primary tool – investigations – is working effectively, honestly, and transparently,” although the report does not specify what types of investigations he refers to, misconduct or officer involved

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<sup>58</sup> Ibid.

<sup>59</sup> Aaron Zisser, J.D, “Recommendations to the San Francisco Office of Citizen Complaints Regarding Investigations Policy, Procedures, and Practice,” *Office of Citizen Complaints*, December 1, 2016, <https://sanfranciscopolice.org/sites/default/files/Documents/PoliceCommission/PoliceCommission010717-Zisser%20ReportreDPAInvestigativeProcess.pdf>.

shooting, it is safe to assume Zisser is discussing “all of the above” investigations.<sup>60</sup> The “Zisser Report” offers four broad recommendations on how to better the DPA. The recommendations below fall into the following broad categories:

1. The evidentiary standard and weighing evidence, including assessing witness credibility (policy and training)
2. Investigative techniques and procedures, including planning, interviews, and timeliness (policy and training)
3. Supervision, attorney roles, and quality assurance
4. Resources, including case assignments and technology

Evaluating recommendation 1, related to weighing evidence, Zisser addresses the ways the DPA weighs its evidence to determine possible findings between “Not Sustained,” “Unfounded,” and “Proper Conduct.” He advises and critiques their usage of “he-said/she-said” evidence to make determinants in misconduct investigations as inappropriate rationale on which to base findings.<sup>61</sup> Recommendation 2, related to basic investigation techniques, calls out the DPA’s lack of actual “field work” during investigations, advising that the agency should practice stronger techniques in their collection of necessary materials and interviews. Overall, the Zisser report did not specifically mention any opinion on the current DPA approach to officer involved shooting investigations. Although this report is insightful and addresses ways the DPA can tighten up their investigation procedures, there was no specificity on OIS investigations that could have helped the agency brainstorm new tactics to investigate given their new authority from Prop. D.

## **Prop G**

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<sup>60</sup> Ibid., 2.

<sup>61</sup> Ibid., 5.



The approval of Proposition G marked a change in the operations of the then Office of Citizen Complaints, as a modestly helpful reform that would give slightly more independence to the oversight agency. The measure passed in the November 2016 election and officially renamed the Office of Citizen Complaints to the Department of Police Accountability. Changing the agency from an office to a whole department was an aspect of the measure that kept the name up to date with its newly granted authority in OIS cases. Prop. G also amended the charter so that the DPA has authority to audit any SFPD policy, procedure or practice.<sup>62</sup> It also makes it so that the DPA now has direct authority over its proposed budget to the mayor. The measure was not controversial in San Francisco, nor did groups like the POA oppose it. While these changes brought the DPA to voter attention, none of these new changes directly effect the structures and laws that hinder DPA officer involved shooting investigations, making the measure ineffective in brining about change to this focus.

## Summary

This project has shown the development of civilian oversight in the context of the San Francisco Police Department's legacy of discretionary policing practices. By examining the ways in which the Department of Police Accountability is structured to conduct investigations of officer involved shootings, we've seen how the DPA is limited in what they may actually be able to determine in these investigations. This proved true in the highly questionable and controversial case of Alex Nieto. In a year long effort to change the regulated procedures that breed a toxic

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<sup>62</sup> SF Elections, "San Francisco Voter Information Pamphlet: G Police Oversight," *City and County of San Francisco*, accessed April 30, 2017, <http://voterguide.sfelections.org/en/police-oversight>.

policing culture, the Police Department created charter amendments effecting the DPA in hopes of stronger oversight. As I have shown, Prop D. and Prop. G will not create change in the officer involved shooting investigative process and ultimately, San Francisco will continue down a path of no administrative accountability for it's police officers when necessary. I propose ideas to address this problem by tackling state laws and our local approach to civilian oversight.

## V. Recommendations

In this section, I present four different recommendations that would change current state laws and the San Francisco charter which directly interferes with the authoritative power and investigatory proceedings of the Department of Police Accountability. As my paper has shown, the work that DPA does related to OIS investigations has failed to make an impact in San Francisco's belief of the organization. Following the implementation of Proposition D in June 2016, the Department of Police Accountability is now in a position to add investigative input that could potentially bring social justice in OIS cases on behalf of the San Francisco civilians they serve, if they are able to produce quality, sustain-worthy findings from OIS cases and if they are able to actually *do something* with these findings. Here, I argue that there are certain laws and policies in place that must be reformed in order to ensure the DPA has complete access, ability and authority to perform their duties to the best of their abilities. These policies are the Peace Officer's Bill of Rights, the Copley Press Decision and the San Francisco Charter's section on the Department of Police Accountability.

### **The Peace Officers Bill of Rights**

In 14 states across the country, police officers are given a set legal protections meant to protect all American law enforcement personnel from investigations and prosecution for conduct while they are acting on duty. This body of rights is called the Law Enforcement Officers' Bill of

Rights (LEOBR) but more commonly known as the Peace Officer's Bill of Rights (POBR).<sup>63</sup> The Peace Officer's Bill of Rights functions as a set of due process rights for police officers under investigation for all forms of alleged misconduct. The Huffington Post tells the history of the Peace Officers Bill of Rights' emergence in the late 1960s and early 1970s as a reactionary effort to combat the demands of civil rights activists who called for greater police accountability and spurred the creation of citizen review boards as discussed earlier.<sup>64</sup> In two rulings in 1967 and 1968, the Supreme Court sided with police officers who claimed they had been deprived of their Fifth Amendment right against self-incrimination.<sup>65</sup> Following these cases, the justices ruled police officers may not be forced (by threat of termination) to testify against themselves, including during internal, administrative investigations.<sup>66</sup>

In 1976, California Governor Jerry Brown signed California's version of the bill into power, calling it the Public Safety Officer's Procedural Bill of Rights Act, Section 3300-3312 of the government code. The California Peace Officer's Bill of Rights lists detailed sections of what sorts of protections cops have, relating to the following: representation in investigation interrogation, inspection of personnel files, locker searching, etc.<sup>67</sup> Section 3303, titled "Investigation interrogations; conduct; conditions; representation; reassignment", declares that whenever a public safety officer is under investigation and subjected to interrogation by any member of the public safety department that could potentially lead to punitive action, the

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<sup>63</sup> "Peace Officers Bill of Rights," *Peace Officers Research Association of California*, accessed March 30, 2017, <http://porac.org/resources/peace-officers-bill-of-rights/>.

<sup>64</sup> Eli Hager, "Take a Look at the Law Enforcement Officers' Bill of Rights," *Huffington Post*, April 27, 2015, [http://www.huffingtonpost.com/2015/04/27/law-enforcement-bill-of-rights\\_n\\_7153106.html](http://www.huffingtonpost.com/2015/04/27/law-enforcement-bill-of-rights_n_7153106.html).

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

interrogation must legally happen under ten descriptive conditions. Some of these conditions include holding the interrogation at a “reasonable hour” preferably when the officer is on duty, if it is done when the officer is off duty then the officer must be compensated for off duty time. Interrogation conditions for officers also include assurance that the officer knows what they are being investigated about prior to the meeting. This is one example of the sorts of “catering” like treatment the POBR ensures for officers who are under investigation for in some cases, very serious crimes.

In San Francisco, the Police Officers Association uses the Peace Officers Bill of Rights as its protective weaponry during accusations of misconduct. In an interview, POA President Halloran explained how the POA uses the Peace Officer’s Bill of Rights during cases in which they must represent officers from punitive action, which can mean suspension and or loss of pay.<sup>68</sup> The POA represents its members for internal affairs investigations, DPA investigations, and will represent officers in any form of hearings before the Police Commission. Hallorin says, “Through the POA, officers under investigation are given defense representatives, who are fellow police officers that defend and represent accused police officers in front of the oversight bodies listed above. For high profile cases like OIS, the POA will bring in attorneys to counsel accused officers as the peace officers bill of rights under Section 3303 subdivision (i) legally allows.”<sup>69</sup> Unions exist to protect their members as the POA has proved time and time again, they aggressively use the POBR to ensure their members’ privacy and protection during officer involved shooting investigations.

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<sup>68</sup> Marty Halloran (Police Officers Association President), interview by Sofia Aguilar in San Francisco, March 4, 3017.

<sup>69</sup>Ibid.

More than 35 years after its inception, the law continues to create a nearly impenetrable wall that restricts public access to police disciplinary records and civilian complaints in California, as we've seen in the DPA's vague openness reports. These openness reports are conducted as a method of transparency but because of the POBR, the reports say nothing about which officers are being accused of misconduct. The Peace Officer Bill of rights makes officer personnel records confidential, including records of promotions and of course discipline records and any other information that would release an "unwanted invasion of personal privacy."<sup>70</sup> The problem with the PBOR is that it works as an invisible force field for civilian oversight agencies like the DPA. These restrictions to police information perpetuate distrust in police, we see this example following Alex Nieto's death in which case community activists demanded the names of the officers who shot Nieto but were denied this information for months on end.

I recommend that the state legislators repeal the Police Officer's Bill of Rights entirely, unless there is an agreement to reform it in a way that allows more information to be made public during officer investigation. As discussed earlier, administrative investigation may only use evidence and information from criminal investigations to support their own. This due process protection is because of the Peace Officers Bill of Rights. The Police Officers Bills of Rights works to dismantle necessary information for investigative personnel in civilian oversight to conduct thorough research and investigation needed to provide charges that are upheld by the Police Commission. This law shapes the structure of investigation so that administrative investigators are left at the mercy of criminal investigators' evidence, which in San Francisco is headed by the SFPD leaving more than enough room for conflicts of interest. This law is deeply flawed and is the direct

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<sup>70</sup> Jim Miller, "California has tightest restrictions on law-enforcement records, access advocates say," *The Modesto Bee*, March 17, 2014, <http://www.modbee.com/news/state/article3162015.html>.

reason why officers face no administrative accountability for their actions after officer involved shooting investigations.

### **Copley Press vs. Supreme Court**

The Peace Officers Bill of Rights is not the only California law that works to protect police officer rights in instances of officer investigations and review. The 2006 state Supreme Court ruling known as the “Copley decision” is another major California policy that directly affects the information civilian oversight agencies are allowed to see. According to *The San Diego Union Tribune*, *Copley Press* sought access to a disciplinary hearing in which a San Diego County deputy sheriff was appealing his termination from the force.<sup>71</sup> The Supreme Court ruled that police disciplinary hearings are closed and the public has no right to learn about allegations against police officers for police misconduct, even when they are discussed in a civil service commission. The *Copley Press* ruling “has effectively shut off all avenues for the public to learn about misconduct involving individual police officers, such as excessive force and dishonesty; officer involved shootings; patterns of misconduct and leniency; previous discipline for misconduct by another agency; and even the identity of officers in misconduct cases,” according to the American Civil Liberties Union of Northern California.<sup>72</sup>

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<sup>71</sup> Steven Greenhut, “The sweeping impact of Copley decision,” *San Diego Union Tribune*, May 30, 2015, <http://www.sandiegouniontribune.com/news/politics/sdut-sweeping-impact-copley-decision-significance-2015may30-story.html>.

<sup>72</sup> ACLU of Northern California, “Frequently Asked Questions about Copley Press and SB 1019,” *American Civil Liberties Union of Northern California*, June 15, 2007, <https://www.aclunc.org/blog/frequently-asked-questions-about-copley-press-and-sb-1019>.

ACLUNC sources say before *Copley Press* was decided, Penal Code 832.7 prevented public access to citizen complaints held by an officer's employing agency, meaning internal affairs records were confidential, while records of administrative appeals to outside bodies like the Police Commission and the OCC were open to the public.<sup>73</sup> In San Francisco before 2006, Police Commission records were open to the public, allowing people to learn about serious misconduct cases ranging from excessive force to dishonesty. But after *Copley Press*, all hearings and related records are no longer released.<sup>74</sup> This is an issue for San Francisco civilian review because the denial of access to officer information has created a major issue of transparency between SFPD and the general public which the DPA has no authority to change. The purpose of the DPA's openness reports is to clearly communicate with the public the investigations and findings of all misconduct cases, including summaries of serious offences like officer involved shootings. Because of the *Copley Press* ruling, the openness reports are written in a "general language" format that excludes names of officers, keeping officer information private. For example, if an officer has prior offenses/records for shooting incidents, that information is kept from the public.

In 2016, Senator Mark Leno (D-San Francisco) introduced Senate Bill 1286, which would have allowed the public access to internal reports in cases where police departments found officers committed misconduct offenses, including investigations of officer involved shootings.<sup>75</sup> This was a direct attempt to combat the *Copley* decision but unfortunately, the measure died shortly after it was proposed. I recommend efforts to either propose a similar Senate bill or to lead a stronger campaign to overturn the *Copley Press* decision. Overturning the *Copley* Decision is necessary in

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Liam Dillon, "California police misconduct records will remain secret after bill dies in committee," *Los Angeles Times*, accessed May 2, 2017, <http://www.latimes.com/politics/la-pol-sac-essential-politics-california-police-misconduct-r-1464384312-htmlstory.html>.



a time of nation wide police reform because it shows citizens that the police responsible for policing their communities have nothing to hide. It would work as beginning steps to break down barriers between communities and police with historic legacies of mistrust not only in San Francisco, but throughout California.

## **The City and County of San Francisco Charter amendment**

My third recommendation to improve the Department of Police Accountability lies in the structural workings of the City and County of San Francisco's Charter. The Department of Police Accountability's authoritative power is detailed in the City Charter under Section 4.136. This includes the structural descriptions of what the DPA is and is not allowed to do. As my project has shown, the DPA routinely makes recommendations to the chief of police all the time that he doesn't follow. In an interview with Police Commissioner Sonia Malera, she said, "I've seen a couple [sustained findings] in which the chief did not carry out recommendations, so they were brought to the commission level and I still didn't think they were that big and when they were brought before us they didn't meet the criteria, now that they are an independent body they might push more through."<sup>76</sup> How will OIS investigations be different? When speaking to Director Joyce Hicks about the process of an OIS, she revealed that the way it works now will more than likely remain the same.<sup>77</sup> Now that the DPA is responsible for investigation more serious crimes, there should be no way that the Police Chief can try to negotiate out of discipline in the death of a civilian. These findings must go to the Police Commission in all instances.

I recommend this section of the charter be reformed to allow the Director of the DPA to directly issue disciplinary recommendations to the Police Commission in cases of officer involved shootings. After the passage of Prop. D, there is still no amended protocol for what the recommendation process will look like in an officer involved shooting investigation. I recommend that in the case of officer involved shooting sustained findings, the DPA Director should be given

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<sup>76</sup> Sonia Malera (Police Commissioner), interviewed by Sofia Aguilar in San Francisco, February 17, 2017.

<sup>77</sup> Ibid.

full authority to directly file charges with the Police Commission, excluding the Police Chief from this negotiation. There should be a new, special section of the city charter that creates a new protocol between the Police Commission and the Department of Police Accountability to review sustained findings independently and then hold hearings with the officers involved and the chief to administer discipline. There needs to be a charter assurance for findings in OIS cases that does not allow these cases to be handled or absolved in a single meeting between DPA director and chief of police. A new measure must be created to ensure the charter upholds a process for OIS case discipline. I believe that is true civilian oversight of policing, when civilian members are able to determine how to reprimand the police department, this will be the beginning of police reform in San Francisco.

### **Department of Police Accountability Executive Director**

The head of a department sets the tone for the whole agency. This proves true for Department of Police Accountability. During Joyce Hicks nine-year term as DPA Director, there was not a single sustained finding charge against police officers involved in an officer involved shooting. Although this project shows how structurally and legally, evidence to support these charges can be difficult to obtain, the power of political will also plays a huge role in how far a case can go. The city charter allows the DPA Director to file charges with the Police Commission if and when they feel its review for discipline is needed, even if the Police Chief decided it isn't. The DPA needs a director who isn't afraid to upset people, specifically the Police Officers Association. Before Joyce Hicks there was Mary Dunlap, a highly regarded civil rights attorney

appointed of the OCC by past Mayor Willie Brown.<sup>78</sup> Dunlap was known for rejuvenating the oversight agency with her strong leadership and high standard of professionalism. She was a director who regularly challenged the chief of police and the POA in her commitment to making the OCC an advocacy agency for citizens' rights. Dunlap died in 2003 and since her passing, the DPA has not had a director with the same level of aggression. Joyce Hicks's retirement leaves an important opening for the DPA, one that will determine the future of police accountability in San Francisco for years to come.

I recommend that the same ways in which the Police Commission and Mayor Ed Lee sought an "outsider" to serve as new chief of police, the Department of Police Accountability should bring in an executive director with no previous connection to the San Francisco Police Department. By bringing someone from outside of San Francisco to head the DPA with a strong background working in civilian oversight, San Francisco needs a new Department head who will not be afraid of challenging the Police Officers Association by taking charges directly to the Police Commission in cases of blatant misconduct and lethal use of force.

## **VI. Conclusion and Analytical Reflection**

We are at a critical point in the story of American policing. Today more than ever, younger generations of informed voters are becoming involved in activism around police brutality and police reform. This newfound attention to policing practices allows all cities to begin to ask their own police departments, what are we doing to perpetuate the narrative of policing? In San

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<sup>78</sup> Henry K Lee. "Mary Dunlap – S.F police watchdog, rights advocate," *SF Gate*, January 22, 2003, <http://www.sfgate.com/bayarea/article/Mary-Dunlap-S-F-police-watchdog-rights-2638828.php>.

Francisco, the outrageous amount of officer involved shootings and lack our accountability for them gives us our answer. Today, it is absolutely necessary for civilian oversight agencies to have full authoritative powers in order to combat this epidemic.

In San Francisco, the general public has little to no faith in the Department of Police Accountability for good reasons. The DPA continues to prove to our local communities that its priorities lie in generating timely reports rather than challenging the Chief of Police. The purpose of my project was to show where the structural limitations exist and how the DPA can combat them. Local residents' frustration with the DPA comes from a lack of understanding in how these policies and power structures work together to create a "perfect storm" for police officers to face little to no discipline in cases of officer involved shootings. Cases like Alex Nieto's death fuel organizing efforts and activism around police brutality in San Francisco, echoing demands for justice from the courts. Although administrative charges don't hold the same effect as sending a police officer to jail for murder, I do think the act of career discipline for officers sends a message to police that government agencies are meant to protect civilians, not cops.

I believe we are on the dawn of a new era for the San Francisco Police Department. The reform efforts of 2016 successfully captured city wide attention on SFPD, we are at a point where their every move is being watched. The open director position at the Department of Police Accountability stirs concerns for the future but a stronger hope as to what this future can look like. This open position has the potential to be filled by a successor that can continue the DPA down the current path it's been on, or if chosen wisely, can make the oversight agency stronger than it's ever been before. I believe we have the information on what needs to be changed in the San Francisco Police Department, locally and state wide. All we need now is the political will to implement these changes.

My interest in the San Francisco Police Department began this summer during my internship with 48 Hills, a San Francisco independent media publication. As an intern, it was my responsibility to stay up to date with local politics and the latest San Francisco news. Watching debates and going to protests was exciting for me. This internship gave me a rush because I was able to personally observe stories and interactions between citizens and policymakers unfold before my eyes. During July of 2016, after the release of the Blue Ribbon Panel report, my supervisor Tim Redmond released an article that gave summary of the panel debriefing which captured the animosity felt between departments. This research triggered questions I had about our huge police department and police policies that come into play during in officer involved shootings.

My internship at 48 hills gave me an understanding of what it takes to be an effective reporter. Being a reporter requires the ability to synthesize a billion bits of information at once and be able to tell the story of what's really happening in your community. I learned that there will be groups of people who disagree with how you tell the story but that's okay because there are always multiple sides to a story and they all deserve to be told. In the case of the San Francisco Police Department, I kept up to date with all the reform efforts of 2016 in search of bits of information that didn't look right. In this process, I grew curious of the Office of Citizen's Complaints. I didn't understand how the police department could get away with so much if we had an agency that was supposed to handle discipline. Trying to understand who the OCC was and what purpose they filled was the starting point of my research.

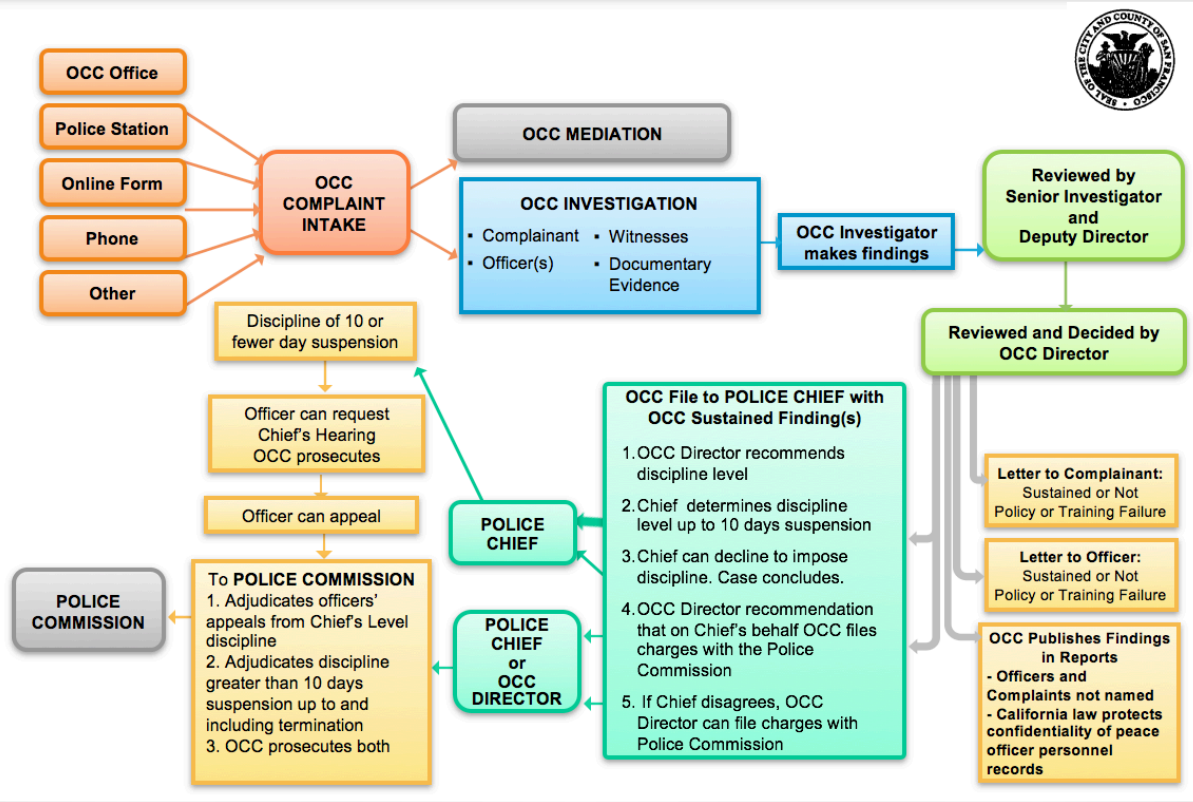
During my internship experience, I also realized how much I enjoyed interviewing people. I wanted to incorporate this method into how I gathered information for my project in order to

personally meet those I'm writing about. Interviewing a variety of key players from my project helped me develop a better narrative how the issue of police discipline is playing out in San Francisco. Meeting the heads of who decides what happens after a tragic situation gave me a different perspective on understanding how city policies are carried out by people. People are the ones who make policies real and meeting the leaders who carry out police department policies was very impactful for me and my research.

Appendix

Appendix A:

San Francisco Office of Citizen Complaints Complaint Process





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