

Responses to 2021-2022 Alameda County Civil Grand Jury Final Report
“BART is on the Wrong Track with Independent Oversight”

FINDINGS

Finding 41:

BART’s board and management interfered with the Office of the Inspector General’s performance of its duties.

RESPONSE: *Disagree*

The Board disagrees with this finding. The Grand Jury report cites areas of supposed "obstruction" of the Office of the Inspector General (OIG), including the Board's unwillingness to adopt the OIG Charter until the OIG consulted with BART's labor unions (see responses to Findings #42 and #43), and management's handling of the OIG's risk assessment.

Management initially viewed the topics of the OIG’s risk assessment as not being in alignment with the scope of the OIG’s enabling legislation, which was interpreted as to review fraud, waste, and abuse, and tied to reviewing capital projects (Senate Bill 595 (Glazer), Section 28840 “...to ensure that the district makes effective use of bridge toll revenue and other revenue and operates efficiently, effectively, and in compliance with applicable federal and state laws.”). Management directed staff to pause their participation in the risk assessment until a clear understanding of the OIG’s scope could be achieved. Once the scope of the OIG was clarified to reflect a broader scope, management directed staff to assist the OIG and the risk assessment moved forward with an OIG consultant.

It was never management’s intent to interject itself into the actual interviews with staff. Management did interject itself into reviewing and commenting on the risk assessment final report (May 2021) when it found several factual errors (e.g., functions that were stated to be under the wrong department, incorrect department names, reference to lack of controls or processes that were already in place, etc.), even though the OIG indicated that no feedback would be taken as the report was final. Management was also concerned that the risk assessment covered some lower risk areas and did not focus on areas of presumed greater risk. Ultimately, the IG did not bring the risk assessment to the full Board of Directors.

Overall, management has been receptive and responsive to recommendations made by the OIG. Per the *Office of Inspector General Fiscal Year 2022 Annual Report*, Appendix I shows that management has accepted 40 of 47 (85%) recommendations made by the OIG. Two recommendations were associated with the Board's use of social media that the Board did not accept, and one was associated with a conflict-of-interest recommendation to seek outside counsel, which management did, but the IG disagreed with the District actions taken (see response to Finding #46).

Four of the seven unaccepted recommendations pertain to a tunnel lighting upgrade project for which management disagreed with the findings and provided independent data to support management’s position. Management took the OIG and several board members to the field to observe the product in question, after which the IG committed to providing a supplemental report, which management has yet to receive.

Finding 42:

BART's board and general manager hampered the approval and implementation of a charter for the Office of the Inspector General, resulting in a lack of understanding within the organization that the Inspector General is independent.

RESPONSE: *Disagree*

The Board disagrees with this finding. The Board and the General Manager supported the OIG from the beginning of the OIG's charter effort including suggesting clarifying language, asking that roles and responsibilities be better defined, advising that terms of the BART labor agreements should be considered, etc. When the IG presented the charter at the January 14, 2021 board meeting, alignment with labor agreements had not been attained and the labor unions expressed concerns that the charter impeded their ability to adequately represent their membership when meeting with the OIG. The Board, as a policy body, directed the OIG to work directly with the labor unions and return with a charter for approval. To-date, an updated charter has not been brought to the Board for its consideration.

Finding 43:

BART's board and management supported the labor unions representing BART employees to try to limit the independence of the Office of the Inspector General investigations by setting unreasonable conditions for engagement of employee witnesses or complainants.

RESPONSE: *Disagree*

The Board disagrees with this finding. The Board and management are neutral to the conditions of engagement between the labor unions and the OIG. The Board requested the IG to develop an acceptable meeting protocol with the labor unions prior to approving the OIG Charter (see response to Finding #42). Involvement by the Board and management would bring in additional parties that would make coming to an agreement between the labor unions and OIG more difficult, which is why the Board has asked the OIG to resolve any issues directly with the unions.

Finding 44:

BART's Office of the Inspector General does not have access to independent counsel, administrative staff, and records storage systems as is considered best practice nationally.

RESPONSE: *Disagree*

The Board disagrees with this finding. The legislation that created the OIG is silent regarding access to independent parties and systems, but it did not preclude the IG from doing so. In practice, the OIG has contracted for external support (e.g., Whistleblower Hotline and external consultants) with no issues. The Board and management have provided the OIG access to BART's General Counsel, District Secretary, Controller-Treasurer, Information Technology, Human Resources, Procurement, Communications, and External Affairs departments, all of which have provided staff time and other resources in support of the OIG.

While there are no restrictions (other than the policies and procedures applicable to all staff) on the OIG's access to independent resources outside of BART, management believes that those provisions and related costs should have been part of the OIG enabling legislation. The Board and management support OIG access to independent counsel, administrative staff, and records storage systems if funds are secured by the OIG to pay for them (see

response to Recommendation #59). It should be noted that subject to existing Board policy, all departments (including the OIG) seeking to use outside counsel should coordinate with the General Counsel's office.

Finding 45:

BART's Office of the Inspector General's budget, set at an initial \$1 million per year in 2018 by PUC Section 28842, is much lower than the budgets of comparable transit agencies' Office of Inspector Generals adjusted for size. A mechanism for increasing the budget annually in the enabling legislation has not been used.

RESPONSE: *Disagree Partially*

The Board partially disagrees with this finding. The OIG was created by the state and funded with Bay Area bridge tolls (2018's Regional Measure 3 (RM3)). One of the criteria for BART's support of RM3 was the assurance that funding for the OIG would come from sources separate and distinct from BART. The RM3 legislation allows for the IG to request a budget increase from the Bay Area Toll Authority (BATA) on an annual basis (the "mechanism" to increase the budget). The Board and management have supported and assisted the IG's request for additional funding from BATA.

BATA denied the OIG's request for additional funding in 2020, citing budget cuts related to lower traffic volumes (and related toll revenue) due to COVID 19. In early 2022, BART's General Manager convened a meeting with the BATA Chair and Vice Chair, MTC Executive Director, BART Inspector General, and other key BART staff to secure additional funding, but BATA subsequently denied the request citing that Regional Measure 3 is in litigation.

The Board and management have continued to support the IG's request for additional funding. In January 2022, the Board revised its adopted 2022 State Legislative Advocacy Program to include the pursuit of additional funding for the OIG. BART staff met with several Bay Area legislators to discuss the OIG's funding needs and submitted a \$1 million budget request to a member in the Assembly for one-time funding. While the request was not advanced within the State's Fiscal Year 2023 Budget, BART staff continue to evaluate funding opportunities within the Fiscal Year 2024 State Budget.

Management has also assisted the OIG with funding 50% (including a change order) of its performance audit of BART's financial organizational structure and allowed the OIG to access its central services on-call consultants. Furthermore, management has stated that it will cover any OIG overhead expenses that would cause the OIG to exceed its current annual \$1 million budget.

The Grand Jury uses two measures, percentage of OIG budget to total operating budget and number of OIG staff, to compare BART's OIG resources to peer transit agencies Washington Metropolitan Area Transit Authority (WMATA) and the Los Angeles County Metropolitan Transportation Authority (LA Metro). WMATA and LA Metro have much wider breadths of programs than BART, including large bus systems and, in the case of LA Metro, allocating funds for several local sales tax programs plus express lane construction. These program differences should be considered. Both peer agencies have, at times, been under court or government-ordered mandates and oversight for past deficiencies. The wider breadth and additional oversight partially explain the larger IG budgets. Beyond these reasons using the ratio of IG budget to operating budget for comparison is reasonable.

Management finds the comparison of Full-Time Equivalents (FTE) among peer agencies to be misleading as the FTEs are not adjusted for the size of the agency (both WMATA and LA Metro are much larger organizations than BART). A better measurement, although not perfect, is OIG FTEs as a percentage of agency FTEs, which still shows that the BART OIG lags behind peer agencies but to a lesser extent than compared to using FTE counts.

Finding 46:

A potential serious conflict of interest exists between a BART senior manager and a construction management firm now under contract that employs the manager's spouse and sibling.

RESPONSE: *Disagree Partially*

The Board agrees that a potential conflict of interest existed, and management contends that the potential conflict has been addressed. The senior manager was placed in a different position when the IG informed management of the conflict and, as a result, the manager no longer performs any work related to the firm that employs their spouse and sibling. Furthermore, management has revamped its California Form 700 Statement of Economic Interests disclosure process and is in the process of reviewing its code of conduct and conflict of interest policies, all based on recommendations of the OIG.

One of the OIG's recommendations pertaining to this potential conflict was for management to "Seek an expert outside opinion from the Fair Political Practices Commission (FPPC) or other appropriate source to determine if the conflicts of interest violate California Government Code § 1090." As the FPPC will not provide an advisory opinion regarding past conduct, BART obtained an opinion from outside counsel, who advised that there were authorities supporting both sides of the conflict-of-interest question. Management stands by its assertion that the potential conflict has been adequately addressed and no further action is necessary beyond implementing the eight other recommendations made by the IG.

RECOMMENDATIONS

Recommendation 56:

BART’s Board of Directors must adopt written policies that acknowledge California Government Code 1236 and require compliance with standards prescribed by the Institute of Internal Auditors or the Government Auditing Standards issued by the Comptroller General of the United States (known as the “Yellow Book.”).

RESPONSE: *Implementation Pending*

Reference to California Government Code 1236 (which references standards prescribed by the Institute of Internal Auditors and Government Auditing Standards) has already been added to the latest draft version of the OIG Charter (July 2021), which will be reviewed by BART’s Audit Committee and full Board when the IG next brings the charter up for review, anticipated to be by the end of calendar 2022. Furthermore, California Government Code 1236 will be integrated into any standard Internal Audit policies.

Recommendation 57:

BART’s Board of Directors must adopt an Office of the Inspector General charter that expands on the spare language of PUC 28840 – 28845 such that the independence of the Inspector General is clearly acknowledged, and the roles and relationships are clearly defined between the Inspector General and senior BART staff such as general manager, general counsel, treasurer/controller, and internal auditor.

RESPONSE: *Analysis Required*

The Board is awaiting the outcome of California Senate Bill (SB 1488) (Glazer). With respect to independence, the Board and management will adhere to any applicable existing and new legislation regarding the function and practices of the Inspector General, including proposed California Senate Bill 1488, adding Public Utilities Code Section 28840(c), which contains specific language in this regard. With respect to roles and responsibilities, the Board and management will review any proposed OIG Charter brought to its attention by December 28, 2022, to ensure that the roles and responsibilities do not contradict or conflict with the roles and responsibilities of the Board, general manager, general counsel, controller/treasurer, and internal auditors.

Recommendation 58:

BART’s Board of Directors must give the Office of the Inspector General unencumbered and confidential access to all of BART’s resources, information, and employees, while respecting the “Weingarten” right of employees to representation during an investigatory interview if requested by the employee.

RESPONSE: *Implementation Pending*

The Board is awaiting the outcome of SB 1488 and resolution of issues regarding the IG’s access to union employees (see response to Finding #42) before implementing this recommendation. With respect to access of information and records, the Board and management will adhere to any applicable existing and new legislation regarding the function and practices of the Inspector General, including proposed California SB 1488, adding Public Utilities Code Section 28841.2(c)(2), which contains specific language in this regard. With respect to staff access, the Board and management will adhere to all laws, rules, regulations, and collective bargaining agreements.

Recommendation 59:

BART’s Board of Directors must provide the Office of the Inspector General independent access to counsel, administrative staff, and records storage systems.

RESPONSE: *Implemented*

The Board agrees that the Office of the Inspector General should have (and currently has) a pathway to access independent counsel, administrative staff, and records storage systems, when warranted. There are no restrictions on the OIG for accessing resources outside of the District provided the OIG has budget capacity for independent access pursuant to policies and procedures that apply to all departments and staff. Within the District offices, the Inspector General has access to the same resources as BART's board-appointed officers (General Counsel, Controller-Treasurer, Independent Police Auditor, and the General Manager). For example, the OIG regularly engages with Communications to post and update the OIG webpage on bart.gov. Government & Community Relations prepared a funding strategy document and met with elected officials in collaboration with the OIG to pursue member budget requests for additional funding in the Fiscal Year 2022-23 State Budget. In addition, the OIG has received direct support from Information Technology, Human Resources, Procurement, the District Secretary’s office, and other departments. Pursuant to existing Board policy, all departments can seek to use of outside counsel through coordination with the General Counsel’s office.

Recommendation 60:

BART’s Board of Directors must increase funding for the Office of the Inspector General to the level of peer transit agencies such as LA Metro and WMATA, expressed as a percentage of overall operating budget.

RESPONSE: *Not Implemented*

The Board will continue to support the OIG's request for a budget increase through the Bay Area Toll Authority (BATA) consistent with the OIG’s enabling legislation, and other sources aside from BART (see response to Finding #45).

Using LA Metro and WMATA as peers in this regard may be overstating the BART OIG’s budget needs due to their much wider breadths of programs than BART, as described in the response to Finding #45, but overall, the Board agrees that the OIG may be underfunded relative to similar offices in other transit agencies.

Recommendation 61:

BART’s Board of Directors must update BART’s Code of Conduct, last revised in 2013, to make reporting of potential conflicts of interest more internally consistent and aligned with federal and state regulations.

RESPONSE: *Implementation Pending*

The Board supports an update to the District’s Code of Conduct and management is in the process of reviewing all codes of conduct (employee, board, contractor, etc.) as part of a wholesale review of its conflict-of-interest policies and procedures and will update policies to align with federal and state regulations by the end of calendar year 2022.