

OFFICE OF INDEPENDENT REVIEW: WHAT'S NEXT?



GRAND JURY 2015-2016

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EXECUTIVE SUMMARY

The Orange County Board of Supervisors (Board) created the Office of Independent Review (OIR) in 2008, after public outcry over an in-custody beating death of an inmate in an Orange County jail and alleged inaction by jail deputies responsible for the safety of the inmates. The Board's 2008 ordinance called for the OIR to act as independent reviewer of the OCSD's internal investigations into in-custody deaths and complaints of employee misconduct, in order to ensure thorough, fair, and effective investigations. The intent of the Board was to restore public trust in the Orange County Sheriff-Coroner's Department (OCSD).

Despite strong cooperation and high marks from the OCSD, the Board criticized the OIR over the years. Many Supervisors were dissatisfied with the detail and quantity of OIR reports. Some felt its independence was impacted by its closeness to the OCSD. And some judged that the OIR had failed to act as an independent investigator to find OCSD problems before they became critical incidents or public controversies, even though, in the Grand Jury's opinion, this fell outside the original purpose and intent stated in the 2008 OIR ordinance.

The breaking point for the Board was the national reaction to the jailhouse informant controversy that arose in a high-profile mass murder trial in Orange County in 2014 and 2015. The Board felt the OIR had failed it and voted unanimously by straw vote to defund the OIR in the June 2015 budget cycle. Some Supervisors saw no value in the OIR; others wanted to shutter it to make way for a bigger, better OIR. Two of the three OIR employees departed around this time.

After both the U.S. Department of Justice and the OCSD raised concerns about leaving the OCSD with no oversight, the Board reversed course and restored funding. Concurrently, it created an ad hoc committee to design a new OIR model. The Board passed the resulting amended OIR ordinance in December 2015. In March 2016, the OIR Executive Director resigned, leaving the OIR effectively dormant until the County acquires new staff to implement the 2015 OIR ordinance. In the interim, the Board has the option to bring in temporary staff, if an urgent need were to arise.

The 2015 ordinance greatly broadened the scope of the OIR, redefined its purpose, and expanded its oversight responsibilities from a single County agency to five, adding the Office of the District Attorney (OCDA), Public Defender, Probation Department, and Social Services Agency to the OCSD. Both the OCDA and the (now previous) Public Defender have voiced strong opposition to being added to the OIR's purview, on the basis of confidentiality concerns, legal precedent, and existing law that prevents outside interference with the ability to effectively try cases. The Public Defender's opposition may be resolved through hiring conditions placed on the new Public Defender by the Board, now that the previous Public Defender has taken a judicial appointment. The OCDA's remaining opposition could be a serious impediment to effective OIR review of the OCDA.

The Grand Jury has provided findings and recommendations related to the coming implementation of the new OIR. They involve operational aspects that need to be addressed, now that the Board has made the policy decisions in the 2015 ordinance. Notable recommendations call for evaluating the vulnerability of the OIR to political influence and implementing mechanisms to protect the independence of the OIR, and urging the OCDA and OIR to establish an operational relationship by including an OIR staff attorney as an outside and independent member of the OCDA's Confidential Informant Review Committee.

The Grand Jury is cautiously optimistic that the new OIR will become operational in fiscal year 2016-2017, and continue to help Orange County earn the public's trust in its criminal justice system.

BACKGROUND

Origins of the Orange County Office of Independent Review

The Orange County Board of Supervisors (Board) established the Orange County Office of Independent Review (OIR) in February 2008, partly in reaction to the October 2006 in-custody beating death of an Orange County jail inmate by other inmates. The media coverage that followed included allegations that some of the jail deputies had failed to take actions that might have prevented the death, thereby damaging the public's trust in the Orange County Sheriff-Coroner's Department (OCSD).

Unrelated to the in-custody jail death, the then Sheriff-Coroner was indicted on federal charges in October 2007 and resigned in January 2008. The Board appointed an Acting Sheriff and simultaneously looked for an independent public safety oversight mechanism that could add transparency to the OCSD's internal investigations and help restore public confidence in the OCSD. They found a promising model already in place in Los Angeles County.

Los Angeles County had adopted an oversight model in 2001, when it formed its Office of Independent Review to monitor and advise the Internal Affairs Group in its Sheriff's Department. That model appeared to be applicable to the OCSD, which has a similar internal affairs group called the Internal Affairs Unit (IAU). The IAU conducts investigations of alleged misconduct by OCSD employees, with appropriate due process, and in accordance with the Peace Officer's Bill of Rights.

The Board hired a veteran of the Los Angeles County's Sheriff's Department as the new Orange County Sheriff in June 2008, and a veteran of the Los Angeles County OIR to be Executive Director of Orange County's OIR in September 2008. The two shared a professional history in Los Angeles County and mutual support of the OIR concept there. As a result, the OIR launch was successful and quickly operational in Orange County.

2008 Orange County OIR Ordinance

The February 2008 OIR ordinance stated that the purpose of the OIR was to monitor, assist, oversee, and advise the Sheriff-Coroner in the investigation of:

- Selected internal and citizen complaints about the actions or inaction of peace officers or custodial officers in the OCSD, and
- Incidents of death or serious injury to persons in the custody of the OCSD.

The 2008 ordinance made the OIR responsible for ensuring that the OCSD's response to these matters was thorough, fair, and effective. The 2008 ordinance described OIR responsibilities including the following:

- Provide periodic status reports to the Board and OCSD management;
- Provide periodic reports to the public concerning OIR activities and findings as the OIR deems proper and appropriate;
- Provide ongoing counsel for the initiation, structuring, and development of investigations conducted by the OCSD's IAU;
- Respond to scenes of investigations, as needed and appropriate;
- Participate in confidential meetings and proceedings to monitor cases in real time;
- Provide counsel to the IAU to ensure thorough, unbiased, and impartial fact-finding and consistent conclusions;
- Review and critique completed investigations and conclusions of the IAU;
- Analyze selected IAU investigations to determine whether OCSD policies, practices, and procedures should be revised to prevent future occurrences of similar allegations of misconduct;
- Propose revisions of implicated policies, practices, and procedures; and
- Propose independent recommendations regarding investigation outcomes, when warranted. (Article, Codified)

Note: This is a partial list of responsibilities. The full text may be found in Appendix C.

Launching OIR Operations

The OIR was budgeted at \$750,000/year, funding an Executive Director and, as deemed necessary by the Executive Director, staff attorneys and administrative support staff. As the economy contracted in late 2008 and forced County belt-tightening, the OIR budget was reduced to \$425,000. Staffing was limited to the Executive Director, one Investigations Analyst with law enforcement experience, and one Executive Secretary. All three were hired in the summer and fall of 2008, and OIR staffing remained constant until 2015.

To enhance the independence of the OIR, the ordinance specified that the Executive Director and the staff attorneys would be independent contractors, rather than county employees, and would have no reporting relationship within the OCSD chain of command. The Executive Secretary was a County employee. The 2008 ordinance required that the Executive Director be an attorney having at least three years' experience in the oversight of law enforcement personnel and departments.

To ensure OIR access to confidential documents, data, and meetings within the OCSD, the 2008 ordinance directed the Executive Director to establish an attorney-client relationship with the County of Orange and the OCSD. Such a relationship obliged the OIR to preserve the confidentiality of information revealed during a review of internal OCSD investigations. The Grand Jury considers this assurance of confidentiality through attorney-client privilege as crucial to the Sheriff's decision to grant this level of access to the OIR.

At the request of the Board, one of the first acts of the new OIR Executive Director was to submit an OIR operations plan and proposed budget. The response took the form of an October 7, 2008 memo and PowerPoint presentation to the Board. (Connolly, OIR Operations) (Connolly, County) It addressed how the OIR would operate, including these important points:

- *Integration into OCSD's review process for critical incidents, use of force, and policies and procedures.* Importantly, the 2008 ordinance does not provide funds or staff for independent OIR investigations. Instead, its investigative function is integrated into the OCSD's existing internal investigations review process.
- *Full-time oversight commitment.* The OIR provides full-time oversight and real-time response to critical incidents, which includes responding to the scene.
- *Access.* The attorney-client relationship between the OIR, the County, and OCSD allows access to investigation files, records, and meetings under full confidentiality.
- *Independence.* The OIR provides an independent voice and outside perspective in OCSD internal investigations and critical incident reviews. OIR staff (excluding the Executive Secretary) are independent contractors, not County employees, and not part of the OCSD chain of command. This allows them to maintain objectivity and arms-length relationships with both the Board and the OCSD, and increase public confidence.
- *Transparency.* The OIR serves as a conduit between the public and the OCSD. It represents the public interest and provides insights to the public on the OCSD's actions.
- *Monitoring.* The OIR monitors officer misconduct complaint cases from start to finish, ensuring that the OCSD process is thorough, fair, and effective.
- *Consulting.* The OIR works with the OCSD on potential reforms in policies, training, systems, and protocols.

- *Coordinating.* The OIR acts as liaison between OCSD and outside groups, such as the County government, the criminal justice system, employee unions, community groups, and the public.
- *Reporting.* The OIR provides reports to the Board at their meetings, responds to individual inquiries from Supervisors, and issues written status reports. Some of the written reports are released to the public as well, through the OIR web site, while other reports may be confidential and protected by the attorney-client privilege.

Scope of This Report

This report covers the OIR from its creation in 2008, through a near-cancellation in June 2015, followed by the creation of a new OIR model in December 2015 with a five-fold expansion of scope and major new policy directions. With that as context, the report takes a detailed look at the recent revisions in the OIR's mandate and model (2008 vs 2015), and the motivations for, and concerns about, the expansion of the OIR's reach.

Prior Orange County Grand Jury Reports Mentioning the OIR

Seven Orange County Grand Jury reports, and/or responses to those reports, have mentioned the OIR since its inception in 2008. Five of the reports focused on the conditions of the county jails, the other two addressed ethics concerns, and all only peripherally mentioned the OIR. Table 7 in Appendix F lists all the OIR-related findings and recommendations from those reports, as well as the responses to those recommendations from the OIR, the Board, and the OCSD (Orange County Grand Jury Reports, 2008 to present). Several of the findings and recommendations of those reports, and responses, are discussed later in this report.

Reason for the Current Focus on the December 2015 Expansion of the OIR

The 2015-2016 Grand Jury focused this report on the expansion of the scope of the OIR that occurred in the middle of this Grand Jury year in December 2015. The Grand Jury judged this the most significant of a series of changes to County oversight bodies and mechanisms in calendar year 2015.

During that year, the Board made changes to four oversight entities – the Fraud Hotline, Internal Audit, Performance Audit, and the Office of Independent Review. The Board's actions led to leadership changes in all four in addition to the expansion of the OIR's reach. The Board took the following actions:

- Replaced the Executive Director of Performance Audit, naming the Internal Audit Executive Director as interim for Performance Audit as well.

- Shifted the Fraud Hotline from Internal Audit to County Counsel, with the Auditor-Controller assisting County Counsel.
- Moved Internal Audit from reporting to the Board to reporting to the Auditor-Controller, aligning the County with standard practice in other California counties. In the process, the Executive Director was replaced by a manager in the Auditor-Controller office.
- Made the interim Performance Audit Executive Director permanent, after which he left for another position in Los Angeles County. A new Executive Director has not yet been chosen.
- Renewed the OIR Executive Director's contract on a month-to-month basis in 2016. The Executive Director resigned in March 2016. The County has not hired a replacement yet for the new OIR.

The Grand Jury viewed the expansion of the OIR as particularly worthy of study, compared to the less fundamental changes in the other oversight entities. Concerns about the potential difficulties in implementing the expansion, and whether the expanded OIR could achieve its goals once implemented, are the reasons for focusing on the expansion in this Grand Jury report.

METHODOLOGY

In the course of its investigation for this report, the Grand Jury interviewed Orange County officials and staff, and representatives of public and private Orange County organizations. The Grand Jury also conducted a literature search, which led to reviewing previous Orange County Grand Jury reports, press coverage of the Orange County government and criminal justice system, and various Orange County government reports, documents, and web sites.

INVESTIGATION AND ANALYSIS

OIR Operations from 2008 through 2015

From 2008 until December 2015, when the Board of Supervisors (Board) passed the amended 2015 OIR ordinance, the OIR's sphere of operation was limited to a single law enforcement agency, the Orange County Sheriff-Coroner's Department (OCSD).

OIR Reports

The OIR published reports and briefed the Board and the OCSD leadership periodically on its activities with the OCSD. The Executive Director's contract initially called for "periodic status reports" on page one of the contract, and "monthly summary reports" to the Board on page five. The Board amended "periodic" to "quarterly" on page one, but left "monthly summary reports" on page five, before approving the contract as amended. There was no mention of the

requirement on page five during the discussion of the amendment, so it's possible the Board was unaware of the apparent conflict that the amendment created. (Item # 21, Clerk)

Taken literally, the amended contract terms called for four quarterly status reports per year plus twelve monthly summary reports, or a total of sixteen reports a year. The OIR Executive Director interpreted the contract as calling for quarterly status reports. In addition, he anticipated writing reports to the Board about individual matters and outcomes. (Connolly, OIR Operations) The OIR published twenty-two public reports total, starting in October 2008 and ending with the March 2015 report.

Some OIR reports involve litigation against the County, which typically means they have to remain confidential. (Santana, County's Office) OIR management estimated that the OIR provided fifteen to twenty confidential reports to the Board and the OCS D since 2008, and a significantly larger number of confidential briefings to individual Supervisors and the OCS D leadership. Due to their confidential content, there are no public records of these reports and briefings.

For the OIR to meet the literal contract requirements for sixteen reports a year for the seven years from 2008 through 2015, it would have had to issue 112 reports, or ninety confidential reports in addition to the known twenty-two public reports. If the Board had instead intended for the OIR to publish just the four quarterly reports a year, as the Board had amended the contract and the Executive Director had interpreted it, the OIR would have had to issue twenty-eight reports, or just six confidential reports in addition to the twenty-two public reports.

OIR Reports	2008	2009	2010	2011	2012	2013	2014	2015
January						✓	✓	
February					✓			
March								✓
April		✓				✓		
May		✓✓	✓		✓		✓	
June								
July		✓						
August		✓			✓			
September		✓				✓		
October	✓	✓		✓	✓		✓	
November								
December				✓				

Table 1 – Dates of public OIR reports from late 2008 through 2015

But the distribution of the OIR's twenty-two public reports over the period from late 2008 through 2015 does not meet the requirement for quarterly reports. The OIR published four or more public reports in only two of the seven years. (See Table 1 above.)

The public reports cited the following OIR accomplishments:

- Decentralized response and disposition of citizen complaints with increased involvement of OCSD supervisors, resulting in fewer Internal Affairs Unit cases;
- Shortened the time to complete Internal Affairs Unit investigation;
- Performed the tasks of embedded outsider overview;
- Reported findings and outcomes of investigations;
- Analyzed problem situations in other law enforcement agencies and jails, in and outside Orange County and applied the lessons learned to OCSD operations to anticipate and avoid similar problems in Orange County in the future;
- Developed a standard decentralized discipline practice, involving OCSD executive management in reviewing disciplinary issues before final decisions by local unit leadership, to promote consistency, then used outcomes to educate all levels as to lessons learned;
- Provided assistance and outside review to another County agency in response to a critical incident;
- Acted as an independent and outside monitor of the OCSD, which was viewed as a positive factor by the U.S. Department of Justice in its investigation of Orange County jail conditions and operations following the 2006 inmate in-custody death;
- Used the complaint process, regarding employee performance and conduct, to identify training needs and enhancements;
- Influenced policy/procedure, critical incident management, and processing of employee misconduct and performance complaints, especially use of force.

Independent or Too Close?

Despite the successes, some County officials interviewed were skeptical of the relationship between the OIR and the OCSD. Even though the OIR's professional staff were neither part of the OCSD's chain of command nor employees of the County, some County officials believed the OIR was too close to OCSD leadership, and therefore not sufficiently independent and objective to inspire public confidence in the OCSD's policing of its own employees.

The 2011-2012 Grand Jury found that there was a perception that the OIR was overly influenced by the OCSD. It found that the co-location of the OIR office with the OCSD offices added to that perception, and recommended that the OIR be relocated to the Hall of Administration. (2011-2012 Grand Jury, Detention, Part I) The Board and OIR disagreed partially with the finding and rejected the recommendation in their September 2012 responses:

Response to Finding: ... [Board] ... believes that OIR's physical location helps promote the access and regular contact that contribute to its monitoring function...

Response to Recommendation: ... The location of the office is critical to OIR's ability to respond in person to critical incidents, consult regularly with OCSD decision-makers, and review OCSD operations, files, and records in an unfettered way. (County, Response)

These responses defended the practice of the OIR sharing office space with the OCSD, but they did not actually address the issue of undue influence.

The current Board came down on the other side of this issue, voting 3 to 2 to relocate the OIR from the Sheriff's Department to the Hall of Administration, where the Board resides, as part of the expansion of the OIR in December 2015. With changes in the Board's makeup, and three more years' experience with the OIR, the change in direction is not as surprising as it might first appear.

In addition to the physical closeness, critics of the OIR were also concerned about the closeness of the working relationship between the OIR and OCSD. The interaction between the OIR and OCSD can be compared to two extremes. At one extreme, an arms-length or even adversarial relationship could emphasize and reinforce the independence of the OIR's role as a reviewer, while at the same time limiting the OIR's effectiveness by discouraging openness and cooperation in the relationship. Access to internal documents and procedures could be limited in such a relationship, for example, if the Sheriff were to refuse to accept an attorney-client relationship with the OIR. At the other extreme, an overly-friendly relationship could allow the reviewer to get open access to OCSD documents, data, and processes, but raises the question of whether the extreme closeness could bias the reviewer's judgment.

The Grand Jury believes that somewhere between the extremes is the relationship maintained by the OIR and OCSD for the past seven years: professional and buttoned up, but also cooperative behind an attorney-client agreement that allowed sharing confidential information. A strong argument can be made that this kind of cooperation is essential for an effective oversight program. However, this, and the co-location of the OIR with the OCSD, played into the view of some that they were too close for true independence.

The voluntary cooperation of the OCSD was essential to making the OIR effective. OCSD senior management could have resisted the involvement of the OIR in its internal investigations, for instance, by citing California Government Code Section 25303, which directs that "The board of supervisors shall not obstruct the investigative function of the sheriff of the county nor shall it obstruct the investigative and prosecutorial function of the district attorney of a county." Even without that legal argument, the OCSD senior management could have resisted the review of the OIR, given that the head of the OCSD is an elected official answering to the citizenry and not to

the Board of Supervisors or County departments reporting to the Board. (Cuniff, Orange ... vote) (Aguilar, Orange ... new model)

OIR Performance Review

Over the years, the current Sheriff has been a consistent and strong supporter of the OIR as an important catalyst for transparency and public confidence in the OCSD and its internal operations. (Santana, Once) (Cuniff, O.C.) (Gerda, OC) (Cuniff, Divided) The Sheriff took office in the midst of the in-custody death controversy and the indictment and resignation of the previous Sheriff. Given the effect those incidents had on the public perception of the OCSD, the incoming Sheriff welcomed OIR oversight as a means to help re-establish public confidence while simultaneously responding to concerns raised by the U.S. Department of Justice. (Santana, Report)

Beyond that, when the Grand Jury asked OCSD management about the OIR, most described the OIR Executive Director as an outsider who had gained their acceptance and trust, but who always stayed within the parameters of the OIR's role. In their view, the OIR provided a citizen's perspective of the policies, procedures, and practices of the OCSD, which is clearly different from the law enforcement insider's view. They found this diversity of perspective healthy and helpful.

In contrast to OCSD management, there has been some discontent about the OIR within the rank and file in the Department. Grand Jury interviews revealed that some OCSD deputies and staff members see the OIR as an extension of OCSD management and a source of harsher disciplinary outcomes, neither of which were viewed positively. The interviews also indicated that other staff members have expressed concerns about the OIR focusing solely on the investigation of misconduct by the rank and file. They see no independent review of the behavior of OCSD command staff or management. This is true, but it is an artifact of the 2008 ordinance, which specifies OIR involvement on misconduct investigations conducted by the Internal Affairs Unit (IAU), and critical incidents involving death or serious injury to citizens under OCSD custody. Command staff and management are rarely if ever the subjects of IAU investigations, because they are not involved in direct law enforcement activities that involve the use of force or other interactions with suspects or inmates under custody.

Besides the OCSD rank and file, some members of the Board have also been critical of the performance of the OIR over this period. It is useful to explore what went wrong with the OIR in the view of these Board members, and why they decided the OIR needed new leadership and a new mandate.

The Board of Supervisors (Board) membership turned over completely between 2008 and 2015. Some of the current Board members do not appear to know or do not recall fully the parameters

of the OIR as described in the 2008 ordinance. As new Supervisors came into office, they developed their own expectations of the OIR, and some projected expectations onto the OIR that were not contained in the original ordinance. (Santana, Report)

Even some Supervisors who voted to pass the ordinance in 2008 later expressed expectations not supported in the text of that document (Santana, Report). The 2011-2012 Grand Jury report found that discussions with the Board led to the OIR experiencing inconsistency in expectations, direction, and evaluation (Orange County Grand Jury, 2011-2012, Part I). Expectations were inconsistent among the Supervisors, and also inconsistent in many cases with the OIR responsibilities as defined in the original 2008 ordinance. The OIR and Board submitted a formal response to the finding, suggesting that better communication between the OIR and the Board had improved the situation. (County, Response).

In reaction to the inconsistent expectations of the Supervisors, the OIR made a point of including the purpose and intent of the OIR, as expressed in the 2008 ordinance, in the introductory material of most reports issued by the OIR. This was intended to reinforce what the Supervisors should and should not expect from the OIR.

Despite the effort to clarify the formal mission and charter of the OIR, differences in expectations continued unabated throughout the next seven years. For instance, more than one Supervisor in this period expected the OIR to carry out its own independent investigations to uncover emerging problems in the operations of the OCSD. These Supervisors expected the OIR to bring those problems to the Board's attention immediately, and certainly before the press could report on them to the public. (Cuniff, Board)

Supervisors with this expectation believed that the information would give them the opportunity to intercede proactively with the OCSD to resolve problems before they became high-profile critical incidents or public controversies. (Gerda, OC) (Cuniff, O.C.) (Cuniff, Todd) The Grand Jury agrees that identification of potential and/or emergent problems is highly desirable, especially if preventive action can be implemented in time to prevent a first occurrence. However, it is the view of this Grand Jury that the OIR was neither resourced nor charged with conducting independent investigations in the 2008 ordinance.

The 2008 ordinance defined a narrow focus for the OIR that is almost exclusively reactive, including:

In coordination and cooperation with the Sheriff-Coroner:

- (i) Monitor, as necessary and appropriate, investigations arising from complaints or custodial deaths or injuries;
- (ii) Respond, as necessary and appropriate, to scenes of investigations;

- (iii) Have access to, and participate in, confidential meetings and proceedings in order to monitor cases in real time;
- (iv) Provide advice and counsel to the I.A. Unit so as to ensure a thorough, unbiased, and impartial fact-finding process and consistent and appropriate conclusions; and
- (v) Review and critique completed investigations and conclusions of the I.A. Unit.

Some County officials judged OIR performance as poor due to high-profile OCSD incidents occurring during the OIR's watch since 2008 (Spitzer, Stephen). Events including the jailhouse informants' controversy in 2015 and 2016, and the escape of three inmates from the Men's Central Jail in January 2016, were not the subject of any OCSD internal investigation until after they occurred. The OIR, in its role as after-the-fact monitor and reviewer of on-going OCSD internal investigations, had no visibility into these incidents until after they occurred, and OCSD's internal investigations had begun. There was no opportunity for the OIR to provide early warning to the Board regarding events like these. The OIR was being asked to provide information that was effectively outside its scope of work.

Even if the 2008 ordinance had called for the OIR to identify developing OCSD problems, and provided the resources for independent investigations and an early warning system, some problems would inevitably have escaped the vigilance of the OIR. For instance, it is not clear that the OIR could have discovered the questionable use of jailhouse informants given that it has taken years of research and investigation by the Public Defender, thousands of pages of motions and evidence, and months of court hearings and testimony to uncover the issues. In another example, OCSD senior leadership has said that the OIR could not be expected to predict jail escapes (Schwebke, After). In any case, the 2008 ordinance did not call for the OIR to provide this kind of predictive/preventive service beyond making recommendations for policy and procedural changes, based on OIR review of previous OCSD internal investigations, with the expectation that those corrective actions, when implemented, would avoid a recurrence of the same problem.

In interviews with the Grand Jury, other Supervisors have been critical of the OIR, but not over its performance. Instead, they have questioned whether the OIR is needed at all. They suggest that the OCSD's leadership and Internal Affairs Unit, along with existing OCSD policies and practices, are sufficient for properly dealing with internal and citizen complaints against OCSD officers. They regard OCSD employees as professionals who can and should be trusted to carry out internal investigations in a professional and fair manner, and thus do not need independent review by the OIR or anyone else. Other Supervisors disagree, suggesting that it is reasonable to trust professionals to do their jobs, but at the same time it is necessary to verify their results. The OIR fulfills this verification role as an independent reviewer.

Mixed Reviews by the Supervisors over the Years

In May 2009, less than a year after the OIR began operations, *The Orange County Register* reported that some Supervisors had significant misunderstandings about what the OIR was set up to do. This came to light when the OIR reported on incidents that occurred during two Board of Supervisors' meetings. The report pertained to controversial behavior exhibited by some Deputy Sheriffs during sessions in late 2008 and early 2009 related to public hearings on gun permits. In one meeting, Deputy Sheriffs exchanged text messages disparaging Supervisors and gun activists. In another meeting, there was use of surveillance cameras and a heavy security presence by OCSD that some felt was inappropriate.

Some Supervisors expected the OIR to base its report on its own independent investigation into the incidents. One Supervisor was looking for the OIR to act like a one-man grand jury. Another felt the resulting OIR report more closely resembled a public relations report than an independent investigation.

This is a good example of expectations not supported by the 2008 ordinance. Some Board members were clearly expecting an independent OIR investigation, rather than an independent OIR review of the Sheriff's investigation, as called for in the 2008 ordinance. Contrary to that expectation, a high-level staffer to another Supervisor felt that the OIR report was exactly in line with the OIR's call to be an independent reviewer, not an investigator. In the article, the OIR Executive Director acknowledged that he needed to do a better job communicating the role and limitations of the OIR. OIR reports are intended to inform the public about the Sheriff Department's response to the incidents which, in this case, included verbal reprimands and policy changes. (Santana, Report)

A year later, in June 2010, the Board discussed eliminating the OIR due to continued constraints on the County budget. Some Supervisors had expected the OIR to be more independent of the OCSD than it seemed to be. Others had expected the OIR to make its activities more visible to the public. Another Supervisor, however, felt that the OIR was doing a great job. In the end, the OIR remained funded, but the Board said it would set performance goals for the OIR. (Muir, Office)

In August 2011, when the OIR Executive Director's contract came up for renewal, the Board chose to extend the contract for less than the requested three years, and declared it would review the OIR performance in six months. The Supervisors asked for more regular reporting to both the public and the Board. The press reported that the contract extension was for six months (Santana, County's Office), but a County insider told the Grand Jury that it was actually extended for one year.

What was the OIR's record on reporting at that point in 2011? As noted earlier, the OIR web site has links to seven public reports from 2009, a single OIR status report from May 2010, and no reports in the rest of 2010 or 2011 until October 2011. The May 2010 report, however, was a detailed 42-page annual report covering 2009 and part of 2010, including an in-depth twelve-page chapter on the 2006 in-custody beating death case of an inmate, and systemic reforms resulting from it. Other chapters in this report cover the mission of the OIR and frequently-asked questions, the OIR role in internal discipline with a number of masked case studies, statistics, and systemic reforms; the OIR role in internal review with masked case studies; and pending projects for the OIR.

Despite the lengthy May 2010 report, the Board was dissatisfied with OIR reporting a year later, in August 2011. The fact that there had been no public reports in the fourteen months after the May 2010 report, and the uneven distribution of reports across the three-year period from 2009 through 2011, may have played a role in the Board's dissatisfaction. It is also possible that it was difficult to find or retrieve the public reports on the OIR web site from time to time. There was a June 2012 press report claiming the OIR had never issued any public reports at all (Santana, Once), which was incorrect, as evidenced by press coverage of a second public OIR report in August 2009 (Saavedra, Complaints). There was also a reference to broken links on the OIR web site for all reports since 2012, as of June 2015 (Cuniff, Todd).

After the OIR responded with two reports in late 2011 and two more reports in the first half of 2012, the Board decided that the OIR had done a better job keeping it informed, including a well-received review of two incidents in the Probation Department. (The Supervisors had amended the Executive Director's contract in 2010 to extend the OIR's reach to the Probation Department after some high-profile cases there.) The Board did not question funding the OIR for the 2012-2013 fiscal year and extended the Executive Director's contract in August 2012. The OIR published two more reports in the second half of 2012, three reports in each of 2013 and 2014, and one in 2015.

An OIR Case Report Example

It's useful to consider an OIR case that was covered in some detail in one of the OIR reports during this period. Curiously, both a County official and a local resident held up this case during Board meetings in 2015 as an example where the OIR had failed to do anything, but the February 28, 2012 OIR report indicates otherwise. (Cuniff, Board) (Cuniff, Split) (Gerda, County) (Gerda, Supervisors)

The report included coverage of the tragic officer-involved shooting death of an unarmed Marine Sergeant, which occurred three weeks prior to the publishing of the report in February 2012. (Connolly, OIR Activity, 28 Feb. 2012) As with all officer-involved shootings, the OIR joined the District Attorney's investigation at the scene and monitored the subsequent investigation into

the legality of the Sheriff Deputy's conduct. It also monitored the Sheriff's critical incident review protocol, which involves examining individual performance and accountability, and also tactics, policy, training, and equipment.

During the course of this incident, OCSD staff made some questionable decisions on when to release information to the public. Worse, the information released was incorrect. The OIR discussed these concerns with the OCSD, leading to changes in policies and protocols, so that appropriate and correct information would be released in a timely manner during future critical incidents. The effectiveness and professionalism of the public briefings during the jail escape incident in January 2016 may have been a reflection of some of the lessons learned in the 2012 incident.

This is an example of an incident that created a large County liability because of the death, even though the Deputy Sheriff involved was eventually cleared. The District Attorney's report said that he acted reasonably and with sufficient force. (Santa Cruz, O.C.) Still, the death eventually resulted in litigation costs plus a settlement for a combined cost of over \$4.4 million to the County. (Goffard, O.C.)

One reason the OIR reviews cases like this is to look for changes to OCSD policies, procedures, and training that could improve the handling of similar events in the future, or better still, avert such tragedies altogether. Besides saving lives, implementation of such changes could also reduce the County's liabilities, by avoiding incidents that could have led to costly settlements, thereby allowing funds otherwise consumed by settlements to be used for other, more constructive County needs. It's clear that the OIR helped improve post-incident policies and practices in this case, but less clear that there were changes that could avert this kind of death in the future.

2015: Supervisors Lose Confidence in the OIR

In early 2015, a relatively low-profile legal controversy that had developed slowly over two years suddenly became a high visibility issue, receiving both local and national attention, during a highly-publicized mass murder trial in Orange County. In the end, this controversy caused the Board to lose confidence in the OIR.

This controversy involved the use of jailhouse informants by the OCDA and its law enforcement partner, the OCSD, to gather evidence for criminal prosecutions. The controversy affected at least half a dozen cases in the Orange County criminal justice system in 2015, sidetracking the sentencing phase of the mass murder trial, disrupting other on-going trials, and upsetting previous convictions. (Cuniff, Amid) (Saavedra, Former) (Saavedra, Watchdog) (Graham, O.C.) This controversy had the dual effect of weakening the public confidence in the Orange County criminal justice system (Chemerinsky, Joint), while also weakening the Board's confidence in

the OIR. (Aguilar, Orange ... new model) (Cuniff, O.C.) (Cuniff, Orange ... vote) (Gerda, OC) (Gerda, DA)

The event during the jailhouse informant controversy that attracted the most national attention was a ruling to dismiss the entire District Attorney's office from one high-profile trial. The judge's ruling resulted from evidence that serious violations by the prosecution had deprived the defendant of due process in the past and could prevent a fair trial if allowed to continue. (Supplemental, People) The prosecution had failed to disclose some evidence to the defense prior to trial in a legal process called "discovery." The evidence had been gathered through the use of a jailhouse informant. (For more details on the history of the jailhouse informant controversy, see Appendix G.)

The Gathering Storm

This unusual ruling set off a national discussion of the misuse of jailhouse informants in the Orange County criminal justice system:

- *The Orange County Register* ran an extensive series of articles extending from 2014 through 2016 about the controversy. (Humes, Inside)
- *The New York Times* published an editorial in November 2015 calling for a thorough investigation of the OCDA's use of jailhouse informants by the U.S. Department of Justice (DOJ). (Editorial, Dishonest)
- In November 2015, in a sharp critique of the Orange County jailhouse informant controversy, over thirty prominent legal scholars, retired prosecutors, and a retired California Attorney General sent a joint letter to the U.S. Attorney General recommending an investigation of the OCDA and OCSD by the U.S. Department of Justice. (Chemerinsky, Joint)
- Finally, a judge on the United States Court of Appeals for the Ninth Circuit published a law review article in 2015 alleging widespread prosecutorial misconduct in the United States, including the Orange County jailhouse informant controversy. Among other recommendations, the judge proposed placing strict limits on jailhouse informant use, and adopting rigorous standards for government disclosure during discovery. (Kozinski, Criminal)

Amid these calls for independent investigations into the use of jailhouse informants by the OCDA and OCSD, the District Attorney acknowledged errors by his prosecutors and convened a panel of his own to advise him on the use of jailhouse informants by his Office. (Saavedra, Watchdog) The resulting Informant Policies and Practices Evaluation Committee (IPPEC) published a report on December 30, 2015, with a set of ten recommendations to the OCDA. In parallel, the OCDA had set up a Confidential Informant Review Committee (CIRC), and

recommendation #2 in the IPPEC report suggested adding an outside, independent member to the CIRC. (Dixon, Orange)

The IPPEC also recommended that an entity with subpoena power do a full investigation of the controversy. It specifically directed this recommendation to the U.S. Department of Justice, the California Attorney General, and the Orange County Grand Jury as appropriate entities with subpoena power.

After that recommendation, the District Attorney sent a letter to the U.S. Department of Justice (but not to the California Attorney General or the Orange County Grand Jury), inviting them to conduct a review with regard to the OCDA policies and practices on the use of informants, with unfettered access to OCDA documents and staff. (Rackauckas, Request) To date, the U.S. Department of Justice has not committed to such a review or investigation. (For more on the IPPEC, see Appendix B.)

A Wild Ride for the OIR

As the jailhouse informant controversy expanded into a national story, many of the Supervisors felt poorly informed and poorly served by the OIR. Their confidence in the OIR dropped sharply when they first learned about the controversy from the press rather than the OIR. (Saavedra, Department) Despite OIR public reports published in October 2014 and March 2015, with coverage and analysis of the informant controversy, and at least one confidential report to the Board on the same subject, the Board continued to feel they learned too much from the press before hearing from the OIR. (Cuniff, O.C.) (Cuniff, Todd) (Gerda, DA)

The Supervisors were greatly concerned by the growing crisis and the shadow it cast over the County, and concluded that the OIR had let them down. In June 2015, the Board took a straw vote during the budget cycle to determine whether to keep funding the OIR. They voted unanimously to defund the OIR, effective July 1, 2015, and allow the Executive Director's contract to expire August 31, 2015. With only the final budget vote standing in the way, the OIR was one vote away from its demise. The contract of the OIR's Investigations Analyst expired and was not renewed at the end of June 2015, and the OIR Executive Secretary transferred to another position within the County in July 2015, leaving just the Executive Director in the OIR. Some Supervisors voted to defund the OIR to clear the way for establishing a new and better public safety oversight body. Others simply wanted to get rid of the OIR, seeing it as a failed experiment and/or a waste of taxpayer dollars. (Cuniff, O.C.)

It is at this point that the County Counsel informed the Board that the U.S. Department of Justice had expressed a concern about the prospect of having no independent reviewer of the OCSA if the OIR was defunded. This concern was echoed by the OCSA leadership, who welcomed the OIR's continued scrutiny as a much preferred alternative to the possibility of the Justice

Department extending their on-going investigation of the County jails. This investigation dated back to the 2006 in-custody beating death of an inmate, and was about to end.

With input from County Counsel, the Board reversed course and extended the OIR and the Executive Director position until December 31, 2015 (later extended month-to-month). The Board also established an OIR Ad Hoc Committee in July 2015, with two Supervisors as members. This Ad Hoc Committee was charged with exploring public safety oversight models and bringing its recommendations for replacing the current OIR to the full Board.

Even though the OIR was rescued at the last moment, it was barely functional after losing two-thirds of its staff. The OIR Executive Director did continue to provide confidential reports and briefings to the Board, but published no more public reports. The Executive Director resigned effective March 31, 2016, rendering the OIR dormant. The position remains vacant as of this writing, with no one assigned to an acting Executive Director role.

Embarking on a New Public Safety Oversight Model

As the OIR Ad Hoc Committee continued its work, the Board collected input on public safety oversight models from a variety of experts in a special public meeting on July 24, 2015:

- Orange County Sheriff;
- Dean of the University of California, Irvine Law School;
- Executive Director of Police Assessment Resource Center;
- Principal at OIR Group, a private corporation, and former Chief Attorney for the Los Angeles County Office of Independent Review;
- President of the Association of Orange County Deputy Sheriffs (AOCDS); and
- President of the National Association for Civilian Oversight of Law Enforcement (NACOLE).

Next, the Board contracted with a Special Counsel to work with the OIR Ad Hoc Committee to create a new public safety oversight model for the OIR. (The same Special Counsel had designed the original OIR for Orange County in 2008, while leading the Los Angeles County OIR.) Several of the Supervisors were in favor of expanding the OIR review duties from one to five Orange County agencies involved with law enforcement:

- The Sheriff-Coroner's Department (as before),
- The Office of the District Attorney,
- The Office of the Public Defender,
- The Probation Department, and
- The Social Services Agency.

In an unusual Board reversal, the OIR had come from imminent demise to a proposed five-fold expansion. There were three motivating factors prompting this change.

First, the jailhouse informant crisis involved more than just the OCSD; the District Attorney's Office was implicated as well. Hence the Board included the District Attorney's Office. The Board also chose to include other County agencies involved in law enforcement. (Saavedra, Federal)

Second, several Supervisors stated that they wanted to add some of the agencies because of the liability they presented to the County. While the Social Services Agency (SSA) does not sound like it would be involved in law enforcement activities, its Children and Family Services Division works closely with the Juvenile Court to serve children and families endangered by abuse, neglect, or exploitation. Additionally, its Adult Protective Services Program works with law enforcement to serve and protect vulnerable adults. In these roles, SSA is clearly part of the County's law enforcement fabric, and can be the subject of litigation.

The Board is understandably concerned whenever there are costly settlements of litigation against the County. Taxpayers, and thus Supervisors, express concern whenever the actions of County agencies or employees divert taxpayer dollars from other County business. Supervisors are seeking solutions to stop sometimes tragic and usually costly incidents from happening in the future. (Aguilar, OC pursues) (Cuniff, Amid)

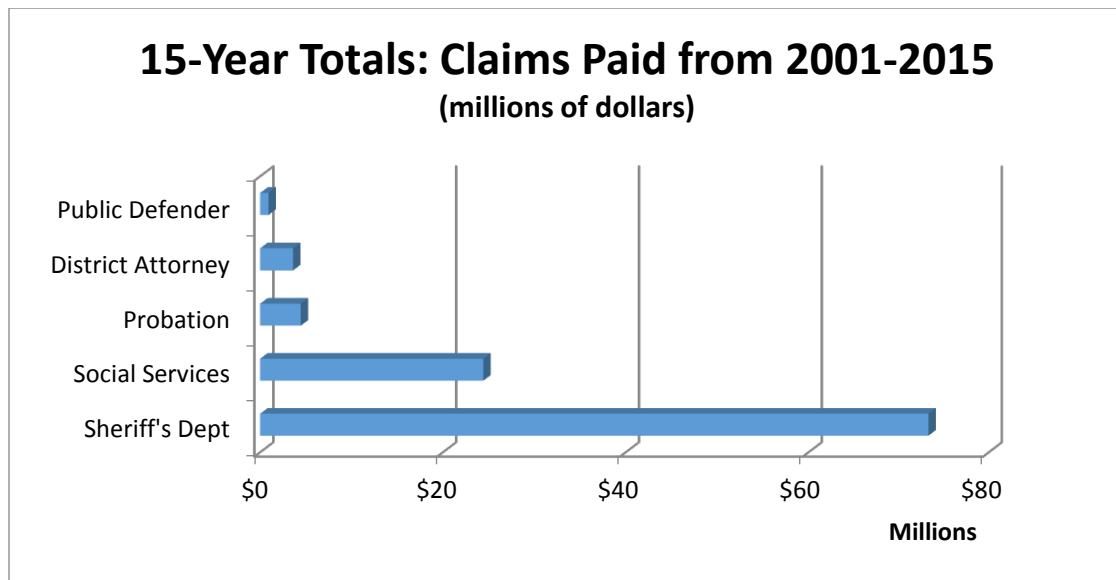


Figure 1. Claims totals for litigation and settlements over fifteen years, by agency

Risk management data provided to the Grand Jury by the County from the fifteen-year period from 2001 through 2015 show that the OCSD has had the largest litigation and settlement costs of the five agencies recommended for the OIR's purview (\$73 million). The SSA was next

highest at \$24 million. The numbers for the other three agencies were much smaller. (See Figure 1 above.) These figures include litigation costs and settlements related to personnel actions as well as outside incidents like the officer-involved shooting death of the Marine Sergeant mentioned earlier.

Third, the Board may have realized that its current expectations did not always line up with the 2008 ordinance or the original contractual requirements that had been agreed with the Executive Director (Gerda, Supervisors) and moved to change the ordinance to better align the OIR with expectations. Most Supervisors felt that the OIR should act pro-actively, finding and averting emerging crises in all five law-enforcement-related agencies. This was to be in addition to its role as a reactive, independent reviewer of agency practices and procedures during internal investigations. (Cuniff, O.C.) (Cuniff, Todd) To that end, at least some members of the Board wanted to expand the OIR's coverage to all five agencies, and expand its purpose from its narrow focus on internal affairs investigations and in-custody deaths and injuries, to a much broader focus on proactively identifying systemic issues within the five agencies and effectively contributing to corrective actions for those issues before an incident could occur.

Expanding the Discussion

In the course of work for the Board's OIR Ad Hoc Committee, the Special Counsel interviewed a number of potential stakeholders, including the District Attorney, the Public Defender, the Chief Probation Officer, the head of the Social Services Agency, public employee union leaders, and others.

The Offices of the District Attorney and the Public Defender submitted emphatic memos to the Board and to the Special Counsel, in strong opposition to the proposal to add them to the OIR's oversight. Both cited legal concerns and precedent that they argued prevented their inclusion in the OIR's purview. (Santana, Santana: ... Continue) (Cuniff, After) (Gerda, DA)

The District Attorney's memo of November 9, 2015 to the Board argued that case law and the California Government Code prohibit the Board from exerting any supervisory control over the manner in which the Office of the District Attorney (OCDA) carries out its prosecutorial work. The memo also asserted that it would not be legal or prudent for the OCDA to share its work materials with a third party such as the OIR. Hence the OIR would be unable to exercise any oversight over the OCDA. Moreover, the memo noted that the OCDA is already subject to substantial oversight by the California Attorney General, the Grand Jury, state and federal courts, and the California State Bar. (Rackauckas, Untitled)

It's worth noting here that the Sheriff-Coroner's Department (OCSD) could have made almost identical arguments in 2008 against oversight of the OCSD by the OIR, but instead chose to embrace the OIR concept. Like the District Attorney, the Sheriff is an elected official, reporting

to the citizenry, not to the Board of Supervisors (Cuniff, Orange ... vote). The Government Code cited in the District Attorney's memo applies to the Sheriff-Coroner as well. Both agencies have similarly strict confidentiality requirements on their records, and the amount of external oversight of the OCSD was already substantial. Instead, the OCSD chose to cooperate with the OIR, shared its records and internal investigations under confidentiality mandated through an attorney-client relationship that it could have rejected, and agreed to additional oversight despite many other forms of oversight by state and federal authorities.

The Public Defender's memo of September 23, 2015 raised objections similar to the District Attorney's. The Public Defender pointed to provisions in California Government Code prohibiting the County Board of Supervisors from exerting any authority over the Public Defender's work. The memo cited a number of prohibitions against allowing access to information related to the Public Defender's clients, including information subject to attorney-client privilege, court-issued protective orders, and prohibitions by bar associations on revealing confidential records. The memo argued that even if the County could force the Public Defender, as client, to enter into an attorney-client relationship with a third party oversight entity (like the OIR) as attorney, the third party would still be legally barred from access to the Public Defender's case-related information. (Ospino, Untitled)

Similar to the District Attorney's memo, the Public Defender's memo noted that the Public Defender is already subject to oversight by Superior and Appellate courts and the State Bar. Lastly, it pointed out that it is not involved in any controversies such as those embroiling the OCSD and OCDA, which had served as catalysts for the original OIR as well as the current update to the OIR. In fact, the Public Defender's Office was instrumental in uncovering the alleged misconduct in jailhouse informant usage, and its clients were the victims of that alleged misconduct. (Ospino, Untitled)

Grand Jury interviews with County leaders knowledgeable about the Probation Department and the Social Services Agency indicated that both agencies would be cooperative with the new OIR. Both see value in OIR assistance in finding systemic issues and corrective actions for those issues, but anticipate difficulties in making all their confidential documents available to the OIR, especially juvenile records and personnel files that are heavily protected by law. In addition, both agencies are headed by Board appointees, so they do not have the same independence of the Board as the elected heads of the OCDA and OCSD.

Finally, several of the Orange County public employee unions raised concerns about the proposed changes to the OIR affecting their members' working conditions. They point to the OIR's involvement in reviewing punitive actions against employees who work for the agencies now added to OIR review. They regard these changes as mandatory subjects of bargaining between the County and the unions representing the workers in the five agencies. (Gerda, DA) (Cuniff, Amid) (Cuniff, Orange ... advance) Thus they requested a meeting with the County to

discuss the proposed changes. The County added language to the 2015 OIR ordinance stating that the OIR is prohibited from doing anything that would affect wages, hours, or working conditions of County employees represented by a recognized employee organization, including any involvement in punitive actions against such employees. The Grand Jury's investigation found that the unions are not universally satisfied with this language.

Selecting the Oversight Model

The Special Counsel (appointed by the Board to redesign the OIR) reported to the OIR Ad Hoc Committee and the Board in November 2015 concerning several models for public safety oversight, but recommended the same auditor model used in Los Angeles and in the 2008 Orange County OIR. He described the auditor model in this excerpt quoted from his report:

The auditor model generally consists of a body of oversight practitioners that are appointed by leaders of the government entity and are paid to perform law enforcement oversight functions. The County's current OIR most closely aligns as an auditor model. The auditor oversight practitioners usually have significantly more access to agency materials and internal investigations and interact more regularly with law enforcement officials. While many auditor models are limited to systemic reviews of the law enforcement agency, some are authorized to review individual cases. Some of the auditor oversight entities are provided the ability to review internal investigations in real time and to make recommendations on case outcomes and discipline. Proponents of the auditor model note the value provided as a result of the acumen and skill of the oversight practitioner versed in law enforcement practices, the significantly greater access usually given to the auditor practitioner, and the increased ability to influence law enforcement agency decisions at both the individual case and systemic levels. Detractors from the auditor model raise concerns about whether auditors so closely immersed in agency functions and decisions are truly independent. Another potential drawback to the model is that because so much of the critical work is undertaken behind the scenes, is granular and necessarily confidential, and because of the restriction California law places on disclosure of personnel matters, it is more difficult to gauge, assess, or be completely aware of the impact the oversight entity has on accountability and reform. (Gennaco, Re: Report)

The Special Counsel considered and rejected two alternatives to the audit model. The Special Counsel described all three models as civilian law enforcement oversight models. The two rejected were a Citizen's Review Board model, and an Investigative model. (Gennaco, Re: Report)

A Citizen's Review Board consists of a panel of volunteer citizens from the community selected by the local governing body, like the Board of Supervisors. Citizen's Review Boards typically have limitations around access, credibility, and influence. They frequently have only restricted

access to law enforcement records, little expertise in law enforcement, and only part-time duty, all of which limit their ability to make fully informed recommendations. This reduces their credibility and hence their influence with the law enforcement agencies they are asked to review. (Gennaco, Re: Report)

The Investigative model has the problem of the extra cost of an independent investigation team, staffed by professionals, in parallel with the law enforcement agency's own investigation team. It also suffers from a frequent failure to earn the trust of either the agency, because of perceived low quality investigations, or its community, because of perceived pro-law-enforcement bias. (Gennaco, Re: Report)

The Board approved in principle the Special Counsel's audit model proposal in early December 2015, and asked the County Counsel to work with the Special Counsel on a revision to the OIR ordinance. On December 15, 2015, the Board passed revisions to the OIR ordinance on a split vote, 3-2, creating the 2015 amended OIR ordinance. The minority opposition to the OIR ordinance was based on the assertion that the original OIR did not work, so it made no sense to expand it from one county agency to five. Instead, if the OIR was not going to be disbanded, the minority said the model should be examined and fixed first, with its current scope overseeing the OCSD, to prove its value. Only after that should the Board consider expanding the scope of the OIR, they asserted. (Item #61, Clerk)

During its interviews, the Grand Jury heard additional suggestions for operating an independent review function. One such interesting suggestion was to avoid hiring a number of permanent employees to run OIR reviews and audits. Instead, the interviewee suggested hiring highly-skilled consultants for limited-time review and audit engagements with clear objectives. The consultant would come in, plan a review or audit process, execute it, provide a report with facts, findings, and recommendations, and then end the consultancy. The County would pay for OIR services only when they were required, avoiding the cost of carrying permanent employees who would likely be generalists rather than specialists and wouldn't necessarily be needed all the time. The interviewee suggested that this approach could enable greater independence, greater expertise, and possibly lower total costs, when compared with a permanent staff approach.

Amending the OIR Ordinance

The biggest changes in the 2015 ordinance, compared to the 2008 ordinance, come down to three things.

1. The Board expanded the OIR scope five-fold, adding the Office of the District Attorney, Office of the Public Defender, the Probation Department, and the Social Services Agency to the Sheriff-Coroner's Department as agencies under the purview of the OIR.

2. The Board gave the OIR a much broader purpose and intent, retaining specific incident review, but also adding systemic issue review involving the performance and operations of the five agencies. It also added the task of identification and resolution of high risk liability issues.
3. The Board changed the focus from assisting and advising the agency under review, to acting as independent resource and counsel to the Board. This effectively shifted the OIR focus from assisting the agencies under review to assisting the Board in its supervision of the five agencies.

The 2015 OIR ordinance expansion adds several key requirements:

1. To review existing systemic issues (and specific incidents which may identify systemic issues) involving the five agencies, and be the Board's independent resource and counsel to ensure accountability with respect to the performance and operations of the five agencies.
2. To conduct substantive systemic audits and reviews of the five agencies' functions impacting departmental or employee accountability and performance.
3. To work with County Counsel, County Risk Management, and department heads to ensure that critical incidents involving significant risk and/or liability to the County are identified, and then addressed with corrective actions to prevent future occurrences.
4. To review department practices in the five agencies and recommend changes based on evolving best practices.

(See Appendices C and D for the 2008 and 2015 OIR ordinances. See Appendix E for Table 6, which compares the key aspects of the two ordinances.)

2016: Concerns Arise about the Newly Expanded OIR

The ink was hardly dry on the 2015 ordinance in December 2015 before observers began to raise concerns about its cost, value, workability, and practicality. The following are questions the Grand Jury looked at, but for which it could only find incomplete answers. This is largely due to the current transitional status of the OIR. Some of these questions were raised by the County officials we interviewed. Most were questions we asked in the interviews, which turned out to be unanswerable with the transition to the new ordinance not yet in motion at that point. As the transition unfolds, answers to these questions will likely come out of operational decisions by the Board and the OIR itself.

- What will the fully operational OIR cost? Are the higher costs justified by the expected results?
- Is the OIR redundant? Are the relevant County agencies already being sufficiently inspected and audited by outside entities?

- Can the OIR achieve its objectives without the full cooperation of the five County agencies?
- What, if any recourse, do the Board and/or OIR have if the Office of the District Attorney were to offer the OIR less access to its confidential information than it gave to the IPPEC and offered to the U.S. DOJ?
- What specialized expertise will the broadened range and scope of the OIR require?
- Who will determine the details of the new OIR's responsibilities and focus?
- How will OIR performance be objectively evaluated?
- Is it realistic to expect the OIR to find all the problems of these five agencies and figure out which could result in high profile media events, like jail escapes?
- Is it practical and realistic to implement OIR activities in all agencies concurrently?
- Does the employer-employee relationship hinder or help the independence of the OIR? Would making the OIR attorneys and analysts independent contractors increase or decrease their independence from the Board of Supervisors (Board)?
- Would the employer-employee relationship, rather than an independent contractor relationship, make it easier for the Board to influence the OIR for politically-motivated purposes, such as directing the OIR to target an agency to discredit an agency head?
- Can the OIR be effective if the Offices of the Public Defender, and the District Attorney, the Probation Department, and the Social Services Agency agreed to oversight in only a narrowly-defined part of the agencies' functions, and for limited time periods?

Projected Cost

At first glance, the cost of the Office of Independent Review could be a significant consideration. The annual budget for the original OIR, fulfilling the 2008 ordinance and overseeing only the OCSD, was \$750,000 for six positions, but was never fully funded or staffed. (Connolly, OIR Operations, p 1)

The current planned 2016-2017 budget for the new 2015 OIR is \$454,949, which is 1% above the 2015-2016 OIR budget of \$450,445. (Orange County CEO, Finance & Budget) Given the five-fold expansion embodied in the 2015 ordinance, the 2016-2017 OIR budget is only a placeholder at this point, and unrealistically low. It will have to change once the new OIR is staffed and launched.

The Grand Jury has conservatively estimated that the salaries and benefits of the new OIR could be approximately \$3 million per year, based on the County's 2015 Human Resources salary listing. This is only a rough estimate. The Grand Jury assumed three-member teams assigned to oversee each agency – attorney, subject matter expert, and one clerical, managed by the Executive Director. In addition, the budget does not include office space, office expenses, or training, which will have to be accounted for. (See Table 2 below.)

Office of Independent Review: What's Next?

# of positions	Position Title	Duties	Job Class or Equivalent	Annual Salary & Benefits	Total
1 FTE	Executive Director	Manage staff, set policy and procedure, BOS liaison	Administrative Manager III SPL	\$210,000 + 63,000 <u>+ 9,180</u> \$282,180	\$282,180
5 FTE	Staff Attorneys	Legal Counsel, monitor critical incident investigations	Attorney III	\$130,488 <u>+ 39,146</u> \$169,634	\$848,170
5 FTE	Subject Experts-investigators	Audit of performance, compliance, policy, and procedure	DA Investigator	\$117,324 <u>+ 35,197</u> \$152,521	\$762,605
1	Lead Jail Monitor	Manage Jail & Juvenile Hall monitoring	Lieutenant or Juvenile Hall Assistant Director	\$148,944 <u>+ 44,683</u> 193,627	\$193,627
4	Jail/Juvenile Hall Monitor	Monitor jail operations, incidents, and complaints	Sergeant or Sup. Detention Control Officer	\$123,000 <u>+ 36,900</u> 159,900	\$639,600
5 FTE	Clerical (confidential)		Office Manager (1) Legal Secretary (1) Office Assts (3)		\$304,559
					\$3,030,741

Notes: Other position possibilities for the Executive Director with annual salary and benefits are Asst. District Attorney equivalent at \$223,101 + \$66,930 = \$290,031, or Senior Deputy District Attorney at \$167,880 + \$50,364 = \$218,224. The Executive Director benefits include a car allowance of \$765/month or \$9,180/year. The ordinance requires the Executive Director to have three years' experience in law enforcement oversight. Top salary and estimated benefits @ 30%.

Table 2. Estimated Annual Budget for Implementing 2015 OIR Ordinance

The Grand Jury discussed this rough estimate with some of the County leaders interviewed, and they appeared unconcerned at an estimated \$3 million a year. Three million dollars out of a total annual budget of over \$6 billion (FY 2016-17) is 0.05% of the budget. If the OIR's influence on policies, practices, procedures, and protocols prevents even one major claim a year, the OIR could potentially pay for itself.

The cost also appears minimal if it can prevent just one in-custody death, or events that can lead to U.S. Department of Justice (DOJ) involvement and the possibility of a consent decree. The cost of complying with a DOJ consent decree is high, because the DOJ watches very carefully

and demands a lot of information. (Cuniff, Divided) Note that the Board chose to continue funding the original OIR and extended the contract of the Executive Director in the summer of 2015, at least in part because the DOJ voiced concern about defunding it. Some high-level County officials voiced concerns that the DOJ might choose to extend their investigation of the County jails if the oversight provided by the OIR were allowed to lapse.

The cost would be harder to justify if the OIR failed to achieve any systemic changes, or if employee misconduct and critical incidents increased or remained at current levels.

Experience and Expertise Requirements

The ordinance requires the Executive Director to have at least three years' experience in law enforcement oversight, but is silent on requirements for staff attorneys. With the expansion of its oversight role from one agency to five, it is likely that the OIR will need to have more highly specialized competencies available among its staff. None of the County officials with whom the Grand Jury raised this issue were ready to discuss needs for specialized expertise in the OIR, as the implementation plans for the new OIR were not yet in place.

Four of the five agencies covered by the 2015 ordinance provide criminal law services and related enforcement services: the Office of the District Attorney, the Office of the Public Defender, the Probation Department, and the Sheriff-Coroner's Department. The fifth agency, the Social Services Agency (SSA), is one of the largest in the County, with over 4,000 employees covering a broad range of specialized skills and expertise, only some of which are law-enforcement related, as discussed earlier. Based on this, the Grand Jury believes that specialized expertise could be very useful, for instance for the staff attorney and subject experts assigned to review the Children and Family Services Division of the SSA. Experience with law enforcement oversight in the areas of child abuse, neglect, and exploitation could be important in this role. The OIR staff attorneys reviewing the other agencies could also benefit from subject matter experts in their respective fields. This all remains to be defined by the County.

Table 3 below is a high level summary of the services provided by the five agencies (At Your Service), and the current number of employees of each of the five agencies. The total of 11,627 employees across the five affected agencies represents 64% of the total 18,118 employees in the County. The OCSD's 4,640 employees represent 24% of all the County's employees. So the increase in the OIR's reach from 2008 to 2015 is substantial, from 24% to 64% of all County employees.

Agency	Services	Employees
Office of the District Attorney / Public Administrator	<ul style="list-style-type: none"> • Law enforcement, criminal and civil prosecutions • Public administration of estates 	794
Probation Department	<ul style="list-style-type: none"> • Supervision of adult and juvenile offenders on probation or in diversion programs • Operation of Juvenile Hall and juvenile offender camps • Investigations for the court • Sentencing reports and recommendations • Crime victim restitution assistance 	1,446
Public Defender	<ul style="list-style-type: none"> • Legal representation for individuals unable to afford a lawyer in criminal, juvenile, mental health, and dependency cases 	397
Sheriff-Coroner's Department	<ul style="list-style-type: none"> • Public safety and law enforcement <ul style="list-style-type: none"> ○ Patrol and investigation ○ Court security ○ Jail operation and management ○ Emergency management and homeland security • Forensic and coroner services 	4,640
Social Services Agency	<ul style="list-style-type: none"> • Children and family services • Elder and child abuse reporting and response services • Adoption and foster care programs and services • In-home services • Delivery of public assistance programs and health insurance 	4,350
		11,627

Table 3. Summary of Services Provided by the Five Agencies & Employee Counts

Cooperation or Lack Thereof

Despite some dissatisfaction with its performance, the OIR was largely successful in carrying out its original mandate under the 2008 ordinance, in the view of the Grand Jury. The successes can be attributed to the cooperative nature of the relationship between the OIR and the management of OCSD.

Absent a willingness to work cooperatively, the likelihood for a successful outcome is more tenuous. The OCDA seems disinclined to offer such cooperation. With the case law and Government Code seemingly on the side of the OCDA, its voluntary agreement to, and

cooperation with, oversight by the OIR appear to be essential to an in-depth OIR engagement with the OCDA, just as was the case with the OCSD in 2008.

The previous Public Defender was also disinclined to cooperate, as described earlier, but has left the Public Defender's office in 2016 to accept a judicial appointment. The new Public Defender may take a different position on cooperation with the OIR, especially if terms of employment require cooperation at some level. The Board will select the new Public Defender and is expected to set terms of employment along these lines, based on interviews done by the Grand Jury.

In any case, the Special Counsel, who developed the 2015 OIR model for the Board, has asserted that the OIR could study systemic issues within the Office of Public Defender without access to documents protected by the Public Defender's attorney-client relationship with its clients. (Gerda, Amid) Also, one County leader has similarly contended that the 2015 OIR could examine important issues of public policy within the OCDA even if the OCDA refuses to enter into an attorney-client relationship with the OIR. (Cuniff, After) In both cases, however, it's clear that the OIR's visibility into the inner workings of the two agencies could be limited in the absence of cooperation from the agencies.

It is important to note that there is some precedent for the OCDA to cooperate fully with an outside, independent entity, for the purposes of an unbiased evaluation or investigation of OCDA policies and practices. The OCDA provided unrestricted access to OCDA files and staff to the IPPEC for their evaluation report in the second half of 2015 on OCDA informant policies and practices. (Dixon, Orange) The OCDA has also offered the same unrestricted access to the U.S. Department of Justice in the OCDA's January 2016 request that the DOJ perform an independent investigation of the OCDA's informant policies and practices. (Rackauckas, Untitled)

The Probation Department and the Social Services Agency report to the County Executive Office and through it to the Board, so they have less opportunity to resist the oversight of the OIR. Both agencies, in fact, appear likely to start from a position of cooperation with the OIR, as noted earlier, much as the OCSD did in 2008.

However, research by the Grand Jury has led it to question the feasibility of accessing confidential documents within these two agencies via attorney-client privilege. In fact, the original OIR's two review assignments with the Probation Department required the OIR to get Juvenile Court approval for access to any juvenile files held by the County or courts. Court approval could prove to be a more reliable way, albeit more difficult and time-consuming, to get the access the OIR needs to be fully effective in its reviews, but only if the Juvenile Court is willing.

In general, the Grand Jury found that some County leaders doubted the feasibility of getting access to confidential documents by establishing an attorney-client relationship between an OIR

attorney and an agency. Not just juvenile records have this problem. The Public Defender and District Attorney both argued the same for documents and materials they control.

All five agencies could argue that they are already inspected, audited, and reviewed by enough outside entities to make OIR oversight redundant and unnecessary. However, the OIR is, primarily, a way for the County to take ownership and ensure that, through its own initiative, there is sufficient review of these agencies, irrespective of what other organizations, outside of its control, are doing.

Planning

Some of the County leaders interviewed by the Grand Jury felt that the next step for developing the OIR should be to define the details of the structure, scope, and operations, before hiring an Executive Director. This could involve the services of the Special Counsel who designed the 2015 OIR model for the OIR Ad Hoc Committee. The thinking is that these details can affect who would be best suited to be the Executive Director, so these parameters should be worked out beforehand to guide the hiring process. Others see the hiring as the first step, so the Executive Director can play the central role in determining and elaborating the operational details.

Still an Expectation Mismatch?

Though not specified in the 2015 ordinance, the Grand Jury has learned from interviews with County leaders that some, like their predecessors, are expecting the new OIR to be a pro-active, hard-hitting investigative team that will find and head off most, if not all, emerging crises in the five agencies specified. Certainly, searching out best practices and working with the five agencies to apply them to their policies and procedures would allow the OIR to help avert some future problems, crises, litigation, and large settlements.

The 2015 OIR ordinance calls for the OIR to “conduct substantive systemic audits and reviews” of functions in the five agencies that impact accountability and performance. These systemic audits, if allowed, have the potential to uncover developing problems and take corrective action before they reach a critical stage.

However, there appears to the Grand Jury to be no clear or definite language in the 2015 OIR ordinance giving the OIR the authority and funding to conduct its own *independent* systemic audit investigations. Recall that the 2008 ordinance only allowed for *reviewing* the OCSD’s internal investigations, not for the OIR to conduct its own independent investigations. It’s unclear to the Grand Jury whether the substantive systemic audits and reviews authorized in the 2015 ordinance would follow the 2008 model or not.

As already noted, the expectations of many Supervisors over the years were that the OIR could and would, in fact, conduct its own independent investigations, even though such investigations were neither authorized nor funded by the 2008 ordinance. It's possible that the 2015 ordinance could be interpreted as calling for the OIR to review the audits and reviews done by Performance Audit and/or Internal Audit, rather than being a third entity performing its own independent audit investigations. It's also possible the Board intended to authorize independent audit investigations by the OIR, in an effort to align the recurring expectations of some Supervisors over the years with the new OIR mandate in the 2015 ordinance.

By adding the focus on best practices and audits to the 2015 ordinance, the Board has added measures that could improve the chances of preventive successes. Still, the expectation that the OIR could ensure that even a minority of high risk and potential liability issues are identified and addressed through corrective actions seems ambitious to the Grand Jury, and perhaps even unrealistic, particularly when one considers the size and reach of the five agencies. The OIR can certainly assist here, and every large settlement averted benefits all involved. The OIR, through data analysis, could learn over time where the most likely sources of lawsuits are concentrated in the five agencies, and then spend proportionately more time focusing on those areas. But the issue of which entity would actually perform the audit investigations is still an open question, in the view of the Grand Jury.

Independence of the OIR

The 2015 OIR ordinance calls for the OIR Executive Director and professional staff to be County employees rather than independent contractors. Under the 2008 OIR ordinance, these positions were independent contractors.

The Board determined the high-level purpose and responsibilities of the OIR in 2008 through the 2008 ordinance and the OIR Executive Director's contract. However, that contract specified in section 7, "Independent Contractor Status," that the Executive Director himself is "wholly responsible for the means and methods of performing these specialized legal services and accomplishing the results, deliverables, objectives and/or purposes as specified and/or requested by County." (Item #21, Clerk) That is, under the 2008 ordinance and the Executive Director's contract, he could independently decide how to implement the general goals and responsibilities laid out in the ordinance and his contract, thereby gaining a measure of independence from the Board. At the same time, he was also independent from the chain of command and management of the agency he was independently reviewing, namely the OCSD.

The Executive Director's contract allowed for either party to terminate the contract in thirty days with written notice, so he was never completely independent of the Board. Under the 2015 ordinance, as a County employee, the new Executive Director will similarly be subject to termination by the Board, especially if he is required to sign an at-will condition of hiring, like

many in upper management. Even without that condition, an employee can be terminated by eliminating his position. So neither independent contractors nor employees can avoid the ultimate control of the Board, namely termination. Short of termination, an independent contractor appears to have more leeway than an employee in performing his duties, under the County's terms for independent contractor status.

The change from contractor to employee in the 2015 ordinance gives the Board substantially more direct control of the OIR's work. Unlike an independent contractor, an employee is not wholly responsible for the means and methods of performing his work, but rather is subject to the direction and control of his employer on how to do any part of his work, or all of it. This change reduces the OIR's independence of the Board, in the view of the Grand Jury. As a result, the OIR, under the terms of the 2015 ordinance, may end up being perceived by the subject agencies simply as an extension of the Board. A number of people interviewed by the Grand Jury raised this new level of Board control over the OIR as a significant concern, because it introduces an OIR vulnerability which could be used for launching politically-motivated attacks on any of the five agencies and/or their executive management.

Current Status, Mid 2016

The OIR is currently in transition. The 2015 OIR exists only on paper. The 2008 OIR no longer exists following the departures of its entire staff. A detailed definition of the 2015 OIR is yet to be completed apart from the limited description in the ordinance, and an Executive Director has yet to be hired.

In response to the lack of an active OIR, the OCSD has requested and received approval for a Constitutional Policing Advisor, similar to an OIR, but reporting to the Sheriff instead of the Board. This ensures that the OCSD will continue to receive good advice on honoring and protecting the public's constitutional rights, in the absence of an OIR. Unlike the OIR models, past and present, which are largely reactive, the Constitutional Policing Advisor model is to be strictly pro-active in examining all policies and procedures and proposing changes to preempt high-risk, high-cost constitutional rights violations that cause litigation. (Graham, O.C.)

Conclusions

The Grand Jury is cautiously optimistic that the OIR will return in fiscal year 2016-2017, but it remains to be seen whether the new OIR will get the cooperation it needs from the OCDA. Moreover, the revised 2015 OIR ordinance lacks details on program design, duties, key performance indicators (KPIs), and outcome measures. The County has yet to develop a detailed vision of exactly what this iteration of the OIR will look like or achieve. Much work remains to fill out the details and reestablish the OIR.

On balance, the Grand Jury believes the original OIR was a worthwhile addition to County government to ensure that the Sheriff's Department's internal investigations and responses to in-custody deaths or serious injuries were thorough, fair, and effective. It suffered, however, from expectations by the Board that were not supported by the founding ordinance. This created tension between the Board and the OIR throughout the past eight years. Now the Board has put the original OIR to rest and started building its replacement with new provisions more closely, but still not perfectly, matched to the Board's expectations of independent and pro-active investigation as well as review. Obviously, it is too early to judge how effective the new OIR may be.

Based on its investigation, the Grand Jury is providing a number of findings and recommendations in this report. They are directed to the Board for its consideration as it fills in the details of the new OIR, and to the five agencies called out in the 2015 ordinance. The hope of the Grand Jury is that the new OIR will apply the lessons learned from the successes and struggles of the original OIR, and fulfill its mandate as an independent watchful eye ensuring thorough, fair, and effective law enforcement for the citizens of Orange County.

FINDINGS

In accordance with *California Penal Code* Sections 933 and 933.05, the 2015-2016 Grand Jury requires (or, as noted, requests) responses from each agency affected by the findings presented in this section. The responses are to be submitted to the Presiding Judge of the Superior Court.

Based on its investigation titled "Office of Independent Review: What's Next?" the 2015-2016 Orange County Grand Jury has arrived at eleven principal findings, as follows:

- F1.** By changing the employment relationship for the revised OIR's Executive Director and professional staff from independent contractor to County employee, the Board of Supervisors appears to have made the 2015 version of the Office of Independent Review less independent of the Board and more vulnerable to the Board exerting politically-motivated influence on the five covered agencies and/or their leadership through the OIR.
- F2.** Some members of the Board of Supervisors were dissatisfied with the OIR's performance from 2008-2015. Some of the dissatisfaction appeared to be the result of a mismatch between Supervisors' expectations and the OIR mandate as described in the 2008 OIR ordinance and the OIR Executive Director's contract.
- F3.** Although the 2015 OIR ordinance calls for the OIR to "conduct substantive systemic audits and reviews," there is no explicit provision of authority or resources for the OIR to conduct them independently, a recurring supervisory expectation. Without the authority or resources to conduct its own independent audit investigations, the 2015 version of the OIR

would have to act only as reviewer of audits and reviews performed by Performance Audit, and/or Internal Audit, and/or the agencies themselves.

- F4.** The OIR could easily cost upwards of \$3 million/year due to expansion to five agencies plus jail monitors.
- F5.** It will be a challenge to find and retain a permanent staff with the qualifications and sufficient subject matter expertise to identify best practices and to review the broad range of services provided by the five agencies identified in the 2015 ordinance.
- F6.** The increase in OIR purview from the 2008 ordinance to the 2015 amended ordinance, from just the OCSD to the OCSD plus four other agencies, is so large in the breadth of services offered by the five agencies, the number of County employees covered, and the number of OIR staff to be hired, that a phased implementation will be required.
- F7.** The strenuous opposition of the OCDA to its inclusion in the OIR's purview could pose a serious threat to the ability of the OIR to provide an effective review of the OCDA as required by the 2015 ordinance.
- F8.** The willingness of the OCSD to work cooperatively with the OIR was crucial to allowing the original 2008 OIR to be effective as an independent reviewer of OCSD's internal investigations.
- F9.** With the OIR's newly-expanded role to review the policies and practices of the OCSD and recommend reforms consistent with evolving best practices, the OCSD has an opportunity to take advantage of the new OIR to assist the OCSD in recovering from the current jailhouse informant controversy. This would require the continued voluntary cooperation of the OCSD with the new OIR.
- F10.** With the OIR's newly-expanded role to review the policies and practices of the OCDA and recommend reforms consistent with evolving best practices, the OCDA has an opportunity to take advantage of the new OIR to assist the OCDA in recovering from the current jailhouse informant controversy, and in particular, implementing IPPEC recommendation #2. This would require the voluntary cooperation of the OCDA with the new OIR.
- F11.** The assurance of confidentiality, through attorney-client privilege between the five relevant County agencies and the OIR, is essential to the effective implementation of the 2015 OIR ordinance. Still, even attorney-client privilege may be insufficient for allowing access to some confidential documents, like juvenile records and personnel files that are very tightly controlled by the courts.

RECOMMENDATIONS

In accordance with *California Penal Code* Sections 933 and 933.05, the 2015-2016 Grand Jury requires (or, as noted, requests) responses from each agency affected by the recommendations presented in this section. The responses are to be submitted to the Presiding Judge of the Superior Court.

Based on its investigation titled "Office of Independent Review: What's Next?" the 2015-2016 Orange County Grand Jury makes the following eight recommendations:

- R1.** The Board of Supervisors should: (1) request the Special Counsel to provide a comparative analysis between using employees or independent contractors to staff the OIR, with particular emphasis on the potential vulnerability of the OIR to politically-motivated influence, and to provide recommendations, should the County use employed staff, for limiting the vulnerability of the OIR to such influence and (2) based on such analysis, consider either amending the 2015 OIR ordinance to ensure the Executive Director and all professional staff are independent contractors or, implement recommendations of the Special Counsel with respect to limiting the vulnerability of the OIR to political influence, all to be completed by December 31, 2016. (F1)
- R2.** The Board of Supervisors should direct the new OIR Executive Director to provide the Board, within three months of the Executive Director being hired, with a plan, budget, and measureable performance outcomes for launching and operating the new OIR. The measurable performance outcomes should be traceable to the responsibilities defined in the 2015 OIR ordinance. (F4, F5, F6, F7, F9, F10, F11)
- R3.** The Board of Supervisors should direct the new OIR Executive Director to consider other models for independent oversight of law enforcement, in addition to the three presented to them by Special Counsel, and make recommendations to the Board as to any elements from such models that could augment the model chosen by the Board and that would be useful and necessary to implement an efficient and effective OIR, all to be completed within six months of the Executive Director being hired. Among other concerns, the OIR Executive Director should consider whether and how the OIR, as currently designed, can meet the Board's desire for the OIR to engage in independent investigations and recommend specific elements that could be integrated into the model chosen by the Board, including explicit authority, budget, and staffing provisions, to support the Board's desire for independent OIR investigations. (F1, F2, F3, F4, F5, F6, F7)
- R4.** The Board of Supervisors should implement the 2015 ordinance in phases, one agency at a time, with incremental process improvements after each phase. (F4, F5, F6)

- R5.** As a pilot project, the Board of Supervisors should direct the new OIR Executive Director to staff, within one year of the hiring of the Executive Director, at least one well-defined, short-term, closed-end review or audit with a skilled independent contractor acting as a short-term consultant or “special counsel.” The Board should direct the OIR Executive Director to provide a written report to the Board, three months after the review or audit is completed, comparing the cost and effectiveness of using a short-term special counsel with deep subject matter expertise, versus the cost and effectiveness of using and maintaining permanent staff. (F4, F5, F6)
- R6.** The Board of Supervisors should direct the OIR Executive Director to work with each of the five agencies to negotiate specific, and possibly narrow, initial scopes for OIR involvement with each agency, all to be completed within three months of the Executive Director being hired. (F4, F5, F6, F7, F8, F9, F10, F11)
- R7.** For three years starting with the hiring of the new OIR Executive Director, the OCSD should provide the revised OIR with open access to the Sheriff’s internal processes for defining, and insuring adherence to, its policies and procedures on the legal use of jailhouse informants, so that the OIR could help recommend reforms consistent with evolving best practices. This requires a continuation of the existing attorney-client relationship between the OIR and the OCSD. (F8, F9, F11)
- R8.** The OCDA should add an OIR staff attorney as an “outside” or independent member of the OCDA’s Confidential Informant Review Committee, in keeping with IPPEC Recommendation 2, given the following prerequisites: The Board of Supervisors should direct the OIR Executive Director to hire, with OCDA approval, and within six months of the hiring of the Executive Director, an OIR staff attorney with legal expertise in the use of informants in trials. Within one month after hiring the OIR staff attorney, the OCDA should enter into an attorney-client relationship, with OCDA as client and the OIR staff attorney as attorney, and add the OIR staff attorney to the CIRC. With confidentiality protected by attorney-client privilege, the OCDA should provide the OIR staff attorney with confidential access to all of OCDA’s processes, policies, procedures, practices, protocols, records, documents, and staff related to OCDA’s use of jailhouse informants. (F7, F8, F10, F11)

REQUIRED RESPONSES

The *California Penal Code* Section 933 requires the governing body of any public agency which the Grand Jury has reviewed, and about which it has issued a final report, to comment to the Presiding Judge of the Superior Court on the findings and recommendations pertaining to matters under the control of the governing body. Such comment shall be made *no later than 90 days* after the Grand Jury publishes its report (filed with the Clerk of the Court). Additionally, in the case of

a report containing findings and recommendations pertaining to a department or agency headed by an elected County official (e.g. District Attorney, Sheriff, etc.), such elected County official shall comment on the findings and recommendations pertaining to the matters under that elected official's control *within 60 days* to the Presiding Judge with an information copy sent to the Board of Supervisors.

Furthermore, *California Penal Code* Section 933.05 subdivisions (a), (b), and (c) detail, as follows, the manner in which such comment(s) is to be made:

(a) As to each Grand Jury finding, the responding person or entity shall indicate one of the following:

(1) The respondent agrees with the finding.

(2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.

(b) As to each Grand Jury recommendation, the responding person or entity shall report one of the following actions:

(1) The recommendation has been implemented, with a summary regarding the implemented action.

(2) The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.

(3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a time frame for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This time frame shall not exceed six months from the date of publication of the Grand Jury report.

(4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.

(c) If a finding or recommendation of the Grand Jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the Board of Supervisors shall respond if requested by the Grand Jury, but the response of the Board of Supervisors shall address only those budgetary and/or personnel matters over which it has some decision making authority. The response of the elected agency or department

head shall address all aspects of the findings or recommendations affecting his or her agency or department.

Comments to the Presiding Judge of the Superior Court in compliance with *Penal Code* Section 933.05 are required or requested.

Responses are required from the following governing bodies within 90 days of the date of the publication of this report:

Orange County Board of Supervisors – Findings F1 – F11; Recommendations R1 – R8

Responses are required from the following elected agency or department heads within 60 days of the date of the publication of this report:

Orange County District Attorney –
Findings F1, F4, F5, F7, F10, F11; Recommendations R6, R8

Orange County Sheriff-Coroner–
Findings F1, F4, F5, F8, F9, F11; Recommendations R6, R7

Responses are requested from the following non-elected agency or department heads:

Orange County Office of the Public Defender –
Findings F1, F4, F5, F11; Recommendation R6

Orange County Probation Department –
Findings F1, F4, F5, F11; Recommendation R6

Orange County Social Services Agency –
Findings F1, F4, F5, F11; Recommendation R6

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APPENDICES

Appendix A: Acronyms

AOCDS	Association of Orange County Deputy Sheriffs
BOS	Board of Supervisors
CIRC	Confidential Informant Review Committee
DA	District Attorney
DOJ	Department of Justice
FTE	Full Time Equivalent
IAU	Internal Affairs Unit
IPPEC	Informant Policies and Practices Evaluation Committee
KPIs	Key Performance Indicators
LAC	Los Angeles County
NACOLE	National Association for Civilian Oversight of Law Enforcement
OCDA	Orange County District Attorney
OCSD	Orange County Sheriff-Coroner's Department
OIG	Office of Inspector General
OIR	Office of Independent Review
S.A.F.E.	Strategy, Accountability, Focus, Evaluation
SSA	Social Services Agency

Appendix B: Informant Policies and Practices Evaluation Committee

The District Attorney announced the Informant Policies and Practices Evaluation Committee (IPPEC) on July 6, 2015. The committee published a report on December 30, 2015, with a set of ten recommendations to the OCDA, as well as a separate recommendation that an entity with subpoena power do a full investigation of the controversy. It specifically directed the latter recommendation to the U.S. Department of Justice, the California Attorney General, and the Orange County Grand Jury as appropriate entities with subpoena power. (Dixon, Orange) (See Tables 4 and 5 below for the full set of recommendations.)

The IPPEC report found that a lack of leadership and a culture of winning at all costs in the District Attorney's office allowed repeated legal errors to be made related to the use of jailhouse informants in the DA's prosecution of serious cases in the Target, Gang, and Homicides Units of the DA. This was the basis for the IPPEC's recommendations. It is the opinion of the Grand Jury that the first, second, and tenth recommendations have the most relevance to this Grand Jury report.

The first recommendation was to tighten the OCDA policies and procedures on the use of jailhouse informants, making them clear and consistent, and allowing for the careful evaluation and strict control of the use of such informants.

The second recommendation called for the Office of the District Attorney to continue the use of its recently-established Confidential Informant Review Committee (CIRC), and add an outside or independent member to the CIRC, preferably a retired attorney or judge who had worked as a criminal defense attorney. The CIRC is charged with reviewing any proposed use of jailhouse informants by the OCDA, and deciding whether to approve that use within well-defined policies and protocols.

The tenth recommendation was to appoint an independent monitor for a three-year period to oversee OCDA compliance with the IPPEC's recommendations. The IPPEC suggested that the monitor be a retired judge.

Table 4 below contains the ten IPPEC recommendations to the OCDA.

Number	Recommendations to the Office of the District Attorney
1	Revise OCDA policies and procedures regarding the use of jailhouse informants.
2	Establish a Confidential Informant Review Committee (CIRC) with defined protocols and include an "outside" or independent member on the CIRC.
3	Overhaul the OCDA training program, with extensive additional training regarding discovery obligations and the use of jailhouse informants.

4	Coordinate with the OCSD and all law enforcement agencies in Orange County regarding jailhouse informant protocols and procedures, including OCDA's Jailhouse Informant Policy, and engage in detailed training on the Orange County Informant Index (OCII).
5	Restructure and combine into one unit the OCDA Gang Unit and Target Unit.
6	Establish an OCDA Conviction Integrity Unit.
7	Establish an OCDA Chief Ethics Officer position.
8	Reinstate the Chief Assistant District Attorney position.
9	Eliminate "Chief of Staff" position and create a position of "Assistant District Attorney for Media Relations."
10	Appoint an independent "monitor" for a three-year period to oversee OCDA compliance with the IPPEC's recommendation.

Table 4. IPPEC recommendations to the Office of the District Attorney

The IPPEC directed the additional recommendation in Table 5 below to the U.S. Department of Justice, California Attorney General, and the Orange County Grand Jury.

Recommendation to US DOJ, CA Attorney General, & Orange County Grand Jury
To demonstrate transparency and foster confidence in the Orange County criminal justice system, investigate the jailhouse informant controversy in Orange County using document subpoena power and the ability to compel witnesses to be questioned under oath. At a minimum, an Investigative Grand Jury should conduct such an inquiry, if not the U.S. Department of Justice or the California Attorney General.

Table 5. IPPEC recommendation to the U.S. DOJ, California AG, and OC Grand Jury

Appendix C: 2008 Ordinance Establishing the Original OIR

ARTICLE 18. - OFFICE OF INDEPENDENT REVIEW

Sec. 1-2-225. - Purpose and intent.

It is the purpose and intent of the Board of Supervisors to establish an Office of Independent Review to monitor, assist, oversee and advise the Orange County Sheriff-Coroner in the investigation of the following:

- (a) Selected internal and citizen complaints in which it is alleged that peace officers and custodial officers employed by the County in the Sheriff-Coroner Department committed certain actions or inactions in the performance of their duties; and
- (b) Selected incidents of death or serious injury occurring to persons while in the custody of employees of the Sheriff-Coroner Department.

(Ord. No. 08-004, § 1, 2-26-08)

Sec. 1-2-226. - Establishment of Office of Independent Review; Qualifications, Selection and Authority of Executive Director and Staff.

- (a) The Board of Supervisors hereby establishes the Office of Independent Review (hereinafter "OIR"), which shall initially be comprised of an Executive Director, staff attorneys and administrative support staff as the Executive Director shall determine are necessary.
- (b) The Executive Director shall be an attorney licensed to practice law in the State of California, shall have had no imposition of discipline by any State or Federal Bar, and shall have had at least three (3) years' experience in conducting oversight of law enforcement personnel and departments. The Executive Director and staff attorneys shall be employed pursuant to independent contract with the County of Orange, and shall hold an attorney-client relationship with the County of Orange and the Orange County Sheriff-Coroner. The terms and conditions of the contract of the Executive Director and of all staff of the OIR shall be set by the Board of Supervisors.
- (c) The Executive Director shall be selected by the Board of Supervisors, upon the advice and counsel of an ad hoc selection committee comprised of the following persons:
 - (1) Two (2) members of the Board of Supervisors;
 - (2) The County Executive Officer or his or her designee;
 - (3) The District Attorney or his or her designee;
 - (4) The Sheriff-Coroner or his or her designee;
 - (5) The County Counsel or his or her designee;

- (6) The Executive Director of the Orange County Human Relations Commission; and
 - (7) One (1) designee each of the Orange County Employees Association and the Association of Orange County Deputy Sheriffs.
- (d) The OIR shall, consistent with existing state law:
- (1) Provide periodic status reports on all investigations and significant matters within the purview of the OIR to the Board of Supervisors and the Sheriff-Coroner.
 - (2) Be authorized to provide such periodic reports to the public concerning its activities and findings as it deems proper and appropriate.
 - (3) In coordination and cooperation with the Sheriff-Coroner, provide ongoing counsel for the initiation, structuring and development of investigations conducted by the Internal Affairs unit of the Sheriff-Coroner (hereinafter "the I.A. Unit").
 - (4) In coordination and cooperation with the Sheriff-Coroner:
 - (i) Monitor, as necessary and appropriate, investigations arising from complaints or custodial deaths or injuries;
 - (ii) Respond, as necessary and appropriate, to scenes of investigations;
 - (iii) Have access to, and participate in, confidential meetings and proceedings in order to monitor cases in real time;
 - (iv) Provide advice and counsel to the I.A. Unit so as to ensure a thorough, unbiased, and impartial fact-finding process and consistent and appropriate conclusions; and
 - (v) Review and critique completed investigations and conclusions of the I.A. Unit.
 - (5) Establish and maintain liaison with the District Attorney, Sheriff-Coroner Department Executives, the Probation Department, the County Counsel, the County Executive Office, the County Human Resources Department, employee unions, the United States Attorney, the Federal Bureau of Investigation, and community based organizations;
 - (6) In coordination and cooperation with the Sheriff-Coroner, review and analyze selected investigations by the I.A. Unit to determine whether departmental policies, practices and procedures should be reexamined to prevent the future occurrence of similar allegations of misconduct, and when warranted, develop, propose and make independent recommendations as follows:
 - (i) Regarding the outcomes of investigations and reviews, and
 - (ii) For revisions of the implicated policies, practices, or procedures.

- (7) Devise and recommend mechanisms to provide positive recognition and incentives to employees who perform duties in an exemplary fashion, e.g., the proper and appropriate use of force, integrity, professionalism, and other matters that frequently may be the subject of complaints;
 - (8) Set the operational philosophy of the OIR to ensure that the needs and goals of the Sheriff-Coroner Department, the community, and the County are met; and
 - (9) Create, with the Sheriff-Coroner, the written protocols referenced in subsection (e)(4) of this section.
- (e) The authority set out in subsection (d)(1)—(7) of this section shall pertain to the investigation of the following:
- (1) Uses of deadly force;
 - (2) Uses of force resulting in, or reasonably likely to result in, death or serious bodily injury;
 - (3) Deaths and serious bodily injuries occurring in custody;
 - (4) Any misconduct not otherwise identified within this ordinance that the Executive Director and the Sheriff-Coroner agree, by written protocol, should be reviewed; and
 - (5) Those allegations set forth in citizen, peace officer, or peace officer supervisor complaints which involve any of the following:
 - (i) Use, threat, solicitation or encouragement of unlawful, improper or excessive force;
 - (ii) Acts or threats of discrimination or disparate treatment or verbal slurs based on race, ethnicity, religious affiliation or belief, national origin, political affiliation, gender, disability or sexual orientation;
 - (iii) Sexual harassment;
 - (iv) The improper display or use of firearms, other weapons, or force;
 - (v) Falsification of government documents or reports;
 - (vi) Interference in, obstruction of, or improper influence over any investigation authorized by law or this ordinance in a manner that inhibits or compromises the impartial search for truth;
 - (vii) Making false or misleading statements in any investigation authorized by law or this ordinance;
 - (viii) Making false or misleading statements to peace officer supervisors;
 - (ix) Use of illicit drugs;

- (x) Use of an official position for personal or financial gain;
 - (xi) Bringing, or assisting or permitting others to bring, contraband to inmates or others in custody; and/or
 - (xii) Criminal conduct.
- (f) The OIR is not authorized to:
- (1) Compel by subpoena the production of any documents or the attendance and testimony of any witnesses.
 - (2) Incur County expense or obligate the County in any way without prior authorization of the County Board of Supervisors. Such authorization may be contained within any contract executed between the Executive Director of the OIR and the County of Orange.
 - (3) Disclose any information obtained in conducting inquiries, except as provided herein or as otherwise ordered by a court of competent jurisdiction. No confidential or privileged information shall be disclosed to anyone not authorized by law to receive it.
 - (4) Interfere with the performance of the statutory duties of the Coroner.
 - (5) Make any written or oral report concerning any complaint to any individual or body other than to the County Board of Supervisors or the Sheriff-Coroner, or to the public as provided for in this ordinance. In addition, all such reports shall be made under the direction, and with the approval of, the Executive Director. No staff member shall make any reports or public comment without such prior approval.
- (g) There shall be a form and log for citizen complaints as set forth herein.
- (1) The complaint form for law enforcement employees shall be substantially similar to that in use by the Sheriff-Coroner.
 - (2) The Executive Director or his designee shall keep a log of the name, address, and telephone number of the complainant as well as a copy of the complaint referred to the Sheriff-Coroner Department for its review.
 - (3) Such log as described in subsection (g)(2) of this section shall be considered a confidential record, and shall not be dis-closable or discoverable except as specifically authorized by law.
- (h) In the event that the County of Orange, either administratively or by ordinance, establishes a protocol or mechanism for mediating certain citizen, peace officer, or peace officer supervisor complaints, and if the Executive Director of the OIR, in his or her absolute discretion, determines that such complaints do not warrant exercise of the authority set forth in section 1-2-226(d)(1)—(7) of this article, the Executive Director may refer such complaint or complaints to the body selected by the County of Orange to provide such mediation.

(Ord. No. 08-004, § 1, 2-26-08) Secs. 1-2-227—1-2-249. - Reserved.

Appendix D: 2015 Amended Ordinance Establishing the New OIR

ORDINANCE NO. 15-022

AN ORDINANCE OF THE COUNTY OF ORANGE, CALIFORNIA,
AMENDING TITLE 1, DIVISION 2, ARTICLE 18 OF THE CODIFIED
ORDINANCES OF THE COUNTY OF ORANGE PERTAINING
TO THE OFFICE OF INDEPENDENT REVIEW

The Board of Supervisors of the County of Orange ordains as follows:

SECTION 1. Section 1-2-225 of the Codified Ordinances of the County of Orange is hereby amended to read as follows:

Sec. 1-2-225. - Purpose and intent.

It is the purpose and intent of the Board of Supervisors to establish an Office of Independent Review to perform the following functions:

- (a) Review systemic issues involving the Orange County Sheriff-Coroner Department, Probation Department, Office of the District Attorney, Office of the Public Defender and the Social Services Agency (hereinafter “relevant County Department(s)”) and serve as an independent resource and counsel for the Board in order to ensure accountability with regard to the performance and operations of relevant County Departments;
- (b) Review specific incidents occurring in relevant County Departments which may identify systemic issues with regard to the performance and operations of relevant County Departments; and
- (c) Provide a resource to ensure that high risk and potential liability issues are identified and addressed through corrective actions.

The Office of Independent Review shall exercise all powers vested in the Board under federal and state law that may be delegated by the Board.

SECTION 2. Section 1-2-226 of the Codified Ordinances of the County of Orange is hereby amended to read as follows:

Sec. 1-2-226. - Establishment of Office of Independent Review; Qualifications, Selection and Authority of Executive Director and Staff.

(a) The Board of Supervisors hereby establishes the Office of Independent Review (hereinafter "OIR"), which shall initially be comprised of an Executive Director, staff attorneys and administrative support staff as the Executive Director shall recommend are necessary.

(b) The Executive Director shall be an attorney licensed to practice law in the State of California, shall have had no imposition of discipline by any State or Federal Bar, and shall have had at least three (3) years' experience in conducting oversight of law enforcement personnel and departments. The Executive Director and all staff of the OIR shall be employees of the County of Orange. The Executive Director and staff attorneys shall hold an attorney-client relationship with the County of Orange. As a result of this attorney-client relationship, the Executive Director and staff attorneys shall have the same access to confidential records as the Office of County Counsel. The terms and conditions of employment of the Executive Director and of all staff of the OIR shall be set by the Board of Supervisors.

(c) The Executive Director shall be selected by the Board of Supervisors.

(d) The OIR shall, consistent with existing state law:

(1) Provide periodic status reports on all investigations and significant matters within the purview of the OIR to the Board of Supervisors and relevant County Department heads.

(2) Solicit from, and provide regular feedback to, the Board of Supervisors regarding ongoing and completed projects of the OIR through the following mechanisms:

(i) Regular debriefing of systemic review and reform projects;

- (ii) Solicitation of Board members for areas of interest for systemic audits and review; and
 - (iii) Regular meetings with Board members and/or designates regarding significant cases and reviews.
- (3) Be authorized to provide such periodic and special reports to the public using traditional reporting and social media concerning its activities and findings as it deems proper and appropriate.
- (4) Be authorized to conduct substantive systemic audits and reviews of relevant County Department functions that impact relevant County Departmental and/or employee accountability and performance.
- (5) Be authorized to work with County Counsel, County Risk Management and relevant County Department heads to review incidents and/or allegations implicating significant risk and/or liability and independently participate in and review the development of corrective actions.
- (6) Be authorized to review County and/or relevant County Department policies and recommend reforms consistent with evolving best practices.
- (7) Be authorized to facilitate interdepartmental referrals of complaints or allegations regarding the conduct of County employees and/or systems to the relevant County Department(s).
- (8) In cooperation with the Sheriff-Coroner, coordinate and enhance the presence of independent jail monitors to report to the OIR.
- (9) In coordination and cooperation with relevant County Department heads, provide ongoing legal counsel and advice to relevant County Department heads concerning the initiation, structuring and development of internal inquiries and investigations into alleged performance issues and/or misconduct of employees.
- (10) In coordination and cooperation with relevant County Department heads:
- (i) Monitor, as necessary and appropriate, investigations arising from complaints or custodial deaths or injuries;
 - (ii) Respond, as necessary and appropriate, to scenes of investigations;

(iii) Have access to, and participate in, confidential meetings and proceedings in order to monitor cases in real time;

(iv) Provide advice and counsel to relevant County Department's internal review and/or internal investigative proceedings so as to ensure a thorough, unbiased, and impartial fact-finding process and consistent and appropriate conclusions; and

(v) Review and critique completed internal investigations and conclusions of internal investigations. No review or critique by the OIR of a completed internal investigation or the conclusions of an internal investigation may be used as the basis for taking punitive action against an employee.

(11) Establish and maintain liaison with the District Attorney, Sheriff-Coroner Department, Probation Department, Public Defender, Social Services Agency, County Counsel, County Executive Office, County Human Resource Services Department, employee unions, the United States Attorney, the Federal Bureau of Investigation, and community based organizations;

(12) In coordination and cooperation with the relevant County Department heads, review and analyze selected investigations to determine whether departmental policies, practices and procedures should be reexamined to prevent the future occurrence of similar allegations of misconduct, and when warranted, develop, propose and make independent recommendations as follows:

(i) Regarding the outcomes of investigations and reviews, and

(ii) For revisions of the implicated policies, practices, or procedures.

(13) Devise and recommend mechanisms to provide positive recognition and incentives to employees who perform duties in an exemplary fashion, e.g., the proper and appropriate use of force, integrity, professionalism, and other matters that frequently may be the subject of complaints;

(14) Set the operational philosophy of the OIR to ensure that the needs and goals of the Board of Supervisors, the community, and the County are met; and

(15) Create, with the Board of Supervisors and relevant County Department heads, the written protocols referenced in subsection (e)(5) of this section.

(e) The authority set out in this article shall include the investigation and review of the following:

- (1) Uses of deadly force;
- (2) Uses of force resulting in, or reasonably likely to result in, death or serious bodily injury;
- (3) Deaths and serious bodily injuries occurring in custody;
- (4) Deaths and serious bodily injuries in which the person harmed has had official contact with relevant County Departments;
- (5) Any misconduct not otherwise identified within this ordinance that the Board of Supervisors, Executive Director and the relevant County Department head(s) agree, by written protocol, should be reviewed; and
- (6) Those allegations set forth in citizen or internally generated complaints which involve any of the following:
 - (i) Use, threat, solicitation or encouragement of unlawful, improper or excessive force;
 - (ii) Acts or threats of discrimination or disparate treatment or verbal slurs based on race, ethnicity, religious affiliation or belief, national origin, political affiliation, gender, disability or sexual orientation;
 - (iii) Sexual harassment;
 - (iv) The improper display or use of firearms, other weapons, or force;
 - (v) Falsification of government documents or reports;
 - (vi) Interference in, obstruction of, or improper influence over any investigation authorized by law or this ordinance in a manner that inhibits or compromises the impartial search for truth;
 - (vii) Making false or misleading statements in any investigation authorized by law or this ordinance;
 - (viii) Making false or misleading statements to relevant County Department supervisors and/or other officials;
 - (ix) Use of illicit drugs;

- (x) Use of an official position for personal or financial gain;
- (xi) Bringing, or assisting or permitting others to bring, contraband to inmates or others in custody; and/or
- (xii) Criminal conduct.

(f) The OIR is not authorized to:

- (1) Compel by subpoena the production of any documents or the attendance and testimony of any witnesses.
- (2) Disclose any information obtained in conducting inquiries, except as provided herein or as otherwise ordered by a court of competent jurisdiction. No confidential or privileged information shall be disclosed to anyone not authorized by law to receive it.
- (3) Make any written or oral report concerning any complaint to any individual or body other than to the County Board of Supervisors or the relevant County Department head, or to the public as provided for in this ordinance. In addition, all such reports shall be made under the direction, and with the approval of, the Executive Director. No staff member shall make any reports or public comment without such prior approval.
- (4) Affect the wages, hours, or working conditions of any County employee represented by a recognized employee organization, as defined under Government Code section 3501, subdivision (b).

(g) There shall be a form and log for citizen complaints as set forth herein.

- (1) The complaint form for employees shall be substantially similar to that in use by relevant County Departments.
- (2) The Executive Director or his or her designee shall keep a log of the name, address, and telephone number of the complainant as well as a copy of the complaint referred to relevant County Department heads for their review.
- (3) Such log as described in subsection (g)(2) of this section shall be considered a confidential record, and shall not be dis-closable or discoverable except as specifically authorized by law.

(h) In the event that the County of Orange, either administratively or by ordinance, establishes a protocol or mechanism for mediating certain citizen, peace officer, or peace officer supervisor complaints, and if the Executive Director of the OIR, in his or her

absolute discretion, determines that such complaints do not warrant exercise of the authority set forth in this article, the Executive Director may refer such complaint or complaints to the body selected by the County of Orange to provide such mediation.

This ordinance shall take effect and be in full force thirty (30) days from and after its passage and before the expiration of fifteen (15) days after the passage thereof, shall be published once in an adjudicated newspaper in the County of Orange.

THE FOREGOING was PASSED and ADOPTED by the following vote of the Orange County Board of Supervisors on December 15, 2015, to wit:

AYES: Supervisors: TODD SPITZER, ANDREW DO, LISA A. BARTLETT,

NOES: Supervisors: MICHELLE STEEL, SHAWN NELSON

EXCUSED:

ABSTAINED:

_____/s/_____

Robin Stieler, Clerk of the Board of Supervisors, County of Orange, California

Appendix E: Comparison of Key Aspects of 2008 Versus 2015 OIR Ordinances

Table 6 below provides a comparison of the key aspects of the 2008 OIR ordinance versus the 2015 OIR ordinance.

Aspect	2008 OIR	2015 OIR
Scope of oversight	Oversee Sheriff-Coroner's Department	Oversee Sheriff-Coroner's Department, District Attorney, Probation Department, Public Defender, Social Services Agency
Purpose and intent	<p>Focus on monitoring, assisting, overseeing, and advising the Sheriff-Coroner, by independently</p> <ol style="list-style-type: none"> 1. reviewing internal disciplinary investigations, and 2. reviewing the handling of in-custody deaths or serious injuries inside the Sheriff-Coroner's Department, to add transparency and boost public confidence. <p>Corrective action to prevent recurrence</p>	<p>Focus on acting as independent resource and counsel to the Board to ensure the five targeted agencies are held accountable for their performance and operations by</p> <ol style="list-style-type: none"> 1. reviewing systemic issues with respect to the performance and operations of the targeted agencies, 2. reviewing specific incidents that may identify systemic issues, and 3. working with County Counsel, County Risk Management, and department heads to ensure that critical incidents involving significant risk and/or liability to the County and are identified and addressed through corrective actions. <p>Preventive and corrective action to prevent occurrence and recurrence</p>
Organizational reporting relationship	Contract terms and conditions set by Board of Supervisors; contract managed by County Executive Officer and County Counsel.	Report to the Board of Supervisors

Aspect	2008 OIR	2015 OIR
Degree of independence of both the Board of Supervisors and the agency or agencies	Executive Director and professional staff were independent contractors, not County employees, responsible for their own work decisions, and not in the OCSO command structure, to enhance their independence from both the BOS and the OCSO. (The OIR executive secretary was a County employee.)	Executive Director and all staff will be County employees reporting directly to the BOS, and not in the reporting structure of any of the five agencies, to enhance their independence from the five agencies, but allow tighter direction by the BOS.
Responsibility for issuing reports	Quarterly status reports to the Board of Supervisors and Sheriff-Coroner; periodic reports to the public	Issue reports to Board of Supervisors, department heads of the five agencies, and the public. Enhance OIR reporting obligations to the Board of Supervisors
Location	Housed at Sheriff's Department	To be housed at Hall of Administration (with Board of Supervisors), to enhance their independence from the five agencies.
Preventive responsibilities	Review Sheriff-Coroner Department policies and practices and recommend improvements	Review department practices in all five departments and recommend changes based on evolving best practices
Jail oversight	N/A	Add jail monitors reporting to the OIR

Table 6. Comparison of the 2008 OIR ordinance to the 2015 amended OIR ordinance

Appendix F: Prior Orange County Grand Jury Reports Mentioning the OIR

Grand Jury Year	Report Title	OIR-Related Findings and Recommendations	Responses
2008-2009	Condition of Orange County Jails	Recommendation 14 — the OIR should submit a written progress report on a quarterly basis as contractually required.	Response to recommendation 14 (OIR) — recommendation has been implemented. Three update reports submitted so far; OIR will provide quarterly presentations to the Board.
2010-2011	Review of Orange County Detention Facilities	Recommendation 4 — Continue to assess and present evidence-based data from the S.A.F.E. Division of the Orange County Sheriff's Department to enhance transparency, provide effective law enforcement and reduce civil litigation.	<p>Response to recommendation 4 (Sheriff) — Recommendation has been implemented.</p> <p>The S.A.F.E. Division presents quarterly Force Trend Reviews and annual Operational Assessments to all command staff. . . . Representatives from County Counsel and the Office of Independent Review, a civilian oversight committee established by the Board of Supervisors, actively attend and participate during all reviews and assessments. The Orange County Sheriff's Department will continue these reviews and work toward enhancing their effectiveness and utility.</p>
2011-2012	Detention Facilities Report – Part I – Adult	<p>Finding 6 — The Office of Independent Review provides a valuable risk management service to the county but may be improperly assigned and underutilized. Direct reporting to the Board of Supervisors results in inconsistent expectations, direction, and evaluations. Additionally, there is a perception that the operation is unduly influenced by the Sheriff's Department. This is reinforced by the physical location of the OIR office in the OCSD headquarters.</p> <p>Recommendation 6 — The Board of Supervisors should review the role and responsibilities of the Office of Independent Review with a view toward expanding the scope of work to include the Probation Department facilities and reassign</p>	<p>Response to Finding 6 (OIR & Board of Supervisors (BOS)) — Disagrees partially with finding 6.</p> <p>The Grand Jury's report accurately identifies some of the challenges OIR has faced... More effective communication from the Executive Director of OIR to the Supervisors has lessened some of the frustrations cited by the Grand Jury... [T]he Board of Supervisors believes that OIR's place in the County organizational chart is appropriate. Moreover, it believes that OIR's physical location helps promote the access and regular contact that contribute to its monitoring function.</p> <p>Response to Recommendation 6 (OIR & BOS) — The recommendation will not be implemented because it is not warranted or is not reasonable.</p> <p>OIR provides civilian oversight for the County's Sheriff's Department from an independent, outside perspective and coordinates with various public and private groups to ensure that relevant issues are identified and addressed. Stakeholders include the Board of Supervisors, County Counsel, District Attorney, County Executive Office, Human Resources, Human Relations Commission, employee unions, relevant federal agencies, and various community-based groups</p>

Office of Independent Review: What’s Next?

Grand Jury Year	Report Title	OIR-Related Findings and Recommendations	Responses
		<p>management control to the Chief Executive Officer as part of the County Risk Management operation. The OIR office should be relocated to the Hall of Administration.</p>	<p>and individuals.</p> <p>In 2010, the Board of Supervisors added a provision to the contract of OIR’s Executive Director that establishes an attorney-client relationship with the Probation Department and allows OIR to perform the recommended monitoring function for selected cases. That option has been utilized on selected occasions, and the Board of Supervisors can also expand the role on an as-needed basis in the future.</p> <p>OIR’s Executive Director provides regular status reports to the Board of Supervisors “on all investigations and significant matters within the purview of OIR.” Additionally, OIR provides written reports to the Board to address the outcome of individual matters relating to the OIR oversight responsibilities. Some of these reports may be confidential and protected by the attorney-client privilege; in other instances, the Board may choose to release the reports in a manner consistent with state law and the privacy rights of involved parties. OIR should continue to report to the Board rather than reassigned to the County Executive Officer to enable the Board continued oversight and involvement in OIR activities.</p> <p>Although the physical OIR office location is located within the Orange County Sheriff Department headquarters, OIR’s Executive Director and professional staff of the OIR are independent contractors – not employees of the County or part of the OCSD chain of command. This promotes the objectivity of OIR’s findings and recommendations. The location of the office is critical to OIR’s ability to respond in person to critical incidents, consult regularly with OCSD decision-makers, and review OCSD operations, files, and records in an unfettered way.</p>
<p>2011-2012</p>	<p>Detention Facilities Report – Part II – Juvenile, Orange County Juvenile Detention and Treatment Facilities</p>	<p>Finding 6 — The risk management aspects of operating juvenile detention and correctional facilities could benefit from the availability of the Office of Independent Review to follow-up on serious behavioral incidents and assist in investigating allegations of staff</p>	<p>Response to Finding 6 (OIR) — Agrees with finding.</p> <p>Response to Recommendation 8 (BOS) — The recommendation has been implemented.</p> <p>In 2010, the Board of Supervisors added a provision to the contract of OIR’s Executive Director that establishes an attorney-client relationship with the Probation Department and allows OIR to perform the recommended monitoring function for selected cases. That option has been utilized on selected occasions, and the Board of Supervisors can also expand the role on an</p>

Office of Independent Review: What’s Next?

Grand Jury Year	Report Title	OIR-Related Findings and Recommendations	Responses
		<p>misconduct.</p> <p>Recommendation 8 — The Board of Supervisors should expand the scope of work for the Office of Independent Review to include reviews of the Probation Department Juvenile facilities operations.</p>	<p>as-needed basis in the future.</p>
2012-2013	<p>A Call for Ethical Standards: Corruption in Orange County</p>	<p>Finding 3 — Orange County reacted to the 1994 bankruptcy scandal by creating a patchwork of oversight offices to audit financial, performance, and professional standards. These offices have varying levels of independence, jurisdiction and legislative support. They need to be accountable as well.</p> <p>Finding 5 — Citizens need a clearinghouse to voice complaints about actual and perceived incidents of corruption and unethical behavior by public officials.</p>	<p>Response to Finding 3 (BOS) — Disagrees partially with the finding.</p> <p>The County of Orange has established a number of oversight bodies and functions over time in order to provide adequate levels of review. The County does not agree with the characterization of these entities as a “patchwork.” Rather, the County views these entities as a network of oversight functions with specialized expertise in financial, operational, and legal oversight. These bodies include the Internal Audit Department, the Performance Audit Department, the District Attorney’s Office, the Office of Independent Review, the Audit Oversight Committee, the Treasurer’s Oversight Committee, the Auditor-Controller, and the Compliance Oversight Committee. Also included in this list of oversight functions is the Grand Jury itself. The County is also scrutinized by a variety of oversight bodies at the state and federal level for compliance with a litany of rules and regulations. The County agrees that these entities need to be accountable and believes that their accountability lies with the electorate.</p> <p>Response to Finding 5 (BOS) — Agrees with the finding.</p> <p>Again, this “finding” is actually a generic recommendation. There are several avenues already in existence for citizens to voice such concerns, including the District Attorney’s Office, the Internal Audit Fraud Hotline, the California Attorney General, the Office of Independent Review, and the Fair Political Practices Commission, as well as the Grand Jury itself.</p>
2012-2013	<p>Detention Facilities Report: (Part II Juvenile) How Do We Know If We Are Taking Care of Our</p>	<p>Finding 6 — The incident between a male and female detainee at Juvenile Hall in February, 2012, was investigated immediately by</p>	<p>Response to Finding 6 (Probation & BOS) — Agrees with the finding.</p>

Office of Independent Review: What’s Next?

Grand Jury Year	Report Title	OIR-Related Findings and Recommendations	Responses
	At-Risk Juveniles	the Orange County Probation Department with oversight from the Office of Independent Review. Some of the juvenile correctional officers that were implicated were experienced officers.	
2013-2014	Ethics and Campaign Reporting: Why and How to Implement Stronger Oversight, Transparency, and Enforcement	Finding 3 — Orange County is subject to the same potential for corruption as anywhere else, yet monitoring and enforcement of ethics, and campaign and lobbyist reporting in the County is deficient in a number of areas, including oversight, law and policy advice and recommendations, audits, coordination, transparency, and independence.	Response to Finding 3 (BOS) — The Board disagrees wholly with this finding. By suggesting that the monitoring and enforcement of ethic, campaign, and lobbyist reporting is “deficient,” the Grand Jury suggests that the County is somehow not meeting a legal or other minimum standard. The Count of Orange <u>exceeds</u> legal requirements for the areas mentioned above. For example, the Board has established a number of oversight bodies and functions, including the Internal Audit Department, the Performance Audit Department, the Office of Independent Review, the Audit Oversight Committee, the Treasurer’s Oversight Committee, the Compliance Oversight Committee, and the Orange County Fraud Hotline. In addition, the County already has limits on campaign contributions in County elections through the Orange County Campaign Reform Ordinance (Codified Ordinances of Orange County, Section 1-6-1 <i>et seq.</i>) The Board has adopted the Orange County Gift Ban Ordinance (Codified Ordinances of Orange County, Section 1-3-21 <i>et seq.</i>) that prohibits County elected officials and high-level employees from receiving gifts from persons doing business, or seeking to do business, with the County. Additionally, the Board has adopted an ordinance requiring the disclosure of lobbyists and lobbying activities through the Lobbyists Registration Ordinance (Codified Ordinances of Orange County, Section 1-1-8 <i>et seq.</i>) These oversight agencies and local laws, all of which operate to prevent corruption and the appearance of corruption, are in addition to the required responsibilities of the District Attorney and County Auditor-Controller.

Table 7. OIR-related findings, recommendations, and responses in prior GJ Reports

Appendix G: History of the OC Jailhouse Informant Controversy

In May 2014, a defendant pleaded guilty to eight counts of first degree murder for the October 2011 mass murder of his ex-wife and seven co-workers, customers, and bystanders at a hair salon in Orange County. Earlier in 2014, the public defender had filed a motion on behalf of his client, alleging prosecutorial misconduct in the use of a jailhouse informant and in the failure to provide evidence related to the informant to the defense during discovery. The motion sought the recusal of the District Attorney's Office from further involvement in the trial, as well as a prohibition on the death penalty as a possible sentence.

After months of hearings on the lengthy motion, along with thousands of supporting documents, the judge on the case ruled in August 2014 that misconduct by law enforcement had occurred, but the misconduct was negligent rather than malicious, and hence did not merit the requested recusal or prohibition.

More discovery requests by the public defender produced further evidence of alleged misconduct. This formed the basis of the November 2014 motion for reconsideration of the judge's August ruling, leading to further court hearings on the motion in early 2015.

In March 2015, the judge issued a supplemental ruling that still refused to prohibit the death penalty. However, the ruling stated that the new evidence revealed serious discovery violations which had deprived the defendant of due process. On the basis of a legal theory around conflict of interest, it held the District Attorney responsible for the discovery violations of its law enforcement partners and recused the entire OCDA from the sentencing phase of the trial to protect the defendant's right to a fair trial. The ruling called for the California Attorney General to take over the prosecution of the case. (Supplemental, People)

Subsequently, the California Attorney General has filed an appeal to overturn this ruling and return the case to the Orange County District Attorney. That appeal is still pending as of June 2016. (Appellant's, People) At the same time as the appeal, at the request of the OCDA, the California Attorney General initiated an investigation into the OCDA and OCSD's alleged illegal use of jailhouse informants. (Saavedra, State) That investigation is also still on-going as of June 2016.

Half a dozen cases have been affected by the jailhouse informant controversy, including reduced charges in some cases due to use of informants in those cases, and previous verdicts overturned in other cases. For more information, see the series of articles and extended coverage in *The Orange County Register's* "Inside the Snitch Tank" feature. (Humes, Inside) Other coverage can be found in the *OC Weekly*, the *Voice of OC* web site, the *Los Angeles Times*, and other newspaper articles in the Works Cited list of this report.