County of Orange

County Executive Office

November 22, 2016

Honorable Charles Margines
Presiding Judge of the Superior Court of California
700 Civic Center Drive West
Santa Ana, CA 92701

Subject: Response to Office of Independent Review – What's Next?

Dear Judge Margines:

Per your request, and in accordance with Penal Code 933, please find the combined County of Orange response to the subject report as approved by the Board of Supervisors. The respondents are the Orange County Board of Supervisors, County Executive Office, Social Services Agency, Probation, and Public Defender's Office.

If you have any questions, please contact Lilly Simmering of the County Executive Office at 714-834-6748.

Sincerely,

Frank Kim
County Executive Officer

Enclosure

cc: FY 2015-16 Orange County Grand Jury Foreman
Lilly Simmering, Deputy Chief Operating Officer, County Executive Office

ORANGE COUNTY BOARD OF SUPERVISORS

MINUTE ORDER

November 22, 2016

Submitting Agency/Department: County Executive Office

Approve proposed response for FY 2015-16 Grand Jury Report "Office of Independent Review - What's Next?" - All Districts

The following is action taken by the Board of Supervisors:

APPROVED AS RECOMMENDED ☒ OTHER ☐

Unanimous ☒ (1) DO: **Y** (2) STEEL: **Y** (3) SPITZER: **Y** (4) NELSON: **Y** (5) BARTLETT: **Y**

Vote Key: Y=Yes; N=No; A=Abstain; X=Excused; B.O.=Board Order

Documents accompanying this matter:

- ☐ Resolution(s)
- ☐ Ordinances(s)
- ☐ Contract(s)

Item No. 42

Special Notes:

Copies sent to:

CEO – Lilly Simmering
Superior Court
Grand Jury

11/29/16

I certify that the foregoing is a true and correct copy of the Minute Order adopted by the Board of Supervisors, Orange County, State of California.
Robin Stieler, Clerk of the Board

By: _____ Deputy

Agenda Item 42

AGENDA STAFF REPORT

ASR Control 16-001372

MEETING DATE:	11/22/16
LEGAL ENTITY TAKING ACTION:	Board of Supervisors
BOARD OF SUPERVISORS DISTRICT(S):	All Districts
SUBMITTING AGENCY/DEPARTMENT:	County Executive Office (Approved)
DEPARTMENT CONTACT PERSON(S):	Frank Kim (714) 834-6200
	Lilly Simmering (714) 834-6748

SUBJECT: Office of Independent Review Grand Jury Response

CEO CONCUR	**COUNTY COUNSEL REVIEW**	**CLERK OF THE BOARD**
Concur	No Legal Objection	Discussion 3 Votes Board Majority

Budgeted: N/A **Current Year Cost:** N/A **Annual Cost:** N/A

Staffing Impact: No **# of Positions:** **Sole Source:** N/A

Current Fiscal Year Revenue: N/A

Funding Source: N/A **County Audit in last 3 years:** No

Prior Board Action: N/A

RECOMMENDED ACTION(S):

1. Approve proposed response to FY 2015-16 Grand Jury Report entitled, "Office of Independent Review - What's Next?"

2. Direct Clerk of the Board to forward this Agenda Staff Report with attachments to the Presiding Judge of the Superior Court and the FY 2015-16 Grand Jury no later than November 25, 2016.

SUMMARY:

Approval of the proposed response to FY 2015-16 Grand Jury Report entitled, "Office of Independent Review - What's Next?" will fulfill the County's response requirement.

BACKGROUND INFORMATION:

On June 30, 2016, the Orange County Grand Jury released a report entitled, "Office of Independent Review - What's Next?" The report directed responses to the findings and recommendations to the Orange County Board of Supervisors, Social Services Agency, Probation, and Public Defender. Attachment B is the proposed response to the Grand Jury's findings and recommendations.

In 2015, an ad hoc committee was established to review changes to the 2008 Office of Independent Review (OIR) ordinance. Given the ad hoc committee's work on the subject, the CEO worked through the ad hoc committee on developing the attached response and presents it to the Board for consideration.

FINANCIAL IMPACT:

N/A

STAFFING IMPACT:

N/A

REVIEWING AGENCIES:

Social Services Agency
Probation
Public Defender
OC District Attorney's Office
OC Sheriff's Department

ATTACHMENT(S):

Attachment A - Grand Jury Report
Attachment B - Proposed Response to the Report
Attachment C - Draft Transmittal Letter

Responses to Findings and Recommendations
2015-16 Grand Jury Report:

"Office of Independent Review: What's Next?"

SUMMARY RESPONSE STATEMENT:

On June 30, 2016, the Grand Jury released a report entitled: "Office of Independent Review: What's Next." This report directed responses to findings and recommendations to the Orange County Board of Supervisors, Public Defender, Probation, and Social Services Agency, which are included below. The Orange County Sheriff's Department and Orange County District Attorney's Office responded separately.

FINDINGS AND RESPONSES:

F.1. **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.**

Response: **Disagree wholly.** The position, whether it is an independent contractor position or County employee, is appointed by and serves at the pleasure of the Board of Supervisors.

The 2008 OIR ordinance laid out specific duties for the OIR; the 2015 ordinance does as well. It is expected that the new OIR Executive Director, once he/she is hired, will work to uphold those duties.

F.2. **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.

Response: **Disagree wholly.** While the Board of Supervisors voiced concerns about the performance of the OIR between 2008-2015, it is speculative to attribute those concerns to any one cause.

F.3. **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 supervisorial expectation. Without the authority or resources to conduct its own independent audit investigations, the 2015 version of the OIR Office of Independent Review: What's Next? 2015-2016 Orange County Grand Jury Page 37 would have to act only as reviewer of audits and reviews performed by Performance Audit, and/or Internal Audit, and/or the agencies themselves.**

Response: **Disagree wholly.** The 2008 OIR ordinance laid out specific duties for the OIR; the 2015 ordinance does as well. It is expected that the new OIR Executive Director, once he/she is hired, will work to uphold those duties.

F.4. **The OIR could easily cost upwards of $3 million/year due to expansion to five agencies plus jail monitors.**

Response: **Disagree wholly.** Although, the overall breadth of the additional agencies is comprehensive, the increase in resources will be in correlation to the workload. The County has done its best to project the cost but only the actual implementation experience will provide an indicator of value. This will require further analysis.

F.5. **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.**

Response: **Disagrees partially with the finding.** The County agrees that the overall breadth of the additional agencies is comprehensive and in order to truly conduct oversight that is fair, objective and useful for the agencies, the OIR will need to hire subject matter experts.

However, the County is committed to finding and retaining talent in the OIR necessary to carry out the duties and responsibilities outlined under the 2015 ordinance. The job announcement for the OIR Executive Director position closed

on July 22, 2016. The County is currently in the final stages of hiring and anticipates the OIR Executive Director will be on-board before the end of 2016. Once the Executive Director is on-board, identifying the skillset of his/her OIR team will be a priority.

F.6. **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.**

Response: **Disagrees partially with the finding.** While the 2015 OIR ordinance does increase the number of County agencies under the purview of the OIR, it remains to be seen what the best implementation plan will be to ensure that oversight of the additional agencies are successfully integrated. A phased implementation will be considered.

F.7. **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.**

Response: The County defers to OCDA for a response.
OCDA Response – Disagree with finding. *The ability of the OIR to review/oversee the OCDA is limited by statutory and case law.*

The Board of Supervisors in winter 2015, received opinion letters from both the Orange County Public Defender and OCDA. The Grand Jury was given a copy of the OCDA legal memorandum (Attachment A). In those letters, each agency outlines their legally mandated duties and responsibilities. Even though each agency represents different interests in the legal system, they are similar in their legal analysis. This is not surprising. Our positions articulate both statutory and case law, which limits the ability of both offices to share information.

F.8. **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 OSCD's internal investigations.**

Response: The County defers to OCSD.
OCSD Response – Agrees with finding. *The cooperation between the Sheriff's Department and OIR resulted in a successful partnership between two departments. The input provided by the OIR Director was beneficial in the creation of Department policy and with regard to internal investigations.*

F.9. **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.**

Response: The County defers to OCSD.
OCSD Response – Partially agrees with finding. *Cooperation with the new OIR is voluntary on the part of the Sheriff's Department. Whether the new OIR offers worthwhile recommendations/ best practices will depend on both the structure and the personnel that are hired. With regard to jailhouse informant policy, the Department has already taken significant steps to address concerns that have been raised. The new Constitutional Policing Advisor will play an important role in monitoring those remedies.*

F.10. **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.**

Response: The County defers to OCDA.
OCDA Response – Partially implemented. *In May 2016, a former Orange County Superior Court judge joined the Confidential Informant Review Committee (CIRC) as a neutral party.*

F.11. **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.**

Response: **Disagrees partially with the finding.** The 2015 OIR ordinance grants the OIR the same level of attorney-client privilege as County Counsel. This will allow the OIR to complete many of its assigned duties. In regards to additional access to confidential records and personnel files, the Grand Jury rightfully identifies that some of that access is protected through the courts or other state or Federal mandates. As an example, under Welfare and Institutions Code (WIC) §827, our legislature has vested control over juvenile court case file records with the Judicial Branch and not the

Executive Branch. Our State Supreme Court has interpreted this statute to encompass not just the records held in the Court Clerk's office, but also the related case file records held by SSA and the Probation Dept. Consequently, the OIR would have to seek Juvenile Court permission via a WIC § 827 petition for disclosure of records in order to review case specific information/records on dependents and wards of the Juvenile Court.

However, the County has no intention of breaching traditional attorney-client privilege or confidentiality requirements mandated by the courts. For example, any attorney-client relationship formed between the Public Defender's Office and an attorney with a County agency would have to be free of conflict. Additionally, any privilege associated with that relationship cannot legally supersede the Constitutional and statutory privileges and ethical requirements that may limit access to documents in the Public Defender's Office.

RECOMMENDATIONS AND RESPONSES:

R.1. **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)**

Response: **The recommendation will not be implemented because it is not warranted.** Special Counsel Michael Gennaco already addressed these issues when he introduced the pros and cons of three potential models in his report received and filed by the Board of Supervisors on November 10, 2015. Furthermore, while Special Counsel Gennaco acknowledged that detractors of the auditing model questioned the independence of the auditing body, he also found that there was "no call by County stakeholders to transition away from the auditing model of the OIR toward either a civilian review board or investigative model."

R.2. **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)

Response: **The recommendation has not been implemented but will be implemented in the future.** The County will exert effort to assist the new Executive Director in completing this task within three months; however, it may take longer depending on the resources needed to complete this task.

R.3. **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)**

Response: **The recommendation will not be implemented because it is not warranted.** The Board has already considered the models proposed by Special Counsel at the November 10, 2015 Board meeting. The Board expects all staff to continually share ideas for efficient and effective practices.

R.4. **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)**

Response: **The recommendation requires further analysis.** Implementation of the 2015 ordinance will be a priority consideration for both the Board of Supervisors and new OIR Executive Director once he/she joins the County. As stated above, the County will implement the Grand Jury's Recommendation Two, which the County feels are necessary infrastructural needs. Only once that is complete, will the Executive Director be able to assess how best to expand coverage to the additional four agencies. This will require some research and analysis.

R.5. **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)

Response: **The recommendation requires further analysis.** The 2008 OIR ordinance laid out specific duties for the OIR; the 2015 ordinance does as well. Whether or not this pilot is feasible or warranted will require further analysis.

R.6. **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)**

Response: **The recommendation has not yet been implemented, but will be implemented in the future.** In keeping with the spirit of the 2015 OIR ordinance, determining a plan to expand the OIR's coverage to the additional agencies is a priority. However, given that it is four additional agencies that comprise of 64% of the total County employee workforce, this recommendation may take longer than three months to complete. An appropriate time frame for completion will be a priority for the new Executive Director.

In the meantime, the County is confident that its agencies/departments have necessary performance oversight tools in place to monitor the performance of their employees. At the Social Service Agency (SSA), there is the Quality Support Team (QST) that reports directly to the SSA Chief Deputy Director and works closely with County Counsel (CoCo), CEO Risk Management (CEO RM), and Defense Attorneys, and provides the following primary functions:

- ***Custodian of Records (COR)*** - to provide practice consistency in all document responses. The COR is the primary contact for CEO RM for document/record requests for all claims, summons, lawsuits, Public Records Act (PRAs), Juvenile Court 827 Petition Requests, etc.
- ***Litigation Coordination*** - liaison between CEO RM, Defense Attorneys, and SSA staff on all matters related to litigation.
- ***Public Inquiry Coordination*** - responsible for all complaints and inquiries from the public. SSA met with CEO RM, Internal Audit, County Counsel, and Defense Attorneys for input on SSA's complaint investigation/response process.
- ***Quality Assurance*** - responsible for mandated child welfare case reviews, child fatality reviews, program audits, and monitoring compliance with State and Federal regulations and mandates.

The performance of both the Office of the Public Defender and Probation departments are monitored by the courts. All attorneys under the Office of the

Public Defender are held accountable to the State Bar of California as well as the department's own bi-annual performance reviews. In addition, the Public Defender implements a Proficiency Index review of all its cases, which the 2006 Grand Jury found to be an effective tool in management.

R.7. **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)**

Response: The County defers to OCSD.

OCSD's Response – The recommendation requires further analysis. *It is premature to implement this recommendation without a clear understanding of how the new OIR model will work.*

As the new model develops, it is the expectation of the Sheriff that the Constitutional Policing Advisor will have responsibility for recommending policies and best practices with regard to jailhouse informants. The Constitutional Policing Advisor will also assist in the review of internal processes and will help insure proper procedures are being followed.

R.8. **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)**

Response: The County defers to OCDA.

OCDA's Response – Partially implemented. *The Cooperating Informant Review Committee (CIRC) was created to provide an effective and efficient process for reviewing informant related issues within the OCDA and to serve as a resource for prosecutors and law enforcement agencies so that proper legal standards are maintained and followed throughout the criminal justice process. The permanent members of the committee include the District Attorney, the Senior*

Assistant in charge of Vertical Prosecutions and Violent Crimes, the Assistant District Attorney of the Homicide Unit, the Assistant District Attorneys of the Gangs/Target Units, the Assistant District Attorney of the Narcotics Enforcement Team, the Deputy District Attorney in charge of the OCII and an appointee from outside the OCDA office.

The OCDA has moved forward with finding a neutral retired magistrate to be part of the CIRC committee. In May 2016, a former Orange County Superior Court judge joined CIRC as a neutral party.