

## **BART IS ON THE WRONG TRACK WITH INDEPENDENT OVERSIGHT**

### **EXECUTIVE SUMMARY**

BART, the San Francisco Bay Area’s largest and geographically broadest rapid transit system, is governed by an elected board of directors whose members serve four-year terms and are drawn from nine districts representing portions of the area served. A board-appointed general manager is the chief executive officer.

A successful 2018 regional ballot measure in nine Bay Area counties activated [Senate Bill 595](#) which dedicated \$1 billion in bridge toll revenue to BART capital projects. It also created an independent Office of the Inspector General (OIG) to provide oversight and accountability of BART’s operations and finances. The first and current Inspector General (IG) was selected by California Governor Gavin Newsom in 2019 from three candidates put forward by BART’s board.

The Grand Jury found that from the beginning, both BART’s board and management impeded the IG’s efforts to conduct independent oversight. In addition, board members and management supported union efforts to limit OIG access to their members, which stymied OIG independence and the confidentiality of investigations.

At a time when ridership is down due to the lingering effects of the pandemic, and BART is more dependent than ever on public funding, independent oversight should be strengthened, not sidelined. This public agency, with a \$2.4 billion annual budget, lacks proper financial structures and oversight. It has a treasurer/controller, an internal auditor, a general counsel, and an external auditor, but none of these are independent of BART’s board or management.

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When compared with other urban transit agencies, BART’s OIG is significantly underfunded and unable to fulfill its mission of uncovering waste, fraud, and abuse. At its current level of funding, the OIG has a backlog of urgent investigations that it does not have the resources to undertake. As one BART director stated at a recent public hearing, “Without this oversight, we don’t know what we don’t know.” Despite this, some BART directors have publicly refused to support efforts to find funding to adequately support the OIG.

A textbook example of the need for independent oversight was revealed in April 2022 when the OIG found an apparent conflict of interest between a senior BART manager and a construction management firm now working on a \$40 million BART contract. The BART manager, who helped

write the contract, did not disclose that the construction firm employs the manager's spouse and sibling. On its face, this is an apparent violation of state and federal guidelines that eluded BART's internal controls for two years. With \$1.5 billion in annual capital expenditures, most of it contracted to private companies, how is the public to know how many other such conflicts have gone undiscovered?

## BACKGROUND

In 2018, nine Bay area counties, including four not served by BART, were willing to raise their bridge tolls to help fund BART with the expectation of improving transportation and reducing congestion throughout the region. Once this ballot measure passed, the enabling legislation, California Public Utility Code sections 28840-28845 went into effect, providing initial seed money of \$1 million per year from tolls collected by the Bay Area Toll Authority (BATA) with the provision that the budget could be adjusted annually.

In March 2020, BART's ridership suddenly plunged 94% due to COVID-19. As of the writing of this report (April 2022), it was still below 50% of pre-pandemic levels. An agency that had previously been funded mostly from the farebox now needed substantially more public money. To supplement lost income while avoiding layoffs, BART received \$328 million in Federal CARES Act funding and \$57 million in Federal Coronavirus Response and Relief funds. Now that the system relies primarily on public funding it has more responsibility than ever to be accountable.

### What Is an Inspector General?

Nationally, the Inspector General Act of 1978 (IG Act) created OIGs to be independent and objective units that conduct audits and investigations to promote economy, efficiency, and effectiveness of their agencies' programs and operations. Their purpose is to prevent and detect waste, fraud, and abuse. OIGs are operationally independent from their agencies. Supervision of the IGs themselves is strictly limited and there are safeguards against their removal. The IG Act guarantees OIG independence to ensure the objectivity of their work.

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It is the norm nationally for publicly supported urban transit agencies to have OIGs. Across the country, these watchdogs have uncovered fraud and saved their transit systems millions of dollars. As the chart on page 129 shows, peer transit agency OIGs are far better funded than BART's OIG.

Typically, IGs report only to their agency heads, in this case, BART's elected board. Employees, even chief executives, do not direct the activities of IGs. This independence limits the potential for conflicts of interest that could exist if an IG were supervised by an official whose programs were being reviewed.

Specifically, the California Public Utility Code legislation states:

*There is hereby created in the district an **independent** (emphasis added) Office of the BART Inspector General to ensure that the district makes effective use of bridge toll revenue and other revenue and operates efficiently, effectively, and in compliance with applicable federal and state laws.*

The legislation goes on to define the duties and responsibilities of the BART OIG to include, among other things, examining the operating practices of the district to identify fraud, waste, and opportunities for efficiencies in the administration of programs and operations.

California Government Code Section 1236 requires special district personnel that conduct audits to adhere to “standards prescribed by the Institute of Internal Auditors, or the Government Auditing Standards issued by the Comptroller General of the United States,” and moreover, that “Auditors should be independent of the activities they audit.”

## INVESTIGATION

The Grand Jury interviewed members of BART’s elected board and senior BART officials. The Grand Jury reviewed the board’s public meeting agendas, minutes, and meeting videos as well as applicable laws, internal emails, budget documents, national auditing standards, and news reports.

### A Pattern of Obstruction

From the beginning, the Grand Jury learned that BART’s board, management, and unions demonstrated an unwillingness to support an independent OIG and erected roadblocks to its function. Instances of attempted interference include the following:

- Unlike comparable transit agencies across the country, BART had never had an IG. The enabling legislation offered little guidance, so a charter was needed to clarify roles and insure sufficient independence between the OIG and BART’s management. The IG presented such a charter at a January 2020 board meeting. At the meeting, the board directed the IG to consult with BART’s unions before the board would consider adopting the charter. Subsequently, a heavily modified version of the charter was produced by union attorneys. The modified charter would have required the IG to provide 48 hours’ notice of any interview with a represented employee, no matter what the subject. Since the vast majority of BART employees are union-represented, it is necessary for the OIG to hear about issues directly from employees. While employees are entitled to union representation in disciplinary matters (Weingarten rights), such a provision applicable to non-disciplinary matters where employees are merely witnesses and not themselves the subject of an inquiry would needlessly destroy the confidentiality of investigations. IGs

should have direct access to all employees, whether they're union or not, and employees should be able to bypass management or union representatives to talk directly with IGs on whistleblowing matters if employees so choose.

- One of the core responsibilities of an OIG is to conduct a risk assessment. A risk assessment is the ranked identification of risks that could negatively impact a complex organization's ability to conduct its mission. It identifies areas most vulnerable to waste, fraud, and abuse and looks for opportunities to improve programs, operations, and service delivery. As such it is a roadmap and work plan for the OIG. But the BART Audit Committee directed the OIG not to move forward with the risk assessment until concerns expressed by BART's general manager were resolved.

*BART management went so far as to instruct staff not to cooperate with the OIG until the scope of the risk assessment was altered to management's satisfaction.*

In the summer of 2020, the OIG produced an outline of the proposed risk assessment for BART. In a series of emails during August and September 2020, BART's management sought to insert itself into the process by identifying areas of risk assessment that it wanted to be off limits to the OIG. BART management sought to restrict the OIG from investigating such areas as potential cost savings and controls, revenues, performance metrics for project and program activities, maintenance and engineering, environmental sustainability and equipment delivery—all seemingly vital areas to

the operation of a transit agency. BART management went so far as to instruct staff not to cooperate with the OIG until the scope of the risk assessment was altered to management's satisfaction. Ultimately, the risk assessment was carried out by an independent consultant.

- In a July 30, 2020, letter to BART's general counsel, the IG identified examples of obstruction:
  - Physical evidence was withheld because a BART employee did not understand the OIG's right to access all information.
  - Management made misleading responses to investigations.
  - Management withheld documentary evidence to quantify the cost of a decision to terminate a contract.
  - Management did not respond to an OIG investigation pertaining to a vendor credit for an overcharge.
  - IG described instances of employees fearing retaliation for contact with the OIG.
  - BART general manager insisted on being the conduit through which all communication between the OIG and employees is filtered.

## An Underfunded Watchdog

The enabling legislation set an initial OIG budget of \$1 million for the first year, from an allocation of bridge toll revenue from BATA. It states:

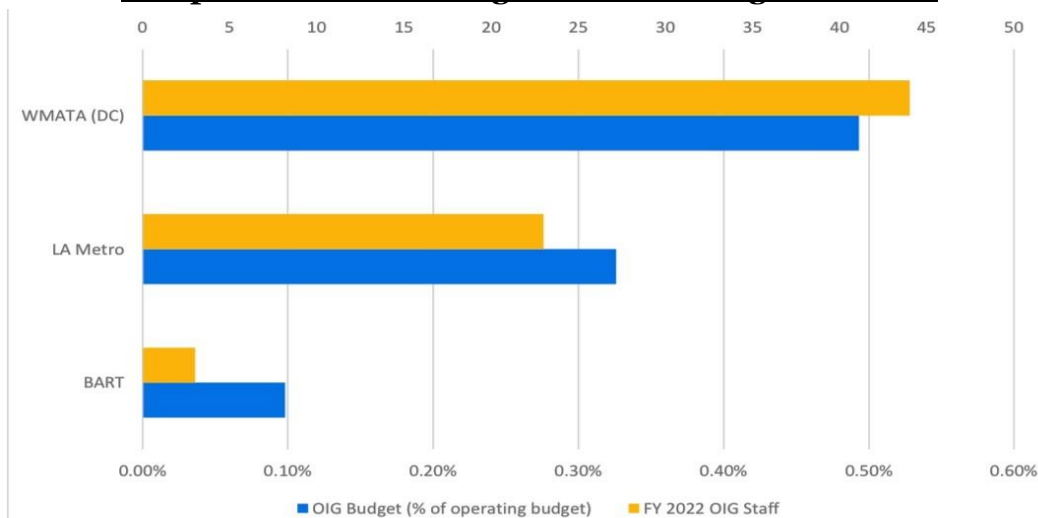
*“In the second and subsequent years of operation of the office, the authority may increase the amount of funding allocated for this purpose to the extent funds are requested and justified by the office and can be accommodated in the authority’s budget.”*

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No second or subsequent requests for additional funding have been made by BART’s board. In March 2020, BART’s general manager and BATA’s executive director entered into a funding agreement for the BART OIG. With regard to annual adjustments to the OIG budget as provided for in the law, the agreement states that any increase in the OIG budget is subject to “BATA’s sole reasonable discretion.” Further, it stipulates that the OIG will be charged for overhead. Overhead, not mentioned in the legislation, is not defined but can be as much as 50% of direct labor expenses. Such a charge reduces the OIG’s already paltry budget by as much as 25%. The Grand Jury found no evidence that this agreement was ever discussed or voted on by BART’s board.

In a December 2021 letter from the IG to the executive director of BATA, a supplementary budget request pursuant to the enabling legislation was made. It proposed an annual budget of approximately \$2.7 million to hire staff and pay for independent legal advice and experts to conduct complex and time-consuming audits. This letter was never answered. After prompting from BART directors, the IG was asked to present this budget request to BART’s Audit Committee and ultimately to BART’s full board in January 2022. At that meeting, some BART directors refused to even consider looking for additional funding for the OIG.

### **Comparison of Transit Agencies’ OIG Budget and Staff**



In February 2022, California [Senate Bill 1488](#) was introduced – an amendment that would update and expand the lean text of the original legislation approved by Bay Area voters in 2018. It would spell out the relationship between the OIG and BART staff in a way that that the defeated charter sought to do. However, BART’s general manager recommended that the board oppose the bill. On April 14, 2022, the BART board voted 6-3 to “oppose the bill unless amended.”

The bill, if enacted, would, among other things:

1. Authorize the OIG to engage in fraud prevention as well as detection.
2. Stipulate that the OIG has the independence necessary to conduct audits and investigations in conformance with national standards.
3. Give the OIG the authority to examine all records and documents.
4. Give the OIG the authority to confidentially interview employees.
5. Give the OIG subpoena power.
6. Require the general manager to respond to all OIG findings and recommendation within 10 days.

## **Unearthing a Conflict of Interest**

On April 8, 2022, the OIG reported an apparent conflict of interest between a BART senior manager and a construction management firm, under contract with BART for a \$40 million project, that employs the BART manager’s spouse and sibling. The report alleges that neither the firm nor the BART manager met its responsibilities to disclose the potential conflict of interest in compliance with BART’s Codes of Conduct, or California Government Code Section 1090 that prohibits government employees from having a role in making contracts in which they have a financial interest. The report also alleges noncompliance with the even more stringent requirements of the Federal Transit Administration (the construction project is partially funded by the federal government).

Public records say that the BART manager in question stated that the family relationships were common knowledge and that “everyone knew.” Regardless of whether the BART employee gained financially from the contract, the fact remains that well-established BART rules as well as state and federal guidelines were alleged to have been ignored. The OIG recommended that the contract be voided to protect BART from possibly more damaging financial and legal consequences going forward. Some of the nine recommended actions were implemented, and at an April 14, 2022, joint meeting with its Audit Committee, BART’s board discussed the need for independent counsel to advise whether or not the contract should be voided.

## **CONCLUSION**

Four years after the voters spoke, some members of BART’s board and management continue to resist the independence of the OIG mandated by voters and the legislature. There is still no charter that enshrines this independence or spells out roles and relationships within BART.



Recent allegations of a previously unreported conflict-of-interest involving a \$40 million construction contract demonstrates that BART management's own internal controls aren't performing well and makes the case for an independent OIG to review and report on BART's financial operations. Now largely funded by the public, BART needs to step up its accountability.

The OIG's existing, arbitrary \$1 million per year budget is inadequate. BART must work together with other government entities to fully fund the OIG, at least to the level of \$2.7 million per year required to execute the planned audits and investigations for 2022 and 2023.

## **FINDINGS**

### *Finding 41:*

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

### *Finding 42:*

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

### *Finding 43:*

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

### *Finding 44:*

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

### *Finding 45:*

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

### *Finding 46:*

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

## RECOMMENDATIONS

### Recommendation 56:

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

### Recommendation 57:

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

### Recommendation 58:

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

### Recommendation 59:

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

### Recommendation 60:

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

### Recommendation 61:

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



## **REQUEST FOR RESPONSES**

Pursuant to California Penal Code sections 933 and 933.05, the Grand Jury requests each entity or individual named below to respond to the enumerated Findings and Recommendations within specific statutory guidelines, no later than 90 days from the public release date of this report.

### **Responses to Findings shall be either:**

- The respondent agrees with the finding.
- 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.

### **Responses to Recommendations shall be one of the following:**

- The recommendation has been implemented, with a summary regarding the implemented action.
- The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.
- 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 where applicable. This time frame shall not exceed six months from the date of publication of the Grand Jury report.
- The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.

## **RESPONSES REQUIRED**

BART Board of Directors

Findings 41 through 46  
Recommendations 56 through 61