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Bryan B. Beyer, *Chief Deputy Inspector General*

OIG | OFFICE *of the* INSPECTOR GENERAL

Independent Prison Oversight

December 2020

Special Review

The California Department of Corrections and Rehabilitation Mishandled Allegations That a High-Ranking Official Engaged in Misconduct

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Roy W. Wesley, Inspector General
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Independent Prison Oversight

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December 9, 2020

Kathleen Allison
Secretary
California Department of Corrections and Rehabilitation
1515 S Street, Suite 502S
Sacramento, California

Dear Secretary Allison:

Enclosed is the public version of the Office of the Inspector General's confidential report titled *Special Review: The California Department of Corrections and Rehabilitation Mishandled Misconduct Allegations That a High-Ranking Official Engaged in Misconduct*. The report assesses the department's response to a complaint it received on October 24, 2018, which alleged [position redacted] engaged in misconduct and made decisions that resulted in a waste of State resources.

We found that the lack of a policy setting forth a formal procedure by which the department reviews complaints against [position redacted] and other high-ranking officials higher in the [position redacted]'s chain of command left departmental officials without clear direction as to how to handle the complaint. When forced to create a special process to review a serious complaint against one of its highest-ranking officials, the department failed to ensure the complaint received the fair and thorough assessment departmental policy requires of complaints concerning all other departmental staff.

Our review of the investigative measures and written analyses departmental representatives performed after receiving the complaint identified substandard investigative processes, improper interpretation of State and departmental policy, and poor legal analysis. The procedural and substantive flaws are almost too many to recount. The complainant and the witnesses to the alleged misconduct were never interviewed. The subject of the complaint used the privilege of her position to gather other departmental records in order to mount a defense against the allegations. One of the subjects' long-time colleagues was chosen to perform an assessment of the allegations against them. The written assessment ignored evidence that supported the allegations, but included irrelevant information that revealed the reviewer's bias and impugned the complainant's character. And the department used an improper evidentiary standard to assess the allegations, which caused credible allegations to evade investigation. Although the department attempted to cure these deficiencies by hiring an outside consultant to perform an independent assessment of the complaint, it immediately tainted the consultant's independence when it provided him its flawed and biased assessment of the complaint.

I am sending you this report to highlight the pitfalls created by the department's lack of a formal process to assess allegations of misconduct against the department's highest-ranking officials. I urge you to strongly consider our recommendations.

Respectfully submitted,

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Inspector General

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Contents

Illustrations

Figures

Tables

Exhibits

Summary

Our office typically provides public oversight of investigations the California Department of Corrections and Rehabilitation (the department) performs into allegations of staff misconduct after investigations have been formally approved by a special unit within the department's Office of Internal Affairs (OIA), known as the Central Intake Unit. Less often, we exercise our statutory authority to monitor the department's investigative processes that precede the formal investigation phase, such as the *allegation inquiries* the department performs in an effort to inform the Central Intake Unit's deliberations about whether to open a formal investigation. The department's allegation inquiries are miniature investigations that test the basic foundations of misconduct allegations the department's staff bring to light. Ultimately, the goal of this preliminary investigative process is to answer one question: Is there a reasonable belief that misconduct occurred?

When we were notified that a mid-level official within one of the department's headquarters offices had raised allegations of misconduct against a high-level official working in that office, we asserted our authority to monitor the department's process for examining this complaint. Because we did not receive timely notice from the department that these allegations had been raised, we began our monitoring of the process after the department had already performed the bulk of the investigative work it intended to perform and was getting ready to dispose of the complaint. Once we intervened and had an opportunity to review the investigative and analytical work that had been performed to date, we quickly determined the process the department used to assess the complaint had been neither thorough nor impartial. The department had only collected a portion of the pertinent information that was readily available to it and had assigned one of the subject's long-time colleagues and legal representatives to assess the allegations against them. The report we reviewed showed clear signs of bias, both against the complainant and in favor of the subjects. The analysis was also logically flawed, dismissing certain allegations based on faulty presumptions and concluding that the subjects' actions were permitted by various departmental policies that did not actually permit their actions.

We immediately raised these concerns with the departmental executive who had managerial authority over the office in question and recommended that the department refer the complaint to an outside contractor who could provide an independent inquiry into the complaint. The department accepted our recommendation and selected a former inspector general from another branch of government whose experience appeared to qualify him to perform the task. However, the department rejected our other recommendation that the outside contractor not receive the written report that we perceived to be biased and logically flawed. Soon after the department selected this individual to perform

the independent assessment, it provided him with a copy of the report. This single act immediately removed any independence the contractor was intended to have, as he had been irreversibly exposed to the original reviewer's bias and incorrect conclusions. When we compared the original report with the outside contractor's written assessment of the allegations, we found many similarities between the two products, including the improper policy interpretations and logical flaws that originated in the initial assessment. After departmental executives reviewed the department's initial assessment and the outside contractor's work, they determined the allegations were not credible and chose not to take any further action on the complaint.

The department has no written process for handling complaints made against the high-level official in charge of the departmental unit in question. Because the department did not exercise sound discretion when it designed the special process by which this complaint would be reviewed, the complaint did not receive an impartial and thorough review. This poor process allowed a number of potentially serious allegations to evade investigation. Our independent review of the same information the department had in its possession identified two allegations in the complaint for which the department should have formed a reasonable belief that misconduct occurred. The department concluded the remaining allegations could not be sustained by a preponderance of the evidence, even though it had not yet gathered all reasonably attainable evidence. In order to ensure future complaints against high-level departmental officials are thoroughly and objectively reviewed—and to assure staff that their complaints against these officials will be taken seriously—the department must formalize a review process that guarantees these complaints receive a fair and independent assessment.

Introduction

This is the public version of a confidential report we provided the Secretary of the California Department of Corrections and Rehabilitation. California Penal Code section 6133, subdivision (b)(2), requires the reports we issue to be "in a form that does not identify the agency employees involved in the alleged misconduct." To maintain the confidentiality of the individuals whose actions are discussed in this report, we replaced the actual names of the individuals with fictitious names and titles. The names used in this report are not the real names of the persons involved. We have also randomly generated the gender of each fictitious name and changed pertinent geographical locations to further protect the confidentiality and privacy rights of the individuals involved. We also had to redact portions of the report that divulged attorney–client privileged information, primarily the contents of report written by one of the department's attorneys that contained an analysis of the complaint and the evidence gathered. We identify those redacted portions throughout the report with gray text boxes. Where feasible, we provided context regarding the contents we had to redact to maintain the confidentiality of the identities of those involved or information subject to the attorney–client privilege.

Background

On October 24, 2018, a mid-level official of one of the department's headquarters' units (Jeffrey Sanders) lodged a complaint with a high-level executive (Keith Schwartz) alleging that his direct supervisor, a second high-level official (Julie Yang), made decisions and took actions that violated State policy and resulted in an avoidable waste of State funds. Sanders alleged that Yang allowed a second mid-level official (Teresa Maloney) to

1. Work from her home in Bakersfield every other week instead of reporting to her assigned work location in San José;
2. Leave the office in San José late in the week, but well before the weekend had begun, so she could begin her four-hour commute home to Bakersfield;
3. Occasionally use a State vehicle for the purposes of commuting 250 miles each way between her Bakersfield home and the San José office; and
4. Receive a full salary (nearly $13,000 per month) for a period of seven months while working primarily from home on special

> assignments and not performing the primary duties of her position, a position which required that the incumbent supervise and manage more than 100 employees in multiple offices throughout the State.

While Maloney allegedly performed this light-duty assignment for seven months, Yang authorized an employee (Employee 1) to receive out-of-class pay for performing the managerial duties that Maloney could not perform from home. This caused a domino effect whereby Yang then authorized a second employee (Employee 2) to receive out-of-class pay to perform the duties of Employee 1's position (a higher level post) and a third employee (Employee 3) to receive out-of-class pay to perform the duties of Employee 2's position (2's position being a higher-level classification than 3's). Sanders claimed these unnecessary out-of-class assignments, while Maloney was still collecting the full amount of the nearly $13,000 monthly salary, cost the department an additional $9,750 over a period of seven months, constituting a waste of State funds. Sanders further claimed that by allowing Maloney to work this light-duty assignment for seven months before she elected to retire in November 2018, Maloney was able to spend one full year in that position's classification, which allowed her to accrue a higher monthly retirement benefit than she would otherwise have collected. Sanders also alleged that when an analyst questioned some perceived improprieties with Maloney's time sheets, Yang told the analyst to mind his own business.

Along with the complaint, Sanders provided the following documents to support the allegations: building access records showing the dates and times Maloney used her key fob to access her office building in San José; time sheets documenting days Maloney claimed to have worked between [specific dates redacted]; a spreadsheet detailing the cost incurred while Maloney received her full salary and three other employees worked out of class to perform Maloney's duties and backfill one another; and a summary of mileage logs that document Maloney's use of her assigned State vehicle.

The Process the Department Used to Assess Sanders's Allegations

After Sanders hand-delivered his memorandum and his supporting documentation to Keith Schwartz, Schwartz sought the assistance of a parole agent (Joshua Cuevas) at one of the department's regional parole offices. Cuevas traveled across the State from [location redacted] to San José to meet with Schwartz. After evaluating the claims and gathering various departmental records, Cuevas advised Schwartz that the allegations did not warrant an investigation, but that Cuevas had discovered some supervisory issues within the [departmental unit Yang managed redacted] that needed to be addressed.

Schwartz then referred the complaint to the department's Office of Legal Affairs for additional review. A high-level attorney (Counsel) working for the department was assigned to review Sanders's allegations and

provide a legal analysis and recommendation regarding whether Yang or Maloney had violated any departmental policies and whether Yang misused the authority or discretion vested in her.

On January 14, 2019, Counsel sent Schwartz a report that included Counsel's interpretation of Sanders's allegations, the records collected, a background narrative Counsel considered necessary to evaluate the allegations, and Counsel's analysis of whether the allegations against Yang could be sustained by a preponderance of the evidence. Counsel recommended that each allegation receive a finding of [redacted]. Counsel did not include a copy of Sanders's complaint or any of the supporting documents Sanders provided along with the complaint. Counsel did not interview Sanders or any of the witnesses Sanders identified by name in the complaint.

We reviewed Counsel's report in February 2019 and determined the report was incomplete, did not objectively assess the allegations, and did not include all pertinent evidence in Counsel's possession. We met with Schwartz on February 28, 2019, and recommended that he provide the complaint to an independent party to perform a proper inquiry, that the inquiry include an interview of Sanders, and that the department withhold from the independent reviewer any copy of Counsel's report.

Schwartz informed us on March 14, 2019, that an outside consultant (Consultant) had been selected to review Sanders's complaint. Consultant later informed us that he was not actually asked to perform an inquiry or an investigation, only an "independent assessment." On May 24, 2019, Consultant met informally with Sanders in a coffee house to discuss the complaint.

On July 11, 2019, Consultant sent his report to the department's Secretary, Ralph Diaz. Consultant's report assessed Counsel's report and accompanying documents the department had provided Consultant, and Sanders's memorandum and the documents Sanders had provided Consultant. Consultant assessed the allegations and recommended that each allegation receive a finding of **Unfounded** or **Exonerated**, with one allegation receiving a finding of both **Unfounded** and **Exonerated**, and one other allegation receiving a finding of **Exonerated** and **No Finding**. Consultant also provided a series of recommendations to the department. Secretary Diaz referred the report to one of the department's three undersecretaries.

The assigned undersecretary reviewed Consultant's report, Counsel's report, and the documents attached to each. The undersecretary then drafted his own assessment and recommendations. On July 15, 2019, the undersecretary sent his response to Secretary Diaz for his consideration. The undersecretary largely adopted Consultant's recommended findings, with the significant exception of the allegation that Yang made an unprofessional remark to the analyst who had raised concerns about Maloney's time sheets.

Consultant recommended no finding be made regarding this allegation because the analyst had not been interviewed, whereas the undersecretary recommended the allegation be stricken because it was too vague.

Secretary Diaz accepted the undersecretary's findings. From start to finish, the department spent a total of 268 days evaluating, but not investigating, Sanders's complaint. The subjects of the complaint have since retired from State service.

Figure 1. Time Line of Complaint and Investigation

2018	October 24	Sanders submitted his complaint alleging misconduct by Yang and Maloney.
	November 19	Yang directed a subordinate employee to obtain [departmental records related to the complaint].
2019	January 14	Counsel provided his legal analysis to Schwartz.
	February 27	OIG executives met with Schwartz to convey their concerns with the objectivity and thoroughness of the complaint. The OIG recommended Schwartz refer the complaint to an external reviewer for a more independent and thorough inquiry, including a thorough interview of Sanders, and that the reviewer not receive a copy of Counsel's report.
	February 28	Sanders contacted Schwartz, requesting an update and asking when he would be interviewed.
	March 14	Schwartz informed the OIG that the department retained an outside consultant (Consultant) to review Sanders's complaint.
	May 24	Sanders met with Consultant at a coffee shop to discuss his complaint.
	June 17	Sanders elevated his concerns with the department's handling of his complaint to the Secretary of the department and informed him that Yang improperly influenced the department's review of the complaint.
	July 11	Consultant provided his report to the Secretary of the department, recommending each allegation receive a finding of **Unfounded** or **Exonerated**.
	July 15	Undersecretary provided his assessment, concluding that all allegations were unfounded, and Yang should be exonerated.

Scope and Methodology

Our review assesses the adequacy of the department's process from October 24, 2018, the date the department received Sanders's complaint, to July 11, 2019, the date the department finalized its review.

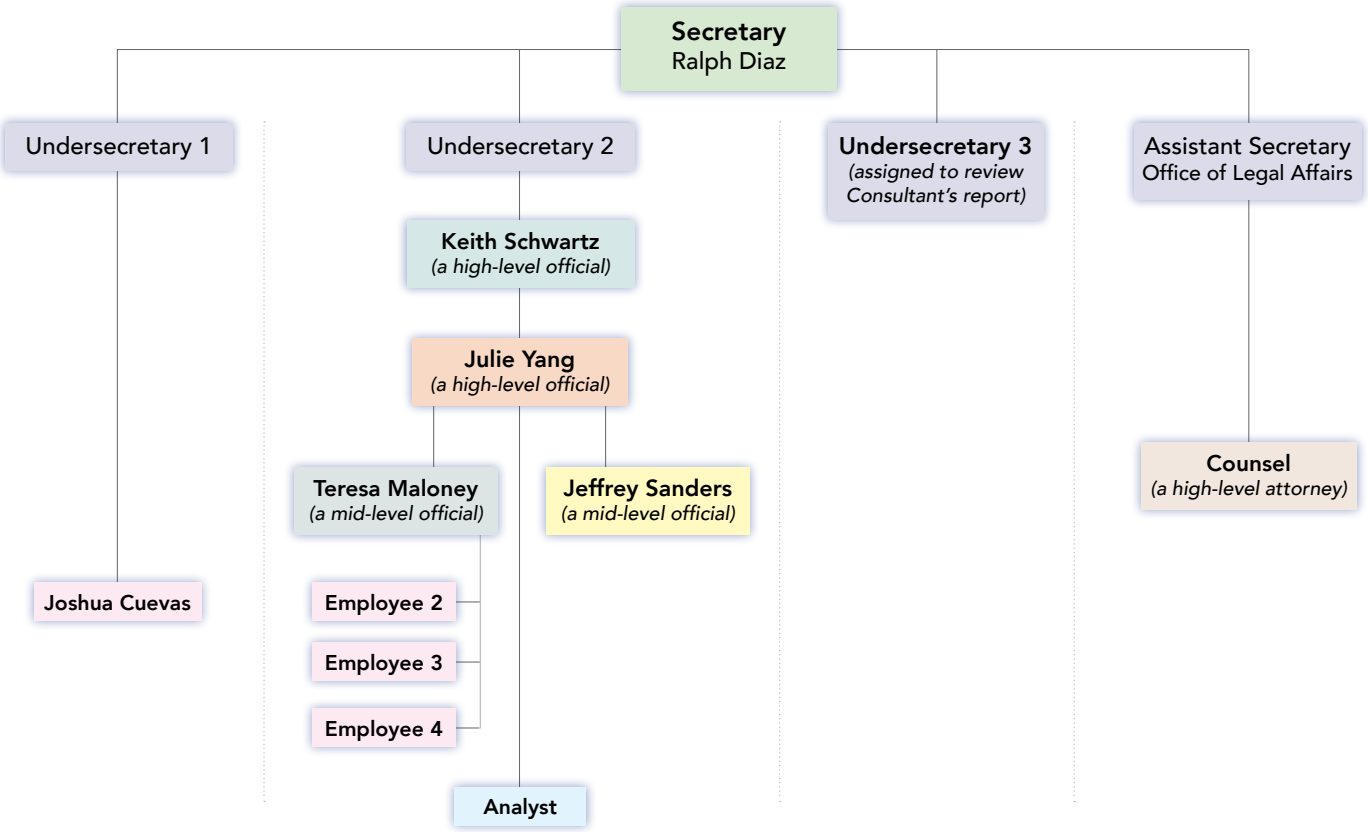
We assessed the process by reviewing the department's policies, procedures, and regulations that govern how it processes allegations of staff misconduct. We evaluated the department's review of Sanders's complaint according to these standards. We also used our considerable experience monitoring the department's investigative processes and knowledge of the standards the department uses to evaluate allegations of misconduct at each stage of the process. We further evaluated the outside consultant's report against Counsel's original report of January 14, 2019, as well as according to the department's policies, procedures, and regulations regarding the processing of complaints.

Because the allegations involved misuse of a State vehicle, we reviewed the applicable policies, procedures, and regulations governing State vehicle use. We evaluated the evidence collected and the department's interpretation of these standards.

We also reviewed the State's policies, procedures, and regulations that govern how State agencies enter into and administer personal services contracts. We evaluated the contract under which the department paid its outside consultant according to these standards.

Because we are not legally authorized to perform investigations into allegations of staff misconduct, our review of this matter is based almost entirely on the records the department and Sanders provided to us. We spoke with Sanders and Schwartz to obtain some additional information about the process, but could not interview any of the witnesses to the alleged misconduct or the subjects of the allegations. Although we have the authority to monitor the department's personnel investigations, because the department did not notify us that it received Sanders's complaint, that it was performing an inquiry into the complaint, or that Consultant was going to be meeting with Sanders to discuss the complaint, we could not monitor this process in real time. As a result, we were unable to issue recommendations, as we usually do in the course of our monitoring, for the department to consider before deciding how to proceed with its review of the complaint.

Figure 2. Abbreviated Departmental Organizational Chart Depicting the Relationships of the Parties Involved in This Case



Special Review Results

The Department's Process for Reviewing Allegations of Misconduct Against a High-Level Official Did Not Follow Standard Procedures or Best Practices

Departmental policy provides that every allegation of employee misconduct shall be promptly reported, objectively reviewed, and investigated when appropriate.[1] To this end, the department's operations manual contains an extensive set of policies governing the department's investigative processes from the time an allegation is received to the time the hiring authority decides whether to sustain charges of misconduct against individual employees. When an employee raises allegations of misconduct that would warrant discipline if true, the department's policy requires investigative staff to perform an initial allegation inquiry, which is described as the "collection of preliminary information concerning an allegation of employee misconduct necessary to evaluate whether a matter shall be [investigated]."[2] Where the initial allegation inquiry provides a reasonable belief that misconduct occurred, the department performs a formal investigation into the allegations.

Allegation inquiries and formal investigations follow the same standard investigative process, but are conducted by different departmental employees and utilize different evidentiary standards. An allegation inquiry is generally conducted by employees outside the Office of Internal Affairs, most often by employees at prisons who are trained in investigative techniques and processes.[3] An employee conducting an allegation inquiry gathers information in the form of interviews and document collection to assess the likelihood that someone committed misconduct and that the misconduct is serious enough to lead to serious discipline, or *adverse action*.[4] The employee conducting an allegation inquiry performs interviews, collects documents, summarizes the information collected, and compiles these materials into an inquiry package. The reviewer does not include recommended findings in the inquiry report. The employee provides the final inquiry package to the hiring authority, who reads the materials and determines **whether there is a reasonable belief that misconduct occurred**. Whenever

1. Department Operations Manual, Section 31140.1, "Policy."
2. Department Operations Manual, Section 31140.3, "Definitions."
3. The department also performs inquiries into allegations of staff misconduct that are raised by inmates and parolees. These inquiries, called *staff complaint inquiries*, are performed by staff in the lieutenant classification who work in a newly formed unit within the Office of Internal Affairs and supervisory staff at the prisons.
4. An *adverse action* is one that is documented, is punitive in nature, and is intended to correct misconduct or poor performance, or terminate employment. Examples include a letter of reprimand, pay reduction, suspension without pay, or termination.

this reasonable belief exists, the hiring authority forwards the inquiry package to the Office of Internal Affairs' Central Intake Unit to request a formal investigation.

Formal investigations are performed by special agents within the Office of Internal Affairs who are specially trained investigators and who perform investigations on a daily basis. Formal investigations also follow standard investigative procedures of interviewing complainants and witnesses, gathering evidence, and interviewing the subject of the complaint. At the conclusion of the investigation, the special agent summarizes the evidence and presents the investigative report and supporting materials to the hiring authority. The investigator does not include recommended findings in the investigative report. The hiring authority reviews the investigative report and determines **whether sufficient evidence exists to sustain the allegations by a preponderance of the evidence**. The hiring authority ultimately decides whether each allegation should receive a finding of Sustained, Not Sustained, Exonerated, or Unfounded.

When Jeffrey Sanders provided his memorandum to Keith Schwartz alleging that his supervisor, Julie Yang, a high-level official, had engaged in misconduct, the department was obligated to perform an objective inquiry into the complaint to determine whether it presented a reasonable belief that misconduct occurred. If the department formed this reasonable belief after completing its review, it was incumbent on the department to perform a formal investigation into the allegations. Our review found that the ad hoc process the department deployed to review Sanders's complaint departed significantly from these basic procedures the department typically uses to review allegations of misconduct against all other staff.

Parole Agent Cuevas Did Not Document His Investigative Efforts or His Analysis of the Complaint

Because documentation regarding parole agent Cuevas's early involvement in the inquiry is largely nonexistent, it was difficult to ascertain his assigned role in this matter—whether he was assigned to perform an initial allegation inquiry or to perform some lesser task. We were able to determine that Cuevas traveled from his distant work location to San José and collected various documents related to the allegations. Cuevas then met with Keith Schwartz and provided his opinion that the allegations did not constitute misconduct, but the complaint indicated the existence of some supervisory issues within the [specific departmental unit which Yang manages redacted] that needed to be addressed.

Although Cuevas apparently assessed the allegations, we have no documentation of that assessment and cannot review its thoroughness or assess his rationale. Although Cuevas may have done everything

Schwartz requested, the tasks he performed fell far short of resembling a complete allegation inquiry. Cuevas did not interview Sanders or any of the witnesses Sanders identified, and did not document or summarize the information he gathered or the impressions he formed during his inquiry.

None of the Individuals Assigned to Review the Complaint Interviewed the Complainant or Any of His Identified Witnesses

Records are a valuable, but limited, source of information. Witness interviews help fill the gaps in the evidence and provide critical information that cannot be gleaned from documents alone. In this case, some of Sanders's allegations were vague; interviewing him would have resolved these ambiguities. The department willfully ignored valuable evidence when it chose to not interview anyone about the allegations contained in the complaint.

Joshua Cuevas did not interview Sanders or anyone else, although Cuevas spoke briefly with Sanders while in San José collecting various documents. Counsel did not interview or contact Sanders or any of the witnesses he identified. The department's independent contractor, Consultant, also did not conduct any interviews during his review of Sanders's complaint.

Of all the departmental representatives who reviewed the complaint, Consultant was the only person to even meet with Sanders. But even this meeting could not be considered an interview. Consultant and Sanders met on May 24, 2019, 212 days after Sanders filed his complaint. In his report, Consultant described the meeting as "informal," taking place in a public coffee shop where others could overhear their conversation on a highly confidential matter. Their conversation was not recorded, and the contents of the conversation were not documented in notes or otherwise incorporated into Consultant's report. Consultant did obtain some documentation from Sanders that the department had not provided Consultant to consider during his review of the complaint.

When contrasted with the department's willingness to accept information from the subject of the complaint (as discussed on pages 13 to 14, and page 19), the failure to interview Sanders or any witnesses he identified completely undermines the neutrality and objectiveness—and reveals the one-sidedness—of the department's review.

Counsel Assessed the Complaint Under an Inappropriate Standard of Review and Presented His Report as if It Were the Product of a Complete Investigation

In the report Counsel submitted at the conclusion of his review, Counsel described his work as a [redacted], not as an inquiry or an investigation—the two methods by which the department reviews allegations of staff misconduct. Counsel explained in his report that his "[

redacted excerpt from Counsel's report in which he described his task and the standard of review he used to assess the allegations]". Here, Counsel describes a dangerous hybrid process that is not described or authorized anywhere in departmental policy. In our experience monitoring the department's investigative and disciplinary processes, we have never seen the department use an investigative or evaluative process resembling the process Counsel used to assess Sanders's complaint.

By the time Counsel finalized his report, only a partial inquiry had been performed. Although a significant amount of evidence had been gathered, no one had been interviewed. Therefore, much pertinent evidence that is typically gathered during the inquiry process had not yet been collected. Even after a *complete* inquiry is performed, the department still does not usually have all the information it needs in order to weigh the evidence and make formal investigative findings.[5] For this reason, the department often follows up a completed inquiry with a formal investigation, which includes an even more expansive search for information, collecting all the relevant evidence it can locate. In this case, Counsel only had the results of a partial, incomplete inquiry before him when performing his assessment of Sanders's complaint.

Because Counsel's analysis was preliminary to an actual investigation, he should have been assessing the evidence gathered during the initial inquiry to determine whether it provided a reasonable belief that misconduct occurred. Instead, Counsel proceeded to assess the allegations as if both a complete inquiry and a complete investigation had been performed. In other words, Counsel analyzed whether [standard Counsel used redacted] before all the evidence had been gathered.

By analyzing the allegations under the [standard Counsel used redacted] standard, and not by the standard of reasonable belief that misconduct had occurred, Counsel presented his recommended findings as if his report were the product of a complete investigation. A hiring authority cannot make an informed decision whether to sustain allegations in the absence of a complete investigation. This deviation from the standard procedure may have caused those who read Counsel's report to conclude that a complete and through investigation had been performed and that it was appropriate to issue investigative findings.

5. In instances when an allegation inquiry is so complete and thorough, and clearly established that the employee engaged in misconduct, the Office of Internal Affairs' Central Intake Unit may refer the case back to the hiring authority to impose adverse action without the need for further investigation. The department's inquiry in this case did not meet this threshold.

Counsel's Report Excluded Evidence That Supported the Allegations

When Counsel submitted his report to Schwartz, he included several hundred pages of exhibits that he factored into his analysis. Sanders's complaint and the materials he provided in support of his complaint were not among these exhibits. Therefore, when Schwartz received Counsel's analysis and reviewed it to determine whether there was a reasonable belief that misconduct occurred, Schwartz did not have critical information available that would have factored into this decision.

Counsel's failure to include these documents with his report caused a very important domino effect. When the department's outside Consultant began his work reviewing the matter, he was only provided Counsel's report and its supporting materials. He did not have Sanders's complaint or the materials Sanders provided in support of the allegations. Therefore, Consultant formed his first impressions of the allegations, not from Sanders's own words, but from Counsel's characterization of Sanders's complaint and Counsel's compromised review of the allegations. Consultant did not receive these critical materials until well after he had reviewed all the other materials the department provided him.

The Department Ignored an Allegation That One of the Subjects Improperly Influenced the Department's Review of the Complaint by Exercising Her Official Authority to Gather Evidence in Her Defense

As discussed on page 19, Counsel attached a set of records [specific description of records redacted] to his report that were all printed from Yang's department-issued computer. Even more concerning than the department's use of this evidence was the fact that the department ignored clear evidence that Yang used her official authority to task a subordinate employee with gathering evidence related to a complaint filed against her. Sanders provided the department with a record (Request), that documented Yang's direction to her staff. The Request, which had to be redacted from this public version of the report, stated that on November 19, 2018, Julie Yang requested her subordinate employee gather records related to Teresa Maloney. The Request goes on to state that, once collected, Yang requested that the records be provided to her "for her review and analysis."

Considering that the events described in the Request occurred after Sanders filed his complaint, Counsel was likely unaware of this allegation and did not consider it during his review. However, by the time Consultant completed his review, Sanders had raised this concern both with Consultant, in person, and in an email to the department's Secretary, who read and responded to Sanders's email. Sanders supplied Consultant with a copy of the Request after their meeting.

Despite having this new allegation and the Request in his possession, Consultant failed to assess this serious allegation that Yang utilized her privilege as a high-level official in the department to obtain departmental records that were later used to assess a complaint made against her. Consultant only mentioned this allegation in a recommendation at the end of his report, which stated the following:

> Policy should clearly state that when senior staff [working in Yang's unit] are accused of misconduct they shall not [redacted].
>
> In this situation, Yang requested her subordinate staff gather records related to Maloney. Although the specific allegations are directly related to Yang, both Yang and Maloney are the subjects of the allegations.

Typically, when an inquiry uncovers new information that provides a reasonable belief of misconduct that was not among the initial allegations, a recommendation is made to expand the scope of the inquiry to include an assessment of the new allegation. The Request provided sufficient evidence to establish a reasonable belief that Yang misused her authority. The Request also indicates that Yang intended to review and analyze the emails once she received them. Considering [analysis redacted to maintain the confidentiality of the individuals involved], the evidence raises a presumption that someone filtered the records before they were provided to Counsel for his consideration. However, Consultant never added this allegation to the scope of the inquiry, and his lapse helped the allegation evade review.

From the Request alone, the department should have formed a reasonable belief that Yang used the authority of her position to gather evidence related to the complaint against herself, which would have triggered the obligation to perform an investigation into the allegation. It may be that Yang had a legitimate justification for gathering the records Or it could be that Yang knew of the complaint and chose to gather evidence that would aid in her defense. We also do not know whether all of the records that Yang's subordinate gathered in accordance with her request were provided to Counsel during Counsel's review or if some of the records were extracted from the set before Counsel received them. Because the department never examined or investigated this allegation, we will never know if Yang's actions were legitimate or if they affected the department's review of Sanders's complaint.

The Department Improperly Overlooked, and Ultimately Dismissed, Another Potentially Serious Allegation

In his complaint, Sanders observed that in [month and year redacted], Maloney

> quit reporting to work but her timesheet reflected that she reported for duty for 64 hours. When her timesheet was brought to the attention of Yang by [the analyst], he was told to mind his [own] business and he has not received a timesheet since.

Although Counsel accurately summarized this allegation in his report, Counsel focused the bulk of his analysis on the accuracy of Yang's time sheet entries and glossed over the allegation that Yang told another employee who was performing his assigned duties to mind his own business. It is unclear whether Sanders was alleging that Yang was merely discourteous to the analyst or whether Sanders was alleging that Yang's statements had the effect—intended or not—of discouraging the analyst from looking any further into potential irregularities with Maloney's time sheets.

Counsel's analysis of this allegation suffers primarily from the lack of information, but it also suffers from flawed logic. Counsel wrote, "[excerpt from Counsel's report redacted]" and "[excerpt from Counsel's report redacted]."

He continued:

> [Excerpt from Counsel's report redacted].

Counsel did not have enough evidence to evaluate this allegation because he did not interview the analyst, did not interview Yang's executive assistant, and did not interview Sanders. We also do not know whether anyone ever searched for emails or other electronic records that would have been relevant to this allegation. [Analysis redacted to maintain confidentiality of privileged information].

Even without the evidence that could have been gathered by interviewing the witnesses, Counsel's reasoning on the matter is flawed, since, as Counsel noted: [

Redacted: In this section of the confidential report, we discuss a logical flaw in Counsel's analysis that caused him to dismiss an allegation improperly

].

To his credit, outside Consultant recognized this shortcoming. Consultant recommended that no finding be made on this allegation and explained that a finding could only be made after the department interviewed the analyst to ask him if Yang had made the statement as alleged.

Ultimately, the undersecretary determined that rather than interview Sanders or the analyst to resolve these ambiguities, the allegation should be removed altogether because Sanders's complaint did not indicate whether he was paraphrasing or directly quoting Yang when Yang allegedly told the analyst to mind his own business. Uncertainty is not a legitimate reason to ignore an allegation that implies, at a minimum, that Yang was discourteous to another employee or, in the alternative, that Yang suggested another employee cover up allegations of time-sheet fraud. This ambiguity only underscores how critical it was for the department to interview Sanders; he could have easily clarified this allegation if asked to do so.

The Department's Process for Reviewing Allegations of Misconduct Against a High-Ranking Official Lacked Independence

[Redacted description of departmental policies, the inclusion of which would have enabled the specific departmental unit, and the individuals involved, to be identified. .][6] However, the department does not have an official policy that governs the review and investigation of complaints made against officials in Yang's position and other high-ranking departmental officials to whom Yang reports. In the past, the department has referred complaints against officials in Yang's position to an outside investigative agency such as the Department of Justice or the Highway Patrol.

Over the course of almost nine months, the department assigned three different people to review the complaint; none provided an evaluation that could objectively be described as fair, thorough, or impartial. Because the department never assigned Sanders's complaint to an individual who could perform an impartial review of the complaint and allowed Yang to become involved in the assessment of the allegations against herself, the department failed in its mission to ensure Sanders's complaint received a fair, objective, and thorough evaluation. The discussion that follows highlights the many deficiencies we identified with the department's review of the allegations against Yang and Maloney that we believe are directly attributed to this lack of independence.

6. On this page, several section numbers and titles referenced from the Department Operations Manual have been redacted.

The Department's Office of Legal Affairs Assigned Review of the Complaint to the Subjects' Colleague Who Had Spent Years Providing Them With Legal Advice and Representation

The department first assigned parole agent Joshua Cuevas to gather departmental records that might shed light on the allegations. After Cuevas completed this task, he met with Schwartz and provided an initial assessment of the complaint. After his meeting with Cuevas and considering his impression of the complaint, Schwartz decided to turn over the allegations to the department's Office of Legal Affairs for further review. The Office of Legal Affairs assigned Counsel to review Sanders's allegations and the documents Cuevas gathered. Counsel has been employed by the department in the [specific departmental unit redacted] since 2009. Attorneys working in Counsel's office provide legal representation for the department during [redacted].[7] Supervisors and managers working in Counsel's office, such as Counsel, provide legal advice to the supervisors and managers within Yang's office. Staff from these two offices have a symbiotic relationship; they [redacted] and collaborate frequently during the [redacted]. As a long-tenured supervisor in this office, Counsel formed close working relationships with Yang and Maloney. Counsel frequently provided Maloney with legal advice when Maloney served as the [specific position and departmental unit redacted].

Counsel also provided a significant amount of legal advice to Yang while Counsel was the [specific position and departmental unit redacted] in the San José office for one month immediately preceding Counsel's review ([specific dates redacted]) and for two months immediately following his review ([specific dates redacted]). The [Yang's position redacted] and the [Counsel's specific position and departmental unit redacted] collaborate daily in their respective efforts to [specific duties redacted]. Moreover, between January and July 2018, Counsel represented Yang as Yang's attorney of record in legal proceedings [description of the specific legal proceedings redacted to maintain confidentiality]. Given Counsel's longstanding working relationships with Yang and Maloney, Counsel could not reasonably be expected to provide a fair and objective review of allegations made against them.

The department's Office of Legal Affairs should have recognized that this assignment posed a clear conflict of interest. Although we question whether anyone working for the department could have performed a truly impartial review of a complaint against Yang, the department could have elected to assign one of its many other high-ranking attorneys who had no personal or working relationship with Yang and Maloney to perform the inquiry into Sanders's complaint. Ideally, the department

7. Department Operations Manual, [section and title redacted].

would have referred the complaint to an outside investigative agency, such as the Department of Justice or a private law firm, to perform an independent inquiry and remove any appearance of conflict. As a veteran member of the California State Bar who is well trained in conflicts of interest and ethical obligations, Counsel should also have identified the conflict and refused the assignment.

The Department Immediately Tainted Its Outside Consultant's Independence

After we reviewed Counsel's report and determined it was flawed, incomplete, and exhibited signs of bias, we recommended Schwartz refer the complaint outside the department to an independent reviewer, direct the independent reviewer to interview Sanders, and withhold Counsel's report from the independent reviewer to enable a neutral assessment of the allegations. In March 2019, Schwartz referred the matter to Consultant. However, the department proceeded to taint Consultant's independence by providing him with Counsel's report. As discussed on pages 33 to 37, Consultant then used Counsel's report to inform his review and analysis of Sanders's complaint. However, the department did not provide Consultant with Sanders's complaint; Consultant had to personally request it from Sanders more than two months after the department selected him to perform the review. When we later reviewed Consultant's report, we noticed it contained much of the same verbiage and analytical flaws as Counsel's.

Yang Used Her Official Authority to Request an Employee Under Her Command Provide Her With Evidence That Was Later Used to Exonerate Her

After he filed the complaint, Sanders learned that Yang had directed one of Yang's subordinates to search [specific description of the record redacted]. Yang instructed the employee to provide her with the records once they had been gathered so that she could personally review and analyze them.

When we reviewed Counsel's report, we discovered that Counsel included with his report a set of records that related to various allegations Sanders raised in his complaint. Counsel used many of these records in his report to support his conclusion that [redacted]. All of the records indicated that they were printed from Yang's department-issued computer. All of the records were [specific description of the records redacted to maintain the confidentiality of the parties involved]. Yang could not have possessed these records without obtaining them from another source. Although this allegation was never investigated, as discussed on pages 13 to 14, the characteristics of these records strongly support the allegation that Yang used her official authority and the special privileges entrusted to her as a high-ranking official to influence the department's review of the complaint against herself.

The Department Failed to Identify Violations of Clearly Worded Policies Governing the Use of State Vehicles

The department's report, written by Counsel, was deeply flawed: It excluded evidence, mischaracterized Sanders's allegations, misinterpreted departmental policy, missed a clear policy violation, included irrelevant and misleading information, and in some places, made conclusions without providing any reasoning at all. Although we cannot publicly discuss many specific details contained in Counsel's report since it is protected by various privileges, we can discuss general shortcomings we identified and explain how the evidence should have been analyzed.

The Department's Analysis Mischaracterized a Critical Allegation and Misled Future Reviewers

Rather than directly restate the allegations Sanders presented in the complaint, Counsel described Sanders's allegations in his own words, which led to some differences between Sanders's exact allegations and Counsel's characterization of them. In most places, the differences between Counsel's characterizations and the exact allegations were benign. However, with regard to the allegation that Yang allowed Maloney to use a State vehicle to commute the very long distance between her home and her office, Counsel's description of Sanders's allegation substantively changed the allegation. Sanders wrote:

> It was not uncommon for Maloney to commute in a state car [description of car redacted] to and from [. . .] her Bakersfield home and [her office] [redacted] in San José.

In his report, Counsel presented this allegation in the following way:

> [Redacted].

Although Sanders provided Consultant a copy of his complaint, he chose to use Counsel's revision as a starting point, further mischaracterizing the allegation. He wrote:

> Starting in October 2017, Maloney was allowed to commute four hours to her home in a state vehicle on state time, constituting a waste of state resources.

The allegations may seem similar enough, but they differ in one very important respect that affected the way Counsel and Consultant evaluated the evidence and how the hiring authority assessed the allegation. After Consultant took Counsel's characterization and further edited it, the allegation incorrectly implied that Maloney had used a State vehicle for all her commutes since October 2017. Sanders alleged only that "it was not uncommon" for Maloney to use a State vehicle to commute. Sanders did not claim that Maloney used the vehicle every day, that there was any pattern to her use of the vehicle, or that it was even normal for her to commute in a State vehicle. However, Consultant, and the undersecretary— the individual assigned as the hiring authority for this complaint—both dismissed this allegation because the travel logs did not establish a pattern of misuse.[8] Consultant's conclusion—that the vehicle usage logs "do not show a commute pattern as alleged"—demonstrates he fundamentally misunderstood the allegation. Had any of the reviewers interviewed Sanders, they could have clarified what he meant by this vague allegation instead of ascribing their own interpretations to it.

As discussed in greater detail on pages 22 to 26, Maloney's work and travel logs showed that she made 16 round-trips between her home and office, using a State car on five of these trips. Accordingly, records in the department's possession demonstrated Maloney used a State car to commute between her home and work on 31 percent of these commutes. This evidence supports Sanders's allegation that "it was not uncommon" for Maloney to use a State vehicle for commuting purposes. Because Counsel skewed this allegation when he restated it in his own words, future reviewers dismissed the allegation after concluding the records did not show a pattern of misuse or demonstrate that Maloney used a State vehicle for her "normal" or everyday commute. Meanwhile, there is no caveat in departmental or State policy that only frequent misuse of a State vehicle constitutes misconduct. Departmental policy clearly states that "improper use of State-owned vehicles shall be cause for adverse personnel action."[9] Evidence that Maloney misused the State vehicle even once is sufficient to raise a reasonable belief that misconduct occurred.

8. The improper use of State vehicles for commuting purposes has been heavily scrutinized by the State Auditor and the news media in recent years. At the time Counsel was performing his analysis, the State Auditor was in the midst of investigating the improper use of State vehicles by managers and supervisors at several State correctional facilities. On May 7, 2019, the State Auditor issued a report criticizing the department for permitting six supervisors and managers to use State vehicles to commute between their homes and their assigned institutions from 2016 to 2018. Combined, these six employees used State vehicles to commute 76,789 miles between their homes and workplaces. *The Sacramento Bee* and other news organizations published articles about the State Auditor's report the same day. On June 25, 2019, *The Sacramento Bee* Editorial Board publicly pleaded for the Governor to put an end to the wasteful practice of allowing State employees to commute in State-owned vehicles. Considering the scrutiny being paid to this issue, the departmental executives who reviewed Counsel's and Consultant's reports in July 2019, just months later, should have been keenly aware of the illegality of the practice.

9. Department Operations Manual, Section 22020.12, "Use of State-Owned Vehicles."

Counsel's analysis of the allegation demonstrates that his mischaracterization of Sanders's allegation directly impacted even his own assessment of the allegation. Counsel concluded [Redacted: In this section of the confidential report, we discuss how Counsel's mischaracterization of the allegation caused him to misassess the allegation.]:

> [Redacted excerpt from Counsel's report].

[Redacted]. He provided no explanation for these contradictory conclusions.

The Department Should Have Concluded That Maloney's Use of a State Vehicle for Commuting Purposes Was Not Authorized by Departmental Policy

The department's collective analysis also misinterpreted departmental policy, thereby missing a clear policy violation. Counsel's report misinterpreted policy, and Consultant's report repeated the error. Our independent review of the records gathered during the inquiry determined that the records related to Maloney's use of a State vehicle demonstrate a reasonable belief that Maloney violated the State's and the department's policies governing the use of State vehicles.

Using the same records the department reviewed, we determined that Maloney used a State vehicle to commute between her Bakersfield home and her primary work location in San José on five separate occasions (see Table 1). During these five round trips, Maloney used the vehicle for a total of 3,005 miles. She also used the vehicle for unspecified purposes each day she was in San José, logging an additional 673 miles on the vehicle. The records provide concrete evidence that Maloney stored the State vehicle at her Bakersfield home for a total of 86 days in a four-month period. Because Maloney stored the State vehicle at her home on a "frequent basis," State and departmental policy required her to apply for a vehicle home storage permit. However, Maloney's actual use of the State vehicle to commute between her home and work would not have qualified her to receive a permit. Permits are only issued to emergency responders who require specialized equipment or vehicles to perform their job duties and to employees whose use of the vehicle meets a very

narrow definition of cost-effectiveness. Because first Counsel—and then Consultant—misinterpreted and misapplied these policies, these allegations, which met the department's standard to be referred for an investigation, went unchallenged, and therefore, unaddressed.

Counsel incorrectly determined [Redacted]. The department's policy[10] provides that State-owned vehicles, as a general rule, may only be driven to or from an employee's home if one of the following scenarios apply:

1. The employee is departing on or returning from an official trip away from headquarters before or after normal working hours.
2. The employee's home is reasonably en route to or from his/her headquarters or other place where he/she is to commence work.
3. The vehicle is used continuously for two or more days to conduct State business.
4. The employee has completed a work day and the vehicle is to be used in the conduct of State business on the same day or before his/her usual working hours the next day.
5. No State garage facility is available.
6. The vehicle is being operated as a van pool on a reimbursed basis between employees' homes and places of employment.

Maloney's use of a State vehicle to drive between her Bakersfield home and the San José office on five occasions did not qualify under any of the six scenarios set forth in this policy. On each of her five round-trip commutes, Maloney traveled to San José in a State vehicle at the start of the workweek, spent the workweek in San José, and then returned home in the State vehicle at the end of the workweek. None of the five trips were preceded or followed by official trips away from headquarters or trips to alternate work locations such that they would be justified under the first, second, or fourth scenarios. There is also no information to suggest Maloney's use of the State vehicle qualified under the fifth or sixth scenarios.

10. Department Operations Manual, Section 22020.12, "Use of State-Owned Vehicles."

Table 1. Travel Log for Chief Teresa Maloney, 2017 and 2018

Date	Miles	Begin	End
Trip 1			
Sunday	246	Bakersfield Home	San José Office
Monday	44	San José Office	
Tuesday	52	San José Office	
Wednesday	55	San José Office	
Thursday	224	San José Office	Paso Robles
Friday	92	Paso Robles	Bakersfield Home
Stored at home for 23 nights			
Trip 2			
Sunday	196	Bakersfield Home	City A
Monday	20	City A	
Tuesday	180	City A	City B
Wednesday	22	City B	
Thursday	184	City B	Paso Robles
Friday	83	Paso Robles	Bakersfield Home
Stored at home for 18 nights			
Trip 3			
Tuesday	249	Bakersfield Home	San José Office
Wednesday	49	San José Office	
Thursday	51	San José Office	
Friday	312	San José Office	Bakersfield Home
Stored at home for nine nights			
Trip 4			
Sunday	276	Bakersfield Home	San José Office
Monday	29	San José Office	
Tuesday	62	San José Office	
Wednesday	64	San José Office	
Thursday	311	San José Office	Bakersfield Home
Stored at home for four nights			
Trip 5			
Monday	245	Bakersfield Home	San José Office
Tuesday	49	San José Office	
Wednesday	49	San José Office	
Thursday	193	San José Office	Paso Robles
Friday	153	Paso Robles	Bakersfield Home
Stored at home for 2 nights			
Trip 6			
Sunday	248	Bakersfield Home	San José Office
Monday	73	San José Office	
Tuesday	43	San José Office	
Wednesday	53	San José Office	
Thursday	214	San José Office	Paso Robles
Friday	242	Paso Robles	Bakersfield Home
Stored at home for 30 nights			
Trip 7			
Monday	224	Bakersfield Home	City C
Tuesday	166	City C	City D
Wednesday	149	City D	Paso Robles
Thursday	207	Paso Robles	Bakersfield Home
Stored at home for 49 nights			

In his report, [redacted description of Counsel's analysis].
Counsel later concluded that

> [Redacted excerpt from Counsel's report].

The records and information contained in the report also do not indicate that Maloney's use of the State vehicle qualified under the third scenario—that Maloney used the vehicle continuously for two or more days to conduct State business. On each of these trips, Maloney drove the car from her San José office to her home in Bakersfield,[11] where it remained unused until she drove it back to San José. Maloney worked out of the San José office for two or three days at a time before driving the vehicle back home to Bakersfield. Although Maloney may have needed a State vehicle to attend meetings at different offices in the San José area, there was no need to drive a State vehicle home to Bakersfield in order to attend these meetings in San José. She could have driven her personal vehicle from her home to San José and checked out one of the department's many pool vehicles, as needed, while in San José.

While working in San José, and presumably living out of a local hotel room or temporary residence, Maloney drove her car for a total of 673 miles, indicating on the vehicle log that she drove the vehicle to locations only identified as "Local," without further detail. Her use of the vehicle for sporadic local travel while working in the San José area could have been for legitimate business purposes (such as travel between various departmental offices and institutions) or it could have been for personal purposes (such as travel to and from her local residence, local restaurants, or other local businesses). However, because the department never interviewed Maloney, we cannot determine whether Maloney's use of the vehicle for this local travel complied with departmental policy.

11. The logs show that on three of these five round trips, Maloney drove the vehicle to Paso Robles on Thursday, spent the night in Paso Robles, and then drove the vehicle home to Bakersfield on Friday. There is no information in the records attached to Counsel's report to suggest that Maloney had work to perform in Paso Robles on these three Thursdays. Maloney's work calendars do not show any scheduled work to be performed in Paso Robles on those Thursdays or on the following Fridays, one of which was a State holiday. Although there is no information to suggest these three overnight stops in Paso Robles were for business purposes, without interviewing Maloney, we cannot conclusively determine whether these trips were within policy.

Counsel also used flawed reasoning to determine, incorrectly, that [redacted criticism of Counsel's analysis]:

[Redacted excerpt from Counsel's report].

[Redacted criticism of Counsel's analysis].

Furthermore, Maloney's travel logs do not demonstrate that she made any exigent trips in the five months she spent performing the full duties of her position, nor do the vehicle logs for the employee who backfilled for Maloney as the acting manager for the following seven months indicate he made any exigent responses in his assigned State vehicle.[12] As evidenced in the 11 months of travel logs attached to Counsel's report, employees who performed the duties of Maloney's position used their assigned State vehicles a cumulative total of four times to travel to locations other than the San José office. All other uses of the assigned State vehicles during those 11 months were for the sole purpose of commuting to and from their homes, with Maloney making five week-long commutes between Bakersfield and San José, totaling 3,005 miles, and the other employee making 80 daily commutes between his home and the San José office, totaling 3,346 miles.

The Department's Analysis Incorrectly Determined Maloney's Use of the State Vehicle Did Not Violate State Requirements for Storing a State Vehicle at an Employee's Home

Counsel also incorrectly analyzed the applicable State rules and policies governing vehicle storage and [Redacted description of Counsel's report].

12. Counsel's report included vehicle logs for the months of June, July, August, October, November, and December, but did not include logs for April, May, or September.

Counsel concluded that Maloney [redacted description of Counsel's report and criticism of his interpretation and application of State and departmental policy]. The State's policy provides the following:[13]

> State vehicles stored at or in the vicinity of an employee's home more than 72 nights in a 12-month period, or 36 nights in a 3-month period, require a VHSP approved by the department head, deputy, or chief administrative officer pursuant to CCR Section 599.808 and STD 377, Vehicle Home Storage Request/Permit Form.

The same or similar language also appears in Department Operations Manual, Section 22020.13, "Home Storage Vehicle Permit" and the *California Code of Regulations*, title 2, Section 599.808 (d), "Storage of State-Owned Motor Vehicles."

Counsel, an attorney whose regular job duties include [redacted description of Counsel's specific duties], incorrectly determined that because Maloney [redacted description of Counsel's report]. A proper application of State policy would have concluded that because Maloney stored the vehicle at her home for 86 nights in a four-month period, her frequent storage of the State vehicle at her Bakersfield home triggered the obligation to obtain a home vehicle storage permit. Therefore, [redacted], departmental policy and State regulations required Maloney to apply for and obtain a home vehicle storage permit.

The question then becomes whether Maloney's use of the State vehicle met the criteria for issuing a home storage vehicle permit contained in State Administrative Manual, Section 4109, which sets forth the limited situations in which a State agency can issue an employee a home vehicle storage permit. The exhibit on the following page shows what that section provides, in part.

These criteria in the exhibit establish that Maloney's job duties did not qualify her to receive a home storage vehicle permit. Maloney did not satisfy the criteria for issuance of an essential permit because she was not a primary responder to emergency events and did not respond to 24 events in one calendar year, nor did she meet the criteria for issuance of a cost-effective permit. While Maloney was assigned the State vehicle, she neither maintained an approved home office nor performed field work

13. Department of General Services, State Administrative Manual, Section 4109, "Home Storage."

Exhibit 1. California State Administrative Manual Criteria Concerning Vehicle Home Storage Permits (VHSPs)

CRITERIA FOR ESSENTIAL & COST-EFFECTIVE PERMITS

Executive Order (EO) B-2-11 specifies that state agencies and departments may only issue VHSPs that are essential or cost effective. In continuance of this policy, DGS developed ongoing criteria to assist departments in their future determinations of essential and cost-effective VHSPs.

ESSENTIAL PERMITS

An essential VHSP is deemed necessary even though it may not be cost-effective; it must meet all of the following criteria:

- The individual must respond to emergency events after hours as a primary responder.
- The emergency responder must respond to the field, rather than to a state facility where his/her vehicle could be stored.
- The emergency responder must be able reach the emergency event within 30 minutes to no more than 1 hour.
- The emergency response must require specialized equipment that is not transferrable to a personal vehicle, or include activity that is not reasonable for a personal vehicle (i.e., taking a felon into custody).
- The emergency response must be for health and safety purposes (i.e., responding to hazards or criminal activity).
- The individual only takes a vehicle home when he/she is needed as a primary responder.
- The individual must respond to a minimum of 24 emergency responses per year.

A department should not issue an essential VHSP to any employee who does not meet all of the above criteria. It is also incumbent upon the department to report/record information as necessary to support the issuance of an essential VHSP.

COST-EFFECTIVE PERMITS

A cost-effective VHSP must meet at least one of the criteria from both Category A and Category B:

Category A

1. The employee has a department-approved home office separate from the department's facilities. Generally, the employee's duty statement and personnel file will denote that his/her reporting office is his/her home.
2. The vehicle is essentially the employee's office (i.e., performing requisite duties in the field on a daily basis directly from his/her home). However, the employee may still be required to occasionally work from a state office.

Category B

1. The employee's job (as reflected on the official duty statement) requires substantial field work (greater than 50 percent), and it is more efficient for the employee to travel directly to the field work location.
2. The employee drives directly to the field from home and/or has work-related after-hour activities that account for 50 percent or more work days within a given month.

A department should not issue a cost-effective VHSP to any employee who does not meet the above criteria. It is also incumbent upon the department to report/record information as necessary to support the issuance of a cost-effective VHSP.

These general standards for cost effectiveness justify the use of a state vehicle versus reimbursement for the use of a personal vehicle or rental—it is not a justification for the state to pay for personal commute miles associated with taking a vehicle home. Providing for personal commuter transportation is not an obligation of the state.

Source: California Department of General Services, State Administrative Manual, Section 4109, "Home Storage."

out of the vehicle by driving to work locations away from a central office. Maloney performed most of her work from an office located in San José.

Although all this information was available to Counsel when he performed his analysis, Counsel did not correctly or logically apply the pertinent policies to the information contained in Maloney's mileage logs. [Redacted criticism of Counsel's analysis and interpretation of State and departmental policy].

The Department's Report Went to Extraordinary Lengths to Discredit the Complainant on Matters Unrelated to the Merit of The Allegations

In addition to these instances of poor reasoning or the absence of reasoning, misinterpreted policies, and evidence omitted or not gathered, the department's report also contained information about Sanders that was not relevant to the substantive merits of his allegations. On page 8 of his 16-page report, Counsel paused in his analysis of the allegations to provide four-and-a-half pages of a discussion titled "Background Facts and Analysis Necessary to Assess Allegations #4–8." This discussion appears to be an attempt to discredit Sanders by suggesting he had ulterior motives in bringing the complaint. Schwartz indicated that after reading Counsel's report, he found Sanders's complaint not credible.

In this "Background" section of the department's report, Counsel first noted that Sanders [redacted description of Counsel's report]. Whether or not [redacted] had no bearing on the merits of any of his allegations.

Counsel next noted that Sanders [redacted description of Counsel's report]. Counsel presented Sanders's [Redacted description of Counsel's report]. The inclusion of this information also suggests Sanders [redacted]. Furthermore, by emphasizing that Sanders [redacted], Counsel suggests to the reader that Sanders purposefully made an untrue allegation, when in reality, Sanders's allegation was more nuanced than Counsel treated it. Counsel ignored the likelihood that [redacted]. Even so, Sanders's [redacted] had no bearing on whether the work Maloney was performing constituted full-time work at the level of a manager at that State classification.

In the next section of the "Background Facts and Analysis," Counsel introduced an anecdote [Specific description of Counsel's analysis redacted]

[redacted]. This information was entirely irrelevant to the allegations Sanders made about Yang; its inclusion in Counsel's report served no legitimate purpose and suggests Sanders had retaliatory motives in filing his complaint.

Counsel included irrelevant information about Sanders in other parts of the report as well, first noting that Yang [redacted]. This information is irrelevant to the allegation that it was improper for Yang to allow Maloney to frequently work from home considering Maloney's primary duty of managing an entire office of staff could not be performed from home. Instead, the inclusion of this information suggests that Sanders [redacted] and depicts Sanders as hypocritical.

This was not the only instance in which Counsel included information that was irrelevant to the allegations that made Sanders appear hypocritical. While assessing Sanders's allegation that [redacted], Counsel observed that after submitting the complaint, Sanders [redacted]. Counsel criticized Sanders's [redacted]. The propriety of [redacted] was irrelevant to the analysis of whether it was proper for Maloney to use a State vehicle for commuting purposes. Therefore, the inclusion of this irrelevant information served no purpose other than to discredit Sanders.

Counsel included all of this irrelevant information in his report, but insisted the information was necessary to the analysis of Sanders's allegations. In our independent judgment, none of this information was even remotely necessary to the determination of whether there was a reasonable belief that the subjects engaged in misconduct. The only purpose for including the information in the analysis was to suggest that Sanders, who also occupied a high-level position within [specific departmental unit redacted], had an improper motive for filing the complaint. By including this information in his report and asserting that this information was necessary to understand Sanders's allegations, Counsel attempted to undermine Sanders's credibility and thereby defend Yang rather than offer a neutral assessment of the allegations. Schwartz indicated that after reviewing Counsel's report, he found Sanders's allegations not credible. Schwartz also cited this lack of

credibility as a reason the department did not further assess whether employees in [Yang's unit] were improperly using State vehicles for commuting purposes.

We question whether an attorney who had no prior relationship with the involved parties would have included this information in their analysis of the allegations.

The Department Ultimately Retained the Services of an Outside Consultant to Assess the Complaint, but the Consultant's Work Was Insufficient and Repeated Many of the Same Mistakes the Department Made

On March 14, 2019, the department notified us that it had accepted our recommendation that it perform an independent assessment of the complaint and assigned Consultant, a former Chief of Police and inspector general for another governmental entity, to perform this assessment. As previously discussed on page 19, the department significantly tainted Consultant's independence when it provided him with a copy of Counsel's memorandum. Not surprisingly, Consultant's review suffered from many of the same defects as Counsel's review.

Consultant did not gather additional documentation or interview witnesses. He relied primarily on the materials the department provided him to inform the bulk of his review. Consultant only supplemented that material by meeting informally with Sanders to discuss his complaint in May 2019, requesting Sanders provide him with some documentation the department likely already had, and performing general research on the department's website and other sources. However, even these efforts did not uncover any new information since the department already had these materials and should have provided them to Consultant at the start of his assignment.

In the cover letter to his report, Consultant described the process he undertook in reviewing the complaint, explaining that he assessed the allegations described in Sanders's complaint and reviewed Counsel's report and the supporting documents provided with the report, had an informal meeting with Sanders, and reviewed documents Sanders provided at his request. From here, Consultant utilized the limited evidence he was provided to assess the allegations. He then issued recommended findings as if a complete investigation had occurred.

Consultant's reliance on Counsel's report became evident when we examined the language he used to describe Sanders's allegations. The side-by-side comparison in Figure 3 on the following page demonstrates that but for some minor stylistic changes (such as adding commas, correcting misspellings, deleting the word "that" where it was not necessary, and changing the word "residence" to "home"), Consultant's allegations were phrased nearly identically to Counsel's, demonstrating that Consultant used Counsel's report as the starting point for his own analysis. This was particularly problematic regarding Allegation No. 2, which Counsel mischaracterized (see discussion on pages 20 to 22).

Figure 3. Comparison of the Manner in Which Counsel and Consultant Characterized the Allegations, Redacted to Preserve Attorney–Client Privileged Information

Counsel's Characterizations	*Consultant's Characterizations*
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Consultant's analysis differed only slightly from Counsel's analysis. As an improvement to Counsel's work, Consultant assessed evidence that Sanders had included with his memorandum, but that Counsel had omitted from his report. Notably, where Counsel relied on [specific description of Counsel's analysis redacted], Consultant used Maloney's building access logs to conclusively determine that Maloney used his assigned building access key San José almost every week. These logs provided evidence that corroborated the entries in Maloney's electronic calendar and improved the quality of the inquiry into this allegation. As discussed on pages 15 to 16, Consultant recognized another shortcoming with Counsel's report, specifically that Counsel [specific description of Counsel's analysis redacted]. Consultant appropriately recommended no finding be made on this allegation.

On the other hand, the remainder of Consultant's analysis was as flawed as Counsel's analysis. Regarding the allegation that Yang permitted Maloney to use a State vehicle to commute between her Bakersfield home and to enter the San José office, Consultant focused on the number of days Maloney reported using the car on her vehicle mileage logs. From this documented usage, he determined that Maloney did not use the car to commute between Bakersfield and San José frequently enough to establish a "pattern" or demonstrate that Maloney used the car for her "normal" commute. Consultant incorrectly focused on the number of days the car was used and not the number of days the car was stored at home, which caused him to misapply the applicable policies).

On this issue, the analysis composed by Consultant was worse than that which Counsel had prepared. Consultant concluded:

> The DGS monthly travel logs do not show a commute pattern as alleged. There were two occasions when trips between San José and Bakersfield may be considered commuting. These two trips represent less than 3.6% of total commute opportunities and do not establish a pattern.

Consultant indicated he arrived at this 3.6 percent figure after dividing the number of trips he considered as commuting (two) by the number of days Maloney worked in the San José office (56). Consultant's failure to account for necessary context by assuming Maloney spent eight hours each day commuting between Bakersfield and San José resulted in a severe flaw in his statistical analysis. As the vehicle logs clearly showed, Maloney was not commuting between Bakersfield and San José on each of these 56 workdays. Maloney made 16 round trips between Bakersfield and San José for work purposes. Therefore, the correct statistical analysis would have called for dividing 2 by 16, which should have led to the

conclusion that Maloney used the car 12.5 percent of the time she commuted, not 3.6 percent.

The remainder of Consultant's analysis used Counsel's analysis and reasoning to arrive at the same conclusions: [redacted]. Consultant, however, took these recommendations one step further when he recommended that some of the allegations receive findings of **Exonerated** or **Unfounded**. The department ascribes the following industry-standard meanings to each of these terms:[14]

> NOT SUSTAINED: The investigation failed to disclose a preponderance of evidence to prove or disprove the allegation made in the complaint.
>
> UNFOUNDED: The investigation conclusively proved that the act(s) alleged did not occur, or the act(s) may have, or in fact, occurred but the individual employee(s) named in the complaint(s) was not involved.
>
> EXONERATED: The facts, which provided the basis for the complaint or allegation, did in fact occur; however, the investigation revealed that the actions were justified, lawful, and proper.

Ultimately, Consultant's assessment suffered from the same flaws that caused us to conclude that Counsel's report could not be deemed an independent assessment of Sanders's complaint. Both reviewers made conclusive findings despite the absence of an investigation, when they should have been assessing whether there existed a reasonable belief that misconduct occurred. Neither reviewer interviewed anyone in connection with the complaint. Both reviewers relied on the same limited body of evidence. And both reviewers misapplied State and departmental policies regarding State vehicle use. Yet both reviewers framed their work as a report resulting from a thorough investigation and recommended [redacted].

We believe Consultant's involvement in this case caused more harm than good. As noted on pages 13 to 14, Consultant failed to mention or assess a very serious allegation that Yang improperly influenced the department's review of the allegations made against her. Although Sanders had also informed Secretary Diaz of these allegations, Consultant's failure to mention this allegation in his report helped the allegations evade review. Moreover, considering Consultant's good reputation in the law enforcement community and the department's perception that his involvement provided a sufficient degree of independence, his opinion

14. Department Operations Manual, Section 33030.13.1, "Investigative Findings."

and assessment carried a significant amount of weight in this case. But because Consultant did little more than rubber stamp Counsel's flawed and biased assessment, his involvement had the effect of legitimizing the highly flawed process by which the department assessed Sanders's complaint. In our opinion, Consultant's assessment cannot be considered the product of a thorough and independent inquiry any more than Counsel's.

The Department Did Not Follow State Contracting Procedures When It Selected Its Outside Consultant

When the department accepted our recommendation and referred Sanders's complaint to an outside consultant, it did not comply with the rules every State agency must follow when contracting out for personal services. The department circumvented these contracting rules, which can be onerous and time consuming, by paying the consultant under one of its already existing contracts that was intended only to provide advanced management training, not to assess allegations of staff misconduct.

The department's Consultant was working as an independent consultant at the time the department selected him to perform an assessment of Sanders's complaint. Consultant, along with several other instructors, was also under contract with a large State university to teach courses to departmental employees.

To better understand the scope of Consultant's assignment and the department's contractual relationship with him, we asked the department for a copy of the contract it used to pay him for the work he performed reviewing Sanders's complaint. In accordance with standard administrative procedure, such a contract would specify the scope and focus of the services to be rendered. In response to our request, the department provided us with its contract with the State university, which was amended on April 4, 2019; the original contract's term ran from January 1, 2018, to December 31, 2019.

Under this contract, the university would develop, revise, and teach the department's curriculum for its advanced supervision training course. The department entered into the contract with the intent "to ensure that supervisors within CDCR are exposed to effective leadership strategies and contemporary issues" and to "enhance leadership skills and reinforce the role of leaders in the success of the CDCR mission." The contract's scope of work discussed the roles of each party to the contract, explaining that the college, through its instructors, would familiarize itself with the department's current training curriculum, work with departmental experts to help understand the department's mission and develop new course curricula, develop a time line for completion, design effective training materials, ensure conducive learning environments, deliver the training courses, track course attendance and completion, and gather feedback from attendees to evaluate the efficacy of the training. The scope of work does not identify any tasks to be performed under the contract that resemble the review of allegations of staff misconduct; its sole focus is the creation and provision of an advanced supervision course for the department's supervisory employees.

The April 4, 2019, amendment substituted a new scope of work section, focused entirely on curriculum and training, and including a rate sheet under the heading "Training Analysis and Curriculum Development and Modification." This rate sheet provided an estimate of the number of hours budgeted for each general task, the hourly rate of the task, and the total estimated cost of the work for each task performed under the contract.

We questioned the department's use of this contract to employ Consultant to review Sanders's allegations.[15] In response, the department claimed the contract qualified under the entry titled "Special Projects" on the contract's rate sheet. That entry allowed 80 hours for special projects under the heading, "Direct Labor Related to Instruction."

The State Contracting Manual provides that contract administrators are not authorized to direct the contractor to perform work that is not specifically described in and funded by the contract. The manual further requires that if a State agency wishes to change the scope of a contract, it must comply with the formal purchase document amendment process. The department's use of this contract to secure Consultant's services to review allegations of staff misconduct appears to violate the State Contracting Manual; although the task may be appropriately deemed a special project, it is not germane to the scope of work the parties intended to be performed under the contract.[16]

It is unclear how the department paid Consultant for these investigative services. We do not know the instructions the department presumably gave to the college. We do not know whether the college understood that it was paying Consultant for services outside the scope of its contract with the department, and we have not seen Consultant's invoices. From the limited documentation the department provided in response to our inquiries, we believe the department violated State policy when it paid Consultant for the work he performed assessing Sanders's complaint under this training contract.

15. [Redacted description of Consultant's professional engagements].

16. State Contracting Manual, Volume 2, Revision 4, Chapter 11, Section 11.2.1, "Contract Administration."

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Recommendations

The department's response to allegations of staff misconduct against this high-ranking official deviated from the standard departmental procedures the department applies to all other complaints of staff misconduct. The ad hoc process the department deployed to assess these allegations suffered from a lack of independence that tainted nearly every aspect of the department's assessment of the complaint.

Even without a formal policy instructing it to do so, it has been the department's practice in previous years to refer to outside investigative entities any complaints made against its high-ranking officials, including those [specific departmental unit redacted]. To ensure that the department fulfills its mission of ensuring that all allegations of staff misconduct—including those involving its highest-ranking officials—are objectively reviewed, appropriately addressed, conducted in a fair and consistent manner, and investigated when appropriate, we recommend the department perform the following actions:

№ 1. Adopt a policy requiring that all complaints involving [individual's in Yang's official position] and officials higher up this official's immediate chain of command be referred for review by an entity external to the department, such as another State agency or a private firm.

№ 2. Adopt a policy requiring that all investigations conducted by external entities adhere to departmental policies and procedures governing the processing of complaints.

№ 3. Adopt a policy that ensures its attorneys are not tasked with reviewing or assessing complaints made against their co-workers and employees they have previously represented.

№ 4. Review its policies to determine whether there are adequate policies in place that instruct staff how to recognize and handle conflicts of interest.

№ 5. Review its training curriculum to determine whether it provides sufficient ongoing training regarding conflicts of interest.

To ensure State vehicles are being used in accordance with State regulations and departmental policy, the department should:

№ 6. Audit its vehicle logs to identify which State vehicles are being used for commuting purposes or are being stored at employees' homes and determine whether the users have a valid vehicle home storage permit.

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STATE OF CALIFORNIA — DEPARTMENT OF CORRECTIONS AND REHABILITATION GAVIN NEWSOM, GOVERNOR

OFFICE OF THE SECRETARY
P.O. Box 942883
Sacramento, CA 94283-0001

November 18, 2020

Mr. Roy Wesley
Office of the Inspector General
10111 Old Placerville Road, Suite 110
Sacramento, CA 95827

Dear Mr. Wesley:

The California Department of Corrections and Rehabilitation (CDCR) submits this letter in response to *Special Review: The California Department of Corrections and Rehabilitation Mishandled Allegations That a High-Ranking Official Engaged in Misconduct*. Thank you for the opportunity to review and comment on the draft report.

CDCR reviewed the draft report prepared by the Office of the Inspector General regarding the CDCR's handling of an allegation against a high-level employee, who OIG publically identifies as "Yang."

The CDCR understands that OIG's primary criticism of the CDCR is that it did not have a procedure in place to respond to allegations against certain individuals within the Department, and recommends that the CDCR have a procedure. The CDCR agrees that it needs to have a procedure to respond to allegations against certain high-level employees. To that end, the CDCR has worked, and continues to work, on a procedure that will address the potential conflicts when allegations are made against particular high-level employees and will meet the needs of the CDCR.

However, much of the OIG's report is based on incomplete or inaccurate information and speculation on its part, which appears to have significantly impacted several of the OIGs conclusions. Furthermore, throughout its report, the OIG conflates inquiries and investigations, causing it to criticize the CDCR for not engaging in activities that were investigatory in nature, despite the CDCR being in the inquiry stage. 1 2

With regard to the process used in response to the allegations against Yang, throughout the inquiry, OIG's concerns were about the process, and the independence thereof. The CDCR undertook measures to attempt to address OIG's concerns about the process; these additional measures ultimately caused the significant delays in completing the inquiry process. 3

Further, what is apparent from this report is that the OIG disagrees with the conclusions reached by several CDCR employees. Unfortunately, the OIG did not raise issues with the conclusions until now – two years after OIG became involved in the inquiry, and approximately 18 months after the inquiry was completed. This delay has greatly impacted the CDCR's ability to respond

to all of the claims made in OIG's report, including gathering the information that demonstrates that OIG's assumptions and speculations are incorrect. The conduct at issue in this matter occurred in 2017 and 2018, and most of the people who were involved in the underlying claimed misconduct are no longer employees of the CDCR.

While the CDCR's ability to respond to the OIG's allegations has been hampered by time, the CDCR provides the following response to OIG's report of its process in responding to the allegations of misconduct:

A. OIG Conflates Inquiries and Investigations

As noted above, throughout the draft report, the OIG conflates an allegation inquiry (conducted by a Hiring Authority), and an investigation (ordinarily conducted by OIA). For example, OIG asserts that allegation inquiries are "miniature investigations" and continuously refers to the work performed as "investigative work."

However, an allegation inquiry is not an investigation, nor is it a "miniature investigation." Instead, an allegation inquiry is "[t]he collection of **preliminary information** concerning an allegation of employee misconduct necessary to evaluate whether a matter shall be referred to the Central Intake Unit." (Dept. Operations Manual ("DOM"), § 31140.3 (emphasis added).) The CDCR policy does not require an individual performing an allegation inquiry to conduct or record interviews. In fact, many allegation inquiries are completed without conducting interviews.[1] "Allegation inquiries shall be conducted at the direction of the Hiring Authority when there is an allegation of misconduct, which if true could lead to adverse action, and the subject(s), allegation(s), or both are not clearly defined or more information is necessary to determine if misconduct may have occurred." (DOM, § 31140.14.)

The CDCR conducted an allegation inquiry as required by policy. It gathered documents and information from numerous sources. It collected information and documents from the complainant ("Sanders").[2] It collected information from personnel records and redacted. It collected information from one of the subjects regarding the second subject. The CDCR's actions fell squarely within an allegation inquiry. Following that allegation inquiry, the CDCR

[1] The OIG is aware that interviews are not required as part of the allegation inquiry process, and aware that many matters are submitted to OIA's Central Intake Panel without any interviews.

[2] OIG repeatedly criticizes the Department for not interviewing Sanders. CDCR did not conduct a formal, noticed interview (as that would be investigatory). However, three separate individuals (Schwartz, Cuevas and the consultant) met with Sanders to obtain information regarding the allegations and any supporting documentation in Sanders' possession. These were interviews.

concluded that the information and documents did not support a reasonable belief of misconduct, but, instead, demonstrated that misconduct had not occurred.

OIG appears to further criticize the CDCR for not involving it in its allegation inquiry. However, at the time the allegations were made, the OIG's contemporaneous oversight authority was for Office of Internal Affairs (OIA) investigations conducted by the OIA. Since the time the allegations were made, the OIG has been granted authority to participate in and monitor allegation inquiries conducted by the OIA Allegation Inquiry Management Section (AIMS) involving inmate-initiated complaints. OIG did not and does not have authority to participate in allegation inquiries generally, such as the one at issue in the report. 2

Even though the CDCR was under no obligation to include the OIG in its allegation inquiry process, once the OIG became aware of the allegations, the CDCR permitted the OIG to participate in this inquiry.

B. <u>The OIG's Report Does Not Accurately Reflect the Procedural History of the Inquiry Into the Allegations Made by Sanders</u>

Throughout its report, the OIG makes numerous assertions that do not appear to have factual support. Instead, many of the claims made by OIG are based on assumption or supposition. For example:

- OIG asserts that Yang filtered or withheld evidence when providing the results of a record search to Cuevas. However, the individual who conducted the search drafted a report of their search and copied the records to a disc. That disc was provided to Cuevas. There are no facts that demonstrated that Yang tampered with the search results. 1

- The OIG alleges that the Department ignored the evidence that Yang abused her position by emailing an employee to conduct the search. However, Schwartz asked Yang to obtain the documents for Cuevas – a fact that Schwartz knew when reviewing the documents. Therefore, the email was not evidence of misconduct, but rather evidence that Yang was complying with an instruction given by her superior. 4

- The OIG incorrectly identifies one of the department's attorneys as the "legal representative of one of the subjects," and accuses him of bias. Counsel for the Department represents the Department, and has not provided representation to the subject employee as his attorney. Further, OIG has no evidence of bias by the attorney. 5

- The OIG asserts that the CDCR's attorney intentionally left documents out of his report. However, as discussed below, the CDCR attorney did not have the documents that OIG claims he left out of his report. 6

- OIG claims that the high-level CDCR staff members were (or could have been) confused by the legal analysis prepared by the attorney and believed it to be a report of an investigation completed by the attorney. The attorney was tasked with preparing an analysis. The written analysis provides in multiple locations that it is an analysis. There is no evidence that anyone was confused that the attorney had conducted a complete investigation. 7

- Without any evidence or support, OIG claims that the outside consultant – a retired police chief and inspector general – was unduly influenced by the analysis provided by the CDCR's attorney. There are no facts that suggest that the experienced outside consultant did not review all the relevant documents and policies, and reach his own conclusions. To CDCR's knowledge, OIG has not confirmed with the consultant that he was unduly influenced by counsel's analysis. No facts exist that demonstrate that the consultant did not independently review the documents and information, and independently come to the same conclusions as the attorney (and Schwartz before him). 8

Further, as explained below, the OIG's recitation of the procedural history of the inquiry is inaccurate, incomplete, and, in many instances, speculative.

1. Prior to Sanders' Complaint, the Hiring Authority (Schwartz) Was Already Aware of Certain Facts Related to the Parties

Prior to Sanders making the complaint, Schwartz was already aware of the following facts that were related to the allegations raised by Sanders:

a. That, in or around June 2018, Schwartz approved Yang's request that Maloney be placed in a blanket position to complete special projects while primarily telecommuting. Yang made the request through the Office of Personnel Services, Executive Appointment Unit and followed Department policy in doing so. Yang, in her position does not have the authority to approve the blanket authorization. Schwartz was aware that the Executive Appointments Unit was responsible for deciding whether to place Yang in the blanket, and that it had decided to do so.

b. That Yang had requested and received authorization to compensate an individual to act behind Maloney. Initially, multiple individuals were set to act out of class behind Maloney on a rotational basis, which would have eliminated the need to pay out of class pay behind Maloney, and would have reduced other, dependent

out of class payments. However, when an actor became unavailable, it caused the CDCR to leave individuals in out of class positions longer than anticipated. Further, Yang does not have authority to approve an out of class assignment with pay. The Office of Personnel Services was responsible for deciding whether to authorize out of class pay for actors behind Maloney, and it had decided to do so.

c. Schwartz was also aware that there was no Department policy against Maloney's position having authorization to possess or utilize a state vehicle. In fact the duty statement for Maloney's position included statewide program responsibility for different office locations throughout the state. While in an acting position located over fifty miles from their assigned office all employees are entitled to travel per diem to include mileage. In lieu of mileage the Department may provide a vehicle for use. Additionally, Maloney's new position and unit procedure required regular visits by her throughout the state requiring frequent travel. 9

d. Schwartz was aware that the personnel position Maloney was in was previously assigned a permanent vehicle and home storage, however when the unit's fleet was reduced, Yang and other executive level managers prioritized vehicle assignment. Yang and Schwartz had previously discussed expansion of the unit's fleet to ensure all peace officers whose duty statement required travel (like Maloney's) would have a permanently assigned vehicle capable of being taken home daily.

2. Despite Being Aware of These Facts, Schwartz Conducted an Allegation Inquiry

On or about October 24, 2018, Schwartz received a complaint by Sanders against Yang, a high level employee who reported to Schwartz. Sanders' complaint contained a thorough memorandum memorializing his allegations of alleged misconduct against Yang, along with numerous documents that allegedly supported the allegations being made. Schwartz discussed the complaint with Sanders, and Schwartz believed that Sanders had provided a thorough accounting of his allegations within the written complaint and the documentation he gathered to support them.

Schwartz took Sanders' complaint seriously and briefed his immediate supervisor, the Undersecretary of Administration. From the outset, the steps taken were intended to ensure independence, provide transparency, and exceed typical scrutiny because of the very nature of the classifications of the complainant and the accused. Based on Schwartz's discussion with Sanders, Schwartz's review of his complaint and the supporting documents he provided, along with Schwartz's previous knowledge of the above facts and the CDCR policy, Schwartz did not have a reasonable belief misconduct had occurred that would support opening an investigation against Yang.

Despite Schwartz's initial assessment, Schwartz determined that further inquiry should be conducted to gather additional information and documentation that related to Sanders' complaints. Because of the positions of the individuals involved and Schwartz's desire for the inquiry to be independent, Schwartz requested the assistance from a division outside of Schwartz's chain of command.

Joshua Cuevas was assigned to conduct an inquiry.[3] Schwartz asked Cuevas to meet with Sanders, clarify his complaint, and collect any additional information or documents he may have. Cuevas was also authorized to obtain records from Yang and Yang's unit, as Cuevas deemed necessary or appropriate. Schwartz advised Yang that Cuevas would be conducting an inquiry, and to gather and provide Cuevas with documents relating to Maloney's time sheets, workload, and vehicle logs.

Cuevas met with Sanders, discussed his complaint, and obtained records from Sanders. In addition, Cuevas determined that he needed documents regarding Maloney's use of a state vehicle and the work that was performed by Maloney while Maloney was in the blanket.

Pursuant to Schwartz's instruction that Yang gather documents for Cuevas, on or about November 19, 2018, Yang sent an email (contained in the OIG report) to a subordinate employee to obtain various records. This employee's job duties involve redacted job description. There was nothing untoward about Yang's request.[4] The employee who conducted the search saved the results to a disc, and that disc was later delivered to Cuevas.

Cuevas completed his inquiry and briefed Schwartz on what evidence he found that related to Sanders' complaints. Based on the information provided by Cuevas, the information contained

[3] Cuevas was a second level supervisor in his division and a senior Employee Relations Officer (ERO). The ERO is a full-time position within CDCR that is trained and knowledgeable in personnel inquiries and investigations. Further, Cuevas has investigative experience as a peace officer. Finally, Cuevas' regular work location is a significant physical distance from the involved parties, therefore, it was unlikely that he would have regular interactions with any of the individuals. Schwartz concluded that Cuevas was capable of performing the allegation inquiry, while maintaining independence and impartiality. There are no facts that demonstrate this to be untrue.

[4] The OIG alleges that the CDCR ignored the "evidence" submitted by Sanders documenting the above request by Yang as evidence of Yang abusing her position (by making the request). OIG's misplaced conclusion appears to be based on its lack of awareness that Schwartz had asked Yang to get the documents for Cuevas, and therefore, there was no evidence that Yang abused her position in sending the request.

in Sanders' complaint and the documents provided by Sanders, the facts and information that Schwartz was previously aware of, and Schwartz's review and knowledge of Department policy, Schwartz – as the Hiring Authority – determined there was no reasonable belief of misconduct by Yang or Maloney.

Thereafter, Schwartz consulted with and briefed individuals in his chain of command regarding his determination.

3. OIG Urged the CDCR to Obtain a Review from The Office of Legal Affairs, Which Was a Significant Deviation from Standard Practice.

After consulting with his chain of command, Schwartz met with a very high-level representative of the OIG. Schwartz informed the OIG of the facts discovered during the allegation inquiry and of his conclusions.

The OIG representative did not object to the facts or the conclusions reached. Instead, the OIG representative voiced concern only about the process, and OIG urged the CDCR to have a secondary review performed and suggested that the Office of Legal Affairs perform the review. The CDCR policy does not provide that a Hiring Authority should (or even can) obtain a secondary or legal opinion regarding the Hiring Authority's determination of whether reasonable belief of misconduct exists. In fact, the CDCR cannot recall another instance where counsel was asked to provide a review regarding an allegation inquiry during the allegation inquiry process. Despite OIG's recommendation being highly irregular, in the interest of addressing OIG's concerns, the CDCR agreed to have counsel for the Department conduct a legal review and analysis. Schwartz consulted with executive level management regarding assignment of the review and analysis. The CDCR determined that the matter should be sent to

Counsel's title and description of duties redacted.

11

The attorney was not tasked with conducting an inquiry or an investigation. Instead, the attorney was tasked with preparing an analysis to assist Schwartz in his evaluation. The attorney was provided with a copy of the complaint by Sanders, but was not provided the documentation gathered by Cuevas or Schwartz. Instead, the attorney collected documents and policies that he believed necessary to provide Schwartz with the requested legal analysis. The documents gathered by the attorney were attached to his analysis.

6

Redacted context related to Counsel's title and position.

Redacted context related to Counsel's title and position.

The attorney's analysis made abundantly clear that it was not an investigation. For example, in the introduction, the attorney expressly stated "This memorandum was requested to review [Sanders'] complaints, and provide a legal analysis and recommendation regarding whether [Yang] violated any California Department of Corrections and Rehabilitation (CDCR) policies, or misused [Yang's] authority or discretion…." Further, the analysis concludes with "should you have any questions regarding this analysis or recommendation…." Nothing in the written analysis indicates that the attorney conducted an independent investigation into the allegations.

7

On or about January 14, 2019, Schwartz received the attorney's written analysis. Schwartz reaffirmed the decision that there was no reasonable belief of misconduct by Yang or Maloney. Schwartz thereafter met with two very high level members of the OIG staff, along with a CDCR Undersecretary. They were provided with a copy of the review and supporting documents. The OIG inferred that the report was biased, however provided no factual basis for their claim. The OIG stated that they did not necessarily disagree with Schwartz's findings, but did not like that the CDCR utilized Counsel to do the analysis. Schwartz disagreed with their inference of bias and advised that the information provided was supported by factual documentation.

12

Claimed Bias: In its report, OIG, without any evidence of actual bias towards any party, asserts that Counsel was biased in favor of the subjects. OIG claims that this is because the attorney worked closely with Yang, and incorrectly identifies the attorney as "legal representative of one of the subjects." The Department's attorneys represent the Department, and the attorney had not served as Yang's legal representative. Furthermore, while the attorney worked some with Yang, he also worked extensively with Sanders.[7]

5

In its report, OIG points to the attorney's discussions regarding whether information provided by Sanders' in the complaint was false and whether Sanders knew the information to be false, whether Sanders had engaged in similar conduct that Sanders now claimed was improper for Yang to have engaged in, and a potential motivation for Sanders' complaint. OIG asserts this is evidence of bias. Whether the information provided by Sanders in the complaint was false was directly relevant to whether there was a reasonable belief of misconduct by Yang. With regard to the other discussions, while conducting the review, the attorney uncovered information that raised a question as to whether Sanders had engaged in misconduct – in particular, whether Sanders had submitted a knowingly false complaint, a complaint in bad faith, or a complaint in retaliation for Yang's inquiry into Sanders' purported prior misconduct. As an attorney and manager for the

12

[7] Redacted to protect the confidentiality of the parties involved.

CDCR, the attorney had an obligation to advise the Hiring Authority of potential misconduct by an employee. 12

In yet another effort to address the concerns voiced by the OIG, the CDCR assigned a second attorney to review the matter. This second attorney was in a separate unit from the prior attorney, and did not have regular contact with any of the individuals at issue in the allegations. However, OIG, again, objected. OIG suggested that the second attorney was incapable of conducting the review, however, no factual basis for this opinion was provided.

4. CDCR Retained the Services of An Experienced Outside Consultant to Conduct the Review - Yet Another Significant Deviation From Process At the Urging of OIG.

In an attempt to provide as much transparency as possible and satisfy the concerns from the OIG, the CDCR determined that an assessment would be conducted by a non-CDCR employee.

The CDCR hired a special consultant who was both a retired police chief and former inspector general to review the issue. The OIG seemed pleased when informed of the selection of the consultant and his qualifications and experience were more than satisfactory to conduct the review.

The consultant met with Sanders and conducted an interview that included discussing his complaint and obtaining any additional information he may have to provide. During this interview, Sanders provide additional information to the consultant. Regardless of the OIG's assertion, the meeting and discussion was an interview by any standards. The fact that it took place in a coffee shop does not undermine the nature of their discussion, nor lessen the value of the information obtained from Sanders.

During the course of the consultant's review, he was provided the complaint, he requested and received all prior documents and reports, and was given the widest possible discretion on methods and tactics for conducting his review/inquiry. After completing his review/inquiry, the consultant determined that he did not find any evidence that created a belief that Yang or Maloney had engaged in misconduct. In fact, he determined that there had not been misconduct in many circumstances. He provided the CDCR with a report that reflected his evaluation and ultimate conclusions. OIG was also provided with this report. 13

OIG now contends that the consultant was improperly influenced by the CDCR's prior inquiries and analysis. However, there is no evidence that he was improperly influenced. OIG points only to the consultant's use of language and phrasing of certain fact-based statements as evidence that the consultant was influenced by the analysis performed by the CDCR attorney. None of 8

8 the facts or circumstances surrounding the consultant's review or report suggests a lack of independence.

5. Given the Repeated Concerns Raised By OIG, the CDCR Secretary Designated A Previously Uninvolved Undersecretary to Review the Records.

Ultimately, given the numerous reviews by Schwartz, and OIG's continuous concerns, an independent Undersecretary was assigned to act as the Hiring Authority. That Undersecretary reviewed all available documents, which included: Sanders initial complaint with exhibits and the subsequent documents provided by Sanders, the legal review and exhibits conducted by counsel,
14 and the report authored by the special consultant. The independent reviewer had the authority to request additional information if necessary. Following the review, the Undersecretary determined that there was no reasonable belief of misconduct.

There is no evidence to suggest that the Undersecretary was unduly influenced by the prior conclusions reached by the CDCR's counsel and the independent consultant. It appears that the only basis for concluding that the Undersecretary was improperly influenced was that the Undersecretary did not find a reasonable belief, with which OIG disagrees. Disagreement is not evidence of improper influence.

Conclusion

The CDCR does not believe that, at this time, it is appropriate to engage in a protracted discussion regarding whether the underlying conduct was, in fact, misconduct. The CDCR disagrees with many of the statements made by the OIG, and believes that OIG's assumptions regarding certain factual information has caused it to reach conclusions; its conclusions may not be supported by the ultimate facts. As discussed at length above, despite not having a separate process for allegations against high-level employees, the CDCR undertook extensive efforts to conduct an allegation inquiry. The Hiring Authority requested that an employee conduct an allegation inquiry on their behalf, which occurred. Further, the CDCR attempted to address all of OIG's stated concerns. Nothing in the CDCR's conduct evidences an attempt to do anything other than perform an allegation inquiry.

Ultimately, the issue is whether the CDCR should have a defined process for claims against certain high-level employees. It is without question that this matter highlighted the need for such a process. The CDCR does not dispute that it needs to have a defined process in place. It has, and will continue, to work to create that process.

Roy Wesley, Office of the Inspector General
Page 11

If you have further questions, please contact me at (916) 323-6001.

Sincerely,

DocuSigned by:
Kathleen Allison
066FFF332C694AB...

KATHLEEN ALLISON
Secretary

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Comments Concerning the Response Received From the Department of Corrections and Rehabilitation

To provide clarity and perspective, we comment on the California Department of Corrections and Rehabilitation's (the department) response to our report. The numbers below correspond with the numbers we have placed in the margin of the department's response. The department contends the report "is based on incomplete or inaccurate information and speculation" and attempts to defend the actions it took as described in the report as both appropriate and even commendable. We submit the facts contained in the report are comprehensive and accurate. Moreover, we are concerned the department's response suggests that it still does not grasp the basic principles of independence, conflicts of interest, and thoroughness which are so critical to the integrity of its investigative processes. The numerous inaccuracies in the department's response give us further pause, as it appears that the department is willing to deliberately mislead the public in its efforts to defend its handling of a complaint which raised allegations that a high-ranking official engaged in misconduct. We draw your attention to our responses to items (4), (5), (9), (11), (12), and (13) for further information about these inaccuracies.

1. The department, throughout its response, attempts to discredit our findings by portraying our review as one based on speculation, assumption, and supposition. In the instances in which we could not conclusively determine what occurred, such as on pages 14 and 25, we clearly noted this limitation and presented reasonable interpretations of the different scenarios that could have occurred instead of speculating as to which of these scenarios actually occurred.

2. The department's response contends our report conflates the investigations it chooses to label as "allegation inquiries" with the investigations it chooses to label as "formal investigations" and posits that we have no authority or jurisdiction to monitor the subcategory of the investigations it refers to as allegation inquiries. After the department issued its response, we had a productive conversation with Secretary Allison during which she agreed to devise a process by which the department notifies us of any allegation inquiries that the department performs which meet our monitoring criteria. She also agreed not to oppose our efforts to monitor those inquiries. We appreciate Secretary Allison's willingness to resolve this dispute in a professional and appropriate manner.

3. The department contends it was blindsided by our disagreement with the substantive conclusions it reached regarding Sanders' allegations, noting that the only concern we raised was with the independence of the process. Our concerns with the process' lack of independence are inseparable from our concerns with the

substantive conclusions that are drawn from that process. A process lacking in independence is less likely to lead to correct substantive conclusions and more likely to lead to inappropriate outcomes that the department cannot defend.

4. The department's response reveals that Yang did not unilaterally request that her subordinate gather evidence related to the allegations made against her. Rather, the department claims it was actually Keith Schwartz—Yang's manager—who directed Yang to gather evidence relevant to the allegations made against her. The department criticizes our report, claiming that we lacked awareness concerning this detail. The department claims our findings on this matter "are based on assumption or supposition," when in reality they were based on statements the department provided us when probed about its handling of this allegation. Our lack of awareness on this critical detail was not the result of a lack of due diligence on our part; rather, it was borne out of Schwartz's lack of candor with our office when we asked him about the department's handling of this allegation.

   In a February 2020 conversation with Schwartz, the departmental executive who directed the department's handling of the complaint, we asked him whether the department had examined this allegation in light of the evidence Sanders presented that suggested Yang ordered her subordinate to gather the records. At that time, Schwartz told us Consultant had reviewed the allegation and concluded that Yang's involvement did not hinder or undermine the fact-finding process, so he decided not to take any further action regarding the allegation. Had Schwartz been forthcoming about the facts surrounding this allegation when we asked him about it and disclosed the information the department now uses in an attempt to discredit our report—that he asked the subject of a complaint to gather evidence about the complaint—our criticism would have focused instead on Schwartz's decision to have Yang gather the evidence. It also explains why Schwartz did nothing further with the allegation; he did not see the inappropriateness of his own actions.

   Schwartz's actions of involving the subject of a complaint in the evidence-gathering process jeopardized the integrity of the inquiry unnecessarily. Schwartz could have obtained the evidence just as easily by approaching Yang's subordinate directly and ordering the subordinate to collect the necessary evidence.

5. The department contends it was appropriate for the attorney referred to in the report as "Counsel" to assess the merit of allegations made against Yang despite Counsel's recent representation of Yang in legal proceedings that took place between February 2018 and July 2018—just a few months earlier. According to the department, Counsel represented **the department** in that proceeding, and not Yang.

We disagree fundamentally with the department's position that Counsel was not actually representing Yang in these legal proceedings. The proceedings, which were before the State Personnel Board, involved allegations that Yang engaged in unlawful whistleblower retaliation. Although the Board ultimately dismissed the complaint after holding an informal hearing, the potential consequences that Yang could have faced in those proceedings demonstrate that Counsel was actually representing and defending Yang in that action. Had the Board found sufficient evidence to sustain the allegations against Yang, the department would have been required by law to impose disciplinary action against Yang. Government Code section 8547.8 states:

> Any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for having made a protected disclosure, is subject to a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for a period not to exceed one year. Pursuant to Section 19683, any state civil service employee who intentionally engages in that conduct shall be disciplined by adverse action as provided by Section 19572.

The department's position also contradicts the record of those legal proceedings, which clearly indicate that Counsel concurrently served as both Yang's and the department's counsel of record:

Respondents, California Department of Corrections and Rehabilitation (Respondent CDCR or CDCR) and Julie Yang (Respondent Yang) (collectively, Respondents) were present and represented by "Counsel", [title redacted], [redacted], CDCR, and "Counsel's" Supervisor, [title redacted], CDCR.

As Counsel was tasked with defending Yang's actions and preventing Yang from incurring personal liability, he undeniably served as Yang's attorney in this matter. The department's representations to the contrary reflect a basic lack of understanding regarding its attorneys' role in these proceedings and suggest a willingness to deceive the public by misrepresenting Counsel's true role as Yang's attorney.

Even if we were to accept the department's position that Counsel represented Yang only in her official capacity as a departmental

employee—and not in her personal capacity as a private citizen—we find this to be a distinction without a difference as it relates to Counsel's ability to provide an impartial assessment of Sanders' complaint against Yang. In other words, less than six months before being tasked with assessing the complaint against Yang, Counsel, at the behest of the department, spent five months serving as Yang's counsel of record and advocating that a complaint against Yang be dismissed. Whether Counsel represented Yang in her individual capacity or official capacity is irrelevant to Counsel's ability to provide a neutral assessment of the allegations Sanders made against Yang. Counsel, or anyone in Counsel's shoes, could not reasonably be expected to shift roles—from Yang's zealous advocate to Yang's potential critic—so quickly.

The department also dismisses our concern that Counsel, as Yang's and Maloney's long-time colleague and advisor, also should have precluded Counsel's involvement in assessing the complaint. According to the department, Counsel's extensive working relationship with Sanders offsets any potential bias stemming from those long-term relationships. To the contrary, Counsel's relationships with each of the involved parties only made him less qualified to perform an independent assessment of the complaint, not more qualified. By having these long-term relationships with all three involved parties, Counsel has been exposed to a voluminous amount of information about the parties that was not relevant to the issues alleged in the complaint. This extraneous information had the potential to impact Counsel's assessments of each parties' actions whether he consciously realized it or not—a widely recognized concept known as implicit bias. Another factor impacting Counsel's implicit bias was his future employment and working relationship with Yang. If Yang found out that Counsel had recommended the department investigate the allegations against Yang, Yang would naturally be less willing to confide in Counsel and seek out Counsel's assistance in the future. Therefore, Counsel would be less inclined—whether he recognized it or not—to conclude that Yang engaged in misconduct if the facts objectively led to such a conclusion.

6. The department claims Counsel did not possess any of the documents that we found to have been omitted from his report. Yet, in its response, the department admits "[Counsel] was provided with a copy of the complaint by Sanders, but was not provided the documentation gathered by Cuevas or Schwartz." The documents we fault Counsel for failing to attach to his report, as discussed on page 13 of our report, are the complaint that served as the basis for his legal analysis and the records Sanders submitted along with his complaint. Since the department admits providing Counsel with Sanders' complaint, only one of two scenarios explain what happened to the supporting materials; both would be worthy of criticism: either (1) Counsel was provided a copy of Sanders' complaint, but not the

evidence he provided in support of his claims; or (2) Counsel failed to attach Sanders' supporting evidence to his report. Regardless of what happened to the supporting documentation, Counsel's failure to attach the complaint to his report means that when Consultant received the report to begin his independent assessment, he did not have Sanders' complaint. Therefore, Consultant formed his first impressions of the allegations from his review of Counsel's report and not from Sanders' complaint. As Consultant noted in his report, he had to ask Sanders to provide him with a copy of the complaint.

7. The department defends Counsel's report on the basis that it was clearly a "legal analysis," claiming it could not have resembled the final product of an inquiry or an investigation because Counsel stated "in multiple locations that it is an analysis" and that "nothing in the written analysis indicates that the attorney conducted an independent investigation into the allegations." We disagree with the department's contention that Counsel's act of referring to his work as "an analysis" sufficiently countered the fact that he provided recommended disciplinary findings throughout his report. During the department's disciplinary and investigative processes, once an investigation has been completed, an attorney reviews the investigative report and provides a written legal analysis to the hiring authority in which the attorney summarizes the evidence pertaining to each allegation and issues a recommended finding for each allegation under investigation. We find untenable the department's position that Counsel's report, which contains the same information and recommended findings, does not resemble the legal analyses its attorneys provide hiring authorities after reviewing a completed investigation report. If Counsel was truly performing only a legal analysis of the complaint, the recommendations should have been whether or not to open an inquiry into the allegations, not whether to sustain them.

   We reviewed Counsel's report in response to the department's contention that Counsel made it "abundantly clear" that his work product was a legal analysis by describing it as such in multiple locations of the report. Counsel makes this representation three times in his report. Notably, the department quoted only two of those instances in its response. The department chose not to quote Counsel's third description of his work product, in which he stated, "The following legal analysis and recommendations consider whether the allegations made by Sanders against Yang **can be sustained by a preponderance of the evidence**, based on the documents and policies reviewed[.]" [*Emphasis not in original.*] The only time an attorney utilizes the preponderance of the evidence standard of review in the disciplinary process is after an investigation has been completed, when the hiring authority is tasked with determining whether to sustain the allegations that were investigated. This postinvestigative evidentiary standard signals to the reader that an investigation has been performed.

8. Our report does not suggest Consultant did not perform his own review of the documents and information the department provided him. We criticize the department's decision to provide him with Counsel's legal analysis as the starting point for his review and point out the degree of the similarities between the two for the purpose of demonstrating the impact Counsel's analysis appears to have had on Consultant's assessment of the complaint. There are far too many similarities between the specific language Counsel and Consultant used in their reports and the analytical flaws contained in each to conclude that Consultant was unaffected by his receipt of Counsel's report; therefore, it is our position that Consultant's report was not the result of a truly independent review.

9. Although we detailed (on pages 20–28 of our report) the State's and the department's policies governing employees' use of State vehicles and the reasons why Maloney's use of the State vehicle between October 2017 and April 2018 violated those policies, the department continues to assert Maloney's use was appropriate and refuses to acknowledge that the records provide a reasonable belief that Maloney's use violated State and department policy. Most surprisingly, the department now claims that Maloney was in an acting assignment while she used the vehicle for commuting purposes, which would have entitled her to reimbursement for the excess mileage she incurred while commuting to her new assigned work location in San José because it was more than 50 miles farther than her previously assigned work location. Because the department had not previously raised Maloney's assignment to an acting role as a justification for her use of the State vehicle for commuting purposes, we requested the department provide us Maloney's employment records to verify this fact. Within 24 hours, the department provided us information from Maloney's personnel records, which confirmed that her acting assignment had ended on September 30, 2017, and that she was officially appointed to the position on October 1, 2017. These dates are critically important because the vehicle usages under scrutiny on page 24 of our report all occurred between October 2017 and April 2018. Maloney was not in an acting position during this time span, which renders frivolous the department's argument that her service in an acting role entitled her to use a State vehicle for commuting purposes. The department's willingness to present this false information in its official response to our report suggests the department places a greater emphasis on defending itself at all costs than it does in confirming the veracity of the information it provides to the public.

10. The department defends Cuevas' efforts even though our report does not criticize Cuevas' efforts. We criticized, on pages 10 and 11, the lack of documentation from which anyone could determine what efforts Cuevas took, what information Cuevas gathered, and whether Cuevas' conclusions were based on sound reasoning. The

department's failure to ensure Cuevas' efforts were documented precluded us, and anyone else, from evaluating his efforts.

11. The department's contention that we urged it to refer the matter for handling by its Office of Legal Affairs is not accurate. We made no contact with the department regarding this matter until after we had reviewed a copy of Counsel's report, which is dated January 14, 2019. During this initial contact, which occurred on February 27, 2019, we urged the department to refer the complaint to an outside entity for an independent assessment.

12. The department dismisses the evidence of bias that manifested itself in Counsel's report (contained on pages 30–32 of our report), claiming that Counsel had a duty to provide this information because it demonstrated Sanders had made false allegations. Although we cannot disclose the substantive nature of the information Counsel provided in his report, and had to redact the majority of it to avoid disclosing information protected by the attorney–client privilege, none of the information, in our opinion, tended to demonstrate Sanders' allegations were false. The department's continued insistence that this information was relevant to the allegations only underscores the department's inability to understand the nature of Sanders' allegations and his reasons for bringing the allegations—both of which could have been clarified by interviewing him to obtain an explanation of his allegations.

    Furthermore, as the department insists, the complaint was in what it deems the "allegation inquiry" stage. As we explained on pages 9 to 10 of our report, the goal at this stage of the investigative process is to determine whether there is a reasonable belief that the alleged misconduct occurred. Sanders' motives, which were pure speculation by Counsel since he had not interviewed him to determine his actual motives, would not be relevant to this analysis. They would only be relevant at the time when a hiring authority had to determine whether the allegations could be sustained by a preponderance of the evidence, where witness credibility plays an important role. Whether Sanders was raising the allegations out of a sense of duty or out of spite is irrelevant to a determination of whether it is reasonable to believe, based on the evidence gathered, that the acts may have occurred. Counsel's suggestion that Sanders raised the allegations as a form of retaliation is clear evidence of bias.

    Even more puzzling is that the department now publicly denies that Counsel's report showed outward signs of bias despite previously indicating its agreement with our position. In our February 2020 conversation, Keith Schwartz stated that he agreed with our assessment that Counsel's report read like a defense of Yang rather than as a neutral assessment of Sanders' allegations and wished that Counsel had included only the relevant facts in his report. Again, the department's willingness to contradict its earlier statements to our office in an effort to defend its actions is highly concerning.

13. The department's statement that Consultant was tasked with performing a "review/inquiry" and "was given the widest possible discretion" contradicts Consultant's statement to us, in which he stated that the department assigned him to conduct only an independent assessment to determine whether there should be an inquiry or investigation.

14. The report does not criticize the undersecretary's substantive conclusions. Based on the reports the undersecretary was provided and the representation that a high-ranking attorney and an independent consultant authored the reports, it was reasonable for the undersecretary to determine the charges should not be sustained. We only criticized, on page 16 of the report, the undersecretary's decision to remove an allegation from a complaint due to uncertainty when a simple interview of Sanders would have resolved this ambiguity.

Special Review

The California Department of Corrections and Rehabilitation Mishandled Allegations That a High-Ranking Official Engaged in Misconduct

OFFICE *of the*
INSPECTOR GENERAL

Roy W. Wesley
Inspector General

Bryan B. Beyer
Chief Deputy Inspector General

STATE *of* CALIFORNIA
December 2020

OIG