

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 1488 (Glazer)
Version: March 16, 2022
Hearing Date: April 26, 2022
Fiscal: Yes
Urgency: No
AM

SUBJECT

San Francisco Bay Area Rapid Transit District: Office of the BART Inspector General

DIGEST

This bill revises the duties and responsibilities of the San Francisco Bay Area Rapid Transit District (BART) Inspector General (BART IG), as specified, and provides that the IG has the independence necessary to conduct all of its audits and investigations in conformity with certain standards. The bill also specifies the BART IG's access to BART facilities and employees, officers, contractors and the authority to examine records and other property, as provided.

EXECUTIVE SUMMARY

Independent inspector generals and auditors provide essential accountability and transparency over government programs and operations through objective analysis. Ensuring their independence is critical to their effectiveness and credibility. This bill seeks to strengthen the independence of the BART IG and provide the BART IG with the powers and authority necessary to effectively carry out the mission of the Office of the BART IG. The bill enacts various changes modeled after current laws governing existing inspector generals, such as the California State Auditor (Auditor), and nationally recognized best practices or standards for auditors and inspector generals, including the Government Auditing Standards published by the Comptroller General of the United States.

The bill is sponsored by the author, and supported by the Association of Local Government Auditors. The bill is opposed by the Board of the Bay Area Rapid Transit District (Board) and the California Board of the Amalgamated Transit Union. The bill passed out of the Senate Transportation Committee on a vote of 15 to 0.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the BART, governed by a board of directors (Board), with specified powers and duties relative to the construction and operation of a rapid transit system.
- 2) Creates an independent Office of the BART IG to ensure BART makes effective use of bridge toll revenue and other revenue and operates efficiently, effectively, and in compliance with applicable laws. (Pub. Util. Code § 28840(a).)
 - a) Requires the Board to nominate three people to the Governor and requires the Governor to appoint one of the three to serve as the BART IG for an initial four-year term, with an option to renew the term at will. (*Id.* at (b).)
 - b) Authorizes the Board to remove the BART IG from office if either a two-thirds majority of the members of the Board votes for their removal or if the BART IG violates federal or state law or regulation, a local ordinance, or any policy or practice related to ethical practices, including but not limited to, the acceptance of gifts or contributions. (*Ibid.*)
 - c) Requires the reason for removal of the BART IG be stated in writing, include the basis for removal, and posted on BART's website. (*Ibid.*)
- 3) Specifies the duties and responsibilities of the BART IG including, among others, conducting, supervising, and coordinating audits and investigations relating to the district's programs and operations. (Pub. Util. Code § 28841.)
- 4) Specifies that any investigatory file compiled by the BART IG is an investigatory file compiled by a local law enforcement agency subject to disclosure pursuant to the California Public Records Act. (Pub. Util. Code § 28844.)

This bill:

- 1) Changes the requirements to remove the BART IG from office during a term to both a two-thirds majority vote of the members of the Board and if the BART IG violates a federal or state law or regulation, a local ordinance, or a policy or practice of the authority relative to the ethical practices.
- 2) Provides that the IG shall have the independence necessary to conduct all of its audits in conformity with the Government Auditing Standards, published by the Comptroller General of the United States, and its investigation in conformity with the Principles and Standards for Offices of the Inspector General, published by the Association of Inspectors General.
- 3) Clarifies and expands the duties and responsibilities of the BART IG to include:

- a) engaging in fraud prevention activities, including reviewing policies, procedures, and transactions to identify internal control weaknesses that can lead to fraud;
 - b) providing recommendations to strengthen internal controls that will prevent or detect fraud, waste, and abuse;
 - c) providing training to BART employees about what fraud is and how to prevent and report it;
 - d) identifying best practices in the delivery of not only capital projects, but also programs and operations; and
 - e) identifying abuse, waste, and fraud in the operating practices of BART.
- 4) Requires BART to give the BART IG access and authority to examine all records, files, documents, accounts, reports, correspondence, or other property of BART and external entities that perform work for them.
- a) Requires any officer or employee of BART or entity having these records or property in their possession, under their control, or otherwise having access to them, to permit access to, and examination and reproduction of, the records or property upon the request of the BART IG or the IG's authorized representative.
 - b) Authorizes the BART IG to gain access to confidential records or property that are obtained in connection with any audit, investigation, or review conducted, unless a law specifically refers to and precludes it.
 - c) Requires that any information or documents obtained in connection with any audit, evaluation, investigation, or review conducted by the BART IG are subject to any limitations on release of the information or documents as may apply to an employee or officer of BART or external entity that provided the information or documents.
 - d) Specifies that providing confidential information, including, but not limited to, confidential information that is subject to a privilege, does not constitute a waiver of that privilege.
- 5) Prohibits an employee, officer, or contractor from distributing, reproducing, releasing, or failing to safeguard confidential draft documents exchanged between the BART IG and the entity subject to any audit, investigation, or review without the IG's express permission.
- 6) Authorizes the BART IG, or their designee, to issue subpoenas for: the attendance of witnesses; the production of records, files, documents, accounts, reports, correspondence, or other property; and the making of oral or written sworn statements, in any interview conducted as part of an audit, investigation, or review. Authorizes any subpoena issued to be served by any person authorized to serve process of any court of record or by any person designated for that purpose by the BART IG or their designee.

- 7) Requires the BART general manager to respond to all findings and recommendations made by the BART IG within 10 business days of receiving a request to respond and requires certain information in the response.
- 8) Authorizes the BART IG to have sole authority to do both (a) determine if the general manager's proposed and implemented corrective actions satisfy the underlying issues identified in the IG's recommendations, and (b) determine the accuracy of reports to be published by the Office of the BART IG.
- 9) Authorizes the BART IG to establish a system for maintaining records that is outside of the district's computer network and not accessible by the other parts of the district to ensure the confidentiality of its work from the other parts of the district, including emails.
- 10) Makes various other changes to the authority of the BART IG, as provided.

COMMENTS

1. Stated need for the bill

The author writes:

Inspector Generals are supposed to be independent watchdogs of the agency with which they serve. This bill would give new powers and protections to the BART Inspector General to ensure that the office is truly independent. The changes proposed in this bill are modeled after current laws governing the CalTrans Inspector General and the state Auditor, and nationally recognized best practices or standards for auditors and inspector generals. With these changes, the residents of the Bay Area could be confident that the Inspector General can exercise the independent oversight that was intended when SB 595 was enacted in 2017 and later ratified by the voters.

2. Establishment of the IG and issues getting the Office of the IG's charter adopted

Senate Bill 595 (Beall, Ch. 650, Stats. 2017), which authorized Regional Measure 3,¹ also created the independent Office of the BART IG to ensure BART makes effective use of bridge tolls and other revenue and operates efficiently, effectively, and in compliance with applicable federal and state laws. In June 2019, Governor Newsom appointed Harriet Richardson as the first BART IG. The Fiscal Year 2021 Annual Report to the Legislature from the BART IG details issues the IG has encountered establishing the

¹ Regional Measure 3 was approved by the voters in 2018 and raised tolls on the Bay Area region's state-owned toll bridges.

Office, specifically, developing the Office of the IG's charter and getting it approved by the Board.²

The Annual Report states that the Board requested the BART IG have discussions with labor unions regarding the proposed charter and that the IG was "surprised" that the unions presented revisions to the proposed charter, "including major changes that would alter the intent of the legislation that created our office and create independence impairments."³ The report further stated:

[...] we discussed the unions' proposed revisions in detail and accepted changes they proposed that allowed us to stay within the confines of the law and our professional standards. However, accepting some of their revisions would mean that we would be noncompliant with the ethical principles and independence standard that the Government Code requires we follow, as well as our statutory mandates in the Public Utilities Code, and would remove the authority traditional and required of an OIG such that we cannot work independently. We, therefore, declined to accept some of the changes. Our position does not imply that we will fail to uphold the rights of union represented employees, or that we will not work with union leaders in a manner that allows for their feedback and input when appropriate.

The charter was never adopted by the Board.

3. Bill provides the BART IG new powers and authority to fulfill purpose of independent oversight of BART

The author has introduced this bill with the goal of ensuring the BART IG has the statutory authority and powers needed to be an independent inspector general. Many of the provisions of the bill are modeled off existing provisions of law related to other existing inspector generals and their authority and powers, such as the Auditor, Inspector General of the Department of Transportation (CalTrans IG), Inspector General of the California Department of Corrections (CDCR IG), and Inspector General of the Los Angeles County Metropolitan Transportation Authority (LACMTA IG). Specifically, the bill provides that the BART IG shall have the independence necessary to conduct all of its audits and investigations in conformity with national standards and freedom from any impairments that may restrict the office's abilities.

² Harriet Richardson, *Fiscal Year 2021 Annual Report* Bart Office of the Inspector General (July 16, 2021) at p. 4, available at

<https://www.bart.gov/sites/default/files/docs/BART%20OIG%20Fiscal%20Year%202021%20Annual%20Report%20to%20Legislature.pdf>.

³ *Ibid.*

a. Authority to inspect confidential records

The bill requires BART to give the BART IG access and authority to examine all records, files, documents, accounts, reports, correspondence, or other property of BART and external entities that perform work for them. It requires any officer or employee of BART or any entity having these records or property in their possession, under their control, or otherwise having access to them, to permit access to, and examination and reproduction of, the records or property upon the request of the BART IG or the IG's authorized representative. The bill additionally authorizes the BART IG to gain access to confidential records or property that are obtained in connection with any audit, investigation, or review conducted, unless a law specifically refers to and precludes it. The bill also provides that complying with these provisions as it relates to confidential information, including, but not limited to, confidential information that is subject to a privilege, does not constitute a waiver of that privilege.

This authority is similar to the Auditor's authority under Section 8545.2 of the Government Code, which provides the Auditor broad access to records of a public entity being audited, and the CalTrans IG's authority under Section 14461 of the Government Code, which specifically authorizes access to examine all records and properties of the Department of Transportation and external entities that receive transportation funds from the department, even if confidential or privileged. The CDCR IG has similar authority to the Auditor and the LACMTA IG has authority to unrestricted access to all MTA records and prompt access to officers, employees, or contractors as necessary.⁴ (Pen. Code § 6126.5; LACMTA Admin, Code § 2-20-010.)

The bill ensures that the confidentiality of any records accessed by the BART IG or their designee remains confidential by requiring that any information or documents obtained in connection with any audit, evaluation, investigation, or review conducted by the IG are subject to any limitations on release of the information or documents as may apply to an employee, officer, or external entity that provided the information or documents. Additionally the bill ensures that complying with these provisions does not constitute a waiver of confidentiality or privilege. Lastly, the bill prohibits an employee, officer, or contractor from distributing, reproducing, releasing, or failing to safeguard confidential draft documents exchanged between the BART IG and the entity subject to any audit, investigation, or review without the BART IG's express permission.

⁴ The LACMTA IG, similarly to the IG, is established in state law but the statute is largely silent on its powers. (Pub. Util. Code § 130051.28) The LACMTA IG gets most of its authority via an ordinance adopted by the LAMTA's Board of Directors. (LACMTA Admin, Code § 2-20-010.)

b. Subpoena power

The bill authorizes the IG, or their designee, to issue subpoenas for:

- the attendance of witnesses;
- the production of records, files, documents, accounts, reports, correspondence, or other property; and
- the making of oral or written sworn statements, in any interview conducted as part of an audit, investigation, or review.

The bill authorizes any subpoena issued to be served by any person authorized to serve process of any court of record or by any person designated for that purpose by the BART IG or their designee.

Existing law grants the Auditor the power to issue subpoenas and administer oaths. (Gov. Code § 8545.4.) Similarly, the CDCR IG has subpoena power and the power to administer oaths. (Pen. Code § 6127.3.) The LACMTA IG also has the explicit authority to issue subpoenas, examine witnesses under oath, and compel the production of evidence. (LACMTA Admin. Code § 2-20-050.) However, the CalTrans IG is not granted specific authority to issue subpoenas.

c. Access and authority to meet with an employee, officer, or contractor

The bill authorizes the BART IG to have access to and authority to meet with any employee or officer or contractor as necessary to complete an audit, investigation, or review. Currently, a represented BART employee has the right to be represented by their exclusive representative at an investigatory interview if the employee reasonably believes that it might result in disciplinary action. Under existing law this is commonly known as a “Weingarten right” as it is derived from a 1975 U.S. Supreme Court Case *NLRB v. J. Weingarten, Inc.* (420 U.S. 251.) that held a represented employee had certain rights in regards to representation in an investigatory interview. An employer is under no obligation to inform employees of these rights and if it is not asserted then the employee loses the right to assert them. Nothing in the bill specially provides that the BART IG has the authority to disregard or supersede these rights.

d. Other changes in the bill

The bill makes various other changes to the BART IG’s duties, powers, and responsibilities, including:

- increasing the requirements to remove the IG from office;
- expanding the IG’s power to identifying abuse, in addition to waste and fraud;

- placing new duties of the general manager of BART to respond to the IG;
- granting the Office of the IG authority to hire staff and consultants;
- authorizing the Office of the IG to establish a system for maintaining records that is outside of BART's computer network and not accessible by the other parts of the district in order to ensure the confidentiality of its work from the other parts of the district; and
- specifying that the IG shall have the independence necessary to conduct all of its audits in conformity with the Government Auditing Standards, published by the Controller General of the United State, and its investigation in conformity with the Principles and Standards for Offices of the Inspector General, published by the Association of Inspectors General.

4. Opposition

BART is opposed to the bill unless amended and provided the Committee with various issues and concerns it hopes to address with the author. These include:

- increasing the requirements to remove the BART IG from office: they would like existing law to remain as is;
- expanding the IG's power to identifying abuse, in addition to waste and fraud, BART is concerned it infringes on other oversight and audit entities within BART;
- concerns that the bill infringes on represented employees Weingarten rights;
- access to confidential records: BART is concerned that access to certain records and property may conflict with existing oversight and audit entities at BART, but do not elaborate as to which records or properties;
- subpoena authority: BART wants to clarify manner in which subpoenas would be issued and enforced;
- additional duties placed on the BART general manager;
- Office of BART IG's authority to hire staff and consultants;
- potential for authority to access employees being in violation of employee rights under their collective bargaining union for representation; and
- ensuring that the separate system for Office of IG records is coordinated to determine appropriate policies, procedures, licensing, and equipment.

The California Conference Board of Amalgamated Transit Union opposes the bill writing:

[...] we believe that SB 1488 substantially undermines our existing collective bargaining agreements with respect to represented employees rights during an investigation, applicable notice requirements, and the union's ability to effectively represent its members.[...]

Finally, we believe that for investigations which involve represented employees or bargaining unit work, the inspector general, must seek prior cooperation and assistance of the Union in the investigations to ensure our members' rights are observed.

5. Statements in support

The Association of Local Government Auditors writes in support:

ALGA is a professional organization with more than 300 member organizations located primarily in the United States (US) and Canada. ALGA is committed to supporting independent performance auditing in local governments, and membership includes local government auditors as well as local government inspectors general.

ALGA believes that an independent government audit function, operating under applicable government auditing standards, such as the Government Auditing Standards (Standards) issued by the U.S. Comptroller General's Government Accountability Office (GAO), plays a key role in effective governance, public accountability, and transparency. Those attributes are also key goals of what an Office of Inspector General strives to achieve within their organization.

ALGA has published a number of best practices for local government auditing on our website, at www.algaonline.org under the "Build an Audit Function" tab. These publications include *Auditor Independence* and *Model Legislation Guidelines for Local Government Auditors*. We note that SB 1488 is very much consistent with our guidelines and model legislation [...] (hyperlinks omitted)

SUPPORT

Association of Local Government Auditors

OPPOSITION

California Conference Board of Amalgamated Transit Union
San Francisco Bay Area Rapid Transit District Board of Directors

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 595 (Beall, Ch. 650, Stats. 2017) authorized a special election in the Bay Area, known as Regional Measure 3, to consider a proposed increase in the amount of the toll rate charged on the state-owned toll bridges in that area to be used for specified projects and programs, and also created the Independent Office of the BART IG within BART, with specified powers and responsibilities for audits and investigations.

SB 87 (Committee on Budget and Fiscal Review, Ch. 32, Stats. 2019) added new powers and duties to the Caltrans Office of Audits and Investigations.

SB 1 (Beall, Ch. 5, Stats. 2017) provided more the \$5 billion annually in new funding for transportation infrastructure, and created the Independent Office of Audits and Investigations within Caltrans, with specified powers and duties.

PRIOR VOTES:

Senate Transportation Committee (Ayes 15, Noes 0)
