

Date of Hearing: June 13, 2022

ASSEMBLY COMMITTEE ON TRANSPORTATION

Laura Friedman, Chair

SB 1488 (Glazer) – As Amended March 16, 2022

SENATE VOTE: 37-0

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

SUMMARY: 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 BART 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. Specifically, **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 BART 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 BART 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 BART 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 BART 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.

EXISTING LAW:

- 1) Establishes 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.

- 3) Requires the BART 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.
- 4) Authorizes the BART Board to remove the BART IG from office if *either* a 2/3rds majority of the members of the Board votes for 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. Requires the reason for removal of the BART IG be stated in writing, include the basis for removal, and posted on BART's website.
- 5) 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.
- 6) Provides for the BART IG to receive \$1 million from an allocation of bridge toll revenue from the Bay Area Toll Authority (BATA), authorizes BATA to increase that amount, as specified.
- 7) Requires the Board to appoint a general manager who is responsible, subject to the direction and control of the Board, for the acquisition, construction, maintenance, and operation of the facilities of the district and also for the administration of the business affairs of the district.

FISCAL EFFECT: According to the Senate Appropriations Committee, pursuant to Senate Rule 28.8, negligible state costs.

COMMENTS:

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.

Background. BART is a special district created by the State of California consisting of Alameda County, Contra Costa County, and the City and County of San Francisco. BART connects San Francisco with cities in the East Bay and suburbs in northern San Mateo County operating on five lines, 131 miles of track with 50 stations in five counties. With an average pre-COVID-19 weekday daily ridership of about 405,000 passengers, BART is the fifth-busiest heavy rail rapid transit system in the nation.

SB 595 (Beall), Chapter 650, Statutes of 2017, authorized Regional Measure 3 (RM3) and created the BART IG. The measure, which raised toll rates on the Bay Area's seven state-owned

bridges, was approved by voters in 2018 in the City and County of San Francisco; and Alameda, Contra Costa, Marin, Napa, San Mateo, Santa Clara, Solano, and Sonoma Counties.

The BART IG was established to ensure BART makes effective use of bridge toll and other revenue and operates efficiently, effectively, and in compliance with applicable federal and state laws. Duties and responsibilities for the BART IG include, among others, conducting fraud and waste investigations, conducting audits, making recommendations to improve the efficiency and effectiveness of BART programs and operations, identifying opportunities to improve the data used to determine project resource allocations, and identifying and recommending best practices in the delivery of capital projects.

SB 595 also requires the Bay Area Toll Authority (BATA) to provide \$1 million annually from an allocation of RM3 revenue to fund the operations of -the BART IG. It allows BATA to increase funding in the second and subsequent years of operation of the office, to the extent the BART IG requests and justifies the need for funds and such requests can be accommodated in BATA's budget.

Issues getting the Office of BART IG Running and Adopting a Charter. The Office of the BART IG Fiscal Year 2021 Annual Report says that since its inception, the office has received 60 complaints and 42 cases have been resolved. The most common allegations have been complaints alleging fraud, including theft of time and contracting fraud, and compliance, mostly policy and procedure noncompliance. Additionally, the BART IG conducted a district-wide risk assessment to help develop an audit plan by understanding areas vulnerable to fraud, waste, or abuse, and identifying opportunities to improve efficiency and effectiveness in the use of resources.

However, Ms. Harriet Richardson, the current BART IG, details issues getting the office running, specifically the development and approval of a charter for the office to clarify roles and responsibilities. The charter was built on both the BART IG statute and additional requirements and authority given to other IGs in California and throughout the nation. The BART IG presented the charter to the BART Board of Directors in January 2021.

According to the Annual Report, "the Board discussed our charter but continued it to a future meeting asking that we have discussions with labor unions before returning to the Board to adopt it. At the time, we understood the Board's request to be that we meet with union leaders to explain what our work entails and the standards that guide it, and for us to address the unions' concerns about how we would engage with represented employees who are under investigation. We were surprised, then, when the labor unions presented us with revisions to our charter, including major changes that would alter the intent of the legislation that created our office and create independence impairments."

Further, "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." The charter was not adopted.

New IG Powers and Authority. 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 after 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.

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 BART 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. (Pen. Code § 6126.5; LACMTA Admin, Code § 2-20-010.)

The bill ensures that any records accessed by the BART IG or their designee remain confidential by requiring 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, 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.

Subpoena power. The bill 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.

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.)

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.

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 BART IG from office;
- expanding the BART 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 BART IG;
- granting the Office of the BART IG authority to hire staff and consultants;
- authorizing the Office of the BART 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 BART 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.

According to the author, “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.”

The Association of Local Government Auditors, supporters of the bill, state that “Section 1 of SB 1488 requires the OIG to have the independence needed to conduct audits in conformity with Government Auditing Standards. These Standards are specifically recommended in our Model Legislation, which also includes language aimed at strengthening independence consistent with the new language in the bill. Section 2 of the bill adds “abuse” to language about fraud and waste, charges the OIG with engaging in fraud prevention activities, and adds language aimed at preventing actions that may restrict the OIG’s ability to conduct independent and objective audits or investigations and issue reports, all consistent with language in ALGA’s publications. Section 3 of the bill adds language aimed at ensuring that the OIG has the access to employees and records and the authority needed to perform audits and investigations in compliance with auditing standards and standards for inspectors general. This language is consistent with ALGA’s Model Legislation, which also notes that many jurisdictions specify subpoena powers for the auditors. Having subpoena powers provides the OIG with better opportunities to obtain complete and accurate information to conduct audits and investigations when they have been faced with resistance in performing their work. Section 4 of the bill requires that the General Manager respond to findings and recommendations made by the office within a certain time frame, consistent with our Model Legislation. Section 5 of the bill gives the Inspector General authority over the Office’s employees, consistent with language in our Model Legislation. This section also makes clear that the OIG’s ability to hire qualified consultants includes obtaining independent counsel if the Inspector General identifies a conflict of interest or threat to the Office’s independence. This language is the same in ALGA’s Model Legislation.”

The California Conference Board of the Amalgamated Transit Union, writing in opposition to the bill, contend that “SB 1488 substantially undermines our existing collective bargaining agreements with respect to represented employee rights during an investigation applicable notice requirements, and the union’s ability to effectively represent its members. For example, SB 1488 imbues the Inspector General with unnecessarily broad power by providing unfettered access to “examine all records, files documents, accounts, reports, correspondence...” of any “external entities.” As drafted, it is unclear whether “external parties” could be read to apply to the union. Finally, we believe that for investigations which involve represented employees or bargaining unit work, the inspector general must seek the prior cooperation and assistance of the Union in the investigation to ensure our members’ rights are observed.”

Committee Comments. The author’s office and BART have agreed to several amendments that alleviate a number of concerns raised by BART. These amendments would address concerns related to the expanded scope of the BART IG, access to confidential records, subpoena power, additional duties of the BART General Manager, hiring of staff and consultants, and maintaining a separate system for records. Due to time constraints, the parties have agreed to have these amendments processed when the bill is in the Assembly Judiciary Committee. Outstanding concerns remain regarding the BART IG removal process and the BART IG’s access to district employees.

REGISTERED SUPPORT / OPPOSITION:

Support

Association of Local Government Auditors

Opposition

California Conference Board of The Amalgamated Transit Union

Oppose Unless Amended

San Francisco Bay Area Rapid Transit District (BART)

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