

DATE: January 21, 1987

SUBJECT: Procedural Questions Concerning the  
Current Charter . 128 Investigation

REQUESTED BY: Rich Snapper, Personnel Director

PREPARED BY: John M. Kaheny, Deputy City Attorney

#### QUESTIONS PRESENTED

In a memorandum dated December 12, 1986, you requested answers to the following questions:

1. Can evidence and/or testimony that is obtained by the Civil Service Commission during a Charter . 128 investigation be used as the basis for subsequent discipline?

2. Can the Civil Service Commission (1) direct, (2) initiate, or (3) recommend discipline based upon testimony and/or evidence obtained during a Charter . 128 investigation? The question assumes that the employees are outside of the Personnel Department.

3. Can the Civil Service Commission grant immunity from disciplinary action to employees who testify during a Charter . 128 investigation?

4. Are the notes, records, letters, responses and investigation materials of the Civil Service Commission's Charter . 128 investigation subject to mandatory disclosure, and if so, under what circumstances? As background, it is the Commission's intent to throw away all materials other than the original Charter . 128 charges and the final report.

5. Does the existence of the federal suit filed on behalf of Charles B. Battle put any special constraints upon the investigation or the disclosure issue that the Commission should be advised of?

#### CONCLUSION

1. Competent evidence and/or testimony obtained by the Civil Service Commission may be used by the appointing authority as the basis for subsequent discipline of an employee.

2. The Civil Service Commission may report its factual findings to an appointing authority at the conclusion of its Charter . 128 investigation but it has no authority under the Charter to direct, initiate or recommend discipline based upon testimony or evidence obtained by it during a Charter . 128 investigation. Its role is solely to gather facts and present findings and conclusions thereon.

3. The Civil Service Commission has no authority to grant immunity from disciplinary action to employees who testify before it during a Charter . 128 investigation.

4. All notes, records, letters, responses and investigation materials relied upon by the Civil Service Commission during the Charter . 128 investigation are public records and, under specified conditions, may be subject to disclosure or nondisclosure. Such records may not be destroyed or discarded, except as provided by law.

5. The existence of the federal lawsuit filed by Charles B. Battle does not restrain the Civil Service Commission from pursuing a lawful investigation. It does, however, raise other legal issues and concerns which we will discuss in detail in this opinion.

## DISCUSSION AND BACKGROUND

### DISCUSSION

At the regularly scheduled Civil Service Commission meeting on November 6, 1986, Mr. Patrick Thistle delivered to the Personnel Director a document entitled "Petition for Hearing pursuant to Charter . 128." As the Commission is aware, Attorney Patrick Thistle represented Charles B. Battle during the appeal of his termination from the San Diego Police Department for using excessive force on a handcuffed prisoner. The Commission upheld the termination on November 13, 1986. On November 17, 1986, Mr. Charles B. Battle, represented by Daniel J. Sullivan of the law firm of Thistle & Krinsky, filed a lawsuit in the United States District Court for the Southern District of California against The City of San Diego, sixteen individually named members of the San Diego Police Department, and Rich Snapper, the

Personnel Director of The City of San Diego. The lawsuit alleges, among several other causes of action, that a conspiracy in violation of 42 USC . 1983 existed between the Personnel Director and members of the San Diego Police Department. The effect of this alleged conspiracy, according to the complaint, was Mr. Battle's loss of employment with The City of San Diego without due process of law.

In light of the broad based allegations and arguments set forth in the "Petition for Hearing Pursuant to Charter . 128" the Civil Service Commission requested an opinion from this office defining the scope of the Civil Service Commission's authority to conduct investigations pursuant to Charter . 128. On December 4, 1986, this office concluded in San Diego City Atty Op. No. 86-6, that

1. The Civil Service Commission or any person designated by it may make an investigation concerning the facts in respect to the operation and enforcement of the Civil Service Provisions of the Charter (article

VIII, sections 115 et seq.), of the rules established under them (Civil Services Rules I through XVII; San Diego Municipal Code, chapter II, article 3, section 23.0101 et seq.) and the provisions of the regulations adopted by the Commission pursuant to those rules. (Personnel Manual of The City of San Diego, San Diego Municipal Code section 23.1603.)

2. The Civil Service Commission has a duty to investigate, or cause to be investigated, written charges of misconduct or inefficiency against any officer or employee in the classified service which have been filed with the Personnel Director by any person. Emphasis added.

3. The Civil Service Commission has no authority to investigate charges, written or unwritten, made against any member of the unclassified service.

4. The Civil Service Commission has no authority to investigate the general conduct, operation or management of the various departments of the City government.

5. During an investigation into the administration of the classified civil service system, if the Civil Service Commission incidentally encounters misconduct, misbehavior or incompetency of any employee, it is appropriate for the Civil Service Commission to refer that matter to the concerned employee's appointing authority for further investigation and the preparation of written charges if necessary.

#### BACKGROUND

On December 16, 1986, the Civil Service Commission issued a press release which indicated that the Commission would inquire into the following areas, among others, during the Charter . 128 investigation.

--Whether a member of the City Attorney's office recommended retaliatory action against police officers who presented testimony at Civil Service Commission disciplinary hearings which was unfavorable to the Police Department;

--Whether Police Department psychiatrists and psychologists rely too heavily on job performance information supplied by department supervisors when diagnosing an employee's condition;

--Whether requests for medical treatment, worker's compensation and disability are expeditiously and appropriately processed;

--Whether the Police Department's medical liaison officer is allowed too much discretion or relies too heavily on opinions from police supervisors;

--Whether the City Personnel Department failed to respond appropriately to the discrimination complaint of Charles Battle;

--Whether Battle's discrimination complaint and request for medical and related benefits were handled appropriately;

--Whether the administration of worker's compensation, industrial leave, long term disability leave, light duty, leaves of absence, retirement, discrimination complaints, and other programs by various departments -- all acting independently and without considering the decisions of each other -- has the net result of damaging an employee's interests;

--Whether the Civil Service Commission should investigate other City departments for the same abuses alleged to occur in the Police Department; and

--Whether it is appropriate for the Police Department to investigate its own discrimination complaints.

In addition, the Civil Service Commission prepared for distribution to 2,000 current and former police officers a survey which asked, among other questions, the following:

Have you ever filed a report of a work injury, illness, or disability and/or requested medical treatment, Worker's Compensation, Industrial Leave or Long Term Disability benefits?

Did you have any problems with the manner your report of injury and request for medical treatment, Worker's Compensation benefits,

Industrial Leave, and/or Long Term Disability were handled by the Police Department?

Did you have any problems with the manner your report of injury and request for medical treatment, Worker's Compensation benefits, Industrial Leave, and/or Long Term Disability were handled by the Risk Management Department?

With respect to your injury, illness, or disability, did you have any contact with the Police Department's medical liaison officer? Do you have any complaints in the manner the Police Department's medical liaison officer handled your case?

Have you ever filed an application for disability retirement?

Were there any problems with the manner in which the Police or Retirement Departments handled your application?

If you can identify any departmental or City policies or procedures which impact upon the ability of San Diego Police Officers to properly perform their duties and you have suggestions for changes, please indicate below.

In a memorandum dated December 16, 1986, the Personnel Director requested the following documents from the Retirement Administrator:

- 1) A copy of all written regulations, procedures, policies, and instructions dealing with the filing and processing of disability retirement applications.
- 2) A flow chart showing the processing of a claim for industrial disability retirement, from start to finish.
- 3) A written description of how the processing of a disability retirement application due to a physical injury versus an application based on psychological stress or nonphysical problem differ, if at all.
- 4) A copy of your complete file on Charles B. Battle (formerly Carlos Gonzalez, Jr.).

On December 16, 1986 the Personnel Director requested the Chief of Police to produce for the Commission's use during its Charter

. 128 investigation the following documents:

- 1) A copy of your Department Instructions and any other departmental written regulations, procedures, policies, and guidelines dealing with the filing and processing of:
  - a) Injury, illness, and disability reports
  - b) Worker's Compensation Claims
  - c) Industrial Disability Claims
  - d) Long Term Disability Claims
  - e) Requests for Leave of Absence due to industrial injuries and disabilities
  - f) Applications for disability retirement
  - g) Requests from employees for psychological and psychiatric counseling services
- 2) A written description of how the Police Department's processing of a claim of a physical injury versus a claim of psychological stress or nonphysical problem differ, if at all.
- 3) A copy of your Department Instructions and any other departmental written regulations, procedures, policies, and guidelines dealing with the filing and processing of discrimination complaints.
- 4) A flow chart showing the processing of a discrimination complaint and investigation within the Police Department.
- 5) A complete copy of Charles B. Battle's personnel file.
- 6) A listing of the names and home addresses of all Police Officer I's Police Officer II's, Police Agents, and Police Sergeants who are currently employed by the Department.
- 7) A listing of the names and home addresses of all Police Officer I's, Police Officer II's, Police Agents, and Police Sergeants who left Police Department employment after December 1, 1981.
- 8) A listing of the names and addresses of the psychologists and psychiatrists, within the past five years, to which the

Police Department usually refers its employees for counselling or examination.

- 9) A listing of all permanent and all temporary light duty positions and all permanent and all light duty assignments in your Department, and the criteria (written) for establishing such positions and assignments.

#### ANALYSIS

In light of the above actions by the Civil Service Commission and the Personnel Director, we will analyze your questions seriatim, under the assumption that the Commission intends to conduct an investigation encompassing the areas described in the press release, survey and request for documents. It should be pointed out that many of the matters specified in these documents are not within the purview, authority and/or responsibility of the Commission or Personnel Director. They are matters of managerial administration under Council authorization. Our analysis will be predicated upon that legal conclusion.

#### I

CAN EVIDENCE AND/OR TESTIMONY THAT IS OBTAINED BY THE COMMISSION DURING A CHARTER . 128 INVESTIGATION BE USED AS THE BASIS FOR SUBSEQUENT DISCIPLINE?

The general rule is that any evidence and/or testimony obtained by the Commission in a lawful investigation may be used as the basis for subsequent discipline by the appointing authority. However, the general rule is based upon the assumption that all constitutional and statutory procedural safeguards are followed. Depending upon the facts, evidence obtained in violation of the constitutional or statutory rights of an individual may arguably preclude the use of such evidence over objection in a subsequent administrative proceeding. The California Supreme Court has stated that the use of the exclusionary rule in an administrative proceeding will depend not only upon the nature of the constitutional violation but also upon a balancing of the interests at stake in the proceedings. *Enslie v. State Bar*, 11 Cal.3d 210, 113 Cal.Rptr. 175, 520 P.2d 99 (1974). In addition, evidence obtained in violation of a specific statutory privilege may be incompetent evidence which cannot support a finding by either an administrative body or a court of law. *Estes v. City of Grover City*, 82 Cal.App.3d 509, 147 Cal.Rptr. 131 (1978). Absent specific facts, it is difficult to state more than the general rule. As to the issue of what is a lawful investigation, we will analyze that in response to your

fourth question.

## II

CAN THE CIVIL SERVICE COMMISSION 1) DIRECT,  
2) INITIATE, OR 3) RECOMMEND DISCIPLINE  
BASED UPON TESTIMONY AND/OR EVIDENCE OBTAINED  
DURING A CHARTER . 128 INVESTIGATION?  
THE QUESTION ASSUMES THAT THE EMPLOYEES ARE  
OUTSIDE OF THE PERSONNEL DEPARTMENT.

All members of the classified service of The City of San Diego, including those within the Personnel Department, are entitled to have the applicable statutory procedures for discipline strictly followed. California Sch. Employers Assn. v. Personnel Commission, 3 Cal.3d 139, 89 Cal.Rptr. 620, 474 P.2d 436 (1970). We must therefore look to the Charter of The City of San Diego itself for initial guidance. Charter . 128 states in part:

The ... Civil Service Commission ... or any persons designated by any of them, may make investigations concerning the facts in respect to the operation and enforcement of the Civil Service provisions of the Charter and of the Rules established thereunder, and concerning the condition of the civil service of the City or any branch thereof. Written charges of misconduct or inefficiency against any officer or employee in the classified service may be filed with the Personnel Director by any person. The Commission shall investigate any such charges, or cause them to be investigated, and report the findings of the investigation to the authority responsible for the appointment of the officer or employee against whom the charges have been made.

Charter . 129 states in part:

### SECTION 129. REMOVALS, SUSPENSION AND LAYOFFS.

Upon attaining permanent status pursuant to the Rules of the Civil Service Commission, any officer or employee of the City in the classified service may be removed from office or employment for cause by the appointing authority.

....

Any officer or employee of the City in the



classified service may be suspended from office or employment for cause or for investigation of misconduct by the appointing authority. Emphasis added.

At the conclusion of the investigation, the Civil Service Commission is authorized to report its factual findings to the appointing authority. The Charter is silent as to the Commission's authority to recommend discipline in a case but it is explicitly clear that the power to initiate discipline rests solely with the appointing authority. Upon receipt of factual findings by the Civil Service Commission, appointing authorities have the responsibility to decide if a further investigation into the facts is needed in order to determine whether or not discipline is appropriate. If discipline is warranted, the appointing authority has the sole discretion to determine the nature and extent of such discipline.

Any disciplinary action taken by an appointing authority must be done in accordance with the provisions of Charter . 129, Rule XI of the Civil Service Commission, Personnel Regulations, Index Code L-2 and the applicable provisions of the various memoranda of understanding between The City of San Diego and the recognized employee groups. Of course, if the appointing authority takes an action which is appealable to the Civil Service Commission pursuant to Charter . 129, the Commission may hold a formal hearing and render a final administrative decision which is binding on the appointing authority and the appellant.

The fact that the Commission may have conducted a prior hearing on the same issue will not preclude the Commission from hearing an appeal over which it has jurisdiction. The rule of necessity applies under such circumstances. The rule of necessity operates when a board or commission having previously considered or ruled on an issue is the only agency authorized by law to pass upon an appeal in the same matter. *Aluisi v. County of Fresno*, 178 Cal.App.2d 443, 2 Cal.Rptr. 779, cert. denied, 364 U.S. 893, 5 L.Ed.2d 188, 81 S.Ct. 224 (1960). However, members of the Commission who have previously heard a matter should excuse themselves from taking part in the appeal if the Commission can still act in their absence in order to avoid a possible challenge for bias. *Andrews v. Agricultural Labor Relations Bd.*, 28 Cal.3d 781, 171 Cal.Rptr. 590, 623 P.2d 151 (1981); *Chevrolet Motor Division v. New Motor Vehicle Bd.*, 146 Cal.App.3d 533, 194 Cal.Rptr. 270 (1983).

### III

#### CAN THE CIVIL SERVICE COMMISSION GRANT IMMUNITY FROM DISCIPLINARY ACTION TO

## EMPLOYEES WHO TESTIFY DURING A CHARTER . 128 INVESTIGATION?

As we have previously discussed, the Charter of The City of San Diego clearly provides that appointing authorities have the discretion whether or not to discipline employees for misconduct or inefficiency. The Charter grants no authority to the Civil Service Commission to grant immunity from disciplinary action to an employee who testifies during a Commission proceeding. Any admission of misconduct or false testimony by a witness may be the basis for subsequent discipline by an appointing authority. This does not mean that the Commission lacks the authority to reduce or overturn the discipline in a case where an appointing authority is found to have disciplined an employee in retaliation for testimony before the Commission. A Commission decision to reduce or overturn discipline must be based upon its factual findings and its discretionary authority and not upon the Commission's desire to grant any degree of immunity.

### IV

## ARE THE NOTES, RECORDS, LETTERS, RESPONSES AND INVESTIGATION MATERIALS OF THE COMMISSION'S CHARTER . 128 INVESTIGATION SUBJECT TO MANDATORY DISCLOSURE, AND IF SO, UNDER WHAT CIRCUMSTANCES? AS BACKGROUND, IT IS THE CIVIL SERVICE COMMISSION'S INTENT TO THROW AWAY ALL MATERIALS OTHER THAN THE ORIGINAL CHARTER . 128 CHARGES AND THE FINAL REPORT.

This is a most difficult question to answer given the present facts. The Commission is conducting a single investigation under both its rulemaking authority (as indicated in the first sentence of Charter . 128) and its quasi-judicial authority (as indicated in the second sentence of Charter . 128). The rights of individual witnesses in the investigation will vary depending upon whether or not the investigation may reasonably result in disciplinary action against the witness and other factors. In addition, the Commission's apparent desire to conduct a wide-spread, unrestricted investigation into areas which may be beyond its jurisdiction raises concerns about the Commission's ability under the law to maintain the confidentiality of certain records. As discussed in detail below, the law provides

safeguards for an administrative agency when it is acting within the scope of its authority. If its authority herein the Commission's is exceeded and is successfully challenged, the statutory safeguards are unavailable and the results may be quite drastic. We will answer your questions based on the available

facts.

A. EXCEPT AS PROVIDED BY LAW, THE COMMISSION MAY NOT DESTROY NOTES, RECORDS, LETTERS, RESPONSES AND INVESTIGATIVE MATERIALS.

In conducting an investigation, any of the written material used by the Commission as evidence is a public record, as defined in Cal. Gov't Code . 6252(d), because it is a writing containing information relating to the conduct of the City's business.

Braun v. City of Taft, 154 Cal.App.3d 332, 340, 201 Cal.Rptr. 654 (1984). "Writing" is defined in Cal. Gov't Code . 6252(e) to mean:

Handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents.

Even rough, undated notes may become public records if they are retained or used in the conduct of the City's business.

Register Div. of Freedom Newspapers, Inc. v. County of Orange, 158 Cal.App.3d 893, 205 Cal.Rptr. 92 (1984). Public records may be destroyed only in accordance with section 34090 of the Cal.

Gov't Code. That section reads as follows:

. 34090. Destruction of city records; excepted records; construction.

Unless otherwise provided by law, with the approval of the legislative body by resolution and the written consent of the city attorney, the head of a city department may destroy any city record, document, instrument, book or paper, under his charge, without making a copy thereof, after the same is no longer required.

This section does not authorize the destruction of:

- (a) . . .
- (b) . . .
- (c) Records required to be kept by statute.
- (d) Records less than two years old.
- (e) The minutes, ordinances, or resolutions of the legislative body or of a

city board or commission.

This section shall not be construed as limiting or qualifying in any manner the authority provided in Section 34090.5 for the destruction of records, documents, instruments, books and papers in accordance with the procedure therein prescribed.

Section 34090.5 outlines the procedures for destroying records after they have been properly microphotographed.

The Commission in its investigation into charges of misconduct against classified employees, must take care to preserve evidence that supports its findings. The destruction of relevant evidence used to support a finding could very well be a violation of an employee's constitutional right to due process and a fair hearing if the employee is subsequently disciplined. *Kolnick v. Board of Medical Quality Assurance*, 101 Cal.App.3d 80, 161 Cal.Rptr. 289 (1980).

In addition, evidence obtained by the Commission during the Charter . 128 investigation may be relevant to the civil rights lawsuit. If so, it may arguably be subject to disclosure during the civil procedure discovery process and eventually used in the lawsuit.

**B. DEPENDING UPON THE CIRCUMSTANCES, CERTAIN MATERIALS USED BY THE COMMISSION IN THE INVESTIGATION WILL BE SUBJECT TO DISCLOSURE. HOWEVER, THE DISCLOSURE OF OTHER MATERIAL MAY NOT BE REQUIRED BY LAW AND THE DISCLOSURE OF SOME MATERIAL MAY IN FACT BE PROHIBITED BY LAW.**

Determining whether or not any particular record obtained or produced by the Civil Service Commission during the current Charter . 128 investigation is subject to disclosure under the Public Records Act or other provision of law will depend upon the nature of the material and the method of discovery and receipt by the Commission. The following general guidance is provided to assist in the resolution of specific questions which may arise during the course of the investigation.

The Commission is not required to disclose to the public information it gains in its investigation if that information is either not subject to disclosure by law or is required by law to be kept in confidence by The City of San Diego. For example, the Public Records Act does not require disclosure of personnel, medical or similar files which would constitute an invasion of personal privacy. California Government Code . 6254 (c). In addition, the public disclosure of police officers' personnel

records is prohibited by law under most circumstances.  
California Penal Code . 832.7 states:

Peace officer personnel records and records maintained pursuant to section 832.5 or information obtained from such records are confidential and shall not be disclosed in any criminal or civil proceedings except by discovery pursuant to section 1043 of the Evidence code. This section shall not apply to investigations or proceedings concerning the conduct of police officers or a police agency conducted by a grand jury or a district attorney's office.

Section 832.8 defines "personnel records" as that term is used in section 832.7 as

Any file maintained under that individual's name by his or her employing agency and containing records relating to:  
emphasis added

(a) Personal data, including marital status, family members, educational and employment history, or similar information;

(b) Medical history;

(c) Election of employee benefits;

(d) Employee advancement, appraisal, or discipline;

(e) Complaints or investigations of complaints concerning an event or transaction in which he participated or which he perceived and pertaining to the manner in which he performed his duties, or

(f) Any other information or disclosure of which would constitute an unwarranted invasion of personal privacy.

Disclosure of the records to the two Civil Service Commissioners conducting the investigation in the course of their duties is not a "public disclosure" as long as the Commissioners are acting within their lawful scope of authority to investigate pursuant to Charter . 128. Disclosure of confidential material by one public official to another public official, authorized by law to receive the confidential material, is not a "public disclosure." *Parrott v. Rogers*, 103 Cal.App.3d 377, 163 Cal.Rptr. 75 (1980).

As we previously indicated to the Commission in our Opinion No. 86-6, the Commission's authority to investigate the affairs

of The City of San Diego is limited by the Charter. The Commission has only that authority specifically conferred upon it by the Charter. *Ferding v. State Personnel Bd.*, 71 Cal.2d 96, 77 Cal.Rptr. 224, 453 P.2d 728 (1969). It may only validly act within those powers and any actions taken by it in excess of those powers are void. *Bank of Italy v. Johnson*, 200 Cal. 1, 251 P. 784 (1926); *Graves v. Commission on Professional Competence*, 63 Cal.App.3d 970, 134 Cal.Rptr. 71 (1976). Even an agency with such broad powers as a county grand jury cannot engage in "fishing expeditions," initiate investigations outside the scope of its authority, or attempt to act as a supervising administrative agency controlling the discretionary activities of public officers over whom it has no authority. If it does so, its proceedings lack legal authority. *Board of Trustees v. Leach*, 258 Cal.App.2d 281, 65 Cal.Rptr 588 (1968). In our Opinion No. 86-6, this office expressed serious concerns about the Commission's desire, as indicated in its press release, survey and request for documents, to conduct an investigation into areas beyond its jurisdiction. For example, Charter . 144 states clearly that the Retirement Board of Administration is the "sole authority and judge under such general ordinances as may be adopted by the Council as to the conditions under which persons may be admitted to benefits of any sort under the Retirement

System." Emphasis added. We conclude, therefore, that if the Commission conducts an investigation into areas beyond its jurisdiction, such as the operation of the City's Retirement System, that the rule established in *Parrot v. Rogers*, 103 Cal.App.3d at 377, protecting the confidentiality of records will very probably be inapplicable. Stated otherwise, disclosure of confidential records to the Commissioners when acting outside the scope of their authority under the Charter may very likely be held to be a public disclosure, removing thereby the statutory confidentiality provided.

When the Commission conducts, at least in part, a quasi-judicial inquiry into charges of misconduct or inefficiency against members of the classified service, it must provide accused employees with certain rights. For example, the current Memorandum of Understanding (MOU) between The City of San Diego and the Police Officers Association gives police officers the rights provided by the Public Safety Officers Procedural Bill of Rights. Cal. Gov't Code . 3300 et seq. The MOU states that an officer who is under an administrative investigation has the right to representation during any interrogation. The officer also has the right to tape record any inquiry concerning his actions as an employee of the City which could lead to

discipline. Nothing prevents the officer from disclosing the contents of the tape recorded interrogation. All other classified employees have the right of representation but do not have the right to tape record interrogations.

If, at the conclusion of the investigation, the appointing authority proposes to take disciplinary action against an employee, the employee is, at the outset, entitled to the documents upon which the discipline is based. *Skelly v. State Personnel Bd.*, 15 Cal.3d 194, 124 Cal.Rptr. 14, 539 P.2d 774 (1975). Those documents can be disclosed to the public by the employee if the employee desires. If the employee receives a suspension, demotion or is terminated and appeals to the Civil Service Commission, the documents may be disclosed during a public hearing required by Charter . 129.

In conducting an inquiry based on the Civil Service Commission's rulemaking authority, all documentary evidence and recorded testimony is also subject to disclosure unless it is otherwise specifically exempted from disclosure pursuant to exemptions contained in the Public Records Act. Whenever a legislative body undertakes a rulemaking investigation, there is a strong public interest in the disclosure of such testimony. This is not to say, however, that certain evidence or testimony could be exempt from disclosure either under the personnel files

exemption discussed earlier or where the disclosure of the information would be against the public interest pursuant to Cal. Gov't Code . 6254(a) or . 6255. For example, a strong argument can be made that the home addresses of all the peace officers should remain confidential even if they are obtained in a rulemaking investigation. The rationale behind such exemption is an individual's right to privacy and possible violation thereof. However, you should be aware that Penal Code . 146(e) only forbids disclosure of this type of information if done with malice and the intent to obstruct justice or the due administration of law. Cal. Gov't Code . 6254.3 exempts the home addresses and telephone numbers of state employees from disclosure under certain circumstances but there is no corresponding provision of law protecting local governmental employees except the general reference to personnel data found in Penal Code . 832.7 discussed earlier. In fact, the court in *Braun v. City of Taft*, 154 Cal.App.3d at 345 indicated that a public employee's telephone number and address are "seldom secret." This does not mean, however, that the home addresses and telephone numbers of those who take active measures to protect their privacy are legally deprived of that right. We are required and must examine each case on its own merits. "Seldom

secret" connotes less than an active effort and concern for protecting one's individual privacy. The word "seldom," as used in the court's opinion, must be accorded reasonable statutory interpretation. If it were meant as an absolute, we have no doubt a clearer choice of words would have been employed.

The 2,000 surveys pose additional problems of logistics and law. It is certainly possible that the surveys may be returned containing some information which is protected from disclosure and some which is not. Section 6257 of the California Public Records Act requires that if nonexempt material is reasonably segregable from exempt material, the nonexempt material must be provided to the requester and each form will require deletion of any and all confidential material. Depending upon how many surveys are returned, an argument can be made that the burden and cost of disclosure, including the expense and inconvenience involved in segregating the nonexempt from the exempt information, clearly outweighs any public interest served by disclosure of this type of information. *American Civil Liberties Union Foundation v. Deukmejian*, 32 Cal.3d 440, 186 Cal.Rptr. 235, 651 P.2d 822 (1982). That issue, however, cannot be resolved at the present time because of the lack of specific facts.

## V

### DOES THE EXISTENCE OF THE FEDERAL SUIT FILED ON BEHALF OF CHARLES BATTLE PUT ANY SPECIAL CONSTRAINTS UPON THE INVESTIGATION OR THE DISCLOSURE ISSUE THAT THE COMMISSION SHOULD BE ADVISED OF?

Under normal circumstances, the answer to this question would be relatively simple. The City of San Diego often conducts its own investigations into matters which are the subject of pending litigation. However, under the present facts, this question raises some interesting legal concerns. In the federal civil rights lawsuit filed on behalf of Mr. Battle by Mr. Sullivan, a member of the law firm of Thistle & Krinsky, punitive damages were alleged against all defendants. There is no mention of Mr. Battle's appeal to the Civil Service Commission in the complaint even though Mr. Thistle represented Mr. Battle in that proceeding. Neither the Civil Service Commission nor its individual members are named as defendants. It appears from our copy of the lawsuit that, at the outset, Mr. Thistle personally represented Mr. Battle in the lawsuit, but for reasons unknown to us, Mr. Sullivan signed and filed the lawsuit. Mr. Thistle has given no indication to the Civil Service Commission that he represents Mr. Battle in the investigation. He has only indicated that he is the actual petitioner. With this legal



representation morass in mind, we will attempt to answer your questions.

A. THE EFFECT OF THE LAWSUIT ON THE  
ROLE OF THE PERSONNEL DIRECTOR IN  
THE INVESTIGATION.

The Personnel Director acts as Secretary to the Civil Service Commission and performs such duties as prescribed by the Charter, the Civil Service Rules or the Commission. Charter . 116.

Under normal circumstances, he is available to assist the Commission in Charter . 128 investigations. Ironically, Mr. Thistle stated to the Commission that he had no objection to Mr. Snapper assisting the Commissioners in the course of the investigation. We say "ironically" because the filing of the lawsuit by a member of Mr. Thistle's firm names Mr. Snapper individually and alleges punitive damages against him. In addition, many of the issues raised in the lawsuit are raised in Mr. Thistle's petition. Mr. Snapper is a named, interested party in both the lawsuit and the investigation. This places Mr. Snapper, the Commission and other named parties in an awkward relationship and apparent conflict. It will be difficult for Mr.

Snapper to assist in the investigation, without the other named individuals in the lawsuit and petition raising the question of the overall fairness of a proceeding, which allows one alleged co-conspirator to participate while others are excluded, except to appear as witnesses on their own behalf. Finally, we believe that nothing prevents the Commission from being brought into the lawsuit as an indispensable party at some time in the future.

B. RECORDS NOT NORMALLY SUBJECT TO  
DISCLOSURE MAY BE DISCLOSED AS  
A RESULT OF THE INVESTIGATION.

Under normal circumstances, certain records pertaining to pending litigation are not subject to public disclosure under the California Public Records Act. Cal. Gov't Code . 6254(b). As discussed earlier, depending upon the circumstances, some records of the investigation may become subject to disclosure. These records may or may not be of the nature of those normally protected by section 6254(b). Absent specific facts, it is again difficult to render any more specific advice at this time.

C. OTHER LEGAL CONCERNS.

Mr. Thistle's petition asks the Commission to undertake a wide, sweeping investigation into, among other areas, allegations that Mr. Battle's termination resulted from discrimination by The City of San Diego. Mr. Thistle's status as the actual petitioner in the investigation and not as Mr. Battle's attorney raises several interesting points.

Our initial concern is that Mr. Thistle is obviously aware that, as Mr. Battle's attorney in the termination appeal, any request by him to reopen the Battle termination hearing would be denied because the Commission, pursuant to Charter . 129, lost jurisdiction over the case when it issued the final decision. *Heap v. City of Los Angeles*, 6 Cal.2d 405 (1936). Having raised, but not proven, some of the issues in the petition during the appeal hearing, he now comes before the Commission as a private citizen and asks the Commission to investigate his unproven allegations.

Second, if Mr. Thistle is a "private citizen" and does not represent Mr. Battle in the investigation, the Commission could be subject to a charge by Mr. Battle, a former City employee, that the Commission is investigating his personal and medical affairs without his consent, in violation of his right to privacy under both the federal and state Constitutions. Furthermore, the disclosure of such confidential medical information without Mr.

Battle's consent or his placing it in issue himself may violate section 56.1 of the California Civil Code which provides for the confidentiality of medical records and numerous provisions of the Information and Practices Act of 1977. Cal. Civ. Code . 1798 et seq. If Mr. Thistle is, on the other hand, representing Mr. Battle then this difficulty is resolved.

Finally, it also appears that Mr. Thistle, as a "private citizen" intends to appear as a witness before the Commission in an investigation, a role not normally fulfilled by an attorney, especially one whose partner is involved in litigation arising out of the same matter. Mr. Sullivan's representation of Mr. Battle in the lawsuit allows Mr. Thistle to retain the appearance of being a "private citizen" when he may, in fact, be an advocate for Mr. Battle. The extent, if any, of Mr. Thistle's financial interest in the outcome of the lawsuit filed by his law firm is subject to speculation but nevertheless should be submitted as a matter for Commission information. However, his law firm will no doubt benefit from the Commission's investigation as it will provide much information which is normally obtained only through an expensive civil procedure discovery process. The California Rules for Professional Conduct, binding on all members of the State Bar, frown on attorneys being both a witness and an advocate in the same action. Cal. Bus. & Prof. Code . 6076, Rule II-111(A)(4). As the California Supreme Court stated in *Comden v. Superior Court*, 20 Cal.3d 906, 145 Cal.Rptr. 9, 576 P.2d 971 (1978):

An attorney who attempts to be both  
advocate and witness impairs his credibility

as witness and diminishes his effectiveness as advocate. While the harm recedes when the attorney-witness is not himself trial counsel but only a member of trial counsel's firm, the opportunity still exists for opposing counsel to argue the attorney's-witness' stake in the litigation through his law firm influences his objectivity.

While there are, of course, exceptions to every rule, we suggest that the Commission clarify Mr. Thistle's role in the lawsuit and in the petition at the earliest possible time. Once that is clearly established, we will then be in a better position to give additional and more complete advice concerning the relationship between the civil rights lawsuit and the Charter . 128 investigation.

Respectfully submitted,  
JOHN W. WITT, City Attorney

By

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APPROVED:

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