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MEMORANDUM OF LAW

SUPERSEDED BY MOL-2010-9 (MAY 18, 2010)

DATE: September 4, 2007

TO: San Diego Civil Service Commission

FROM: City Attorney

SUBJECT: *Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272 (2006) and Its Applicability to the Civil Service Commission of the City of San Diego

INTRODUCTION

In *Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272 (2006) [*Copley Press*], the California Supreme Court [Court] held that the records of the San Diego County Civil Service Commission related to County peace officer administrative appeals could not be released in response to a request under the California Public Records Act (Cal. Gov't Code § 6250-6270) [CPRA]. The Court held the County Civil Service Commission's records and files were confidential peace officer personnel records under California Penal Code sections 832.7 and 832.8 because the County used the Civil Service Commission's administrative appeal process to meet its requirements under the Public Safety Officers Procedural Bill of Rights Act (Cal. Gov't Code § 3300-3313) [POBRA].

The San Diego Civil Service Commission [Commission] has requested the City Attorney review the *Copley Press* opinion to determine if it is applicable to peace officer administrative appeal records of the City's Commission. In addition, the Commission asks whether the opinion impacts the public nature of peace officer disciplinary hearings before the Commission and the public treatment of certain Commission records required by the San Diego Charter.¹

To answer the questions, this Office analyzes the administrative appeal processes made available by the City of San Diego for its City *police* officers, the largest group of City-employed peace officers.²

¹ Bills to abrogate the *Copley Press* opinion, introduced during this year's legislative session, were unsuccessful. See A.B. No. 1648 and S.B. No. 1019.

² To the extent the City of San Diego employs other peace officers covered by POBRA this analysis may or may not be applicable to their disciplinary hearings or hearing records.

QUESTIONS PRESENTED

1. Does the Supreme Court's opinion in *Copley Press* apply to San Diego City Commission records of police officer administrative hearings, exempting them from disclosure under the CPRA?
2. May the City Commission continue to hold public hearings for police officer disciplinary matters and to treat as public certain Commission records as required by the San Diego City Charter?

SHORT ANSWERS

1. No. *Copley Press* does not apply to exempt Commission records from disclosure under the CPRA. Unlike County procedures reviewed in *Copley Press*, the City of San Diego meets POBRA administrative appeal requirements for San Diego police officers by providing them with an intra-departmental administrative appeal by memorandum of understanding rather than by using the Commission. Thus, the Commission does not function as part of the officers' employing agency, maintaining peace officer personnel records.
2. Yes. Commission hearings for police officers may be public as the San Diego Charter requires, so long as hearing officers make an *in camera* decision before disclosing the officer's personnel records at the hearing. The Commission records that the San Diego Charter requires be treated as public records may continue to be treated as public records.

ANALYSIS

I. The *Copley Press* Opinion Does Not Apply to Records of Police Officer Disciplinary Hearings Before the San Diego City Civil Service Commission.

A. Details of the *Copley Press* Opinion.

The *Copley Press* decision is a limited one despite the length of the opinion. The principal holding is that San Diego County's Civil Service Commission was correct in refusing a CPRA request to disclose the identity of an appealing peace officer (a deputy sheriff) and to provide unredacted Commission records related to that officer's administrative appeal. The Court held those records were exempt from disclosure under the CPRA as confidential police officer personnel records under California Penal Code section 832.7.³

³ Future references are to the California Penal Code unless indicated otherwise.

The Court followed a two-step process to reach its conclusion that the administrative appeal records of the County's Civil Service Commission were not to be freely disclosed to the public in response to a CPRA request. First, the Court decided that all police officer personnel records were to be considered "confidential" and disclosable only under the limited exceptions found in section 832.7.⁴ *Copley Press*, 39 Cal. 4th 1272, 1284-1285. This construction of the section does not "enable third parties, by invoking the CPRA, so easily to circumvent the privacy protection granted under section 832.7," and does not "grant the general public greater access to this information than it granted litigants in civil and criminal proceedings." *Id.* at 1286 n.6.

Second, the Court had to find the records and files of the County's Civil Service Commission were peace officer personnel records that were "maintained by [the officer's] employing agency" as required by section 832.8. *Copley Press*, 39 Cal. 4th at 1286-1287. The Court did so after reviewing the County Commission and its role in disciplinary proceedings for County peace officers. The Court concluded that "for purposes of applying the relevant statutes in this case, the Commission is functioning as part of 'the employing agency' and that any file it maintains regarding a peace officer's disciplinary appeal constitutes a file 'maintained . . . by [the officer's] employing agency' within the meaning of section 832.8." *Id.* at 1288. Pivotal to the Court's holding was its finding that the County used the Civil Service Commission's appeal process to fulfill its statutory duty under POBRA to provide its peace officers with an administrative appeal procedure. *See* Cal. Gov't Code § 3304(b); *Copley Press*, 39 Cal. 4th at 1287. The Court also found the County Civil Service Commission was a "department of the County" established as such by the County Charter. *Ibid.* Thus the confidentiality requirements of section 832.7 applied to those records, and exempted them from disclosure under the CPRA.

However, although POBRA mandates local agencies provide administrative appeals, it also gives local agencies the discretion to determine the actual procedures provided. *Copley Press*, 39 Cal. 4th at 1292. Some agencies, like the County of San Diego, exercise that discretion by designating a Civil Service Commission, or some other extra-departmental administrative appeal process. Other agencies provide an intra-departmental appeal process, using individuals within the peace officer's department up to and including a police chief to hear appeals. *Id.* at 1290 n.10, 1292. Both methods meet POBRA purposes, namely, to give peace officers an opportunity to convince their employing agency to reverse a punitive action decision. *Id.* at 1287. *Copley Press* made clear that *either* an internal or an external appeal process, if designated by a local agency to meet POBRA requirements, creates files that must be treated confidentially as peace officer personnel records under the CPRA. *Id.* at 1292-1296.

Copley Press did not address whether its holding would apply to a City, like San Diego, that provides its police officers with *both* an intra-departmental appeal process that meets

⁴ Section 832.7 provides: "(a) Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code"

POBRA requirements *and* a supplemental Commission appeal process. This Office concludes that the opinion does not apply for the reasons set forth in the next section.

B. Copley Press Does Not Apply to the Records of Administrative Appeals by Police Officers to the City's Civil Service Commission.

Like County of San Diego peace officers, City of San Diego police officers are members of the classified service. San Diego Charter §§ 117, 57. Like County classified employees, all City classified employees are provided the option to appeal serious disciplinary matters to the City Commission. San Diego Charter § 129. However, unlike the County, the City provides its police officers with an additional intra-departmental administrative appeal process [Chief's appeal] for all disciplinary matters by a Memorandum of Understanding [MOU]. *See* the 2003 Declaration of Assistant Police Chief Louis Scanlon, attached as Exhibit A, and Article 41 of the MOU between the City of San Diego and the San Diego Police Officer's Association.⁵

The Chief's appeal provided by MOU meets the City's obligations under POBRA to provide officers facing serious disciplinary matters with an evidentiary hearing before a neutral hearing officer such as a police chief. *See Giuffre v. Sparks*, 76 Cal. App. 4th 1322, 1330 (1999); *Stanton v. City of West Sacramento*, 226 Cal. App. 3d 1438, 1440, 1443 (1991). This form of intra-departmental administrative appeal is not uncommon. *See Copley Press*, 39 Cal. 4th at 1290 n.10, 1292. For example in *Brown v. City of Los Angeles*, 102 Cal. App. 4th 155, 173, 178-179 (2002), the departmental review was by a captain through deputy chief; in *Stanton*, at 1440, 1443, it was by a police chief; in *Riveros v. City of Los Angeles*, 41 Cal. App. 4th 1342, 1358-1361 (1996), a captain acted as hearing officer with the chief retaining the right to final decision; and in *Holcomb v. City of Los Angeles*, 210 Cal. App. 3d 1560, 1562 (1989), the review was by a board of rights consisting of two watch commanders and one captain.

Article 41 of the MOU expressly provides that its procedures meet and exceed POBRA appeal rights, acknowledging that police officers also have supplementary appeal rights under the Charter, and permitting them to elect either or both procedures. It provides: "All provisions of this article are to be read to expand and/or complement rights which officers enjoy under the

⁵ Article 41 of the City's MOU with the Police Officer's Association is entitled "Officer Rights." The sections cited below are incorporated within the MOU for fiscal year 2007-2008. Section V of Article 41 is entitled "Intra-Departmental Hearings." Intra-departmental hearings are available to officers for a range of punitive actions including the dismissals, suspensions and demotions also covered by Civil Service rules. MOU Art. 41 § V(A)(1)-(3); *See* San Diego Charter § 129; SDMC §§ 23.1206, 23.1207 and 23.1211; Civ. Serv. Rules § XI. Article 41 designates the hearing officer for the intra-departmental hearing as the "Chief of Police or his/her designate of not less than rank of Assistant Chief . . . Such hearing officer shall have no role in the original decision to take punitive actions." MOU Art. 41 § V(B)(1). The "appeal hearing" must be recorded with right of access to all parties to the recordation or transcript; and the officer has the right to "present evidence, cross-examine witnesses and require the attendance of any witnesses who are city employees." MOU Art. 41 § V(B)(3) and (4).

Public Safety Officer Procedural Bill of Rights.” MOU Art. 41 § I(A) and VII(A). “Officers may, in addition to other rights to administrative appeals and/or hearings set out herein, appeal any punitive action which is covered by provisions of the City Civil Service Rules to the Civil Service Commission in accordance with those rules.” MOU Art. 41 § III(A). “Officers entitled to appeal any action to the Civil Service Commission shall retain such right notwithstanding the use of intra-departmental appeal procedures and may elect either or both procedures without prejudice to the other.” MOU Art. 41 § V(A)(9).

The County satisfies its POBRA requirements by designating its Commission as the *only* appropriate body to hear peace officer administrative appeals. *Copley Press*, 39 Cal. 4th at 1287; *also see Caloca v. County of San Diego*, 72 Cal. App. 4th 1209, 1223 n.10 (1999) [*Caloca*]. The City designates an intra-departmental administrative appeal for its officers that both parties agree meet and exceed POBRA requirements. This fact significantly distinguishes the City’s situation from the County’s situation reviewed in the *Copley Press* opinion.⁶ The absence of this pivotal precondition means that the City’s Commission does *not* act as part of the City’s employing agency when it hears police officer appeals. It follows from this that the City Commission’s records of those appeals are not personnel records maintained by the officer’s employing agency as the *Copley Press* opinion decided was true for the County.⁷

Accordingly, this Office concludes that the files and records of the City Commission related to police officer appeals are not subject to the confidentiality requirements of section 832.7. The *Copley Press* opinion does not require the City Commission to treat its records of police officer appeals as confidential if they are sought pursuant to a CPRA request.

II. The Civil Service Commission Hearings Should Remain Public.

Our conclusion that Commission police officer appeal records are not subject to the *Copley Press* opinion does not answer whether the *use* of confidential police officer personnel records during a Commission appeal hearing impacts the public nature of those hearings required by the San Diego Charter. For the reasons outlined below, this Office concludes that the City Commission’s current procedures place adequate controls on the use of police officer records at Commission hearings so that such hearings may remain open to the public.

⁶ Moreover, the City Commission is not established as a City Department by Charter or by ordinance. *See* San Diego Charter § 115; SDMC § 22.1801. City Commission members are appointed by the Mayor and confirmed by the City Council. San Diego Charter § 41. The City’s Commission members serve fixed five-year terms and may not be removed except for cause after a hearing, and by a two-thirds vote of the City Council. These facts also support the conclusion that the City’s Commission is far more an independent entity than is the County’s.

⁷ The Police Department, providing the intra-departmental appeal, *is* part of the City’s employing agency during the appeal process. Accordingly, records of the Chief’s Appeal would be maintained by the officers’ employing agency and, pursuant to the *Copley Press* opinion, subject to the confidentiality requirements of section 832.7 if the subject of a CPRA request.

A. The Charter Requires Commission Disciplinary Appeal Hearings be Public.

San Diego Charter section 129 requires that Civil Service Commission hearings be “public hearing[s].” These public hearings protect police officer interests. *See Caloca v. County of San Diego*, 102 Cal. App. 4th 433, 446 (2002). They also protect the public interest. “Given the powerful position of law enforcement officers in our society, there are many valid reasons for requiring that the public be kept fully informed about the police discipline system.” *San Diego Police Officer’s Assn. v. City of San Diego Civil Service Com.*, 104 Cal. App. 4th 275, 286 (2002) [*SDPOA*] (Citing *City of Hemet v. Superior Court*, 37 Cal. App. 4th 1411, 1428 (1995); *New York Times Co. v. Superior Court*, 52 Cal. App. 4th 97, 104-105 (1997); *San Francisco Police Officers’ Ass’n. v. Superior Court*, 202 Cal. App. 3d 183, 191 (1988).) It is in everyone’s best interest that the open nature of these hearings be preserved if legally possible to do so.

B. Confidential Police Officer Records May Not Be the Subject of Uncontrolled Disclosure.

The *Copley Press* and *SDPOA* opinions make clear that confidential police officer personnel records should not be subject to *uncontrolled* disclosure to the public. *SDPOA* held that “employing agencies may not freely disclose [confidential police officer personnel] records at public disciplinary appeal hearings if the affected officer asserts an objection.” *SDPOA*, 104 Cal. App. 4th at 287. Because a request for discovery is generally not at issue in these hearings, *SDPOA* also found the discovery procedures referenced in section 832.7 to be “inapplicable” as the statute is currently written. *Id.* at 286, 287.

Copley Press applied the confidentiality requirements of section 832.7 to the County Commission’s records to prevent the public from having greater access to those records than that given litigants in civil or criminal proceedings. *Copley Press*, 39 Cal. 4th at 1286 & n.6. The majority opinion did not address the use of peace officer personnel records during a public administrative appeal hearing. *Copley Press*, 39 Cal. 4th at 1281 n.3, 1305 n.27.⁸

The discovery provisions of section 832.7 may not be expressly applicable to police personnel records used during a public Commission disciplinary hearing. But they do reflect what the Legislature and the Courts have found to be acceptable controls for the disclosure of police personnel records in civil and criminal litigation.⁹ They show there is no inherent inconsistency in accommodating both public proceedings and the statutory protections for peace officer personnel records. Moreover, the Supreme Court has often said the *in camera* review of records required by the statutory scheme provides a method that balances the need for the disclosure of relevant information with the expectation of privacy by law enforcement personnel.

⁸ The single dissenting justice suggested that only direct information introduced from an officer’s personnel records at a hearing be treated as confidential under the CPRA in order to balance the officer’s right to confidentiality and the public’s right to accountability. *Copley Press*, 39 Cal. 4th at 1313-1314 (J. Werdegar, dissenting.)

⁹ The disclosure rules were adopted to codify the requirements of *Pitchess v. Superior Court*, 11 Cal. 3d 531 (1974).

People v. Mooc, 26 Cal. 4th 1216, 1220 (2001). Once a trial judge has reviewed the records in private and determined their relevancy to the matter, a peace officer may not prevent the disclosure of personnel records simply because he or she does not desire disclosure. *SDPOA*, 104 Cal. App. 4th at 287; *Rosales v. City of Los Angeles*, 82 Cal. App. 4th 419, 426-427 (2000).

Although civil service commissions are not courts, nor are hearing officers trial judges, the commissions act as quasi-judicial bodies during administrative appeals and the hearings proceed as do civil trials. *Copley Press*, 39 Cal. 4th at 1303 n.26. *Copley Press* applied the confidentiality provisions of section 832.7 to administrative proceedings, even though the statute did not expressly encompass such proceedings. Though the opinion declined to address the impact of its decision upon public commission hearings, it seems to follow logically that the *in camera* review procedures described under section 832.7, should be adequate controls balancing both the rights of the police officers and the public if applied to public Commission hearings.

C. Commission Procedures Provide Adequate Controls for Disclosure.

In 2003, Assistant Police Chief Louis Scanlon and Civil Service Commissioner Norman T. Seltzer prepared and filed affidavits for use by the Court hearing the trial of the *SDPOA* matter on remand. See, attached Exhibits A and B, respectively. They detail the disciplinary procedures in use by the San Diego Police Department and the Commission including the use of Police Department personnel records by the Department and the Commission.

In San Diego, a Commission hearing may involve the use of some, or none, of a police officer's personnel file. To the extent the Department requires personnel records, only the portions of the records pertinent to the discipline being imposed are generally involved. See Exhibit A. If an officer objects to the disclosure of his or her personnel records at the public hearing, the hearing officer reviews the files *in camera*, determining which portion of the records are relevant for the purpose offered before they are disclosed at the public hearing. See Exhibit B. This *in camera* review is essentially identical to the process governing the disclosure of peace officer personnel records in public civil and criminal trials under section 832.7.

The evil the courts sought to prevent in both *Copley Press* and *SDPOA* was the uncontrolled disclosure of confidential peace officer personnel records to any person without any justification. We see no inconsistency in holding Commission hearings in public as required by the San Diego Charter for police officers who choose that public procedure,¹⁰ so long as there is an *in camera* review of any records proposed for use in those hearings if an officer objects.

Accordingly, we conclude the process the Commission currently uses to screen police officer personnel records before their disclosure at a public Commission appeal places adequate controls on the disclosure of the records and properly balances the need for disclosure at the

¹⁰ It could also be argued that San Diego police officers who choose a public Commission hearing in addition, or the alternative, to the more private Chief's appeal waive any statutory confidentiality protections in records that might be used in such public hearings.

public hearing and the officer's expectation of privacy in the records. To the extent that it has not been done, we suggest the Commission discuss formalizing procedures for these *in camera* reviews that are fully consistent with those used in civil and criminal proceedings.

III. Police Officer Civil Service Commission Records as Public Records.

After the Commission makes its decision, the San Diego Charter also requires that, "[a] copy of the written statement of reasons given for any removal, and a copy of any written reply thereto by the officer or employee involved, together with a copy of the decision of the Civil Service Commission shall be filed as a public record in the office of the Civil Service Commission." San Diego Charter § 129. These few records, generated after the decision to appeal to the Commission, must be considered Commission records.

As we concluded earlier in this memorandum, the City does not use the administrative appeals offered by the Commission to meet PÖBRA appeal requirements for City police officers. Thus, Commission's files and records are not confidential police officer personnel records maintained by the employing agency. They are not exempt from disclosure as confidential records under the CPRA and section 832.7. When officers choose the public hearing afforded to them by the San Diego Charter they can expect the records described by section 129 of the San Diego Charter to be treated by the Commission as public records. This Office sees no legal barrier to the continued treatment of the limited Commission records described in San Diego Charter section 129 as public records subject to disclosure.

CONCLUSION

This Office concludes that the *Copley Press* opinion is not applicable to Commission records of San Diego Police Officer administrative appeals. Unlike the County of San Diego, the City of San Diego does not use its Commission appeals to meet PÖBRA requirements. City Commission appeals are available to all classified employees, including police officers, as required by the San Diego Charter. However, Commission appeals for police officers are *in addition* to an intra-departmental administrative appeal process that meets PÖBRA requirements. Thus the Commission does not function as part of the employing agency for City police officers and Commission records are not those maintained by the police officer's employing agency. Accordingly, this Office concludes that the opinion in *Copley Press* is not applicable to require the records of the Commission relating to San Diego police officer administrative appeals be treated as confidential under the CPRA.

This Office also concludes that Civil Service Commission hearings for San Diego police officers should remain open to the public as required by the San Diego Charter, so long as the hearing officers make an *in camera* determination which of an officer's personnel records may be used at the hearing upon an officer's objection. We suggest the Commission formalize procedures for these *in camera* reviews that are consistent with those used currently in civil or criminal proceedings.

Last, this Office sees no legal barrier to the continued treatment of the limited list of Commission records described in San Diego Charter section 129 as discloseable public records.

MICHAEL J. AGUIRRE, City Attorney

By
City Attorney

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cc: Rich Snapper, Personnel Director
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Exhibits

ML-2007-12