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MEMORANDUM OF LAW

**DATE:** May 18, 2010

**TO:** San Diego Civil Service Commission

**FROM:** City Attorney

**SUBJECT:** Closing Commission Hearings and Treating Peace Officer Appeal Records as Confidential

INTRODUCTION

In August 2006, the California Supreme Court decided *Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272 (2006) (*Copley Press*). *Copley Press* concluded that disciplinary administrative appeal records of the San Diego County Civil Service Commission were confidential peace officer personnel records under the Peace Officer Bill of Rights (Cal. Pen. Code §§ 832.7 and 832.8), and that neither the records nor the identity of the disciplined officer could be disclosed pursuant to the California Public Records Act (Cal. Gov't Code §§ 6250-6270) (CPRA). *Copley Press* did not address the use of confidential peace officer personnel records during a public administrative appeal hearing.

In response to questions from the San Diego City Civil Service Commission, this Office issued a memorandum of law considering whether *Copley Press* applied to City peace officer administrative appeal records, and whether the public hearings required by the San Diego Charter for such appeals could continue. City Att'y MOL 2007-12 (Sept. 4, 2007). The memorandum concluded that *Copley Press* did not apply to the City's Civil Service Commission records of San Diego Police Officer administrative appeals, due to the unusual and dual appeal process afforded City police officers. Furthermore, Commission hearings involving such police officers could remain open to the public, so long as the Commission used an *in camera* procedure to determine which of an officer's confidential personnel records may be used during the public hearing. Last, we concluded that the Commission could continue to disclose the Commission records of the hearing as required by the Charter.

In 2007, the Supreme Court issued two opinions further interpreting *Copley Press*, namely, *Comm'n. on Peace Officer Standards & Training v. Superior Court*, 42 Cal. 4th 278 (2007) (*POST*) and *Int'l Fed. of Prof. and Tech. Engineers, Local 21, AFL-CIO v. Superior*

*Court*, 42 Cal. 4th 319 (2007) (*Engineers*). In 2008, an appellate court also discussed *Copley Press Berkeley Police Ass'n v. City of Berkeley*, 167 Cal. App. 4th 385 (2008) (*Berkeley*). A City police officer is now seeking a closed administrative review hearing of a disciplinary matter before the Commission. In light of that request, this memorandum will review the case law since *Copley Press*, and revisit the 2007 Memorandum to provide the Commission with current guidance.

### QUESTION PRESENTED

Do the cases decided since *Copley Press* affect the 2007 conclusion that administrative appeals for City police officers should remain open to the public and that Commission records of these appeals may be disclosed in accordance with the CPRA?

### SHORT ANSWER

Yes. The *Berkeley* decision requires substantial revision to the 2007 conclusions. To the extent City peace officer administrative appeals before the Commission involve personnel records within the meaning of California Penal Code section 832.7, those records should be treated as confidential. In the absence of a waiver by the appealing officer, City Civil Service Commission hearings involving peace officer personnel records should be closed to the public and the identity of the appealing officer be treated as confidential. The Commission should also treat as confidential the Commission records required to be filed as a public record by San Diego Charter.

### ANALYSIS

After *Copley Press*, the Supreme Court issued two opinions that implied *Copley Press* may be more limited in its impact than it first appeared. In *POST*, 42 Cal. 4th 278 (2007), the court concluded that records held by the Commission on Peace Officer Standards and Training, including the names, employing departments, and hiring and termination dates of California peace officers, were *not* rendered confidential records by California Penal Code sections 832.7 and 832.8<sup>1</sup>, and were *not* exempt from disclosure under the CPRA. *POST*, 42 Cal. 4th at 284, 298-299. The court distinguished the records involved in *Copley Press*, particularly noting that decision barred the disclosure of “the identification of an individual as the officer involved in an incident that was the subject of a complaint or disciplinary investigation.” *Id.*, at 299. In *Engineers*, the companion case to *POST*, the court held that the identities and salaries of police officers<sup>2</sup> were subject to disclosure under the CPRA. *Id.* at 340-346.<sup>3</sup>

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<sup>1</sup> Future section references are to the California Penal Code unless indicated otherwise.

<sup>2</sup> Individual officers may protect their information from disclosure in certain circumstances. *Id.*, at 344.

<sup>3</sup> In the wake of the *POST* decision, the California Attorney General issued an opinion in May, 2008 determining that the names of peace officers involved in a critical incident could be released to the public. 91 Ops. Cal. Att’y Gen. 11 (2008).

However in 2008, an appellate court decided the *Berkeley* case, which provided a more expansive interpretation of the *Copley Press* opinion and directly addressed whether the confidentiality provisions required closure of public hearings of a citizens' police review commission governed by section 832.5. *Berkeley* court rejected a "narrow" interpretation of *Copley Press* - that the confidentiality requirements of section 832.7 only applied to confidential investigatory processes that can lead to discipline. *Berkeley*, 167 Cal. App. 4th at 400-406. Instead, the court interpreted *Copley Press* to hold "the confidentiality statutes apply to the handling of 'all aspects of disciplinary matters and citizen complaints,' without regard to the mechanisms set up by a local jurisdiction to handle such matters, and without regard to whether entities independent of the jurisdiction's police department or agency play a role in investigating or hearing such matters." *Berkeley*, 167 Cal. App. 4th at 401 (citing *Copley Press*, 39 Cal. 4th at pp. 1294-1295).

In short, *Berkeley* held that any *procedure* involving peace officer personnel records that are subject to the confidentiality protections of sections 832.7 and 832.5 must be confidential. Public hearings could not be held without disclosing the identity of the officers and confidential information from their files, nor could witnesses be effectively cross-examined without disclosing confidential information. *Berkeley*, 167 Cal. App. 4th at 404. In *dicta*, *Berkeley* rejected an argument that a charter city could properly require open hearings, noting that state general laws governing privileges supersede charter provisions. *Id.*, citing *Dibb v. County of San Diego*, 8 Cal. 4th 1200, 1210, n. 5 (1994).<sup>4</sup> So, in the absence of a waiver by the officer, the *Berkeley* court ordered the City to "comply with Penal Code section 832.7 and not disclose peace officer personnel records except in accordance with the contingencies specified in that section and [to] cease permitting the public to access [the commission's] investigations, reports, hearings, and findings." *Berkeley*, 167 Cal. App. 4th at 406.

The *Berkeley* court expanded the legal interpretation and application of *Copley Press* and section 832.7. The decision is binding on all lower courts in California until an equal and differing court decides otherwise; the California Supreme Court decides otherwise; or the statutes are changed. In the interim, this Office concludes that courts are likely to apply *Berkeley's* analysis to the peace officer administrative appeal hearings held before the City's Civil Service Commission. For that reason, the conclusions provided in our 2007 memorandum are modified as follows, and supersede that opinion to the extent they are inconsistent.

### CONCLUSION

In accord with the decision in *Berkeley Police Ass'n v. City of Berkeley*, 167 Cal. App. 4th 385 (2008) and to the extent peace officer administrative appeals involve personnel records within the meaning of California Penal Code section 832.7, those records should be treated as confidential. Also, in the absence of a waiver by the appealing officer, City Civil Service Commission hearings involving peace officer personnel records should be closed to the public,

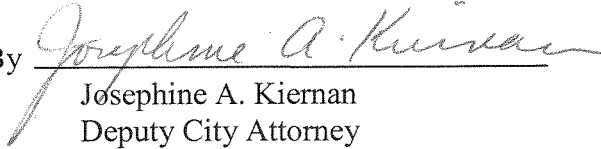
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<sup>4</sup> *Berkeley* did not assess the use of *in camera* proceedings to determine the relevance and admissibility of records as suggested in our 2007 memorandum.

and the identity of the appealing officer be treated as confidential. Last, the Commission should treat as confidential the Commission records required to be filed as a public record by San Diego Charter section 129. Those records include “[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.” San Diego Charter § 129.

This Office is available to answer Commission questions and will provide any new input should the legal landscape change in the future.

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