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MEMORANDUM OF LAW

DATE: April 17, 1987

TO: George Penn, Assistant to the City Manager

FROM: City Attorney

SUBJECT: Confidentiality of Police Department Internal Affairs Records

You have asked this office to respond to the following questions which have been raised by the Citizens Advisory Board on Police/Community Relations.

1. Does the City Manager have access to the Police Department's Internal Affairs Division records of civilian complaints against City of San Diego police officers?

2. If the City Manager has access to the records of the Internal Affairs Division, can he lawfully delegate it to an assistant in the City Manager's office?

3. If the answers to the above questions are in the negative, what possible alternatives exist under present law which would permit "civilian review" of Internal Affairs Division records?

BACKGROUND

After extensive public hearings, the Citizens Advisory Board on Police/Community Relations voted to recommend to the City Manager and the City Council of The City of San Diego that a process be established which would permit "some form of civilian review of citizen complaints made against members of the San Diego Police Department." The Advisory Board also requested that the executive subcommittee of the Board meet to refine this concept and to have the office of the City Attorney review the formalized proposal before the Board's meeting on April 21, 1985. The subcommittee met on April 7, 1986 and discussed various proposals including one that the City Manager appoint a minimum of two unclassified "civilian" assistants whose duties would involve reviewing the records of the Internal Affairs Division of

the San Diego Police Department. This memorandum is in response to the above questions concerning access to current Internal Affairs Division records which arose during the discussion of that proposal.

ANALYSIS

The question of the City Manager's access to confidential records of the San Diego Police Department (SDPD) is not a new one. Just over a decade ago, a controversy arose over the authority of the City Council or City Manager to review the criminal intelligence records of the SDPD. In response to the numerous legal questions which arose during that controversy this office issued several opinions. Copies of those opinions are attached to this memorandum of law, not only because we will refer to them in this analysis but also because they will be of assistance to you in future discussions concerning access to Police Department files.

In City Attorney Opinion No. 76-14 (prepared by Robert S. Teaze, Assistant City Attorney and issued on May 5, 1976) this office concluded:

> Under section 57 of the Charter, the files of the Police Department are under the control of the Chief of Police and any determination as to what access to those files will be given anyone is for the Chief of Police to make, consistent with the requirements of section 6254 of the Government Code, sections 1040 and 1041 of the Evidence Code and section 11140 through 11144 of the Penal Code. If one individual is permitted access, the privilege against disclosure is waived as to anyone else desiring similar action.

As to the specific question of the City Manager's access to Police Department records, City Attorney Opinion No. 76-14 indicates at page 10:

> Finally, it was asked whether the City Manager might grant the special attorney access to the Police Department records. The City Manager does not have control over police records. Such is vested in the Chief of Police by section 57 of the Charter:
>
> The Chief of Police shall have all power and authority necessary for the

operation and control of the Police Department.

The City Manager has the power to appoint and remove the Chief of Police (Charter sections 30 and 57). He also has the power to "set aside any action taken" by the Chief of Police and "may supersede him in authority in the function of his office or employment." Charter section 28. However, until the City Manager does so act, the control of police records is in the hands of the Chief of Police.

It is therefore clear that unless the City Manager is acting as the Chief of Police, he does not have access to Police Department records. If the situation ever arises whereby the City Manager does supersede the Chief of Police in the functions of his office, the City Manager would have the same power to delegate authority to subordinates or assistants as the Chief of Police has but they would also be bound by the provisions of California Penal Code sections 832.5 or 832.7 which make records of civilian complaints confidential. The effect of those statutes will be discussed in response to your third question.

Before responding to that question, we believe it appropriate and helpful to provide you with a short historical perspective of the relevant legal issues surrounding the establishment of civilian review boards.

It has not been unusual for cities to encounter legal difficulties in establishing civilian review boards because charter provisions often give the chiefs of police specific responsibilities for the control and operation of police departments. New York City was successful in establishing its police review board in the 1960s by placing it under the police commissioner and not the mayor. Cassese v. Lindsey, 272 N.Y.2d 324 (1966). The City of Berkeley experienced legal difficulties when portions of its ordinance creating a police review commission were found to be in conflict with various charter provisions. Brown v. City of Berkeley, 57 Cal.App.3d 223, 129 Cal.Rptr. 1 (1976). However, the following year a court did find that the action by the Berkeley police chief permitting a member of the citizens police review commission to sit in on department hearings regarding citizens' complaints against officers was not unlawful. Berkeley Police Assn. v. City of Berkeley, 76 Cal.App.3d 931, 143 Cal.Rptr. 255 (1977). The key holding in that case was the court's ruling that the privilege against disclosure of police department records provided for in the California Public Records Act [Government Code section 6250 et

seq.] operates only when it is asserted by the agency itself and that individual police officers had no standing to assert a privilege under that section. In other words, the court did not intercede and prohibit the chief of police from releasing police department investigative materials to the citizens police review commission because the chief of police, as the holder of the privilege against disclosure, was free to waive it at any time.

In another case involving the City of Berkeley, it was held that disclosure of internal affairs records to a city official who was authorized by the charter to receive such information was not "public disclosure" as that term is used in the California Public Records Act. Parrot v. Rogers, 103 Cal.App.3d 377, 163 Cal.Rptr. 75 (1980).

However, none of these cases involved an analysis of California Penal Code sections 832.5 and 832.7 which were enacted by the Legislature in 1978 and created a statewide procedure for protecting the confidentiality of citizens complaints against peace officers. Those sections state:

> **§ 832.5. Citizens' complaint against personnel; investigation; description of procedure; retention of records**
>
> (a) Each department or agency in this state which employs peace officers shall establish a procedure to investigate citizens' complaints against the personnel of such departments or agencies, and shall make a written description of the procedure available to the public.
>
> (b) Complaints and any reports or finding relating thereto shall be retained for a period of at least five years.
>
> **§ 832.7. Personnel records; confidentiality; discovery**
>
> Peace officer personnel records and records maintained pursuant to Section 832.5, or information obtained from these records,
>
> are confidential and shall not be disclosed in any criminal or civil proceedings except by discovery pursuant to Section 1043 and 1046 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.

These sections now make it very difficult for a "citizen" to obtain access to the internal affairs records of a police department. In fact, one court has held that these statutes not only protect the records themselves but also protect the identical information about personal history which is within an officer's own recollection during a deposition. City of San Diego v. Superior Court, 136 Cal.App.3d 236, 186 Cal.Rptr. 112 (1981).

Read together these statutes clearly place a duty on the "department or agency ... which employs peace officers" to protect the records from unauthorized disclosure.

Unfortunately, there is no case law which analyzes the effect of these statutes on the rule established in Parrot v. Rogers. However, we feel confident that disclosure of internal affairs records to an officer of The City of San Diego authorized such access in the performance of his or her duty under the Charter would not be a public disclosure of these records. The officer is, of course, bound by the statute and may not authorize public disclosure. For example, Charter section 40 permits the City Attorney or its deputies access to such files when "necessary to be used in any suit or required for the purpose of his office." In addition, section 832.7 also specifically permits inspection of these records by the Grand Jury or the District Attorney's office in the performance of their duties. Such inspection clearly would not be public disclosure.

In summary, we must inform you that under current law there are significant legal obstacles that block the way to access to Internal Affairs Division records by a civilian review board. In order to obtain such confidential access, it would be necessary, at a minimum, to amend the Charter of The City of San Diego. If public disclosure of these records is contemplated, it will be necessary for the State Legislature to amend the provisions of Penal Code section 832.7 and authorize such disclosure.

JOHN W. WITT, City Attorney

By John M. Kaheny
John M. Kaheny
Deputy City Attorney

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Attachments
ML-87-41

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OPINION NO. 76-13

DATE: May 4, 1976

SUBJECT: Brown Act - Executive Session

REQUESTED BY: Mayor Pete Wilson

PREPARED BY: John W. Witt, City Attorney
Robert S. Teaze, Assistant City Attorney

QUESTION PRESENTED

Can the City Council receive responses from the Police Department in Executive Session under the provisions of the Brown Act where the publicity of such responses would compromise or jeopardize either a process or agent of the department?

CONCLUSION

No such exception to the Brown Act exists.

BACKGROUND

On March 24, 1976, the Council, meeting as the Committee of the Whole, approved a set of guidelines for conducting an inquiry into the intelligence operations of the San Diego Police Department. Those guidelines are attached hereto as "Exhibit A."

One of the several lines of inquiry under the "Guidelines" is the following:

> 6. Responses of the Police Department to any of the above inquiries shall not be required to be made publicly where the publicity would compromise or jeopardize either a process or agent of the Department, whether currently in progress or in prospect, where that contention (that is to say, the threat of compromise or jeopardizing any process or agent) is made by the Department or by another law enforcement agency, the information sought would be received in Executive Session pursuant to the provisions of the Brown Act.

The above paragraph raises the question as to whether any provision of law would prohibit an Executive Session so that the Council might receive evidence and testimony of police operations and records in secret.

ANALYSIS

The Ralph M. Brown Act (Government Code, § 54950, et seq.) generally requires all business of local government legislative bodies to be conducted in noticed, open public meetings. There are some exceptions to the Act permitting executive sessions, however. First, there is the personnel exception, expressed in Section 54957, which permits legislative bodies to go into executive session to discuss the appointment, employment or dismissal of a public employee or charges against such employee. This exception was discussed at length in Opinion No. 75-12 dated August 8, 1975. In that opinion, we concluded such an exception applies only to public employees whom the Council has the power to employ or dismiss. The personnel exception, of course, is not available to permit discussion in executive session of the matters about which you have expressed concern.

The second Brown Act exception, again expressed in Section 54957, permits discussion in executive session of "the security of buildings or a threat to the public's right of access to public services or public facilities." This exception obviously is not broad enough to permit executive session discussion of matters contemplated in your question.

The third exception found in the Brown Act (Section 54957.6) permits executive sessions to review the City's position and instruct your "designated representatives prior to and during consultations and discussions with . . . employee organizations regarding salaries, salary schedules or . . . fringe benefits." This exception is likewise of no assistance in the situation you have posed.

There is a further exception not spelled out in the Brown Act itself. But it is well recognized by the California courts. It is based on the attorney-client privilege set forth at Section 952 of the Evidence Code. It permits a legislative body to discuss potential or pending litigation with its attorney in executive session.

The Court of Appeal opinion in the case of Sacramento Newspaper Guild v. Sacramento County Bd. of Supvs., 263 Cal.App.2d 41 (1968) discusses at considerable length the force of this so-called "litigation" exception. Since your

question does not relate to a matter in litigation, the aforementioned exception would not appear to be available. As the court said in the Sacramento case:

> The two enactments [the Brown Act and the Evidence Code] are capable of concurrent operation if the lawyer-client privilege is not overblown beyond its true dimensions. As a barrier to testimonial disclosure, the privilege tends to suppress relevant facts, hence is strictly construed. (Greyhound Corp. v. Superior Court, supra, 56 Cal.2d at p. 396.) As a barrier against public access to public affairs, it has precisely the same suppressing effect, hence here too must be strictly construed. As noted earlier, the assurance of private legal consultation is restricted to communications "in confidence." Private clients, relatively free of regulation, may set relatively wide limits on confidentiality. Public board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest. To attempt a generalization embracing the occasions for genuine confidentiality would be rash. The Evidence Code lawyer-client provisions may operate concurrently with the Brown Act, neither superseding the other by implication.

There are no other exceptions to the "open meeting" requirements of the Brown Act. Thus it is clear that the type of investigation suggested by your question cannot be conducted in executive session.

Even though the investigation cannot be conducted in executive session, sections of the Evidence and Government Codes would in any case present a barrier to the disclosure of the kind of information which your questions suggest is being sought. For example, Sections 1040 and 1041 of the Evidence Code classify such information as being privileged. Those sections read as follows:

> § 1040. Official Information.
>
> (a) As used in this section, "official information" means information acquired in confidence by a public employee in the course

of his duty and not open, or officially disclosed to the public prior to the time the claim of privilege is made.

(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

§ 1041. Identity of Informer.

(a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving

the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(b) This section applies only if the information is furnished in confidence by the informer to:

(1) A law enforcement officer;

(2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated; or

(3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2).

(c) There is no privilege under this section to prevent the informer from disclosing his identity.

Furthermore, under Section 6254 of the Government Code, the files of the Police Department are protected from public disclosure. The particular provision is as follows:

§ 6254. Exemption of particular records

Except as provided in Section 6254.7, nothing in this chapter shall be construed to require disclosure of records that are:

. . . .

(f) Records of complaints to or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local agency for

correctional, law enforcement or licensing purposes;

. . . .

Nothing in this section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.

It is apparent that under the above section, the kind of information suggested by your question is privileged from public disclosure whether in a court of law or whether simply in response to a matter of general inquiry by a member of the public.

From the above language, it appears the privilege might be waived by the "public entity" in the Evidence Code section and the "agency" in the Government Code section. The question arises as to whether the right of waiver reposes with the Council or with the Police Department itself. Under Evidence Code Section 200, public entity is defined as follows:

§ 200. Public Entity Defined.

"Public entity" includes a nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation, whether foreign or domestic.

"Agency" is not specifically defined in the Government Code, but since the privilege is accorded to the "local police agency," the option to waive by the "agency" as expressed in the last paragraph of Section 6254 is one that only the Police Department can exercise. The broad definition of "public entity" set forth above and the provision of Section 57 of the Charter vesting in the Chief of Police "all power and authority necessary for the operation and control of the Police Department" can lead only to the conclusion that the privilege against disclosure is for the Police Department to make as the "public entity." After all, it is the agency, not the Council, that possesses knowledge of the contents of files and the scope and source of confidential information in order to make the determination in the first instance as to the need for preserving confidentiality outweighing the necessity for disclosure. It should be noted that through Section 915 of the Evidence Code, the law provides a way for the validity of the assertion of the privilege of confidentiality under Sections 1040 and 1041 to be tested in a court of law in the

privacy of the judge's chambers. No such procedure is available to the Council to make a decision in a similar manner in any proceeding before it.

In addition, the City Council in pursuing this kind of investigation may run athwart of the same kind of problems that confronted the City of Berkeley in its adoption of a resolution allowing residents or citizens of Berkeley to "obtain access to their state arrest records contained in the files of the Berkeley Police Department." The Attorney General contended this was contrary to the provisions of Sections 11075 through 11081 of the Penal Code dealing with criminal record dissemination. The Appellate Court in Younger v. Berkeley City Council, 45 Cal.App.3d 825 (1975) agreed stating:

> . . . certain documents in the possession of a municipality are expressly exempt from disclosure and included in this category are ". . . records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes."
>
> . . . .
>
> It is concluded that the Public Records Act does not authorize local entities to permit access to state criminal offender records to anyone ". . . for the purpose of assisting a private citizen in carrying on his personal interests . . ." (Pen. Code, § 11105, subd. (b)) or to insure the accuracy of such records.

Since the responses sought to be elicited from police officers may well involve information gleaned from state records, the Attorney General will undoubtedly have the same objection to their disclosure as was made in the Younger case.

A further discussion is necessary in light of the concession the Attorney General apparently made in Younger that "the City of Berkeley could permit whatever access the City Council deemed appropriate in the case of arrest records compiled by the Berkeley Police Department." The court did not indicate whether it agreed with the Attorney General or not. The question necessarily arises here as to whether the San Diego City Council would have similar control over records

compiled by the San Diego Police Department as the Attorney General conceded that the Berkeley Council had over the Berkeley Police Department.

A study of the Berkeley Charter has disclosed that it provides that "[t]he Council shall by ordinance prescribe the duties of all chief officers" which includes the Chief of Police (Section 30, Stats. 1909, p. 1208, as amended). Further, the Charter provides that "[a]s the legislative organ of the city, the Council . . . shall have power: . . . (5) To organize and maintain police and fire departments. . . ." No such similar power to organize and prescribe duties is given the San Diego City Council by its Charter. On the contrary, Section 57 provides as follows:

> Section 57. POLICE DEPARTMENT.
>
> . . . .
>
> The Chief of Police, with the approval of the City Manager, shall appoint, direct and supervise the personnel, subject to Civil Service regulations, have charge of the property and equipment of the department and exercise all powers and duties provided by general laws or by ordinance of the Council. The Chief of Police shall have all power and authority necessary for the operation and control of the Police Department. [Emphasis added.]

The only power accorded by the Charter to the Council is the ability to bestow on the Police Chief additional duties and powers over and above what the Police Chief exercises by inherent Charter right for the operation and control of the Department. Once again, therefore, we are obliged to come to the opinion that the determination of what may be disclosed rests with the Chief of Police consistent, of course, with the laws of the State and good police investigation practice as spelled out in that policy submitted to the Council for its review at the meeting of April 14, 1976.

The conclusion, therefore, appears inescapable that, because of the limitations imposed by the Brown Act, the Council, as a legislative body, is not contemplated in the law to be the vehicle for inquiries of this kind. Under California law, the public body vested with the responsibility for investigations into public offenses is the Grand Jury (Penal Code, § 919(c)). It is not encumbered by the requirements of the Brown Act. The Grand Jury's sessions, in

contradistinction to the Council's, are required to be secret (Penal Code, Sections 911, 915, 924, 924.1, 924.2 and 939). Indeed, special permission from the Superior Court is necessary before Grand Jury sessions may be conducted in public (§ 939.1). Furthermore, the Grand Jury, is entitled to free access to all public records (Section 921), an entitlement not fully shared by the Council. Also, a willful disclosure of any matters involving an indictment or information before the arrest of a defendant is a misdemeanor (Section 924). No similar provision protects the security of information presented to the Council.

The rules under which the Grand Jury operates exist to protect the innocent from accusations without merit or ground. As was said in McFarland v. Superior Court, 88 Cal.App.2d 153, 160 (1948):

> The Grand Jury is an inquisitorial body of very ancient origin and a constituent part or agency of the court created for the protection of society and the enforcement of the law.

The City Council is organized neither as an inquisitorial body nor as a constituent part or agency of the court. It, therefore, is poorly equipped to undertake such responsibilities because it cannot assure, under the same stringent rules as govern a Grand Jury, that the innocent can be protected by the shroud of secrecy from malicious or unfounded accusations. Nor can it assure confidentiality of information the public disclosure of which may be injurious to the public security or the physical safety of individuals.

Respectfully submitted,

John W. Witt
City Attorney

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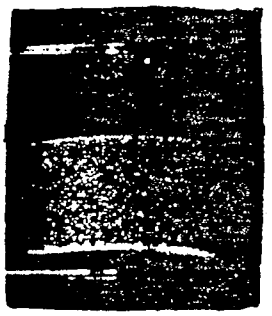

The Council inquiry is for the purpose of ascertaining the past and present Police Department's policies with respect to intelligence operations and any contemplated changes of those policies. It is beyond the scope of the inquiry to determine the truth of individual charges of misconduct or redress individual grievances.

The following lines of inquiry are appropriate:

1. The kinds of information gathered and retained by the Investigative Support Unit of the Police Department.

2. The methods used to gather such information.

3. The manner in which such information is used by the Police Department.

4. The types of individuals and agencies who are permitted to have access to the information stored by the Investigative Support Unit.

5. The length of time the information is presently being retained by the Investigative Support Unit.

6. Responses of the Police Department to any of the above inquiries shall not be required to be made publicly where the publicity would compromise or jeopardize either a process or agent of the Department whether currently in progress or in prospect, where that contention, that is to say, the threat of compromise or jeopardizing any process or agent is made by the Department or by another law enforcement agency, the matter would be pursued in Executive Session pursuant to the provision of the Brown Act.

In order to facilitate and expedite the inquiry, the Council hereby designates the Rules Committee Consultant as special assistant to the City Council for the purpose of assisting the Council in conducting inquiries into intelligence operations pursuant to Resolution No. 215233.

1. It shall be the responsibility of the Rules Committe Consultant to prepare a timetable for completion of the Council inquiry.

2. It shall be the responsibility of the Rules Committee Consultant to conduct interviews of City employees as may be necessary on behalf of the Council.

3. It shall be his responsibility to obtain and, when necessary, to solicit, statements from any person with any information relevant to the Council's inquiry.

4. It shall be the responsibility of the Rules Committee Consultant to report in a timely manner to the Council the results of his investigation and inquiries; and to recommend, as seems appropriate, the scheduling of hearings relative to the Council's inquiry.

5. It shall be the responsibility of the Rules Committee Consultant to prepare, at the conclusion of his investigations and at the conclusion of Council deliberations, a final report, including recommendations for adoption of policies or procedures by the Council relative to intelligence operations.

6. The City Attorney, City Manager and all other department heads shall cooperate and lend whatever assistance reasonable and necessary to assist the Rules Committee Consultant.

OFFICE OF
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OPINION NO. 76-14

DATE: May 5, 1976

SUBJECT: Police Intelligence Inquiry and the Attorney-Client Privilege

REQUESTED BY: Coleman Conrad, Rules Committee Consultant

PREPARED BY: Robert S. Teaze, Assistant City Attorney

QUESTIONS PRESENTED

1. Is it legal for the Council to designate a lawyer licensed to practice law in the State of California as an additional attorney for the specific purpose of assisting Council in this inquiry?

2. Assuming that such a designation is legal, what is the extent of the attorney-client privilege that would result from this designation?

3. Is the City Manager prohibited from providing free access to the information contained in the files of the Investigative Support Unit of the Police Department to the Rules Committee Consultant acting as special assistant to the Council in conducting inquiries into intelligence operations pursuant to Resolution No. 215233?

4. If the City Manager is prohibited in some manner, please specify which files are not to be made available to the Rules Committee Consultant acting in his capacity as special assistant to the Council in conducting inquiries into intelligence operations pursuant to Resolution No. 215233.

CONCLUSION

1. Under Section 40 of the City Charter, the Council may employ an "additional competent technical legal attorney" to assist it if the need therefor can be shown. But in this case, since legal advice or assistance is not being sought, the necessity for employing an attorney is difficult to rationalize.

2. Since the attorney-client privilege against disclosure of information attaches only when a lawyer has been consulted for legal advice or is giving it, and neither of which is involved here, no privilege would result from the designation. Where a lawyer is acting primarily as an investigator and his papers merely record the statements of witnesses, that information will be subject to discovery.

3. and 4. Under Section 57 of the Charter, the files of the Police Department are under the control of the Chief of Police and any determination as to what access to those files will be given anyone is for the Chief of Police to make, consistent with the requirements of Section 6254 of the Government Code, Sections 1040 and 1041 of the Evidence Code and Sections 11140 through 11144 of the Penal Code. If one individual is permitted access, the privilege against disclosure is waived as to anyone else desiring similar access.

BACKGROUND

On January 29, 1976, the Council adopted Resolution No. 215233 which provided, among other things, for the Council to meet as a Committee of the Whole "to inquire about intelligence operations by City employees with a view to adopting policies or procedures or both . . . to deal with future City employee participation in such intelligence operations." The resolution further provided that the Committee of the Whole would meet to conduct a specific inquiry "into the intelligence operations of the San Diego Police Department." Finally, the resolution directed the City Manager and City Attorney to provide whatever assistance and personnel were necessary and the Committee was required to "establish whatever rules and regulations [deemed] necessary."

Subsequently, the Committee of the Whole met on Wednesday, March 24, 1976 and adopted a motion setting forth the guidelines for conducting the inquiry into police intelligence operations. A document incorporating those guidelines was prepared by the City Clerk pursuant to his understanding of the direction of the Committee of the Whole and is attached hereto as "Exhibit A." The guidelines designate the Rules Committee Consultant as a special assistant to the Council for the purpose of assisting in the inquiry.

The questions set forth above were asked by the Rules Committee Consultant, Mr. Coleman Conrad. Since he is also an attorney licensed to practice law in the State of California, he perceived his task to be better accomplished if he were to undertake it not simply as a "special assistant," but as a specifically appointed attorney under Section 40 of the Charter.

Mr. Conrad expressed his concern as follows:

> It is apparent that there are many aspects of this inquiry that must be carefully considered by the Council. There is the need to conduct an inquiry that will be completely thorough. There is the need to ensure that the rights of all parties to the Bohmer lawsuit [Bohmer v. Nixon, et al., Fed. Dist. Court No. 75-4-T] are fully protected. There is the need to ensure that the rights of all individuals interviewed are fully protected. And, there is the need to ensure that the Council, special assistant and other employees of the City connected with this matter are proceeding in a lawful manner at each step of the inquiry.
>
> If I am to be effective in this assignment as a special assistant to the Council, it is my belief that I should be designated an additional attorney. It is, therefore, recommended that Council, by resolution, in accordance with Charter Section 40, designate me as an additional attorney for the specific purpose of assisting Council in this inquiry. Such a designation would provide, among other things, for a privileged attorney-client relationship to be established between the Council and myself. It would be clearly understood that City Attorney John W. Witt shall continue to be the chief legal advisor for the City in all matters, including this matter of an inquiry into Police Intelligence Operations.

It is obvious that Mr. Conrad's intent in seeking the appointment is to establish an attorney-client relationship between himself and the Council in the belief that information gathered by him in the course of his investigation would be privileged from disclosure by any attempts made by litigants in the Bohmer case.

The Bohmer case is one brought against a number of individuals in Federal Court upon allegations of a violation of civil rights. Among the numerous defendants are several San Diego police officers. Since the City is obligated to respond in damages to any liability that may be determined to fall upon these officers for actions undertaken during the course and scope of their employment, they are being defended by this office. The actions taken by them during the course and scope of their employment are, in effect, City actions. As such, they are clients of this office just as are members of the Council or any other employees of the City acting within the course and scope of their employment. Seemingly then, the interest of the Council and the police officers in the outcome of the lawsuit are the same insofar as it concerns acts committed during the course and scope of employment.

Recognizing the existence of an equivalent interest, the Council's Committee of the Whole in adopting the guidelines sought to avoid hindering the defense of the police officers in the Bohmer case by providing as follows:

> It is beyond the scope of the inquiry to determine the truth of individual charges of misconduct or redress individual grievances.

Against this background, the Council inquiry, as well as the task assigned to the "special attorney," is one of fact gathering. The specific aim, as it should be, is to avoid any involvement in individual grievances or charges of misconduct such as have been raised in the Bohmer suit. In pursuing his task of "fact gathering," the "special attorney" has indicated a need not only to talk to individual police officers, but also to examine the intelligence files of the Police Department. The analysis as to whether his appointment as an attorney will preclude involuntary disclosure of the material gathered and whether the City Manager may permit him access to the police files follows.

ANALYSIS

I

Section 40 of the City Charter provides:

> The Council shall have authority to employ additional competent technical legal attorneys to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith.

This section has traditionally been used as the authority for retaining special counsel when there is a need for an independent legal opinion in connection with a bond issue or a 1913 Act assessment proceeding. Independent legal opinions are "necessary in connection therewith" in order for the bonds to be marketable (see City Attorney Report to Mayor and Council dated April 17, 1972). Also, from time to time, outside counsel is needed in connection with test cases such as The City of San Diego v. George Bean, Superior Court No. 252754 in which the Metropolitan Sewer agreements were involved, City Council v. McKinley and Sage, Superior Court No. 370274 in which the status of a contract for services was involved and Hubbard v. The City of San Diego, Superior Court No. 358163 in which the legality of an ordinance was questioned. In these cases, it was necessary to secure outside counsel because various clients of this office were involved on both sides of the litigation.

In this situation, however, there is no need to hire independent counsel. This office stands ready to render such legal assistance and advice as the Council may need. In fact, the Council has directed us to render just such assistance in Resolution No. 215233, adopted January 29, 1976. Since we are involved in the Bohmer litigation, we are better able to meet the Council's desire not to delve into matters related to that case in order to protect the interest of defendant police officers acting in the course and scope of their employment, as well as the Council's interest in protection of the taxpaying public's treasury. In the final analysis, it is the Council which would have to authorize any money needed to meet judgments that might be rendered.

Furthermore, the "special attorney" is not being retained to give legal advice or assistance. His task is one of information gathering. Admission to practice law is not a prerequisite to performing such functions. Appointment of a lawyer to accomplish the task is, therefore, not necessary and the portion of Charter Section 40 relied on is not applicable.

II

When an attorney is retained to undertake legal services, communications from and advice given the client are privileged. The basic rule with respect to the application of the attorney-client privilege is set forth in the following two sections of the Evidence Code:

§ 952. "Confidential communication between client and lawyer"

As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

§ 954. Lawyer-client privilege

Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

(a) The holder of the privilege;

(b) A person who is authorized to claim the privilege by the holder of the privilege; or

(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

. . . .

The principles upon which the lawyer-client privilege is based were discussed by the court in People ex rel Dept. of Public Works v. Glen Arms Estate, 230 Cal.App.2d 841 (1964):

> . . . The general principle of the attorney-client privilege expressed in terms of its essential elements, has been articulated by Wigmore thusly: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." (8 Wigmore on Evidence (McNaughton Rev. 1961) § 2292, p. 554.) This privilege is grounded on a policy which, according to its modern concept, declares that "[i]n order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent." (8 Wigmore, op. cit., § 2291, p. 545.) It is "strictly construed, since it suppresses relevant facts that may be necessary for a just decision. [Citations.] It cannot be invoked unless the client intended the communication to be confidential [citations]; . . ." (City & County of San Francisco v. Superior Court (1951) 37 Cal.2d 227, 234-235 [231 P.2d 26, 25 A.L.R.2d 1418].) It is settled that "[t]he privilege embraces not only oral or written statements but actions, signs, or other means of communicating information by a client to his attorney. [Citations.]" (City & County of San Francisco v. Superior Court, supra, at p. 235.) "Where the document is itself the client's written communication, coming into existence merely as a communication to the attorney, . . . [the] communication itself is not to be produced, . . ." (8 Wigmore, op. cit., § 2307, p. 594.) Finally, although the last principle is clear in itself its application is frequently difficult where the actual maker of the document is some person other than the client himself or is a person purporting to act for a corporation or other artificial person or body. (8 Wigmore, op. cit., § 2307, p. 595.)

Thus, a communication from a client seeking legal advice and the response of the attorney are considered confidential when they are intended to be made in confidence. The City Council, as the legislative body of the City, has status as a client and is entitled to invoke the privilege. The

Appellate Court said in Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 255 Cal.App.2d 51 (1967):

> There is a public entitlement to effective aid of legal counsel in civil litigation.

The allusion to civil litigation reflects the fact that the attorney-client privilege with respect to public bodies is not generally invoked unless litigation is involved. The reason for this is that in most instances, communications between attorney and a public body client are not intended to be confidential. Such is the case with all of the many opinions and reports written by this office.

The special attorney's assignment is to conduct an investigation and is not to give legal advice. Nor is the Council seeking legal advice. Therefore, it does not appear that an attorney-client relationship even exists. Merely because one is an attorney does not in and of itself necessarily create an attorney-client relationship. A communication to be privileged must have been made to an attorney acting in his official capacity toward his client. Solon v. Lichtenstein, 39 Cal.2d 75, 80 (1952). The attorney must have been consulted for legal advice or be giving it, 51 Cal. State Bar Journal 119, 120 (1976); U.S. v. United Shoe Machinery Corp., 89 F.Supp. 357 (1950); see also Holm v. Superior Court, 42 Cal.2d 500 (1954); Sullivan v. Superior Court, 29 Cal.App.3d 64 (1972). As was said by the Supreme Court many years ago in Hunter v. Watson, 12 Cal. 363, 377 (1859):

> . . . while the attorney is not permitted to disclose the confidential communications of his client, yet if he acquires information apart from any such communications, he is not protected from disclosing it. We do not understand that the witness was required to state any facts derived from statements made to him by his client, or from the papers of his client, but merely to state facts coming to his knowledge from independent sources.

The hiring of an attorney to undertake an investigation would not create an attorney-client relationship if no legal advice is being sought. The results of such investigation would therefore not be privileged, whether or not communicated to the client. Knowledge which is not otherwise privileged does not become so merely by being communicated to an attorney, Grand Lake Drive-In v. Superior Court, 179 Cal.App.2d 122 (1960); People ex rel. Dept. of Public Works v. Donovan, 57 Cal.2d 346, 355 (1962).

The question arises as to whether the information gathered by the special attorney might be privileged from disclosure under the attorney work product rule. That rule is set forth in Section 2016 of the Code of Civil Procedure as follows:

. . . .

> The work product of an attorney shall not be discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing his claim or defense or will result in an injustice, and any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances.

. . . .

> (g) It is the policy of this state (i) to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (ii) to prevent an attorney from taking undue advantage of his adversary's industry or efforts.

The difficulty in applying this rule with respect to the "special attorney" work product is that the results of his investigation are intended to be reported to the Council so that there is really nothing to which the rule would apply. It might be argued that there would be some information for one reason or another the "special attorney" would decide not to pass on to the Council. Even if the rule protected such matters as a work product, if the information has been rendered in written form, it would not escape being disclosed through use of interrogatories or a deposition. Such was the determination in the case of Scotsman Manufacturing Co. v. Superior Court, 242 Cal.App.2d 527 (1966). There an attorney had retained a doctor to conduct an examination and make a written report in connection with action for injuries suffered in an explosion. The doctor's report was held to constitute a part of the attorney's work product. However, the information and opinions possessed by the doctor were nevertheless subject to discovery "through interrogation and deposition procedures," Scotsman, supra, p. 532. The same conclusion was reached in Kenny v. Superior Court, 255 Cal.App.2d 106 (1967).

III

Finally, it was asked whether the City Manager might grant the special attorney access to Police Department records. The City Manager does not have control over police records. Such is vested in the Chief of Police by Section 57 of the Charter:

> The Chief of Police shall have all power and authority necessary for the operation and control of the Police Department.

The City Manager has the power to appoint and remove the Chief of Police (Charter Sections 30 and 57). He also has the power "to set aside any action taken" by the Chief of Police and "may supersede him in authority in the functions of his office or employment" (Charter Section 28). However, until the City Manager does so act, the control of the police records is in the hands of the Chief of Police.

The Chief of Police and the City Manager, if he supersedes the Chief of Police, must be guided by Evidence Code Sections 1040 and 1041, Government Code Section 6254 and Penal Code Sections 11140-11144, the provisions of which are set forth in "Exhibit B" attached hereto. The effect of these provisions has been discussed in Opinion No. 76-13 issued May 4, 1976. In it, we concluded that information in the police files which has been received from the Department of Justice cannot be disseminated to any but persons authorized by a court, statute or decisional law. The "special attorney" does not appear to be such a person. It is a misdemeanor either to give or receive such information.

Also, information obtained from the Federal Bureau of Investigation is protected from disclosure [5 U.S.C.A. Sec. 552 (b)(7)] and criminal penalities exist for the disclosure of information where prohibited [5 U.S.C.A. Sec. 552 a(i)]. As to information from these two sources, the Chief of Police is not in the position to allow access except to authorized persons. Under the circumstances, it would seem that it would be for the Attorney Generals of the State and Federal Government to determine whether in this instance access should be accorded the "special attorney." The same rule should doubtless apply to information received from any other Federal or State agency.

As to information gathered by the San Diego Police Department itself, the determination whether to allow access rests in the hands of the Chief of Police (see pp. 6 and 8, City Attorney Opinion No. 76-13). In making the determination

to allow access, if such information is physically separated from that gathered from other sources so as to make access possible in the first instance, the Police Chief must consider a number of factors, not the least of which is the public interest against disclosure to protect ongoing investigations, the privacy of individuals and the right to a fair trial among others. He should also bear in mind that under the case of Black Panther Party v. Kehoe, 42 Cal.App.3d 645 (1974), any disclosure will destroy the confidentiality of the files. As was said in that case:

> The term public inspection necessarily implies general, nonselective disclosure. It implies that public officials may not favor one citizen with disclosures denied to another. When a record loses its exempt status and becomes available for public inspection, section 6253, subdivision (a), endows every citizen with a right to inspect it. By force of these provisions, records are completely public or completely confidential. The Public Records Act denies public officials any power to pick and choose the recipients of disclosure.

SUMMARY

It does not appear that the task of collecting facts is an assignment that requires the services of an attorney. The fact that an attorney is hired for that assignment does not in and of itself create an attorney-client relationship because he is not being retained to render legal advice or conduct litigation. Therefore, neither the attorney-client privilege would arise to protect information gathered nor would the work product rule protect the information if it is put in the form of writing. In any case, the Chief of Police is not in the position to allow access to information received from the State Department of Justice or the Federal Bureau of Investigation, as well as other public agencies, without permission of such agencies. And as to information gathered by the San Diego Police Department itself, before allowing access, the Chief should consider the public interest in refusal to disclose, bearing in mind that any access allowed will destroy the privilege against disclosure.

Respectfully submitted,

JOHN W. WITT, City Attorney

By Robert S. Teaze
Robert S. Teaze
Assistant City Attorney

RST:rb

APPROVED:

The Council inquiry is for the purpose of ascertaining the past and present Police Department's policies with respect to intelligence operations and any contemplated changes of those policies. It is beyond the scope of the inquiry to determine the truth of individual charges of misconduct or redress individual grievances.

The following lines of inquiry are appropriate:

1. The kinds of information gathered and retained by the Investigative Support Unit of the Police Department.

2. The methods used to gather such information.

3. The manner in which such information is used by the Police Department.

4. The types of individuals and agencies who are permitted to have access to the information stored by the Investigative Support Unit.

5. The length of time the information is presently being retained by the Investigative Support Unit.

6. Responses of the Police Department to any of the above inquiries shall not be required to be made publicly where the publicity would compromise or jeopardize either a process or agent of the Department whether currently in progress or in prospect, where that contention, that is to say, the threat of compromise or jeopardizing any process or agent is made by the Department or by another law enforcement agency, the matter would be pursued in Executive Session pursuant to the provision of the Brown Act.

In order to facilitate and expedite the inquiry, the Council hereby designates the Rules Committee Consultant as special assistant to the City Council for the purpose of assisting the Council in conducting inquiries into intelligence operations pursuant to Resolution No. 215233.

1. It shall be the responsibility of the Rules Committe Consultant to prepare a timetable for completion of the Council inquiry.

2. It shall be the responsibility of the Rules Committee Consultant to conduct interviews of City employees as may be necessary on behalf of the Council.

EXHIBIT A

3. It shall be his responsibility to obtain and, when necessary, to solicit, statements from any person with any information relevant to the Council's inquiry.

4. It shall be the responsibility of the Rules Committee Consultant to report in a timely manner to the Council the results of his investigation and inquiries; and to recommend, as seems appropriate, the scheduling of hearings relative to the Council's inquiry.

5. It shall be the responsibility of the Rules Committee Consultant to prepare, at the conclusion of his investigations and at the conclusion of Council deliberations, a final report, including recommendations for adoption of policies or procedures by the Council relative to intelligence operations.

6. The City Attorney, City Manager and all other department heads shall cooperate and lend whatever assistance reasonable and necessary to assist the Rules Committee Consultant.

EXHIBIT A

§ 1040. Official Information.

(a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed to the public prior to the time the claim of privilege is made.

(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

§ 1041. Identity of Informer.

(a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(b) This section applies only if the information is furnished in confidence by the informer to:

(1) A law enforcement officer;

(2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated; or

(3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2).

(c) There is no privilege under this section to prevent the informer from disclosing his identity.

§ 6254. Exemption of particular records

Except as provided in Section 6254.7, nothing in this chapter shall be construed to require disclosure of records that are:

. . . .

(f) Records of complaints to or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes;

. . . .

Nothing in this section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.

ARTICLE 6

Unlawful Furnishing of Master Record Sheet

[Added by Stats 1974 ch 963 § 1.]

§ 11140. [Definitions.] As used in this article:

(a) "Record" means the master record sheet, or a copy thereof, maintained under a person's name by the Department of Justice, and commonly known as an "arrest record," "criminal record sheet," or "rap sheet." "Record" does not include any other records or files of the Department of Justice.

(b) "A person authorized by law to receive a record" means any person or public agency authorized by a court, statute, or decisional law to receive a record. [1974 ch 963 § 1.]

§ 11141. [Furnishing by employee of Department of Justice to unauthorized person as misdemeanor.] Any employee of the Department of Justice who knowingly furnishes a record or information obtained from a record to a person who is not authorized by law to receive the record or information is guilty of a misdemeanor. [1974 ch 963 § 1.]

§ 11142. [Furnishing by any authorized person to unauthorized person as misdemeanor.] Any person authorized by law to receive a record or information obtained from a record wh knowingly furnishes the record or information to a person who is not authorized by law t receive the record or information is guilty of a misdemeanor. [1974 ch 963 § 1.]

§ 11143. [Buying, etc. by certain unauthorized person as misdemeanor.] Any person, except those specifically referred to in Section 1070 of the Evidence Code, who, knowing he is not authorized by law to receive a record or information obtained from a record, knowingly buys, receives, or possesses the record or information is guilty of a misdemeanor. [1974 ch 963 § 1.]

§ 11144. [Exceptions.] (a) It is not a violation of this article to disseminate statistical or research information obtained from a record, provided that the identity of the subject of the record is not disclosed.

(b) It is not a violation of this article to disseminate information obtained from a record for the purpose of assisting in the apprehension of a person wanted in connection with the commission of a crime.

(c) It is not a violation of this article to include information obtained from a record in (1) a transcript or record of a judicial or administrative proceeding or (2) any other public record when the inclusion of the information in the public record is authorized by a court, statute, or decisional law. [1974 ch 963 § 1.]

EXHIBIT B

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
JOHN W. WITT
CITY ATTORNEY

CITY ADMINISTRATION BUILDING
SAN DIEGO, CALIFORNIA 92101
(714) 236-6220

OPINION NO. 76-18

DATE: June 17, 1976

SUBJECT: Police Intelligence Inquiry

REQUESTED BY: Mayor and City Council

PREPARED BY: Robert S. Teaze, Assistant City Attorney

QUESTIONS PRESENTED

1. May the Council direct the City Manager and Chief of Police to "provide a special attorney [appointed by the Council] with any assistance that the special attorney deems necessary to his conduct of a complete independent inquiry [into police intelligence operations]?"

2. May such assistance include "providing complete access [to the special attorney] to any and all written information contained in the files of the Police Department?"

3. May such assistance also include "providing complete access to . . . any testimonial information that can be gained from interviews of past and present employees of the intelligence operation of the Police Department?"

CONCLUSION

1. Certainly the Council may direct the City Manager to provide such assistance to the special attorney that he may legally give. However, the assistance he provides cannot be such as the special attorney in his discretion deems necessary where it would be contrary to law or the best interests of The City of San Diego, its agents and employees. As to the Chief of Police, being a managerial appointee, pursuant to the Charter, he is not under the operational control of the City Council and can only be directed by the City Manager.

2. It is not within the legal powers of the City Manager or the Chief of Police to provide the special attorney with complete access to any and all written information contained in the files of the Police Department.

3. As to testimonial information, the special attorney is certainly entitled to talk to anyone. He must bear in mind, however, that certain information may be of a privileged nature and disclosure to him would result in a waiver of that privilege.

BACKGROUND

This opinion has been prompted by Resolutions Nos. 216170 and 216171, adopted by the Council on June 9, 1976. Copies of the resolutions are attached hereto as Exhibits I and II, respectively.

Resolution No. 216170 was apparently drafted in an attempt to meet certain legal problems outlined in our Opinion No. 76-14, dated May 5, 1976. In that opinion, we concluded as follows:

> 2. Since the attorney-client privilege against disclosure of information attaches only when a lawyer has been consulted for legal advice or is giving it, and neither of which is involved here, no privilege would result from the designation. Where a lawyer is acting primarily as an investigator and his papers merely record the statements of witnesses, that information will be subject to discovery.

By drafting Resolution No. 216170 to require specifically that the "special attorney" provide the "Council with legal advice . . . designed to cure any police intelligence practices and policies that might expose the City to civil liability," the drafter apparently intended to bring information gathered from the police files under the protection of the attorney-client privilege.

In presenting the aforementioned Resolution No. 216170 to the Council meeting as a Committee of the Whole, the "special attorney" stated as follows:

> The central issue here is the fundamental right of this City Council representing the people of San Diego to set the policies of this City. The determination of what policies are proper and in the best public interest to govern the operations of City departments including the Police Department; that determination of what is proper and in the best public interest rests with the City Council. The City Charter provides that the Council alone is the policy making body of this City. . . .

Also, the independent attorney stated that:

> . . . the Council does, as the governing body of this City, have the right to know through an independent attorney of their own choosing what the practices and policies of the Police Department are now and have been . . .

It should be noted that the Chief of Police submitted to the Council on April 14, 1976, in written form, a statement of the present practices and policies of the Police Department and offered on May 12, 1976, to discuss them as well as what past practices and policies were. No questions were forthcoming from the Council.

ANALYSIS

I

It is obvious that the desire of the Council is to safeguard the confidentiality of the police files. This was emphasized by the "special attorney" in his statement to the Council on May 12, 1976, as follows:

> The reason the Council has designated one special attorney to conduct an independent inquiry and to report his independent findings directly to Council is because the Council does not want to compromise police agents or police processes or police files simply by conducting this inquiry, . . .

Therefore, initially, the question that should be answered is whether Resolution No. 216170 would preserve the confidentiality of information gathered from the police files by the "special attorney" under an attorney-client privilege on the basis that he was retained to give "legal advice." The answer now is no different than that we gave in Opinion No. 76-14. Communications between an attorney and his client seeking or giving legal advice can be considered to be within the privilege when the intent was that they should be confidential. In People Ex Rel Dept. of Public Works v. Glen Arms Estate Inc., 230 Cal.App.2d 841, 853-4 (1964) the court succinctly expresses the rule as follows:

> The general principle of the attorney-client privilege expressed in terms of its essential elements, has been articulated by Wigmore thusly: "(1) Where legal advice of any kind is sought (2) from a professional

> legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." (8 Wigmore on Evidence (McNaughton Rev. 1961) §2292, p. 554.) This privilege is grounded on a policy which, according to its modern concept, declares that "[i]n order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent." (8 Wigmore, op. cit., § 2291, p. 545.) It is "strictly construed, since it suppresses relevant facts that may be necessary for a just decision. [Citations.] It cannot be invoked unless the client intended the communication to be confidential [citations]; . . ." (City & County of San Francisco v. Superior Court (1951) 37 Cal.2d 227, 234-235 [231 P.2d 26, 25 A.L.R.2d 1418].) It is settled that "[t]he privilege embraces not only oral or written statements but actions, signs, or other means of communicating information by a client to his attorney. [Citations.]" (City & County of San Francsico v. Superior Court, supra, at p. 235.) "Where the document is itself the client's written communication, coming into existence merely as a communication to the attorney, . . . [the] communication itself is not to be produced, . . ." (8 Wigmore, op. cit., § 2307, p. 594.) Finally, although the last principle is clear in itself its application is frequently difficult where the actual maker of the document is some person other than the client himself or is a person purporting to act for a corporation or other artificial person or body. (8 Wigmore, op. cit., § 2307, p. 595.)

In this case, however, we are not dealing with a communication received from a client. If access to Police Department files is allowed, it would not be information obtained from a client. The "special attorney's" client is the Council, not the Police Department. Such information would not be within the attorney-client privilege and, therefore, would be subject to discovery.

Judge Kirkpatrick in City of Philadelphia v. Westinghouse Electric Corp., 210 F.Supp. 483, 484-485 (1962) made the following observation:

> Now in order that the attorney-client privilege can protect a communication made to a lawyer by any person or corporation, it is a first essential that it be made for the purpose of securing legal advice or assistance, and that means advice or assistance for the person or corporation making the communication. If the communication is made to enable the lawyer to advise someone else or if it is made by someone other than the client (the corporation) it is not privileged.
>
> The rule, as stated by Wigmore, is in substance that where legal advice of any kind is sought, communications and so forth made in confidence by the client are privileged. 97 C.J.S. Witnesses § 276, states the rule as follows: "the privilege applies only if * * * the communication relates to a fact of which the attorney was informed by his client * * * for the purpose of securing primarily either an opinion on law or legal services or assistance in some legal proceeding." This basic requirement, namely, that the communication must be made by the client to enable the lawyer to advise him, appears in every statement of the rule which has come to my attention.

The information sought from the Police Department files would not be given to the special attorney in order for him to render legal advice to the Police Department. It, therefore, would not be protected by the attorney-client privilege.

Also, it should be borne in mind that the information gathered by the attorney is intended to be utilized for the purpose of advising the Council, presumably in order for it to take such legislative action as might be deemed to be required. Such advice cannot be communicated in executive session, City Attorney Ops. 76-13, Brown Act, Gov. Code, § 54950, et seq. How, therefore, can the information gathered be accorded the status of confidentiality? Advice on legislation has never been accorded a confidential status. It is only when litigation is involved, or where

the Council is dealing with personnel, meet and confer, and building security matters can communications with it be handled in a confidential manner. The so-called "advice" it is seeking from the "special attorney" falls in none of the above exceptions as was explained in our Opinions No. 76-13 of May 4, 1976 and No. 76-14 of May 5, 1976.

II

The confidentiality of the police files themselves is protected by a specific provision of state law. Section 6254 of the Government Code, which forms a part of the Public Records Act, includes the following exemption:

> Except as provided in Section 6254.7, nothing in this chapter shall be construed to require disclosure of records that are:
>
> . . . .
>
> (f) Records of complaints to or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes;
>
> . . . .

In Black Panther Party v. Kehoe, 42 Cal.App.3d 645 (1974) the court discusses the reason for the law:

> . . . .
>
> Government files hold massive collections which are roughly divisible into public business and private revelations. Statutory and decisional law on public record disclosure reveals two fundamental if somewhat competing societal concerns - prevention of secrecy in government and protection of individual privacy. "The people's right to know" is a rubric which often accompanies disclosure claims. The "right to know" demands public exposure of recorded official action. A narrower but important interest is the privacy of individuals whose personal

affairs are recorded in government files. Societal concern for privacy focuses on minimum exposure of personal information collected for governmental purposes. The California courts have equated the right of privacy with the right "to be let alone," which must be balanced against public interest in the dissemination of information demanded by democratic processes.

. . . The same dual concern appears throughout the act. Subdivision (f) of section 6254 is one of 14 subdivisions of that section, all describing exemptions from the general disclosure requirement. In large part, these exemptions are designed to protect the privacy of persons whose data or documents come into governmental possession.

. . . The objectives of the Public Records Act thus include preservation of islands of privacy upon the broad seas of enforced disclosure. Recognition of privacy as a distinct statutory goal fully confirms our textual interpretation of section 6254, subdivision (f). Both complaining citizens and the public have an interest in the confidentiality of complaints of wrongdoing prior to the inception of formal enforcement or disciplinary proceedings. Effective enforcement of penal laws depends to no small extent upon the readiness of citizens to complain of alleged crime. Complainants often demand anonymity. The prospect of public exposure discourages complaints and inhibits effective enforcement. Similarly, effective policing of licensed occupations depends heavily on citizens' readiness to complain of wrongdoing by licensees.

In the formulation of a statutory policy governing disclosure of citizen complaints, public concern extends to the alleged wrongdoer as well as the alleged victim. Many a reputation has been lost, many a life damaged, by unfounded accusations of wrongdoing. The public has an ethical interest in protecting private reputations against notoriety emanating from "crank" or malicious accusations.

. . . The California Public Records Act evidences a legislative policy of disclosure, yet one which is mindful of individual privacy. (§ 6250.)

> . . . Overbroad claims to disclosure may threaten the privacy of individual citizens and accelerate the advent of the Orwellian state. As we have noted, subdivision (f) of section 6254 (fn. 3, supra) reflects a genuine legislative concern for the privacy of citizen complaints. . . .

The last paragraph of Section 6254 provides as follows:

> Nothing in this section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.

We have interpreted in Opinion No. 76-13, pages 6-9 that in the context of the above section, "agency" means the Police Department and the power to open records to public inspection rests in the Police Chief who is charged by Charter Section 57 with the control and operation of the department.

We indicated in that opinion that limited access to the police files could be afforded the special attorney. However, we also pointed out any access that is allowed constitutes a waiver of the confidentiality of those files to which access was permitted. As the court stated in the Black Panther case, supra, pages 656-657:

> . . . .
>
> The term public inspection necessarily implies general, nonselective disclosure. It implies that public officials may not favor one citizen with disclosures denied to another. When a record loses its exempt status and becomes available for public inspection, section 6253, subdivision (a), endows every citizen with a right to inspect it. By force of these provisions, records are completely public or completely confidential. The Public Records Act denies public officials any power to pick and choose the recipients of disclosure. When defendants elect to supply copies of complaints to collection agencies, the complaints become public records available for public inspection. . . .

The question might be asked why inspection by the "special attorney" appointed by the Council would be the equivalent to "public inspection." That is because the "special attorney" is the agent of the Council and acting for it. Information he gathers is the Council's information and no information received by the Council as a body is entitled to be treated as confidential under the Brown Act (Government Code Section 54950 et seq.) unless it be connected with litigation, or with personnel, meet and confer or building security matters. Council inspection thus amounts to public inspection.

However, a further problem arises in that the police files contain information obtained from other law enforcement agencies, including the State Department of Justice and the Federal Bureau of Investigation. As to these files, we do not believe the Police Chief has the discretionary power to permit inspection because in the language of Section 6254, "disclosure is otherwise prohibited by law." Access to "rap sheets," "arrest records" or "criminal record sheets" obtained from the Department of Justice cannot be allowed to "unauthorized persons" without subjecting both the persons permitting and those being permitted access to possible criminal penalties under Sections 11142 and 11143 of the Penal Code. (See also, Penal Code Sections 11076 and 11081.) As to information received from federal records, Section 552a of Title 5, U.S.C.A. appears to be applicable.

We, therefore, must advise the Police Chief that before he permits any access to information received from State or Federal sources, he should first seek the advice of those agencies as to whether the "special attorney" appointed by the Council might be permitted access to such information.

III

Contrary to the statement made by the "special attorney" to the Council on April 14, 1976 and quoted above, the Council's power to deal with the operations of City departments is not unlimited. The Charter sets boundaries beyond which the Council may not go. It acts as a limitation, not a grant of power, City of Grass Valley v. Walkinshaw, 34 Cal.2d 595, 598 (1949); San Francisco v. Boyd, 17 Cal.2d 606, 617 (1941).

The Council's actions are undertaken through the promulgation of ordinances or resolutions. Such actions must conform to any limitations expressed in the Charter. As was said by the appellate court in Currieri v. City of Roseville, 4 Cal.App.3d 997, 1001 (1970):

> . . . The proposition is self-evident . . . that an ordinance must conform to, be subordinate to, not conflict with, and not exceed the [city's] charter, and can no more change or limit the effect of the charter than a legislative act can modify or supersede a provision of the constitution of the state. (5 McQuillin Municipal Corporation (3d ed. 1969 rev.) § 15.19, pp. 79-80, § 15.15, p. 74; 1 Antieau, Municipal Corporation Law, § 3.09, pp. 122, 123, § 5.39, p. 292.38; Marculescu v. City Planning Com. (1935) 7 Cal.App.2d 371, 373-374 [46 P.2d 308], hear. den.)

Again, in Hubbard v. City of San Diego, 53 Cal.App.3d 380, 385 (1976), the Court said:

> Under the Constitution the charter of a city is not only the organic law of the city, but it is also a law of the state within the constitutional limitations. (C. J. Kubach Co. v. McGuire, 199 Cal. 215, 217 [248 P. 676].)

More recently in San Francisco Fire Fighters v. City and County of San Francisco, 57 Cal.App.3d 173, 175 (1976):

> The Charter "represents the supreme law of the City and County of San Francisco, subject, of course, to conflicting provisions in the United States and California Constitutions, and to preemptive state law." (Harman v. City and County of San Francisco, 7 Cal.3d 150, 161 [101 Cal.Rptr. 880, 496 P.2d 1248].) "[Charter] cities may make and enforce all ordinances and regulations subject only to restrictions and limitations imposed in their several charters. . . . Within its scope, such a charter is to a city what the state Constitution is to the state." (Campen v. Greiner, 15 Cal.App.3d 836, 840 [93 Cal.Rptr. 525].)

And, even more recently, the law was stated in Brown v. City of Berkeley, 57 Cal.App.3d 223, 230-231 (1976) as follows:

To consider the problem presented it is necessary to set forth certain rules of construction applicable to charters, ordinances and the power of the city council. Ordinances are invalid if they conflict with the charter. (Acton v. Henderson (1957) 150 Cal.App.2d 1, 13 [309 P.2d 481].)

". . . The charter of a municipality is its constitution. (In re Pfahler, 150 Cal. 71, 82 [88 Pac. 270, 11 Ann. Cas. 911, 11 L.R.A. (N.S.) 1092]; Platt v. San Francisco, 158 Cal. 74, 84 [110 Pac. 304].) Any ordinance passed by a municipal corporation within the scope of the authority expressly conferred on it has the same force within its corporate limits as a statute passed by the legislature has throughout the state. (Ex parte Roach, 104 Cal. 272 [37 Pac. 1044]; Weisman v. Board of Building & Safety Commrs., 85 Cal.App. 493 [259 Pac. 768].) To be valid, an ordinance must harmonize with the charter. (South Pasadena v. Terminal Ry. Co., 109 Cal. 315 [41 Pac. 1093].) An ordinance can no more change or limit the effect of the charter than a statute can modify or supersede a provision of the state Constitution. (McQuillin, Municipal Corporations, 2d ed., sec. 682.)" (Marculescu v. City Planning Com. (1935) 7 Cal.App.2d 371, 373-374 [46 P.2d 308].)

Older cases variously stated the rule as follows:

The powers of municipal officers are prescribed by the provisions of city charters and ordinances passed pursuant thereto. (Const., art XX, § 16; Craig v. Superior Court, 157 Cal. 481 [108 P. 310]; 18 Cal.Jur. 974, § 250.) . . .

Wilbur v. Office of City Clerk,
143 Cal.App.2d 636, 643 (1956)

. . . In the present case, if the plaintiffs had a right to be deemed appointed to the city service as of the date they joined the private company, the commission had no power to take that right away by rule. ". . . it is a fundamental principle of municipal law that the rule-making power vested by a city charter in a

municipal agency must be exercised in conformity with all charter provisions, and that any rule adopted by such agency which has the effect of opening the way to circumvent or nullify charter provisions is, to that extent, inoperative and void." (Ballf v. Civil Service Commission, 43 Cal.App.2d 211, 215 [110 P.2d 478]; see, also, Kenney v. Wolff, 84 Cal.App.2d 592 [191 P.2d 88].)

Kenney v. Wolff, 102 Cal.App.2d 132, 136 (1951)

But regardless of this, and construing the resolution as purporting to apply to the board of supervisors, it is clearly inconsistent with provisions of the charter of San Francisco, and must be held to be without force. It is needless to say that the provisions of the charter are paramount. Only ordinances, orders, and resolutions that were not inconsistent with the present charter were continued in force at the time of its adoption, so that if the resolution was valid under the old Consolidation Act, which is not at all clear, it died with the adoption of the new charter, if inconsistent therewith. The matter of stationery and supplies in the way of printed blanks is regulated by the provisions of sections 1 and 3 of chapter III of article II of the charter. A method of competitive bidding for contracts to furnish such supplies is provided, and the board of supervisors has no power to purchase or pay for the same unless the provisions in regard thereto are strictly followed. . . . They cannot impose additional conditions, and any ordinance or resolution purporting to do so is ineffectual. The inconsistency of the resolution relied on with these provisions of the charter is obvious. . . .

Neal Publishing Co. v. Rolph, 169 Cal. 190, 197 (1915)

Therefore, we must determine whether the ordinance under view transgresses any of the just and needful restrictions which the general law of the state imposes upon local legislation of this nature. A municipal ordinance must consist with the general powers and purposes of

the corporation, must harmonize with the general laws of the state, the municipal charter, and the principles of the common law. (Ex parte Frank, 52 Cal. 609; 28 Am.Rep. 642; Ex parte Kearny, 55 Cal. 225.) . . .

South Pasadena v. Terminal Ry. Co., 109 Cal. 315, 321 (1895)

All legislative power is vested in the Council (Charter Section 11) and is to be exercised through the adoption of ordinances (Charter Section 13). All administrative power is not vested in the Council. Such as is conferred on the Council is found in various sections of the Charter. A specific enumeration may be found in the index to the Charter. They include the power to appoint various officers of the City, such as the City Manager (Charter Section 27), but not the Police Chief (Charter Section 57). The Council has the power to award public works contracts, but only "on the recommendation of the Manager or the head of the department in charge" (Charter Section 94). The Council is required to adopt an Administrative Code detailing the duties and powers of the administrative offices and departments of the City (Charter Section 26). The requirement to adopt an Administrative Code did not extend to the "operations" of City departments. "Operations" of departments are the responsibility of department heads. For example, the Charter vests in the Chief of Police "all power and authority necessary for the operation and control of the Police Department [Charter Section 57]." In addition, the Police Chief is required to "exercise all powers and duties provided by general laws or by ordinance of the Council" (Charter Section 57). Likewise, the Manager is charged with "the duty . . . to supervise the administration of the affairs of the City except as otherwise specifically provided by [the] Charter" and in addition shall "perform such other duties as may be . . . required of him by ordinance or resolution of the Council." As for the City Attorney, the Charter first mandates that he "shall be the chief legal adviser of, and attorney for the City and all departments and offices thereof" and then states that [i]t shall be his duty, . . . to perform all services incident to the legal department." The Charter again further provides that "[t]he City Attorney shall perform such other duties of a legal nature as the Council may by ordinance require. . . ."

It is clear the Charter allows the Council to impose additional duties on the Manager, Police Chief and City Attorney in the area of the responsibilities of each office.

Thus, the Council could adopt, for example, an ordinance making the throwing of litter in the street a misdemeanor. It would then be the Police Chief's duty to see to the arrest of any person throwing litter in the street, the duty of the City Manager to see that the Police Chief was enforcing the law and the duty of the City Attorney to see that persons throwing litter in the street were prosecuted. However, the Council has no power to control the operation of the administration of this assigned duty. That is vested by the Charter in the Manager, Police Chief and City Attorney.

The Charter provides specifically that "[e]xcept for the purpose of inquiry, the Council and its members shall deal with that part of the administrative service for which the City Manager is responsible solely through the City Manager . . . and not through his subordinates." The connotation is clear; the administration of the operations of managerial departments is the responsibility of the City Manager and the Council and its members deal with him when they desire to ask more than a question. The court so held in Brown v. City of Berkeley, supra, p. 234 in considering a similar provision in Berkeley's Charter.

With the foregoing preface, Resolution No. 216170 contains two basic problems. One, it proposes to appoint a special attorney to give the Council legal advice when the City Attorney is charged with that duty. Second, it requires the Police Chief to permit access to files, such as those of the Attorney General and Federal Bureau of Investigation, which he has no right to give and to files of the Police Department which would then be subject to discovery and compromise for the purpose of proposing legislation to govern the operations of the Police Department which the Charter specifically vests in the Police Chief.

As to the first problem, we have already observed that this office is the "chief legal adviser of . . . the City." The special attorney himself in the April 9, 1976 memorandum to the Council, Exhibit B attached to Resolution No. 216170 states as follows:

> . . . It would be clearly understood that City Attorney John W. Witt shall continue to be the chief legal advisor for the City in all matters, including this matter of an inquiry into Police Intelligence Operations.

If we are to continue to be the chief legal adviser as the Charter requires, what necessity is there, indeed, what power does the Council have to retain anyone else? We believe, under the Charter, the Council as well as the "special attorney," who is also incidentally a City employee, is obliged to receive its legal advice from this office. For if it is legally possible for the Council to retain anyone of their choosing to give legal advice, then the duties assigned by the Charter to this office could be rendered meaningless. What would prevent the Council from hiring a whole line of committee consultants who are incidentally lawyers, then appointing them "special attorneys" and ask for their advice when the advice given by this office did not please the Council? For that matter, what would prevent any department to do likewise? We do not believe that any such independent right exists in the face of the Charter provision that "[t]he City Attorney shall be the chief legal adviser of . . . the City. . . ."

Our Opinion No. 76-14 dated May 5, 1976 indicated that the Council had the power to employ an "additional competent technical attorney." However, such power cannot be used to supplant the position of this office as "chief legal adviser." It was placed in the Charter in order for the City to retain outside counsel when special expertise or help was necessary which this office was not in the position to supply. That is not the instant situation.

As to the second problem, we do not believe the Council has the power to order either the Police Chief or the City Manager to allow access to the police files. We base this on the aforementioned provision of the Charter and of State and Federal law, but also on the reasoning of the above-cited recent case of Brown v. City of Berkeley, 57 Cal.App.3d 223 (1976). That case involved an initiative ordinance approved by the electorate which established a Police Review Commission. Among the powers granted the Commission was the power to request and receive promptly written and unwritten information, documents and materials and assistance from any officer of the City. More specifically, Section 10c of the ordinance provided the Commission with the power:

> . . . to request and receive promptly such written and unwritten information, documents and materials and assistance as it may deem necessary in carrying out any of its responsibilities under this ordinance from any office or officer or department of the city government, including but not limited to the Police Department, the City Manager, the Finance Department,

> the Public Works Department, and the City Attorney, each and all of which are hereby directed as part of their duties to cooperate with and assist the Commission in the carrying out of its responsibilities; provided that, information the disclosure of which would impair the right of privacy of specific individuals or prejudice pending litigation concerning them shall not be required to be made available to the Commission except in general form to the extent police activities in specific cases reflect police department policies and, provided that, the individual involved in the specific situation may consent in writing to the disclosure of information concerning him or her; in which case it shall be made available to the Commission.

The Court in that case stated that the above section did "violence to the mandate of the Charter requirement that everything pertaining to administrative services go solely through the City Manager." Brown v. City of Berkeley, supra, p. 234. The Court cites Art. XII, Sec. 27 of the Berkeley Charter which is remarkably similar to Section 22(b) of our Charter. Brown v. City of Berkeley, supra, pp. 231-232, 234.* The rationale behind the court's ruling is that the

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* It is interesting to note that in another case brought in 1973 by the Attorney General to void the so-called "Berkeley Marijuana Initiative" approved by the electorate which attempted to require the Berkeley Police Department not to make any "arrests for the possession, use or cultivation of marijuana without the authorization of the Berkeley City Council," the Superior Court in Younger v. Berkeley City Council, Superior Court No. 435827, made the following as a finding of fact and a conclusion of law, respectively:

7. The Berkeley City Charter, Article VII, Section 28 provides that except for the purpose of inquiry, the Council and its members shall deal with the administrative service solely through the City Manager, and neither the Council nor any member thereof shall give orders to any of the subordinates of the City Manager, either publicly or privately.

. . . .

8. The Berkeley Marijuana Initiative is void and unconstitutional in that it is in direct conflict with Article VII, Section 28 of the Berkeley City Charter.

people through an initiative ordinance could not divest the Council, the Manager and the Chief of Police of powers vested by the Charter in the legislative body or a specific office. The court found that under the Berkeley Charter, the Council's authority over the Police Department was specifically "[t]o organize and maintain the police and fire departments," Art. IX, Section 49, paragraph 5 of the Berkeley Charter. The court analyzed the Berkeley Council's powers under the aforementioned section as follows:

> The power to organize and maintain the police department is specifically granted in the charter to the city council. (Charter, art. IX, § 49(5).) The words "organize and maintain" connote the power of the council to have an ongoing involvement in the formation of the policies, practices and procedures of the police department. This clearly includes the power to investigate same and make pertinent recommendations. The fundamental nature of the ordinance is directly aimed at inquiring into and investigating the policies, practices and procedures of the police department. Under the charter sections, it is clearly within the council's power to inquire into said police department practices, procedures and policies and make recommendations concerning same.

As was stated in our Opinion No. 76-13 dated May 4, 1976, the Council of The City of San Diego has no such similar power. Indeed, under the Charter of The City of San Diego, "[t]he Chief of Police shall have all power and authority necessary for the operation and control of the Police Department." Therefore, applying the same reasoning as the court did in the Berkeley case that the voters of the City of Berkeley had no legal right to enact by initiative an ordinance interfering with powers vested in the Council, City Manager and Police Chief, then by a clear analogy, the City Council of San Diego does not have the legal authority to interfere with the Police Chief's power to operate and control the Police Department nor specifically to interfere with the discretionary power of the Chief of Police to control access to his department's files.

IV

Finally, dealing with the last question posed, there appears to be no reason against the "special attorney" talking to anyone he wishes. However, information gained

would be discoverable for the same reasons given above with respect to material gleaned from the Police files.

Respectfully submitted,

JOHN W. WITT, City Attorney

By Robert S. Teaze
Robert S. Teaze
Assistant City Attorney

RST:rb 535

APPROVED:

John W. Witt
City Attorney

R 76-2465

RESOLUTION NO. 216170

WHEREAS, the San Diego City Council has been made aware through the public media of alleged misconduct on the part of past and present City employees, possibly in violation of the civil rights of several citizens of San Diego; and

WHEREAS, such alleged misconduct, in part, has resulted in the filing of Lawsuit No. 75-4-7 in Federal District Court (Bohmer v. Nixon, et al.) alleging a violation of civil rights by numerous defendants, including several San Diego police officers; and

WHEREAS, The City of San Diego is obligated to respond in damages to any liability that may be determined to fall upon those officers for actions undertaken during the course and scope of their employment; and

WHEREAS, the City Council must authorize any money needed from the taxpaying public's treasury to meet such judgments as might be rendered against the City; and

WHEREAS, such alleged misconduct may indicate a pattern of Police Department practices, past and present, that represent unwritten, but actual, policies of the Police Department that tacitly condone the violation of the civil rights of certain individuals and which might expose the City to further future civil liability; and

WHEREAS, all policies of The City of San Diego should be reviewed and established by the City Council, the legislative body that is responsible for the public treasury and who

5-10-76

represents the citizens of San Diego; and

WHEREAS, the City Council has a need to know the actual practices and policies that govern the conduct of all City departments, including the intelligence operations of the Police Department, for the clear legislative purpose of prospective cure of such practices and policies that the City Council determines may not be in the best interest of the public and which may expose the City to further future civil liability; NOW, THEREFORE,

BE IT RESOLVED, that the City Council of The City of San Diego hereby establishes that it is in the best interest of the people of San Diego for the Council to proceed with an independent inquiry of the intelligence operations of the Police Department.

BE IT FURTHER RESOLVED, that the City Council reaffirms the "Guidelines for Conducting Police Intelligence Inquiry" adopted by the Council on March 24, 1976 (Exhibit A).

BE IT FURTHER RESOLVED, that the City Council hereby designates Mr. Coleman Conrad as a special attorney under the provisions of Charter Section 40 for the specific purpose of conducting an independent inquiry of his own, on behalf of the City Council, of the police intelligence operations and providing Council with legal advice and assistance and recommendations designed to cure any police intelligence practices and policies that might expose the City to civil liability.

BE IT FURTHER RESOLVED, that the City Council reaffirms

the methodology to be used by the special attorney for gathering necessary background information as recommended by the Rules Committee Consultant in his April 9, 1976 memorandum to Council entitled "Status Report on Inquiry into Police Intelligence Operations" (Exhibit B).

BE IT FURTHER RESOLVED, that the City Manager and Chief of Police are hereby directed to provide the special attorney with any assistance that the special attorney deems necessary to his conduct of a complete independent inquiry, on behalf of the City Council, including assistance in providing complete access to any and all written information contained in the files of the Police Department, within the limits of the law, and any testimonial information that can be gained from interviews of past and present employees of the intelligence operations of the Police Department.

BE IT FURTHER RESOLVED, that at the conclusion of his independent inquiry, the special attorney shall provide the Council with legal advice and assistance necessary to assist the Council in determining how to proceed with a public Council inquiry into police intelligence operations in a public forum, if the Council concludes at that time that such a public inquiry is necessary and in the best public interest.

APPROVED AS TO FORM ONLY AND
NOT AS TO LEGALITY:

JOHN W. WITT, City Attorney

10-76

By Robert S. Teaze
Robert S. Teaze

The Council inquiry is for the purpose of ascertaining the past and present Police Department's policies with respect to intelligence operations and any contemplated changes of those policies. It is beyond the scope of the inquiry to determine the truth of individual charges of misconduct or redress individual grievances.

The following lines of inquiry are appropriate:

1. The kinds of information gathered and retained by the Investigative Support Unit of the Police Department.

2. The methods used to gather such information.

3. The manner in which such information is used by the Police Department.

4. The types of individuals and agencies who are permitted to have access to the information stored by the Investigative Support Unit.

5. The length of time the information is presently being retained by the Investigative Support Unit.

6. Responses of the Police Department to any of the above inquiries shall not be required to be made publicly where the publicity would compromise or jeopardize either a process or agent of the Department whether currently in progress or in prospect, where that contention, that is to say, the threat of compromise or jeopardizing any process or agent is made by the Department or by another law enforcement agency, the matter would be pursued in private, with the Special Attorney to the Committee of the Whole with the understanding that the Special Attorney shall not make public the specifics by identifying actual persons and places but shall make use of the specifics as a basis for legislative recommendations.

In order to facilitate and expedite the inquiry, the Council hereby designates the Rules Committee Consultant as special assistant to the City Council for the purpose of assisting the Council in conducting inquiries into intelligence operations pursuant to Resolution No. 215233.

1. It shall be the responsibility of the Rules Committe Consultant to prepare a timetable for completion of the Council inquiry.

2. It shall be the responsibility of the Rules Committee Consultant to conduct interviews of City employees as may be necessary on behalf of the Council.

EXHIBIT A

3. It shall be his responsibility to obtain and, when necessary, to solicit, statements from any person with any information relevant to the Council's inquiry.

4. It shall be the responsibility of the Rules Committee Consultant to report in a timely manner to the Council the results of his investigation and inquiries; and to recommend, as seems appropriate, the scheduling of hearings relative to the Council's inquiry.

5. It shall be the responsibility of the Rules Committee Consultant to prepare, at the conclusion of his investigations and at the conclusion of Council deliberations, a final report, including recommendations for adoption of policies or procedures by the Council relative to intelligence operations.

6. The City Attorney, City Manager and all other department heads shall cooperate and lend whatever assistance reasonable and necessary to assist the Rules Committee Consultant.

EXHIBIT A

CITY OF SAN DIEGO

MEMORANDUM

April 9, 1976

Honorable Mayor and Members of the City Council

Coleman Conrad, Rules Committee Consultant

Status Report on Inquiry into Police Intelligence Operations

BACKGROUND

On March 24, 1976 the City Council adopted "Guidelines for Conducting Inquiry into Police Intelligence Operations." As a part of those guidelines the Council designated the Rules Committee Consultant as special assistant to the City Council for the purpose of assisting the Council in conducting inquiries into intelligence operations pursuant to Resolution No. 215233.

It is my understanding that the intent of the City Council, in providing for a special assistant to assist them in this inquiry, was to charge the designated special assistant with the responsibility for conducting an independent inquiry for the purpose of ascertaining past and present policies with respect to intelligence operations in the Police Department. The special assistant will report his independent findings directly to the City Council at the direction of the Council.

Additionally, at the direction of the Council, the special assistant shall arrange for the appearance before the Council of members of the public who wish to testify on this matter.

PROPOSED METHODS FOR GATHERING DATA

It is my intention to use the following methods to gather necessary background data as part of this inquiry, if such methods are approved by Council:

(1) Review City Manager and City Attorney reports on this matter.

(2) Request Senator Frank Church, Chairman of the United States Select Committee on Intelligence, and appropriate federal and state agencies to provide any information that they might have relative to the past and present policies of the San Diego Police Department with respect to intelligence operations.

(3) Interview past and present City employees who have knowledge of the past and present policies of the San Diego Police Department with respect to intelligence operations.

(4) Interview members of the public who wish to make voluntary statements relative to the past and present policies of the San Diego Police Department with respect to intelligence operations.

(5) Personally examine the files of the Investigative Support Unit of the Police Department in order to ascertain the kinds of information gathered and retained by that Unit.

The adopted guidelines provide that the special assistant shall schedule hearings relative to the Council's inquiry. Accordingly, I have requested Mayor Wilson to call a Committee of the Whole meeting for Wednesday, April 14, 1976 at 2:00 p.m. in the Council Chambers for the purpose of discussing the inquiry into Police Intelligence Operations. This is the same date and time that Council established by adoption of Resolution No. 215355.

It is recommended that the agenda for the April 14, 1976 meeting consist of the following:

(1) Report from the City Manager on the following lines of inquiry specified in the adopted guidelines.

a. The kinds of information gathered and retained by the Investigative Support Unit of the Police Department.

b. The methods used to gather such information.

c. The manner in which such information is used by the Police Department.

d. The types of individuals and agencies who are permitted to have access to the information stored by the Investigative Support Unit.

e. The length of time the information is presently being retained by the Investigative Support Unit.

(2) Report from the special assistant on proposed methods for gathering necessary background data (as specified in this status report).

OBSERVATIONS AND RECOMMENDATIONS

It is apparent that there are many aspects of this inquiry that must be carefully considered by the Council. There is the need to conduct an inquiry that will be completely thorough. There is the need to ensure that the rights of all parties to the Bohmer lawsuit are fully protected. There is the need to ensure that the rights of all individuals interviewed are fully protected. And, there is the need to ensure that the Council, special assistant and other employees of the City connected with this matter are proceeding in a lawful manner at each step of the inquiry.

If I am to be effective in this assignment as a special assistant to the Council, it is my belief that I should be designated an additional attorney. It is, therefore, recommended that Council, by resolution, in accordance with Charter Section 40, designate me as an additional attorney for the specific purpose of assisting Council in this inquiry. Such a designation would provide, among other things, for a privileged attorney-client relationship to be established between the Council and myself. It would be clearly understood that City Attorney John W. Witt shall continue to be the chief legal advisor for the City in all matters, including this matter of an inquiry into Police Intelligence Operations.

By separate memorandum, I have requested City Attorney John W. Witt to provide a written legal opinion on the following:

1. Is it legal for the Council to designate me as an additional attorney for the specific purpose of assisting Council in this inquiry?

2. Assuming that such a designation is legal, what is the extent of the privilege that would result from this designation?

3. Is the City Manager prohibited from providing free access to the information contained in the files of the Investigative Support Unit of the Police Department to the Rules Committee Consultant acting as special assistant to the Council in conducting inquiries into intelligence operations pursuant to Resolution No. 215233?

4. If the City Manager is prohibited in some manner, please specify which files are not to be made available to the Rules Committee Consultant acting in his capacity as special assistant to the Council in conducting inquiries into intelligence operations pursuant to Resolution No. 215233.

Between now and April 14th I will continue to become familiar with the allegations of the Bohmer lawsuit and articles in the media concerning this matter. Aside from this, I will take no further action concerning this matter until Council gives me further direction on the 14th.

Coleman Conrad

COLEMAN CONRAD

CC/lg

c.c. City Attorney John W. Witt
City Manager Hugh McKinley

R 76-2466

RESOLUTION NO. 216171

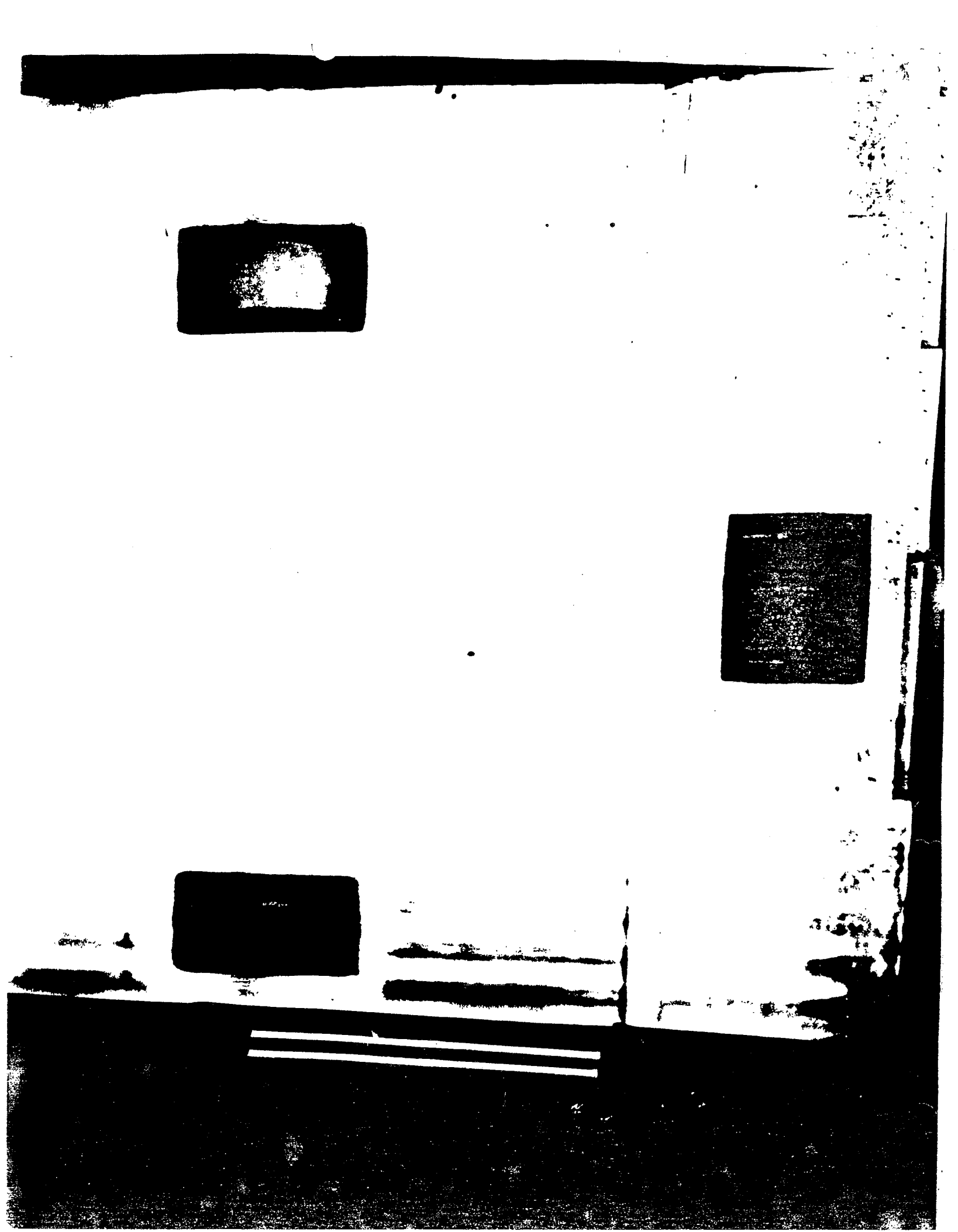
BE IT RESOLVED, that the City Council of The City of San Diego hereby requests the City Attorney to reexamine his legal position in the matter of the police intelligence inquiry in light of the fact of Council's adoption of a new and specific resolution governing the purpose and scope and conduct of this inquiry (Exhibit I).

BE IT FURTHER RESOLVED, that the Council hereby directs the City Attorney to provide a written report to Council within one week indicating what the City Attorney's advice to the City Manager and Chief of Police will be concerning that portion of the above-referenced resolution which directs the City Manager and Chief of Police to "provide the special attorney with any assistance that the special attorney deems necessary to his conduct of a complete independent inquiry, including assistance in providing complete access to any and all written information contained in the files of the Police Department and any testimonial information that can be gained from interviews of past and present employees of the intelligence operations of the Police Department."

BE IT FURTHER RESOLVED, that if the City Attorney advises the City Manager and Chief of Police that they cannot provide the special attorney with complete access to this information that the City Attorney, as part of his written

inquiry including assistance in providing complete access to any and all written information contained in the files of the police department and any testimonial information that can be gained from interviews of past and present employees of the intelligence operations of the police department;

BE IT, FURTHER, RESOLVED that, at the conclusion of his independent inquiry, the special attorney shall provide the Council with legal advice and assistance necessary to assist the Council in determining how to proceed with a public Council inquiry into police intelligence operations in a public forum, if the Council concludes at that time that such a public inquiry is necessary and in the best public interest.



report to Council within one week, specifically cite all legal authority in support of such advice.

APPROVED: JOHN W. WITT, City Attorney

By _____
Robert S. Teaze
Assistant City Attorney

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f. Dept.: Mayor

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the intelligence operations of the police department, for the clear legislative purpose of prospective cure of such practices and policies that the City Council determines may not be in the best interest of the public and which may expose the City to further future civil liability,

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of San Diego hereby establishes that it is in the best interest of the people of San Diego for the Council to proceed with an independent inquiry of the intelligence operations of the police department;

BE IT, FURTHER, RESOLVED that the City Council reaffirms the "Guidelines for Conducting Police Intelligence Inquiry" adopted by the Council on March 24, 1976 (Exhibit A);

BE IT, FURTHER, RESOLVED that the City Council hereby designates Mr. Coleman ~~Conrad~~ as a special attorney under the provisions of Charter Section 40 for the specific purpose of conducting an independent inquiry of his own of the police intelligence operations and providing Council with legal advice and assistance and recommendations designed to cure any police intelligence practices and policies that might expose the City to civil liability;

BE IT, FURTHER, RESOLVED that the City Council reaffirms the methodology to be used by the special attorney for gathering necessary background information as recommended by the Rules Committee Consultant in his April 9, 1976 memorandum to Council entitled "Status Report on Inquiry into Police Intelligence Operations" (Exhibit B);

BE IT, FURTHER, RESOLVED that the City Manager and Chief of Police are, hereby, directed to provide the special attorney with any assistance that the special attorney deems necessary to his conduct of a complete independent

DRAFT RESOLUTION

WHEREAS, the San Diego City Council has been made aware through the public media of alleged misconduct on the part of past and present City employees, possibly in violation of the civil rights of several citizens of San Diego; and

WHEREAS, such alleged misconduct, in part, has resulted in the filing of Lawsuit No. 75-4-7 in Federal District Court (Bohmer v. Nixon, et al) alleging a violation of civil rights by numerous defendants, including several San Diego police officers; and

WHEREAS, the City of San Diego is obligated to respond in damages to any liability that may be determined to fall upon those officers for actions undertaken during the course and scope of their employment; and

WHEREAS, the City Council must authorize any money needed from the taxpaying public's treasury to meet such judgments as might be rendered against the City; and

WHEREAS, such alleged misconduct may indicate a pattern of police department practices, past and present, that represent unwritten, but actual, policies of the police department that tacitly condone the violation of the civil rights of certain individuals and which might expose the City to further future civil liability; and

WHEREAS, all policies of the City of San Diego should be reviewed and established by the City Council, the legislative body that is responsible for the public treasury and who represents the citizens of San Diego; and

WHEREAS, the City Council has a need to know the actual practices and policies that govern the conduct of all City departments, including