

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, 1987. The subcommittee met on April 7, 1987 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.

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By

John M. Kaheny

Deputy City Attorney

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Attachments

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