DATE: October 6, 1989

TO: Jack McGrory, Assistant City Manager
FROM: City Attorney
SUBJECT: Public Hearings on Citizens' Complaints Against Peace Officers

In a memorandum dated August 11, 1989, you asked this office to reevaluate our previous advice to the City Manager and the San Diego Police Department regarding the public disclosure of information "in connection with the San Diego Citizens' Review Board on Police Practices." Attached to your memorandum was Legislative Counsel Opinion No. 15711 of July 13, 1989, entitled "Police Review Panels" addressed to the Honorable Larry Stirling which you believe sets forth a view that is inconsistent with this office's previous advice on this general subject.

We have reviewed Legislative Counsel's Opinion No. 15711 and find that a portion of the advice contained in it may appear to be inconsistent with this office's advice to you concerning this issue. We certainly have no quarrel with Legislative Counsel's conclusion that a city charter may provide access to confidential records to any public official whose duty is to investigate the subject matter of the records if the official maintains the confidentiality of the records. Parrott v. Rogers, 103 Cal. App. 3d 377 (1980). We also agree that a city charter may bestow subpoena power upon a legislative or quasi-legislative body of the city. In fact, The City of San Diego's Civil Service Commission is granted this authority by Charter section 128. We also agree that nothing in current law relating to the confidentiality of peace officer personnel records prohibits a charter city from adopting rules and regulations requiring that citizens' police review panel hearings be conducted in public so long as the adopted rules and regulations include procedures to ensure that there will be no public disclosure of records or information made confidential under section 832.7 or 832.8 of the Penal Code. As you are aware, the Citizens' Review Board on Police Practices conducts public hearings concerning nonconfidential matters in accordance with its own rules. We

are, however, puzzled by Legislative Counsel's qualified and closely guarded analysis that may lead one to believe that an investigatory proceeding conducted by such a panel into allegations of misconduct by a peace officer may be open to the public (and of course the press) and not violate the confidentiality requirements of California Penal Code section

832.7 as long as confidential records are not disclosed during the hearing. We are also troubled by the analysis that leads Legislative Counsel to the qualified assertion that the overall statutory scheme relating to peace officer personnel records may not entirely preempt this field, leaving some room for a city to adopt conflicting legislation.

As you are aware, the statutory scheme established to protect the confidentiality of police department internal affairs files and police personnel records is a very complex, technical and often times confusing area of the law. In addressing the above listed concerns, we will review the Legislative Counsel's Opinion and the applicable sections of the California Evidence, Government and Penal Codes. In addition, we will also analyze the relevant California Attorney General Opinion on this subject and case law decided after Legislative Counsel published Legislative Opinion No. 15711. We will begin our analysis by restating the question posed to Legislative Counsel by Senator Larry Stirling and Legislative Counsel's response.

Legislative Counsel Opinion No. 15711

The first paragraph of Legislative Counsel Opinion No. 15711 states as follows:

> The following is in response to your request for an analysis of whether state law prohibits a citizen police review panel established by a chartered city from conducting public hearings on citizens' complaints against police officers, from gaining access to police officer personnel records, and from subpoenaing police officers for their testimony as to nonconfidential matters. We have assumed for purposes of this opinion, that the citizen police review panel would be designated by the chartered city as the administrative body responsible for investigating citizens' complaints and recommending any appropriate disciplinary action against police officers. (Emphasis added.)

The Legislative Counsel's conclusion set forth in the last paragraph of the Opinion states as follows:

> To summarize, although the matter is not entirely free from doubt, we do not think that current law relating to the confidentiality of police officer personnel records prohibits a chartered city from adopting rules and

> regulations requiring that citizen police review panel hearings be conducted in public, so long as the adopted rules and regulations include procedures to ensure that there will be no public disclosure of records or information made confidential under sections 832.7 and 832.8 of the Penal Code. In addition, we think that a chartered city may authorize its citizen police review panel to issue subpoenas to compel the attendance of peace officers for their testimony as to nonconfidential matters at the hearing. With regard to whether the adopted rules and regulations may authorize a citizen police review panel to be provided access to police officer personnel records, we think the most viable method for a citizen police review panel to seek disclosure of those records is pursuant to discovery made under Sections 1043 and 1046 of the Evidence Code. (Emphasis added.)

Conducting Police Review Hearings in Public

As can be seen from the above quote, the Legislative Counsel's Opinion addressed public hearings conducted by an administrative body charged with the responsibility of investigating citizens' complaints and recommending disciplinary action against police officers. There is no uniform definition of a "Citizen's Review Panel" but it appears from the terms utilized in describing this "police review panel" that Legislative Counsel had in mind an administrative body similar to the Office of Citizens' Complaints (OCC) found in the San Francisco Police Department which was the subject of the court's ruling in San Francisco Police Officers' Assn. v. Superior Court, 202 Cal. App. 3d 183 (1988), a case heavily relied upon by the Legislative Counsel in Opinion No. 15711.

The OCC was established pursuant to San Francisco Charter section 3.530.2 which was enacted in November of 1982. Under that section, the San Francisco Police Commission has direct authority over the organization and management of the OCC and appoints its director. The director is empowered to appoint hearing officers to facilitate the fact-finding procedures needed in contested cases. Staff investigators in the OCC are full-time civilian employees of the City and County of San Francisco and are appointed by the director of the OCC. As created and organized, the fact-finding hearings conducted by the hearing

officers of the OCC are confidential and not open to the public. San Francisco Police Officers' Assn., 202 Cal. App. 3d at 187; San Francisco City Attorney Opinion No. 85-5.

In reaching the qualified conclusion that public hearings conducted by a citizens' police review panel could be open to the public, Legislative Counsel relied heavily upon the following language in San Francisco Police Officers' Assn. at 191.

> Contrary to petitioners' argument, the hearing is part of the fact-finding process and not, in and of itself, a record within the meaning of section 832.7. While the hearing is tape recorded, it is the tape recording which becomes a part of the confidential records of the OCC (sec. 709), disclosure of which is expressly governed by the statutory scheme. Moreover, nothing in the Rules sanctions disclosure of such tape recordings to the complainant.
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> By parity of reasoning, we conclude that the Rules properly authorize a complainant's representative to be present at the fact-finding hearing.

In reaching this narrow ruling, the court was analyzing a procedure which itself was confidential under the rules of the OCC. Because of this fact, Legislative Counsel's Opinion could be interpreted to stand for the proposition that testimony at a public investigatory hearing could be made confidential after the hearing. We must disagree with such an interpretation for the following reasons.

In our view, even the mere filing of a complaint against an officer creates an identifiable confidential personnel record within the statutory scheme. We base this position on the combined effect of section 832.8 of the Penal Code and section 3305 of the Government Code. Those sections state as follow:

> Sec. 832.8. Personnel records
>
> As used in Section 832.7, "personnel records" means any file maintained under that individual's name by his or her employing agency and containing records relating to:
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> . . . .
>
> (e) Complaints, or investigations of complaints, concerning an event or transaction in which he participated, or which he perceived, and pertaining to the manner in which he performed his duties; or . . . .

> Sec. 3305. Comments adverse to interest; entry in personnel file or in other record; opportunity to read and sign instrument; refusal to sign
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> No public safety officer shall have any comment adverse to his interest entered in his personnel file, or any other file used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment indicating he is aware of such comment, except that such entry may be made if after reading such instrument the public safety officer refuses to sign it. Should a public safety officer refuse to sign, that fact shall be noted on that document, and signed or initiated by such officer. (Emphasis added.)

Our position is further strengthened by the California Supreme Court's analysis of Education Code section 44031 which affords public school employees similar protection. In Miller v. Chico Unified School Dist., 24 Cal. 3d 703 (1979) the court stated at 712 - 713:

> The school board unpersuasively asserts that section 44031 does not apply to the present case on the ground that none of the Cloud memoranda were ever "entered or filed" in plaintiff's personnel file. A school district, however, may not avoid the
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> requirements of the statute by maintaining a "personnel file" for certain documents relating to an employee, segregating elsewhere under a different label materials which may serve as a basis for affecting the status of the employee's employment.

The mere fact that the complaint itself is a record does not preclude a complainant and his representative from being present during a fact-finding hearing as long as that hearing remains confidential in accordance with statutory scheme. The court's ruling in San Francisco Police Officers' Assn., 202 Cal. App. 3d at 183 was narrow and specific. The court held that the fact-finding meeting in and of itself was not a record. However, the court did not rule nor even suggest that the investigatory proceeding be open to the public. That issue was simply not

before the court.

Another area of concern we have with conducting public hearings into allegations of police misconduct is the impact of Government Code section 3303(e). We are intrigued that Legislative Counsel did not address this provision because it concerns the rights of peace officers during investigations and interrogations. That section states: "The employer shall not cause the public safety officer under interrogation to be subjected to visits by the press or news media without his express consent nor shall his home address or photograph be given to the press or news media without his express consent."

It is obvious that the press and news media have a constitutional right to be present at public hearings. The plain language of the above section indicates that an officer who is under interrogation for an act of misconduct may not be subject to visits by the press and news media without his express consent. One cannot reconcile this provision with a procedure that compels a peace officer to be interrogated or investigated at a public hearing where the press has a constitutional right to attend.

We believe this statute is a clear indication that underlying all of the protections in the Public Safety Officers' Procedural Bill of Rights (Government Code section 3300 et seq.) is the assumption that the strict rules of confidentiality found in Penal Code sections 832.5, 832.7 and 832.8 apply to investigations of police misconduct.

We also look to the views expressed by the California Attorney General on this subject. The Opinions of the Attorney

General are given great weight by the courts of this state. Tafoya v. Hastings College, 191 Cal. App. 3d 437 (1987). Therefore no analysis of this subject can be complete without addressing that legal authority. Specifically, our attention is drawn to 71 Op. Att'y Gen. 247 (1988) which states in part at page 248:

> The courts have stated that one of the purposes of this 1974 enactment (Stats. 1974, ch. 29), which originally applied only to sheriffs' departments and city police departments but the coverage of which was expanded in 1978 (Stats. 1978, ch. 630), was a desire on the part of the Legislature to encourage citizens' complaints. (Pena v. Municipal Court (1979) 96 Cal.App.3d 77, 82). Chapter 630, Statutes of 1978, which expanded

the coverage of section 832.5, also enacted section 832.7 and Evidence Code sections 1043 and 1045. These amendments followed in the wake of the California Supreme Court's decision in Pitchess v. Superior Court (1974) 11 Cal.3d 531 to provide the rules with respect to accessing records of citizens' complaints. In Pitchess the court permitted discovery of citizens' complaints in a criminal case under informal rules relating to criminal discovery coupled with the "balancing test" provided for in section 1040, subdivision (b)(2) of the Evidence Code for disclosure of "official information." The 1978 amendments substituted statutory procedures for so-called "Pitchess motions."

. . . .

The addition of section 832.7 coupled with Evidence Code sections 1043 and 1045 in 1978 was to protect the right of privacy of peace officers who were the subject of citizens' complaints, and to make their personnel records, which include such complaints, privileged material. This purpose of protecting peace officers' right of privacy is evidenced specifically in section 832.8. That section defines peace officers' "personnel records" for purposes of section 832.7 and includes "(e) complaints, or investigations of complaints . . . or (f) any other information the disclosure of which would constitute an unwarranted invasion of personal privacy." (See also generally City of Santa Cruz v. Superior Court (1987) 190 Cal.App.3d 1669, 1674; Herrera v. Superior Court (1985)

172 Cal.App.3d 1162-1163; Arcelona v. Municipal Court (1980) 113 Cal.App.3d 523, 532.)

Additionally, the confidentiality provisions of section 832.7 would also appear to be intended to encourage citizens to make complaints against peace officers by shielding their complaints from undo sic publicity. (Emphasis added.)

This reflects the previous position taken by the Attorney

General in 71 Op. Att'y Gen. 1 at 2 where it states: "Section 832.7 imposes a requirement of confidentiality on the citizens' complaints against peace officers received and retained pursuant to section 832.5."

Unfortunately, Legislative Counsel did not have available at the time of publication of Opinion No. 15711 the views expressed by the California Supreme Court in its July 27, 1989, decision in City of Santa Cruz v. Municipal Court, 49 Cal. 3d 74 (1989) which further supports the premise that the initial investigation of police misconduct must be kept confidential. In its review of the legislative history of the "Pitchess" statutes, the Supreme Court of California states at 83 and 84:

> The relatively low threshold for discovery embodied in section 1043 is offset, in turn, by section 1045's protective provisions which: (1) explicitly "exclude from disclosure" certain enumerated categories of information (sec. 1045, subd. (b)); (2) establish a procedure for in camera inspection by the court prior to any disclosure (sec. 1045, subd. (b)); and (3) issue a forceful directive to the courts to consider the privacy interests of the officers whose records are sought and take whatever steps "justice requires" to protect the officers from "unnecessary annoyance, embarrassment or oppression." (sec. 1045, subds. (c), (d) & (e).)
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> The statutory scheme thus carefully balances two directly conflicting interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to his defense. (Emphasis added.)

This is not to say that the statutory scheme precludes all discovery or disclosure of these records and information obtained from them. Clearly, Evidence Code sections 1043 and 1045 provide procedural safeguards to be utilized prior to disclosure in cases of pending litigation before a court or an administrative body. In those narrow circumstances where the interests of justice demand, the strict notice requirements may be waived by the court or administrative body and, of course, the governmental agency holding such records may itself waive the hearing (Evidence Code section 1043(c)). Such waiver should only occur in very narrow and specific circumstances such as when discovery or disclosure

is required by provisions of the United States or California Constitution. For example, disclosure may be necessary to afford a public employee his or her rights to administrative due process when litigating a loss of a significant vested right in employment. Skelly v. State Personnel Bd., 15 Cal. 3d 194 (1975) or to afford a criminal defendant the necessary discovery to defend him or herself. Brady v. Maryland, 373 U.S. 83 (1963). Hampton v. Hanrahan, 600 F.2d 600, 629 (1979); In re Ferguson, 5 Cal. 3d 525 (1971), Carruthers v. Municipal Court, 110 Cal. App. 3d 439 (1980).

Based on the above analysis, we conclude that the "Pitchess" statutory scheme protects both the peace officer and the complainant's privacy during the investigatory stages of the complaint process and that the Public Safety Officers' Procedural Bill of Rights affords the officer additional protection during any investigatory interrogation. We must, therefore, disagree with any interpretation of Legislative Counsel Opinion No. 15711 to the contrary. In regard to a general disclosure of any information concerning citizens' complaints filed pursuant to Section 832.5 of the Penal Code, we still maintain the belief that it is prudent to follow the advice of the Attorney General in 71 Op. Att'y Gen. 247 at 250 where it states: "Such information is confidential and the agency has a statutory duty to protect that confidentiality."

STATE PREEMPTION

In discussing the issue of state preemption, Legislative Counsel Opinion No. 15711 states at 6:

> Thus, while the decision of the court in San Francisco Police Officers' Assn. v. Superior Court, supra, appears to provide support for the position that under most circumstances the procedural safety words relating to the confidentiality of police
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> officer personnel records prescribed by Sections 832.5 and 832.7 would be viewed by the courts as matters of statewide concern sufficient to preempt the field of regulation under the municipal affairs doctrine, and to thereby supersede any conflicting local rules and regulations adopted by a chartered city, we do not think that the court's decision conclusively resolved these issues. Accordingly, although we find no indication in the overall statutory scheme relating to the confidentiality of police officer personnel

> records that there is any prohibition against the adoption of rules and regulations by a chartered city authorizing citizens' police review panel hearings to be conducted in public, or authorizing members of a panel to be provided access to nonconfidential materials, so long as there are adequate safeguards to ensure that there will be no public disclosure of records or information made confidential under Sections 832.7 and 832.8, it is nevertheless possible that a reviewing court could reach a contrary conclusion and determine that state law has completely preempted the field of regulation relating to the confidentiality of these records and precludes the adoption of any rules and regulations to that effect.

We believe that Legislative Counsel's heavy reliance on San Francisco Police Officers' Assn. for guidance on the issue of preemption resulted in an overly broad conclusion. The California Supreme Court has ruled that charter cities are bound by the Public Safety Officers' Procedural Bill of Rights. Baggett v. Gates, 32 Cal. 3d 128 (1982). Because of the overlapping nature of the "Pitchess" statutes and the Public Safety Officers' Procedural Bill of Rights and the legislative history of the "Pitchess" statutes, we feel strongly that in order for a charter city to enact valid conflicting rules in this area, the California Supreme Court would have to reverse its ruling in Baggett v. Gates. We do not see that as a real possibility. Therefore, we must respectfully disagree with the scope of Legislative Counsel's conclusion concerning the ability of a charter city to enact conflicting legislation. We do agree that charter cities are free to develop their own internal procedures to investigate citizens' complaints against peace

officers pursuant to Penal Code section 832.5. This does not mean that they are free to make such investigative procedures open to the public because to do so violates the provisions of the "Pitchess" statutes and the applicable provisions of the Public Safety Officers' Bill of Rights. This view is consistent with both the court's ruling in San Francisco Police Officers' Assn., 202 Cal. App. 3d 183 (1988) and the rule established in Younger v. Berkeley City Council, 45 Cal. App. 3d 825 (1975) cited by the Attorney General in 71 Op. Att'y Gen. 247 (1988). We believe that had Legislative Counsel analyzed the Attorney General's Opinion, and had the opportunity to review the Supreme

Court's recent decision in City of Santa Cruz, Legislative
Counsel may very well have come to a conclusion similar to ours.

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