MEMORANDUM OF LAW

DATE: October 30, 1992

TO: Arthur Duncan, Executive Director

FROM: City Attorney

SUBJECT: Citizens' Review Board on Police Practices - Officer's Complaint History and Red Flagging Continuing Complaints

By memorandum dated August 14, 1992, you have requested an opinion regarding what information may be released to the members of the Citizens' Review Board on Police Practices ("the Board"). Specifically, the Board has requested access to all prior complaints against an officer who is under investigation, whether sustained or not, and whether similar or not. Additionally, the Board has requested that it be allowed to "red flag" officers by maintaining a record that would include the case number, allegation(s), name of complainant and the subject officers involved. You have asked if such procedures are permissible.

The Public Records Act, Government Code sections 6250 et seq., as well as Penal Code section 832.7, address the issue of the confidentiality afforded an officer's personnel file. Government Code section 6254(c) exempts certain personnel records, which includes discipline reports, from disclosure. Penal Code section 832.7 provides that investigations conducted pursuant to citizen complaints are confidential and may be reviewed only under limited circumstances.

The Board was established pursuant to San Diego City Charter ("Charter") section 43(d) to review and evaluate citizens complaints against officers. The City Manager establishes the rules and regulations necessary for the Board to carry out its function. Release of information to the Board would not constitute disclosure to the public at large for two reasons. First, as noted in Parrott v. Rogers, 103 Cal. App. 3d 377, 383 (1980), "disclosure by one official or department to another is not a 'public disclosure'. . . ." Second, the Board is prohibited by Penal Code section 832.7(b) from releasing anything other than statistical information.

Thus, should the Chief release confidential information to the Board, no public disclosure is involved and thus no breach of

the confidentiality provisions of Penal Code section 832.7 ensues.

There are, however, basic issues of fundamental fairness and due process that must be addressed concerning the Board's use of the requested information. The courts have long stated that in regard to discipline matters, the "police chief or fire chief cannot act arbitrarily or capriciously but instead must act reasonably and upon substantial evidence." Puckett v. City and County of San Francisco, 208 Cal. App. 2d 471, 475 (1962). The use of not sustained, exonerated and unfounded complaints puts the officer whose file is being reviewed in the unfortunate position of having his/her credibility evaluated, at least in part, on cases that have been previously investigated and found to be lacking sufficient basis for disciplinary action. Great care must be taken so that evaluation of the information does not result in a decision which equates the number of complaints with the officers' credibility. Officers receive complaints for a variety of reasons, and many of the reasons may reflect the division, unit, or shift the officer works. The use of unproven complaints as an evaluative criteria in determining the degree of the officers' culpability and the degree of discipline the Board recommends appears, on its face, to be unfair. The Board should adhere to the same standard the courts have imposed upon chiefs of police in reaching its decisions. The use of unproven or exonerated complaints does not rise to the level of substantial evidence.

The actions of the Board are also constrained by Charter section 43(d) and its own by-laws. The Board, as established by Charter section 43(d), is empowered to "review and evaluate citizens" complaints against members of the San Diego Police Department and the San Diego Police Department's administration of discipline arising from such complaints." The by-laws of the Board, Section 11, state:

> SECTION 11. PRESERVATION OF RIGHTS
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> These procedures by the Board shall be in addition to and not in derogation of:
>
> A. The procedures existing from time to time for the preservation of rights of police officers, pursuant to the Police Safety Officers' Procedural Bill of Rights.
>
> B. The Memorandum of Understanding between the Police Department and the

Police Officers' Association and all other applicable laws, ordinances and statutes.

C. The applicable laws, ordinances, statutes and constitution of the State of California, and the San Diego City Charter.

When considering the extent of the information to be released, it is imperative that any information released does not cause the Board to violate its own rules. Should the information the Board requests contravene the by-laws, amendments to the by-laws consistent with the provisions of Charter section 43(d) must be made.

The Public Safety Officer's Procedural Bill of Rights ("the Act") does not directly affect the issue of disclosure of discipline files to citizen review boards. Rather, it is an enumeration of basic rights and protections which must be afforded to all peace officers by the employing agency. Baggett v. Gates, 32 Cal. 3d 128, 135 (1982).

The Act makes specific references to an officer's right to privacy in only four (4) instances: 1. polygraph examinations, Government Code section 3307; 2. financial records, Government Code section 3308; 3. media attention, Government Code section 3303(e); and 4. searches, Government Code section 3309. The majority of the enumerated rights refer to the department's treatment of an officer during the course of an investigation.

The Act does not address a review conducted by an independent advisory board subsequent to a department's investigation. Thus, in the majority of cases, actions by the Board will not involve the Act. However, should the Board make a recommendation concerning discipline that is accepted by the department, the Act could come into play because the degree of discipline would be affected. Even in cases where no actual recommendation of discipline is made, the courts have found that adverse comments that go into an officer's personnel file or, as here, the Internal Affairs' ("IA") file, are subject to the provisions of the Act. For example, the case of Aguilar v. Johnson, 202 Cal. App. 3d 241 (1988), concerned a citizen complaint that was not investigated, but was nevertheless placed in the officers' personnel file. In reaching its decision that the complaint, though not investigated and therefore unproven, constituted adverse action against the officer, the court cited the following sections of the Act:

Government Code section 3305

> provides: 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 pubic 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 initialed by such officer. (Emphasis added.)
>
> Government Code section 3306 provides: A public safety officer shall have 30 days within which to file a written response to any adverse comment entered in his personnel file. Such written response shall be attached to, and shall accompany, the adverse comment. (Emphasis added.)

Aguilar at 249.

The court went on to say:

> Under basic rules of statutory construction "courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them." As relevant here, Webster defines comment as "an observation or remark expressing an opinion or attitude . . . ."
> "Adverse" is defined s "in opposition to one's interest: DETRIMENTAL, UNFAVORABLE."

Id. at 249.

Finally, the court indicated that: "Logic and general rules of statutory construction suggest that a citizens' complaint that contains allegations of police brutality is a "comment adverse to (the officer's) interest." Under the findings of the case then, adverse comments by the Board included in an investigation file

are subject to the provisions of the Act.

The court in Hopson v. City of Los Angeles, 139 Cal. App. 3d 347 (1983) reached a similar conclusion. In Hopson, a case involving a Board of Police Commissioners ("Commission") unlike the Board, the Commission findings in a officer involved shooting differed from the Police Department and Shooting Review Board findings. The court said the findings of the Commission constituted punitive action. In explaining its decision the court conceded that only the Chief of Police could impose discipline, but found nevertheless, that such comments constitute adverse action and were punitive in nature.

The court stated:

> Our focus is on whether such a written report is "punitive action" under the Public Safety Officers Procedural Bill of Rights Act . . . . In our view, placing a report of this type in a personnel file is punitive action under the Public Safety Officers Procedural Bill of Rights Act although it is not "discipline" under the Los Angeles City Charter.

Hopson at 353.

The court went on to explain that because of the potential impact of the Commission report on the career opportunities of the officers, in terms of promotion and transfer, the findings were "adverse action" within the meaning of Government Code section 3305.

The same is true of the comments by the Board. Comments stay with the IA files and the IA files are available for review by commanding officers for promotion and transfer purposes. Thus, comments by the Board which conflict with findings by the Department are punitive actions under current case law. Punitive actions require an administrative hearing under the provisions of Government Code section 3304(b).

Additionally, there is the question of whether disclosure of the requested information contravenes the Memorandum of Understanding ("MOU") with the Police Officers Association ("POA"). Article 41, section VIII of the MOU specifies the prior discipline that may be considered in evaluating discipline. It reads in part:

> Formal reprimands without further penalty more than two (2) years old and those with additional penalty more than five (5) years old, will

not be considered for purposes of promotion, transfer, special assignment and disciplinary actions except as to disciplinary actions, when such reprimands show patterns of specific similar police misconduct as defined in Departmental Rules and Regulations and Department Instructions.

Pursuant to the MOU and the Board's by-laws, the Board should receive no past discipline other than that provided for by the MOU. An argument could be made that because the Board functions only as an advisory board and cannot dictate to the department the amount of discipline to be imposed, it is not bound by the constraints of the MOU. We do not think that point is well taken. Through its advisory capacity, a recommendation of the Board may impact an individual officer's discipline or the department's overall approach to discipline. Such an occurrence, if it was based upon discipline outside the scope of Article 41 Section 11, could again be construed as a breach of the MOU and subject the Board to litigation by the POA.

Finally, regardless of what information the department determines should be released to the Board for evaluation purposes, in our view, all changes are subject to the meet and confer process under Meyers-Milias-Brown Act.

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