MEMORANDUM OF LAW

DATE: March 24, 1998

TO: Scott Fulkerson, Executive Director, Citizens' Review Board on Police Practices

FROM: City Attorney

SUBJECT: Confidentiality Provisions of California Penal Code Section 832.7

QUESTION PRESENTED

May the Citizens' Review Board on Police Practices [CRB] release to complainants, disposition letters that provide specific information regarding the complaint without violating the confidentiality provisions of California Penal Code section 832.7?

SHORT ANSWER

The CRB has some discretion about the information it releases to complainants. This discretion is limited by the prohibitions of California Penal Code section 832.7. As amended in 1989, the section provides that the disposition of the complaint may be released to the complainant. Assuming the police officers' identities are protected, the CRB may release information regarding any actions the CRB takes.

BACKGROUND

Penal Code section 832.7 limits the ability of the CRB to disclose detailed information regarding a citizen's complaint against a police officer. Currently, the CRB sends out a brief disposition letter. The letter goes out after the CRB has completed its review and evaluation of the investigation conducted by the Internal Affairs Unit of the San Diego Police Department [IA]. Each allegation is listed and responded to separately. The letter does not contain information regarding the process used by the CRB to reach its decision. Instead, it contains only a statement that the CRB either agrees or disagrees with the findings of the [IA]. The brevity of the letter and its lack of meaningful information creates the impression that the CRB function is merely to rubber stamp decisions made by the police department.

This is an erroneous impression. The CRB's process includes an extensive review. The CRB review may require that IA provide additional facts or information. The CRB may also request additional investigation if it deems such information or investigation essential to a meaningful and accurate review. When the review is complete, the CRB deliberates about the IA investigation and makes a decision to agree or disagree with the IA findings. The CRB may add comments to its decision if such comments seem warranted for clarification. No information regarding this exhaustive process is included in the disposition letter. A sample disposition letter is attached to this memorandum as Attachment A.

Several members of the CRB have indicated to the executive director that disposition letters containing such minimal information serve no purpose, because they do not sufficiently apprise complainants of the actions taken by the CRB. Complainants have echoed these concerns. The CRB has therefore asked whether the type of information included in the letter to the complainants may be broadened to more accurately reflect the scope of the CRB's review. The CRB would like to include a more detailed description of the allegations and information regarding the analysis that led the CRB to agree or disagree with the IA findings. You have asked whether more information may lawfully be disclosed to the complainant.

Historical Background

In 1974, the California Legislature adopted Penal Code section 832.5. This section requires law enforcement agencies to establish a procedure for investigating citizen complaints against peace officers and to retain records of the original complaint and subsequent investigation for five years.

Also in 1974, the California Supreme Court decided *Pitchess v. Superior Court*, 11 Cal. 3d 531 (1974). In *Pitchess*, the defendant filed a subpena duces tecum requesting that the Sheriff's Department produce certain records. The defendant wanted any information regarding allegations that the named deputies may have used excessive force in making previous arrests. The defendant intended to use the prior complaints to support his allegation that excessive force was used by those deputies when they arrested him. In *Pitchess*, the court decided that the rights of the defendant to prepare an intelligent defense depended, in part, on the defendant's ability to obtain all relevant and reasonably accessible information. Thus, the court granted the defendant's motion.

Before the *Pitchess* decision, law enforcement agencies felt secure in the knowledge that prior complaints against officers would remain confidential. Evidence Code section 1040 provides a privilege against the disclosure of official information acquired by a public employee in the course of his or her employment. The *Pitchess* court made it clear, however, that the propriety of a motion to invoke the governmental privilege of Evidence Code section 1040 would in the future, "remain within the sound discretion of the trial Court." *Pitchess* at 540.[1]

In the wake of the *Pitchess* decision, it was widely believed law enforcement agencies had begun shredding complaint records to prevent disclosures such as the one ordered by the court in *Pitchess*. In response to this perception, the legislature enacted Penal Code section 832.7 in 1978. The statute provides confidentiality for records maintained pursuant to Penal Code

section 832.5 and defines the specific circumstances under which the records can be released.

California Penal Code section 832.7 provides in pertinent part:

Confidentiality of peace officer records

(a) Peace officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code . . . .

(b) Notwithstanding subdivision (a), a department or agency shall release to the complaining party a copy of his or her own statements at the time the complaint is filed.

> (c) Notwithstanding subdivision (a), a department or agency which employs peace officers may disseminate data regarding the number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved.

One court has said "as statutory schemes go, this one is 'a veritable model of clarity and balance.'" *Hackett v. Superior Court*, 13 Cal. App. 4th 96, 98 (1993). To the extent a defendant is seeking disclosure of police officer personnel records or citizen complaint history in a civil or criminal proceeding, the court's statement is true. Unfortunately, except for the statistical data that may be released pursuant to Penal Code section 832.7(c), the section does not address the questions of when and how much of the records are subject to disclosure outside a courtroom. Because the statute only addresses how records may be released in civil or criminal proceedings, case law and legislative intent must provide guidance for releasing records under other circumstances.

In 1988, the Attorney General responded to two questions from Assemblymember Byron Sher, regarding the import of Penal Code section 832.5. The first question was whether, pursuant to Penal Code section 832.5, a public agency could release summaries of information contained in the records. The second was whether a public agency could compile statistical information concerning the types of citizens' complaints filed, and the disposition of such complaints, and release those statistics to the public. The Attorney General concluded that a police agency could not release either summaries of the complaints or statistical information regarding citizens' complaints filed pursuant to section 832.5. In reaching this conclusion, the Attorney General found: (1) the statute expressly requires that the information remain confidential; and, (2) law enforcement agencies have a statutory duty to protect that confidentiality. 71 Op. Cal. Att'y Gen. 306 (1988).

About this time, courts were also deciding what type of information maintained by law enforcement agencies pursuant to Penal Code section 832.5 could be disclosed. The courts provided a different answer. Two weeks before the release of the Attorney General's opinion, the Court of Appeal decided a similar issue in *San Francisco Police Officers' Assn. v. Superior*

Court, 202 Cal. App. 3d 183 (1988). In that case, the San Francisco Police Officers' Association [POA] alleged that the newly adopted rules of the city's Office of Citizens' Complaints [OCC] violated the provisions of Penal Code section 832.7. The OCC was the board established to investigate complaints against San Francisco police officers. Its rules provided that the investigative hearings of citizen complaints conducted by the OCC Board must be confidential. Individuals who attended the hearings were required to sign statements under oath in which they promised to maintain the confidentiality of the proceedings. Complainants and their representatives were among those permitted to attend the hearings. The proceedings were taped and the tapes became part of the confidential record. After the hearing, the hearing officer was required to prepare a detailed report summarizing the evidence presented and detailing his or her findings of fact. The complainant received a copy of the hearing officer's findings.

The court found that Penal Code section 832.7 does not prohibit the complainant and his or her representative from attending OCC confidential hearings. The court found, however, that Penal Code section 832.7 prohibits release of the hearing officer's report. In its analysis, the court cited a report prepared by the Senate Committee on the Judiciary, which stated the main purpose of Penal Code section 832.7 "was to curtail the practice of record shredding and discovery abuses which allegedly occurred in the wake of the California Supreme Court's decision in *Pitchess v. Superior Court*." *Id.* at 189. Based on the legislative intent, the court found that nothing in the statutory scheme prohibited the complainant from being present at the fact finding or from receiving information that the investigation was complete and that further action would or would not be taken. The court did not agree with the lower court's finding that the hearing officer's report could be released to the complainant. On this point, the court said: Penal Code section 832.5(b) "expressly requires retention of 'reports or findings.' Thus, these documents [the findings] are clearly 'records maintained pursuant to Section 832.5' within the meaning of Penal Code section 832.7." *Id.* at 192.

The court's interpretation of the legislative intent was at odds with the Attorney General's interpretation of the legislative intent behind the adoption of Penal Code section 832.7. The court held that the intent was to quash discovery abuses and protect the records, while the Attorney General argued the legislative intent was to protect the officer's right to privacy. Both the court and the Attorney General agreed that final reports may not be released, but the decision of the court to allow complainants to be present at hearings essentially allowed release of the information through a different avenue. The Attorney General's opinion was inconsistent with the court of appeal's holding. However, because the courts have frequently opined that "[A]ttorney General opinions are not binding legal authority, but are persuasive authority since we presume the Legislature is aware of the Attorney General opinion and would take corrective action if they believe the legislative intent has been mistreated." *Southern Pacific Pipe Lines, Inc. v. State Board of Equalization*, 14 Cal. App. 4th 42 (1993), the American Civil Liberties Union [ACLU] asked the Attorney General to reconsider his opinion. The ACLU cited the fact that many jurisdictions already released statistical information regarding complaints filed under the provisions of Penal Code section 832.5 and claimed the release of such information was in the best interests of the public. The legislature amended Penal Code section 832.7 to resolve these apparent contradictions regarding the purpose and intent of the statute.

Legislative History

Documents promulgated during the legislative session in which the amendment to Penal Code section 832.7 (AB 2222) was adopted confirm that its purpose was to respond to the 1988 Attorney General's opinion. The California Newspaper Publishers' Association [CNPA] supported the bill in general, but opposed that part which left the decision to release information regarding citizens complaints with the law enforcement agency. CNPA believed that law enforcement agencies should be required to release general information regarding peace officer complaints. It argued that because the identity of officers was not disclosed, no confidentiality concerns justified withholding the information.

The ACLU also opposed the language in the bill, arguing it might needlessly and unintentionally limit the type and detail of statistical information currently available to the public. The ACLU opposed restricting the admissibility of the IA findings in court proceedings. The ACLU argued no legitimate confidentiality or privacy interests were affected by the public release of statistical information or other material so long as the material did not reveal the identity of individual officers. In opposing the bill, the ACLU sought amendments deleting language that would restrict the amount and use of information compiled under Penal Code section 832.5. However, neither the proposal of the CNPA, nor the proposal of the ACLU was incorporated into the final legislation.

In response to the concerns expressed by the CNPA and the ACLU, Carolyn McIntyre, Special Agent Supervisor/Legislative Advocate for John K. Van DeKamp, Attorney General, sent a letter to the bill author, Assemblymember Byron Sher, stating at page 1-2:

> It is not our intent in proposing AB 2222 to standardize local complaint procedures. Instead, our intent is to expressly authorize local jurisdictions to release specified information on complaints which maintain confidentiality over the identifies [sic] of the individuals involved. Assuming personal confidentiality interests are protected, local jurisdictions will still be free to choose both whether to disseminate data under AB 2222 and, if so, the types of data and the form in which this dissemination will take place.
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> The specific language in AB 2222 - "data regarding the number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded)" - is intended only as an example of the sort of information contemplated for appropriate dissemination. This language is not intended to define statistical reports, nor will it force localities to amend their procedures so that their official findings in complaints match the examples listed in parenthesis. If personal confidentiality is maintained, AB 2222 provides wide latitude to local agencies to determine for themselves the detail of information to be released.

The language of Ms. McIntyre's letter suggests that the legislation was intended to allow jurisdictions to be free, within limits, to determine the content of the information they choose to release. No subsequent amendments to the proposed bill changed the language to further restrict or define the limits of information subject to disclosure.

The California Peace Officers' Association, California Police Chiefs' Association, and California State Sheriffs' Association, supported the legislation without change. Many agencies represented by these associations had, prior to the Attorney General's opinion 88-305, released general statistical information regarding complaints made against police officers and routinely informed complainants of the disposition of their complaints. Local jurisdictions were united in the belief that this practice benefitted the departments as well as the public. AB 2222 as amended, was signed into law in September 1989. They did not, however, support the expansive changes recommended by the CNPA or ACLU.

ANALYSIS

Those opposed (i.e., ACLU and CNPA) to the bill were not successful in getting it amended. Consequently, these groups supported a broad interpretation of the bill, such as that suggested in the letter from Carolyn McIntyre to Assemblymember Sher. Subsequent case law has not, however, been helpful in determining whether the broad interpretation espoused in the statute's pre-enactment days has been adopted by the courts. Only the procedures for obtaining records in the course of civil and criminal discovery are clear.

Despite the lack of legislative clarity, some courts have attempted to give guidelines for the dissemination of information. Unfortunately, the courts have reached decidedly different conclusions. Thus, case law sheds little light on the amount or type of information kept pursuant to Penal Code section 832.7 that may be released.

The court in *Bradshaw v. City of Los Angeles*, 221 Cal. App. 3d 908 (1990), was the first to dissect the statute. Prior to *Bradshaw* the argument against releasing citizen complaint information had been that the language of the statute itself precluded the release of any information. The only exceptions to this blanket prohibition were those specifically found in the statute. The statutory exceptions permit the release of statistical information and the release of information pursuant to a discovery motion in a civil or criminal proceeding. This narrow interpretation was discredited by the *Bradshaw* court.

In *Bradshaw*, Police Chief Darryl Gates and the City of Los Angeles voluntarily released to the media portions of a transcript from a board of rights hearing (the equivalent of the City's Civil Service appeal). They also released other information from the investigation of the underlying incident that had precipitated the board of rights hearing. Like the City's Civil Service Commission appeals, the board of rights hearing was open to the public and the media, although in this instance, neither members of the public nor media attended. Also, the release of information was prompted by an order of the chief of police and was not the result of a public records request.

The plaintiff police officer alleged the department's release of the information was negligence per se and a violation of the statutory right to confidentiality provided by Penal Code section 832.7. In reaching its decision that the department had not acted negligently, the court said "[s]ince the statute specifically refers only to restrictions on disclosure in 'criminal and civil proceedings' the statute thus does not prohibit a public agency from disclosing records to the public." *Id.* at 916. "The amendment does not, by its terms acknowledge or create a

confidentiality privilege in peace officer personnel information outside of a civil or criminal proceeding . . . . Indeed, the amendment could be viewed as dispelling any broad notion of confidentiality . . . ." *Id.* at 919.

The court also noted that "[n]o other statutory provisions specifically address any other limitation on the authority of a police department to release information to the news media, and we do not construe any other specific limitation as intended by the legislature." *Id.* at 917. The court acknowledged that a recent Attorney General opinion raised "[s]peculation that the 1989 amendment acknowledges or creates a more general confidentiality privilege . . . ." *Id.* at 919. However, the court determined that such speculation was not convincing and specifically invited the legislature to amend the existing confidentiality provisions of the statute, but refused to do so through judicial interpretation.

Subsequent cases have narrowed and openly disagreed with the holding of *Bradshaw* that allows broad dissemination of complaint information at the sole discretion of the law enforcement agency. As yet, however, the California Supreme Court has not overruled *Bradshaw*. An example of a case that narrows *Bradshaw* is *City of Richmond v. Superior Court*, 32 Cal. App. 4th 1430 (1995). In the *Richmond* case, the San Francisco Bay Guardian [The Guardian] newspaper requested, through the California Public Records Act [CPRA], information about complaints filed against officers of the Richmond Police Department. The Guardian's request for records was exhaustive and included:

(1) the citizen complaint files of the Richmond Police Commission (RPC) involving police misconduct, specifically excessive force and racially abusive treatment . . .; (2) "[a]ccess to RPD records which reflect or indicate or contain information regarding what recommendations or disciplinary actions . . . [were] taken . . . ([t]his request does not seek names of the complainants or officers involved . . .)"; (3) "[a]ccess to or copies of records which reflect or indicate or contain information regarding the weight and height of all officers by name" involved in the specific incident that sparked the investigation.

Id. at 1432.

In response to The Guardian's extensive request, the court found:

> It [Penal Code section 832.7] imposes confidentiality upon peace officer personnel records and records of investigations of citizens' complaints, with strict procedures for appropriate disclosure in civil and criminal cases and limited exceptions under which a department "may disseminate data regarding the number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved . . ." (citation omitted), and a department must notify the complaining party of the disposition of the complaint (Pen. Code 832.7, subd. (d)).

Id. at 1440.

This language seems to indicate Penal Code section 832.7 must be narrowly interpreted to allow only the release of statistical data. However, this construction of the language conflicts with a footnote in which the court expanded on the statutory meaning by stating:

> This exception demonstrates that Penal Code section 832.7 is designed primarily to protect the identity of officers and witnesses involved in citizen complaints. Much of what the Guardian needs for its investigation will fit within this exception, which the court should *interpret liberally* in favor of disclosure.

Id. at 1440 n.3 (emphasis added).

On one level, it appears the *Richmond* court agrees with the *Bradshaw* court. The *Richmond* court's recommendation that the subsection (c) exception of Penal Code section 832.7, allowing statistical data to be released, be liberally interpreted meshes well with the *Bradshaw* court's expansive interpretation. Similarly, the *Richmond* interpretation supports the Attorney General's interpretation of the legislative intent as expressed in the letter to Assemblymember Sher. In that letter, the Attorney General's legislative advocate opined that the intent of the statute was to allow local jurisdictions to determine the type and amount of information that may be disclosed. While agreeing that Penal Code section 832.7 should be liberally interpreted, the *Bradshaw* court and *Richmond* court disagree on exactly what that means.

The *Richmond* court agreed with the *Bradshaw* court that the legislation was "not intended to abrogate a police department's right to disseminate information pursuant to California Government Code section 6250 et seq." *Richmond* at 1439. But the *Richmond* court distinguished the *Bradshaw* case because, in *Bradshaw*, the department voluntarily disclosed the records, while in *Richmond* the records were being sought over the department's objection. Additionally, the *Bradshaw* court determined the word "confidential" was "descriptive and prefatory to the specific legislative dictate which follows right after the word . . . ." *Bradshaw* at 916. The court thus determined the restrictions referred only to disclosures in civil or criminal proceedings. The *Richmond* court, however, said the legislature could have limited the legislation to defining procedures in discovery proceedings without designating the information "confidential." The legislature's failure to limit the scope of the legislation, said the court, supports the view the term "has independent significance." *Richmond* at 1440. Read together, the cases appear to mean that the information is confidential, but the department may choose to waive the confidentiality and disclose information. The information may not be disclosed over the department's objection and, even if the department chooses to disclose information, it may not do so in a way that reveals the identity of the officers.

Can the department be forced to waive the privilege? This question remains unanswered. Each of the cases cited above sought, and was denied, a hearing before the California Supreme Court. Due to the lack of clarity on the issue, the appropriate course of action at this juncture would be to attempt to reconcile the needs of the police department and the needs of the CRB. An important point in resolving the issue is that CRB letters to complainants are not records kept pursuant to Penal Code section 832.5. Rather, the letters reflect the CRB's findings. Arguably, although the issue has never been addressed by the courts, so long as the letters do not reveal the identity of officers or witnesses, or the substance of the investigatory files reviewed by the CRB,

the CRB is free to structure the letters as they wish. Nevertheless, all CRB findings are based upon the confidential IA files, thus the distinction between what is appropriately considered CRB information and what is IA information is blurred. We suggest the better course is to seek some common ground where both the CRB and the police department are comfortable with the information that is released.

CONCLUSION

Based on the opinions of the Attorney General and subsequent court decisions, Penal Code section 832.7(c) is not a complete bar to releasing information about the CRB's findings in disposition letters to complainants. However, it is not clear how detailed the information may be. Legislative intent indicates the identity of officers and witnesses may not be disclosed. Beyond that clear limitation, releasing information is subject to challenge by the Police Officer's Association or the police department. The split of opinion among the courts makes the outcome of such a challenge uncertain. With this in mind, we believe the best course of action is to work toward a mutually agreeable solution. This office is ready to assist in that endeavor.

CASEY GWINN, City Attorney

By
Sharon A. Marshall
Deputy City Attorney

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