

**TO:** Sunshine Task Force Public  
Records Subcommittee

**FROM:** Richard Doyle, City Attorney

**SUBJECT:** Initial Review of Proposed  
Language Relating to  
Records of Alleged Employee  
Misconduct

**DATE:** January 22, 2008

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After an initial review of the proposed language submitted by Bert Robinson in his email dated January 17, 2008, we have some thoughts to share and questions to pose. This memorandum does not provide a comprehensive examination of all possible legal matters raised by the proposed language, but was prepared for discussion purposes when the subcommittee reviews the proposed language on January 28, 2008.

**A. The City's Concerns Relating to Potential Exposure to Legal Claims**

First, as previously explained, the City's response to a public records request for records of alleged employee misconduct is made on a case-by-case basis and depends upon a number of factors, including the individual at issue, the records sought, the nature of the alleged misconduct, the evidence supporting the allegations, the status of any related investigation, the status of the disciplinary process, if any, and an analysis of the law at the time the request is made. Accordingly, it is difficult, if not impossible, to draft an ordinance that draws bright line tests for disclosure of records involving alleged misconduct under legal principles from cases that do not draw bright line tests.

Second, there are important factors to consider in disclosing records relating to employee misconduct. As currently drafted, the proposed language appears to seek unsubstantiated information and opinions of witnesses and accusations unsupported by evidence. Disclosure of records containing such information may expose the City to liability for invasion of privacy and defamation.

Further, as previously explained, if there is a pending criminal investigation relating to the misconduct, the suspected employee who participated in the investigation and provided statements may not have waived his/her Fifth Amendment and Fourteenth Amendment rights against self-incrimination, and the disclosure of such statements or information obtained as a result of the statements may affect their right to a fair trial should criminal charges be filed. This may be another area of exposure to liability.

**B. There is No Exception for Peace Officers**

The proposed language also does not provide any exception for personnel records relating to misconduct by peace officers. Peace officer personnel records, including

disciplinary actions, are confidential and may not be disclosed under the law. *Copley Press, Inc. v. Superior Court*, (2006) 39 Cal.4<sup>th</sup> 1272 (holding that Copley did not have a right under the Public Records Act to records of the county civil service commission relating to a peace officer's administrative appeal of a disciplinary matter, which were protected by statutes safeguarding officer's right of privacy under the Penal Code).

### C. Questions Regarding the Proposed Language

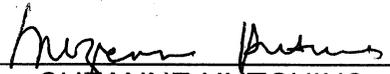
After an initial review of the proposed language, the following questions were raised:

- For number 1, what does "if the allegation of misconduct is not so unreliable that it could not be anything but false" really mean? We understand that the language came from the *BRV* case, where the Court of Appeal for the Third District found that the public's interest in how the City of Bakersfield handled allegations of misconduct against its only high school superintendent outweighed the superintendent's privacy interest in disclosing a redacted version of a report where it exonerated the superintendent of all serious allegations of misconduct except those relating to outbursts of anger. See *BRV v. Superior Court*, (2006) 143 Cal.App.4<sup>th</sup> 742. The *BRV* case, however, was fact specific to Bakersfield's only school superintendent and we are concerned how the rationale used by the Court could be extended to the number of people that would be covered under the definition of "City Official" under Municipal Code Section 12.12.120.
- For number 2, as discussed at the meeting on January 14, 2008, the reasons for discipline can cover many types of conduct – conduct that some may deem trivial and conduct that some may deem serious. With these considerations in mind, are you suggesting that disclosure be required for all findings of "malfeasance," "dishonesty," and "misuse of City property" irrespective of the seriousness of the allegation?
- For number 4, would this include records containing an employee's medical information? Would this include records containing unsubstantiated information? Would this include records that contain non-work related information, i.e., employee's personal problems, social life, family life, etc.?
- For number 5, what types of information would the log contain? Also, what does "summarizing actions taken by Employee Relations" mean?

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By

  
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