



FILED
ALAMEDA COUNTY

FEB - 9 2007

CLERK OF THE SUPERIOR COURT

By *Vicki Daybell* *JD*

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

BERKELEY POLICE ASSOCIATION

No. 2002-057569

Petitioner/Plaintiff

ORDER DENYING MOTION OF
PETITIONER BERKELEY POLICE
ASSOCIATION FOR SUMMARY
JUDGMENT; GRANTING IN PART
AND DENYING IN PART MOTION
FOR SUMMARY ADJUDICATION;
AND ORDER TO SHOW CAUSE RE
DENIAL OR DISMISSAL OF
FOURTH CAUSE OF ACTION

vs.

CITY OF BERKELEY AND CITY OF
BERKELEY POLICE REVIEW
COMMISSION,

Respondents/Defendants.

Pursuant to the parties' stipulation, the Motion of Petitioner Berkeley Police Association ("Petitioner" or "Petitioner BPA") for Summary Judgment or Alternatively Summary Adjudication came on for hearing on November 14, 2006, in Department 31 of this Court, the Honorable Winifred Y. Smith presiding. Petitioner appeared by Alison Berry Wilkinson, Esq. Respondents City of

Berkeley and City of Berkeley Police Review Commission (“Respondents”) appeared by Berkeley City Attorney Manuela Albuquerque, Esq.

Petitioner’s alternative motion seeks summary adjudication of each of the three “causes of action” that remain pending in this proceeding, namely, Petitioner’s requests for writ relief on the grounds that the public disclosure of PRC records violates Penal Code §832.7, that PRC procedures are subject to the Public Safety Officers Procedural Bill of Rights Act, and that the PRC is in violation of the parties’ Memorandum of Understanding by failing to issue decisions within 120 days of the filing of a citizen complaint.¹ (Petitioner has styled these requests for writ relief as its third, first and fourth causes of action, respectively.)

¹ On July 11, 2002, Petitioner filed its Verified Petition for Writ of Mandate and Complaint for Declaratory Relief, alleging four “causes of action” for writ of mandate relief pursuant to Code Civ. Proc. §1085, and a fifth cause of action for declaratory relief. Respondents filed their Answer on September 11, 2002. On October 18, 2004, the parties stipulated to dismiss the second and fifth causes of action without prejudice. (Although Petitioner has not filed a request for dismissal as directed by the Court, the Court nevertheless considers that these causes of action are no longer pending.) This matter initially came on for hearing on October 25, 2004, in the form of Petitioner’s Motion for a Peremptory Writ. At that time, the Court requested further briefing on whether there were any material factual disputes and, if so, what would be the proper avenue for resolving them. On November 22, 2004, the Court suggested that the matter could be resolved by way of summary judgment, and the Motion for a Peremptory Writ of Mandate was dropped from the Court’s calendar at Petitioner’s request. (The Court’s minutes from that date indicate that the Motion for a Peremptory Writ was “withdrawn”; however, there is no suggestion that the underlying Petition itself has been withdrawn.) Petitioner has not scheduled a new hearing on its Motion for a Peremptory Writ. Instead, the instant motion for summary judgment was set for hearing on an expedited basis by stipulation of the parties approved by the court on October 11, 2006.

The Court has considered the pleadings, moving papers and the opposition thereto, the admissible evidence, the arguments presented at the hearing and, good cause appearing, hereby DENIES Petitioner's Motion for Summary Judgment and GRANTS IN PART Petitioner's alternative Motion for Summary Adjudication.

FACTUAL BACKGROUND

Respondent Police Review Commission ("PRC") is a citizen complaint review board established to investigate complaints of misconduct lodged with the PRC against employees of the Berkeley Police Department ("BPD"). (UMF nos. 1, 3.) The PRC investigates civilian complaints and holds public hearings² concerning the allegations. The City Manager of Berkeley mandates that police officers cooperate with the PRC investigations of all timely filed complaints and testify at the public hearings. (UMF nos.5, 10.) Any officer who fails to appear before the PRC would be violating a direct order, would be considered insubordinate and would be subject to disciplinary action. (UMF no. 12.)

After its investigation and hearing, the PRC issues a Report of Findings. The Report of Findings may contain criticisms of an officer's behavior on a specific occasion; discuss the rules, regulations, or orders the officer violated; and provide direction on the PRC's expectations of how the officer should behave or proceed in the future. (UMF no. 20.) These findings are made available to the

² The initiative ordinance establishing the PRC provides in pertinent part that "all meetings shall be open to the public, unless the [PRC], in order to protect the rights and privacy of individuals, decides otherwise and if such closed meeting is not waived by the individual concerned." (UMF no. 4.)

public and are sent to the City Manager and the Berkeley Chief of Police. (UMF nos. 22, 23.) Berkeley officers are entitled to appeal these findings to an administrative body. (Lui Dec., ¶ 38.)

Under the Berkeley City Charter, the City Manager has sole authority over the discipline and discharge of all city employees. The City Manager has delegated to the Police Chief the authority to issue disciplinary suspensions of less than three days and to issue written reprimands and letters of advice to Berkeley police officers. (UMF no. 25.) The City Manager keeps all PRC findings in a file in his office. (UMF no. 26.) Based upon the findings and conclusions of an investigation by the PRC and/or the Berkeley Police Department, the Chief of Police may recommend to the City Manager that a police officer be disciplined or terminated. (UMF no. 27.) It is undisputed that the City Manager and the Chief of Police have the authority to impose discipline on an officer based on PRC findings. (UMF nos. 27, 28.)

DISCUSSION

A. Public Disclosure of PRC Records Violates Statutory Confidentiality Protections.

In its third cause of action, Petitioner argues that the public disclosure of PRC records violates Penal Code sections 832.7 and 832.8. The Court agrees.

1. The Confidentiality Mandates of Penal Code Section 832.7 Apply to the City's Police Review Commission Process Because the Police Review Commission is Part of the Employing Agency, the City of Berkeley.

Penal Code section 832.7(a) establishes that records pertaining to peace officer misconduct, complaints, investigations, hearings and personnel records are confidential.

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.

(Penal Code §832.7(a).)

PRC records are created by a "local agency pursuant to Penal Code section 832.5" and are subject to the confidentiality mandates of Penal Code section 832.7. Penal Code section 832.5(a)(a) provides:

Each department or agency in this state that employs peace officers [hereinafter "Employing Agency"] shall establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies, and shall make a written description of the procedure available to the public.

PRC records are protected under Penal Code section 832.7 because they are maintained by the peace officers' Employing Agency, the City of Berkeley. (See also Penal Code §832.8.) The facts are undisputed that under the Berkeley City Charter, the City Manager has the sole authority over the discipline and discharge of all city employees, including all police officers. The City Manager orders the city's peace officers to cooperate and testify in PRC investigations and hearings

(UMF no. 10) under pain of discipline, keeps all PRC findings in his office (UMF no. 26), and has the authority to discipline officers based, in part or exclusively, on PRC findings. (UMF nos. 28-29.) Ultimately, the police officers work under the authority of the City Manager.

The confidentiality mandates of section 832.7 extend to PRC records because the PRC is a sub-agency of the City of Berkeley. Municipal Code section 3.32.020 states: "There is established a Police Review Commission" whose members are appointed by the City Counsel and whose members are paid by the City (Berkeley Municipal Code § 3.32.060) and report directly to the City Council and the City Manager. (Berkeley Municipal Code § 3.32.090; UMF no. 6.) Respondents argue that the PRC is exempt from the confidentiality requirements of the Penal Code because the Berkeley Police Department, not the City of Berkeley, is the Employing Agency and the PRC is a completely separate entity. The facts, however, belie that contention. The scope of the City Manager's authority over the police officers and the PRC compel the conclusion that the City of Berkeley is the Employing Agency and the confidentiality provisions include the PRC records.

The fact that the City of Berkeley has more than one forum for investigating citizen complaints does not affect the applicability of section 832.7. This point was addressed *Copley Press v. Superior Court* (2006) 39 Cal. 4th 1272. The Court in *Copley Press* noted that confidentiality protections should not "turn on whether [the officer] works in a jurisdiction where responsibility for

administrative appeals has been assigned to someone outside of the law enforcement department.” (*Id.* at 1294.) While *Copley Press* dealt with the agency’s discretion to establish a disciplinary appeal process under Government Code section 3304, the reasoning extends to the complaint investigation process here. Similarly, Penal Code section 832.5 gives a public agency the discretion to determine how and by whom citizen complaints of misconduct are investigated. Regardless of whether the investigation is being conducted by the Police Department or the Police Review Commission, it is being conducted by the peace officer’s Employing Agency, the City of Berkeley. The Supreme Court reasoned:

[I]t is unlikely the Legislature, which went to great effort to ensure that records of such matters would be confidential and subject to disclosure under very limited circumstances, intended that such protection would be lost as an inadvertent or incidental consequence of a local agency’s decision . . . to designate someone outside the agency to hear such matters.

(*Copley Press v. Superior Court, supra*, 39 Cal. 4th at 1295.)

The Court in *Copley Press* broadly construed the term “employing agency” to include records maintained by sub-entities of public agencies. The Court rejected the argument that the records of the San Diego Civil Service Commission do not qualify for protection under section 832.7 because the Commission does not employ peace officers. The argument “fail[ed] to take into account the nature of the commission and its role in disciplinary proceedings for peace officers.” (*Id.* at 1287.)

Because the Commission, a department of the County, has been designated to provide the appeal that the officer’s employer is

required by law to provide in connection with taking punitive action, it is reasonable to conclude that for purposes of applying the relevant statutes in this case, the Commission is functioning as part of “the employing agency” and that any file it maintains regarding a peace officer’s disciplinary appeal constitutes a file “maintained by [the officer’s] employing agency” within the meaning of section 832.8.

(*Copley Press v. Superior Court* (2006) 39 Cal. 4th 1272, 1290).

The PRC is designated to conduct investigations and make findings on citizen complaints concerning police misconduct. Under section 832.7, records of police misconduct investigations created as a result of a citizen complaint pursuant to 832.5, whether the complaint is made to the City of Berkeley’s Police Department or the City’s PRC, are confidential. Thus, under *Copley Press, supra*, PRC files are subject to the confidentiality mandates of section 832.7 as the PRC is functioning as part of the Employing Agency, the City of Berkeley.

2. Penal Code Section 832.8 Prohibits the PRC from Allowing Public Access to its Investigations, Reports, Hearings, and Findings.

PRC records are also protected as confidential under Penal Code section 832.8. Penal Code section 832.8 defines “personnel records” as:

[A]ny file maintained under that individual’s name by his or her employing agency [containing records of] complaints, or investigations of complaints, concerning an event or transaction in which [a peace officer] participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.

(See Penal Code §§ 832.8(d) and (e).) Courts have determined that a personnel record remains a personnel record no matter the label affixed to the file or where the file is kept (*Aguilar v. Johnson* (1988) 202 Cal.App.3d 241, 251), and

regardless of whether the file is kept under the individual officer's name or by the complaint number. (See *Davis v. City of San Diego* (2003) 106 Cal.App.4th 893.)

In *Davis v. City of San Diego* (2003) 106 Cal.App.4th 893, the court determined a civilian complaint review board's investigation report of an officer's alleged misconduct to constitute a personnel record. The City in the *Davis* case claimed the civilian review board's reports were not personnel records because they were not maintained under the officer's name. Instead, they were maintained under an internal investigation number and the name of the alleged victim of police misconduct. The Court determined that the manner in which they were maintained did not determine their status and found the civilian review board's reports to be personnel records under Penal Code section 832.8, opining as follows:

[Reasonably] read in its entirety, section 832.8 defines as personnel record any report naming an individual officer and relating to a complaint or investigation of a complaint about an event the named officer participated in or perceived and that concerned the manner of the officer's performance or duty. San Diego's proffered interpretation of section 832.8's phrase "any file maintained under that individual's name" is unreasonably narrow as essentially focusing on the caption identifying a file or record. [Citations omitted.] . . . San Diego presented no evidence establishing that individual officer's names did not appear elsewhere in those documents.

(*Davis, supra*, 106 Cal.App.4th at 900.)

In *Copley Press, supra*, 39 Cal. 4th at 1290, the Court determined that records may be protected under section 832.7 even where the records are being maintained by an agency that does not actually employ peace officers. The Court

in *Copley Press* also held that the confidentiality provisions of Penal Code sections 832.7 and 832.8 apply not only to criminal and civil proceedings, but also to administrative proceedings. Although the facts in *Copley Press* case involved the agency's discretionary decision to have an outside agency administer its disciplinary appeal process under Government Code section 3304, the reasoning extends to the citizen complaint investigation process at issue here.

Finally, the term "confidential" as used in section 832.7 also has independent significance and "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" (*City of Richmond v. Superior Court* (1995) 32 Cal.App.4th 1430, 1440.)

B. The PRC Procedures Violate the Public Safety Officers Procedural Bill of Rights Act.

In its first cause of action, Petitioner contends that PRC procedures are subject to The Public Safety Officers Procedural Bill of Rights Act (the "Act"). The Court agrees.

The Act was enacted by the legislature to define the rights and responsibilities of employers and public safety officers during the disciplinary process. (Government Code section 3300 et seq.) The Act affords peace officers important rights when "any public safety officer is under investigation and subjected to interrogation by his commanding officer, or any other member of the employing safety department that could lead to punitive action." (Gov. Code.

§3303.) Here, as discussed above, the PRC process may lead to disciplinary or punitive action placing it within the ambit of the Public Safety Officers Procedure Bill of Rights.

The claim that the PRC is a completely independent entity and thus that the Act does not apply to its actions is not meritorious. The determination that the City of Berkeley is the Employing Agency of the police officers with the corresponding authority to discipline officers based upon the findings of the PRC forecloses consideration of the PRC as an independent entity.

Moreover, the PRC process in many ways mimics the internal disciplinary process of the Berkeley Police Department. The Police Chief and the City Manager order peace officers to appear before the PRC and testify. (UMF nos. 10-11.) Officers that are ordered to appear are subject to discipline for failure to comply (UMF no. 12.) and are “subjected to interrogation by his or her commanding officer,” thereby triggering the requirements of Government code section 3303 et seq. (*See California Correctional Peace Officers Assn. v. State of California* (2000) 82 Cal.App.4th 294, finding that officers were entitled to protection under the Act where the Department of Correction enlisted the Department of Justice to conduct an investigation into misconduct allegations.) Once the PRC findings are sent to the Police Chief and City Manager for review and possible imposition of disciplinary action (UMF nos. 22, 27, 28) the officer is entitled to invoke his or her right to an administrative review of those findings.

While Respondents are correct that the PRC itself cannot impose or recommend disciplinary action (see *Brown v. City of Berkeley v. City of Berkeley* (1976) 57 Cal. App.3d 223, 233), the critical factor in the analysis is that the PRC actions “could lead to punitive action.” (Gov. Code. §3303.) Accordingly, because the PRC process is mandatory, the officer is subject to interrogation by his commanding officer and the resulting findings may lead to disciplinary action the peace officers are entitled to the rights and protections afforded by the Act.³

C. The MOU Does Not Require the PRC to Issue Findings Within 120 Days of the Filing Of A Complaint

With respect to the fourth cause of action, Petitioner seeks summary adjudication that the PRC must issue its findings within 120 days from the date a civilian complaint is filed with the PRC, because the PRC findings are tantamount to a “letter of advice” and/or “written reprimand” as described in the section 37.4 of the Memorandum of Understanding (“MOU”) between the City of Berkeley and the BPA. The Court disagrees.

MOU section 37.4 states:

³ Respondents argue that during the last twenty years, no City of Berkeley Police Chief has ever recommended taking disciplinary action against an officer based on PRC issued findings. (See Respondents’ Separate Statement of Additional Facts, UMF no. 27 and Respondents’ response.) It is undisputed that the City Manager once imposed discipline on an officer based on PRC findings. (UMF no. 28 and Respondents’ response.) Regardless of whether the Police Chief or City Manager have previously imposed discipline based on PRC findings, the issue for the Court is whether discipline may be imposed based upon the PRC’s findings. (See Gov. Code. §3303.)

The City agrees that no disciplinary action against an employee covered by this Understanding, which action involves a letter of advice, written reprimand, loss or reduction of pay or discharge, shall be imposed unless such action is taken within one hundred twenty (120) calendar days after the date of the incident giving rise to the disciplinary action or within one hundred twenty (120) calendar days of the date the City has knowledge of the incident giving rise to the disciplinary action.

(UMF no. 34.)

A plain reading of this section requires the City Manager and Police Chief to issue “a letter of advice, written reprimand, loss or reduction of pay or discharge,” within 120 days of the date the City became aware of the incident giving rise to the disciplinary action. It follows that if the discipline is imposed based upon PRC findings, the Chief of Police or City Manager would have to take that action within 120 days of the filing of the complaint. Section 37.4 of the MOU cannot reasonably be interpreted to require that all finding of the PRC be issued within 120 days, because the Chief of Police and City Manager have the authority to impose discipline based upon those findings. The event which triggers the 120 day limitation is the imposition of discipline, not the issuance of the findings, and it is well established that the PRC does not have the authority to discipline officers. (See *Brown v. City of Berkeley v. City of Berkeley* (1976) 57 Cal.App.3d 223, 233.) Thus, issuance of the PRC findings can lead to disciplinary action but cannot be characterized as a disciplinary action as defined in the MOU.

Petitioner cites *Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209 in support of the application of the 120-day limitation, but Petitioner’s reliance is

concerning written reprimands and letters of advice require the PRC to issue its findings within 120 days. Accordingly, Petitioner's Motion for Summary Adjudication as to the fourth cause of action is DENIED.

Evidentiary Objections and Request for Judicial Notice

Respondents' request that the court take judicial notice of the Berkeley Charter and Municipal Code is GRANTED.

Petitioner's unnumbered Objections to Evidence, which are directed to the Declaration of James Chanin (¶¶ 5-8), are all SUSTAINED for hearsay and lack of foundation.

The Court did not consider the evidence submitted with Petitioner's reply brief.

Disposition and Further Proceedings

Based on all the foregoing, IT IS THEREFORE ORDERED that Petitioner's Motion for Summary Judgment is DENIED. Petitioner's Alternative Motion for Summary Adjudication is GRANTED as to Petitioner's first and third causes of action, and DENIED as to Petitioner's fourth cause of action.

With respect to the substance of the matters raised in this proceeding, the Court is inclined—once this proceeding is fully resolved—to issue a writ of mandate compelling Respondents:

(A) To comply with the requirements of Penal Code section 832.7 and not disclose peace officer personnel records except in accordance with the specific enumerated contingencies contained therein; and

(B) To afford all peace officers subject to PRC investigations the rights and protections under the Public Safety Officers Procedural Bill of Rights Act.

As a procedural matter, Petitioner's fourth cause of action remains pending. Respondents have not filed a motion for summary judgment or adjudication with respect to this cause of action (or any other issue in this proceeding), and no further hearing on the Petition is presently set. However, it appears from the parties' papers and counsel's representations that there are no further material factual disputes between the parties. If the fourth cause of action were presented for hearing without further supporting evidence, the Court would be inclined to deny or dismiss that portion of the Petition.

Therefore, the parties are hereby ORDERED TO SHOW CAUSE on March 7, 2007, at 9:00 a.m. in Department 31, why the fourth cause of action should not be denied or, in the alternative, dismissed. The parties shall submit briefs addressing whether, in light of the matters determined in this Order, further hearing is required before the Court may deny or dismiss the fourth cause of action. At their option, the parties may also address in their briefs the appropriate content of any writ of mandate that may issue in this proceeding.


The following briefing schedule shall apply: Petitioner shall file and serve its brief of no more than 7 pages no later than 4:00 p.m. on February 20, 2007. Respondents shall file and serve their opposing brief of no more than 7 pages no later than 4:00 p.m. on February 26, 2007. Petitioner's reply of no more than 5 pages shall be filed and served no later than 4:00 p.m. on March 2, 2007. Proof of

service shall be filed no later than 4:00 p.m. on March 2, 2007. Service may be made by personal delivery or facsimile.

If the OSC hearing date is not convenient for one or more of the parties, the Court will entertain any reasonable request for a continuance. Prior to making such a request, the parties shall meet and confer to agree upon a mutually convenient hearing date and a revised briefing schedule. Continuance requests may be made by calling the courtroom clerk at 510-208-3935.

IT IS SO ORDERED.

DATED: **FEB - 9** 2007


Winifred Y. Smith
Judge of the Superior Court

CLERK'S DECLARATION OF MAILING

I certify that I am not a party to this cause and that on the date stated below I caused a true copy of the foregoing ORDER DENYING MOTION OF PETITIONER BERKELEY POLICE ASSOCIATION FOR SUMMARY JUDGMENT; GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY ADJUDICATION; AND ORDER TO SHOW CAUSE RE DENIAL OR DISMISSAL OF FOURTH CAUSE OF ACTION to be mailed first class, postage pre paid, in a sealed envelope to the persons hereto, addressed as follows:

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I declare under penalty of perjury that the same is true and correct.
Executed on February 9, 2007.

By: Vicki Daybell
Vicki Daybell, Deputy Clerk
Department 31