



CITY OF CORONADO

OFFICE OF THE MAYOR

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July 21, 2016

The Honorable Jeffrey B. Barton, Presiding Judge
P.O. Box #122724
San Diego, California 92112

Re: **Response to Grand Jury Report “Citizen Oversight Boards of Police Behavior” by the Mayor and City Council of the City of Coronado in Accordance with §933(c) PC**

Dear Judge Barton:

As required by subdivision (c) of Penal Code section 933, this letter is the response of the Mayor and City Council of the City of Coronado (“Coronado” or the “City”) to the San Diego County Grand Jury Report filed on May 25, 2016, entitled “Citizen Oversight Boards of Police Behavior.” The Grand Jury recommended that all law enforcement agencies in the County of San Diego (the “County”) establish independent citizens’ boards to investigate complaints against law enforcement officers.

The Grand Jury Report first addresses concerns pertaining to the County and the already established San Diego County Citizens’ Law Enforcement Review Board (“CLERB”), the City of San Diego Citizens’ Review Board (“CRB”), and National City’s Community and Police Relations Commission (“CPRC”). The Report then discusses cities within the County that are currently without a community review board or commission.

FINDINGS:

The City recognizes that the Grand Jury Report contains a total of six (6) Findings; however, Finding 01 to Finding 04 pertain only to the CRB and the CLERB, while Finding 05 and Finding 06 concern cities, including Coronado, that are currently without a community review board or commission. This response, therefore, only addresses Finding 05 and Finding 06 that concern the City.

Finding 05: Cities without a citizens’ oversight board do not have public review of complaints of police behavior and risk losing the trust of their citizens.

Response: The Mayor and City Council of the City of Coronado disagree with this finding. Coronado believes that its citizens are satisfied with the City’s police department. In 2014, an independent organization conducted a survey of residents of the City and compared responses to those from other communities across the nation. The survey found that, “Broadly, Coronado’s

ratings tended to be similar to or higher than the benchmark when compared to other communities across the nation.”¹ Specifically, the responses regarding the City’s safety were higher than the national benchmarks. (Id. at p. 1.) Likewise, the City’s police department had an 84% positive rating on residents’ “overall feeling of safety.” (Id. at p. 2.)

Without specifying which cities, the Grand Jury reported that it received complaints from citizens in several of the cities without a community review board who felt there was inadequate resolution of grievances. The City believes that its current processes maintain sufficient oversight over the police department and instill trust in the City’s citizens who have not requested or advocated for a review board. The Grand Jury’s report lacks documentation or statistical information that the San Diego County cities with a community review board or commission enjoy any higher level of citizen trust than the trust placed in the City of Coronado’s Police Department by its citizens. The Grand Jury’s report does not establish a causal relationship between the existence, or lack therefore, of a Police Review Board between the quality of police work, crime rate, or the trust of a community.

Finding 06: A review board shaped with citizen input will promote confidence in actions taken by the board.

Response: The Mayor and City Council of the City of Coronado disagree with this finding. The Grand Jury Report states that the absence of a citizens’ review board can seriously erode public trust in the police department. However, this “fact” does not apply to Coronado because, as mentioned above, the citizens of the City have a very high regard of the police department and have not requested that a review board be implemented.

Further, hearings held by independent citizen commissions must be closed to the public and reports created by the commissions are extremely limited due to confidentiality restrictions under both the Public Safety Officers Procedural Bill of Rights, California Government Code § 3300 *et seq.* (“PBRA”) and the California Penal Code. (See Responses to Recommendation 16-30, at sections 2 and 3 below.) In reality, the public has limited familiarity regarding independent citizen commissions and public participation (beyond citizen appointees to a review board) is nil.

The City of Coronado operates under a form of government referred to as the council-manager form of government. Pursuant to the City’s Municipal Code, personnel decisions are removed from the hands of the City Council and through the chain of command flow to the City Manager, a civilian head, and to the Police Chief, a sworn Police Officer who serves to lead the Police Department. Hiring and firing decisions are delegated to the Police Chief through the authority of the City Manager with job protection and property rights established via an independently appointed Civil Service Commission (CSC).

¹ A copy of the survey can be found at the following link:
http://www.coronado.ca.us/egov/documents/1408466095_23981.pdf

RESPONSES TO RECOMMENDATIONS

The following responses are made on behalf of the Mayor and City Council of the City of Coronado.

Recommendation 16-30: *Establish independent citizen commissions for oversight of police behavior.*

Response: *Recommendation will not be implemented because it is not warranted or reasonable.*

EXPLANATION

Based upon the City of Coronado's governance structure, the current high level of satisfaction with the Police Department and Police Services, the City's relatively low crime rate, the lack of evidence that independent citizen review commissions improve individual police officer performance or the performance of the Police Department, the delay a citizen commission introduces into the resolution of complaints against police officers, increased cost, the potential erosion of relations with the Coronado Police Officers' Association ("CPOA"), the potential conflict that could be produced in disciplining police officers and the appeal rights of the police officer to the Civil Service Commission, and the legitimate concerns regarding the City's potential exposure to liability. Our analysis is that each of these outweighs the possibility that an independent citizen commission will improve the Police Department, lower crime, or increase trust. Accordingly, the Grand Jury's recommendation is not warranted or reasonable.

1. Requiring the City to Amend its Established Rules and Policies Regarding Peace Officers' Terms and Conditions of Employment is Overly Burdensome and Unreasonable.

To account for the procedural changes that will occur with the implementation of an independent citizen commission, the City will have to amend current work rules and policies as well as provisions of the current Memorandum of Understanding with the CPOA.

The CPOA is the exclusive bargaining representative of the City's peace officers and the relationship between the City and the CPOA is governed by the Meyers-Milias-Brown Act ("MMBA"), California Government Code § 3500, *et seq.* Government Code § 3505 provides, in pertinent part: "The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action."

Discipline criteria and procedures as well as evaluation procedures are matters within the scope of representation and require the parties to negotiate over any changes prior to implementation. *Rio Hondo Community College District*, PERB Decision No. 2313 (2013); *San Bernardino Unified School District*, PERB Decision No. 255 (1982); *Modesto City Schools*, PERB Decision No. 347 (1983). The implementation of an independent citizen commission would certainly concern and likely alter disciplinary procedures and review criteria of peace officers. Additionally, to the extent that the implementation of an independent citizen commission alters other terms and conditions of employment, these too will fall within the scope of bargaining. See *Vernon City Firefighters Association v. City of Vernon*, 107 Cal.App.3d 802 (1980) (“Numerous topics fall within ‘other terms and conditions of employment’ as this phrase is used in the [MMBA]. Many are now so clearly recognized to be mandatory subjects for bargaining that no discussion is required. Among these topics are the following: Provisions for a grievance procedure and arbitration, layoffs, discharge, workloads, vacations, holidays, sick leave, work rules. . . .”).

Implementation of an independent citizen commission affects peace officers’ terms and conditions of employment, as defined under the MMBA. Accordingly, any changes to the current CSC Rules, other work procedures, and rules related to officers’ terms and conditions of employment fall within the scope of representation and require that the City bargain with the CPOA prior to implementation.

It is unsurprising that unions have been quite hostile toward the implementation of independent review boards. See e.g., Maxine Bernstein, *Police chief, police union urge officers not to attend citizen review panel hearings*, THE OREGONIAN, April 4, 2016; Everett L. Bobbitt, *Living with the Reality of Civilian Review Boards*, PORAC LAW ENFORCEMENT NEWS, April 2004; Lynne Wilson, *Democracy vs. Collective Bargaining: Countering Police Union Attacks on Citizen Review*, POLICE MISCONDUCT AND CIVIL RIGHTS LAW REPORT, Vol. 5, No. 5, September-October 1996. The City foresees that bargaining over changes to the terms and conditions of peace officers’ employment will be highly contested and heated. These types of negotiations expose the City to unfair labor practice charges filed with the Public Employment Relations Board which the City will have to defend.

Additionally, negotiations over an independent citizen commission will result in changes to the CSC Rules, which were last revised in 2010. The City will have to confirm that the changes are legally sound which will consume time and resources. After implementation, the City will have to ensure that the changes to the CSC Rules are followed, not only by current City staff but also the members of the independent review board. The City would have to expend additional legal costs to oversee the changes.

In sum, our analysis determined that bargaining over the implementation of an independent review board will take considerable time and resources and may also result in unfair labor practice charges filed against the City. This, coupled with the apparent lack of any benefit from an independent review board, makes it difficult to conclude that the Civil Grand Jury’s recommendation is reasonable.

2. Ensuring that the Independent Citizen Commission Does Not Violate the Public Safety Officers Procedural Bill of Rights Act is Overly Burdensome.

California Government Code § 3300 *et seq.*, also known as the Public Safety Officers Procedural Bill of Rights (“PBRA”), provides a catalogue of basic rights and protections which must be afforded all peace officers by the public entities which employ them. *Binkley v. City of Long Beach*, 16 Cal.App.4th 1795, 1805 (1993).

PBRA § 3303 states, “When any public safety officer is under investigation and subjected to interrogation by his commanding officer, or any other member of the employing public safety department, which could lead to punitive action, such interrogation shall be conducted under the following conditions Punitive action is defined as any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment” Among other things, this section provides that the subject officer be informed of the nature of the investigation in advance; the subject officer must be provided with representation; that only two interrogators be present during the interrogation; the subject officer must be interrogated at a reasonable time and for a reasonable amount of time; the subject officer is entitled to certain documents regarding the investigation; the interrogation is to be recorded and the subject officer is entitled to a copy of the recording; and that the subject officer be given their *Lybarger v. City of Los Angeles*, 40 Cal.3d 822 (1985) rights. *Id.*

Another basic protection of the PBRA is that the employing public entity must provide public safety officers the right to an administrative appeal of punitive actions: “No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency ... without providing the public safety officer with an opportunity for administrative appeal.” PBRA § 3304 (b).

Under PBRA § 3305, a peace officer must be provided with the opportunity to read and sign any adverse comment put into his personnel file. Under § 3306, an officer is granted 30 days to respond to any adverse comment entered into his personnel file.

Cities have been liable when independent citizen commissions fail to protect the extensive rights guaranteed to officers under the PBRA. *See Berkeley Police Association v. City of Berkeley*, 167 Cal.App.4th 385 (2008) (holding that the PBRA was applicable to the investigation of the independent citizen commission because the PBRA applies to investigations that “could lead to punitive action” and the police chief or city manager could take disciplinary action against an officer based on the investigation); *Caloca v. City of San Diego*, 72 Cal.App.4th 1209 (1999) (analyzing procedures of San Diego’s CLERB and finding that PBRA § 3304 required the City to provide peace officers with an appeal of any decision made by CLERB).

PBRA § 3303 *alone* guarantees no less than seven distinct rights to peace officers during interrogations and investigations. The members of an independent citizen commission will have to be thoroughly trained regarding each right that must be afforded an officer during an

investigation. Any failure of the independent citizen commission to grant and protect these rights is a violation of the PBRA for which the City can be held responsible. To ensure compliance, the City would likely have to appoint special legal counsel to both train and oversee an independent citizen commission. With finite resources, it is unreasonable to require the City to institute an independent review board, particularly when its current system is satisfactory.

Moreover, the CSC Rules already allow all employees, including peace officers, to appeal discipline to the CSC. (Rule VIII, § 8.) An independent citizen commission, therefore, will merely add excessive, unnecessary, and burdensome steps to the disciplinary process while opening the door to potential liability. There is a significant and legitimate concern as to whether the independent citizen commission would be able to handle its assigned tasks without exposing the City to litigation and liability. Our analysis has determined that this potential liability far exceeds the benefit that the City will derive from an independent citizen commission.

3. Ensuring that the Independent Citizen Commission Does Not Violate the California Penal Code is Overly Burdensome.

Peace officer personnel records are confidential and are only subject to disclosure in criminal or civil proceedings if authorized by a judge following an *in camera* review. *Commission on Peace Officer Standards and Training v. Super. Ct.*, 42 Cal. 4th 278, 293 (2007). California Penal Code § 832.7 provides that, “Peace officer or custodial 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 § 832.8 states, “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 any of the following: (a) Personal data, including marital status, family members, education and employment history, home addresses, or similar information; (b) Medical history; (c) Election of employee benefits; (d) Employee advancement, appraisal, or discipline; (e) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties; (f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.”

Many cities have had to defend lawsuits due to their independent citizen commission’s failure to abide by the Penal Code. *See Davis v. City of San Diego*, 106 Cal.App.4th 893 (2003) (court held that reports written by the independent citizen commission were protected under Penal Code §§ 832.7 and 832.8; court awarded police union and individual officers approximately \$10,000 in attorneys’ fees and costs to be paid by the city); *Berkeley Police Association v. City of Berkeley*, 167 Cal.App.4th 385 (2008) (court determined that public hearings on citizen complaints by the independent review commission boards violated § 832.7, subdivision (a) by disclosing information “obtained from” confidential records, including the identity of officers who are subject to complaints and the content of investigative files and memoranda compiled by the commission investigators before the hearing); 71 Ops. Cal. Att’y Gen. 1, 5 (1998) (“[w]here the

city manager, assistant city manager or citizens' review board have authority to inspect citizens' complaints against peace officers they are required by Penal Code section 832.7 to maintain the confidentiality of such complaints and are precluded from disclosing the contents thereof to members of the public.”).

The City will be responsible for ensuring that the independent review board is well-trained in order to be able to identify which documents fall within the definition of “personnel records” as set forth in Penal Code §§ 832.7 and 832.8. The scope of confidential documents is very broad. However, identifying confidential information is not an easy task as demonstrated by the above-cited cases. Accordingly, the disclosure of seemingly innocuous information by an independent review board can expose the City to liability. The City will have the ultimate responsibility if the independent review board does not appropriately handle such nuanced decision-making.

Our analysis has determined that the burden that would be placed upon the City by the implementation of an independent review commission is far outweighed by all of the liability exposure, the exorbitant costs, and the risk of disrupting labor relations. With finite resources, the City's time, taxpayer dollars, and revenue are far better allocated to other City programs. This is particularly true where, as here, the City's citizens are highly satisfied with the police department and there are established procedures already in place to oversee peace officer misconduct.

4. The findings presented by the Civil Grand Jury lack empirical evidence that an independent citizen commission will achieve any of the purported benefits; therefore, the recommendation is not warranted.

No empirical evidence is referenced that citizen oversight boards improve the performance of a police department or improve the public's level of trust or confidence. The reported benefits of citizen oversight boards are presented as a doctrine, the same as a tenant of faith or religious dogma. In fact, citizen oversight boards do not improve police department performance or individual police officer accountability. Citizen oversight boards are reactive, responding to complaints after an allegation of misconduct has been made and misconduct has already occurred. Citizen oversight boards lack the authority to improve a police department's performance initially, and oftentimes lead to the “us against them” mentality that is the root of distrust between the public and police agencies.

Recommendation 16-31: ***Determine the specific commission model with community input to ensure acceptance, independence, and accountability.***

Response: ***Recommendation will not be implemented because it is not warranted or reasonable.***

While there may be a benefit in implementing an independent citizen commission, the City must consider whether citizens will support a review board as well as the costs of implementation. Our analysis has determined that citizens will not support the implementation of an independent citizen commission because they will see it as wasteful and unnecessary. The City also has

legitimate concerns that a commission exposes it to liability based upon wrongdoings of the commission. Accordingly, the Grand Jury's recommendation is not warranted or reasonable.

Citizens of Coronado are highly satisfied with the work and conduct of the police department and have not requested that a citizen review board be implemented. The City expects that the citizens would actually oppose the implementation of a review board and see it as a waste of taxpayer money and City resources. Additionally, gaining acceptance by the residents will be hard to come by as the independent citizen review commission's work will, for the most part, be private and confidential. Residents will not know what work, if any, is being performed by the commission.

Further, it is impossible to ensure independence and accountability of an independent citizen review commission because a commission, pursuant to the case law cited-above, is *not* accountable for its own actions. It is the City that will be liable for any wrongdoing or mistakes made by a commission. If a lawsuit is brought against the City for acts of an independent citizen commission, Coronado citizens will merely see it as a failure of the City itself. Our analysis has, therefore, determined that establishing an independent citizen commission is not warranted or reasonable.

On behalf of the Coronado City Council, I would like to thank the Grand Jury for its service to the residents of San Diego County, and express our appreciation for the dedication and hard work of each of its members.

Sincerely,



Casey Tanaka
Mayor of Coronado

CT/jnc

cc: City Council
City Manager
City Attorney