

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: December 28, 2021

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Implementation of the Commission on Police Practices

INTRODUCTION

This Memorandum responds to a request from Councilmember Monica Montgomery Steppe to provide general information on the implementation of the City of San Diego (City)'s Commission on Police Practices (Commission) that she may use to create an informational fact sheet (FAQ) for interested community members. As you are aware, the City hired the outside law firm of Meyers Nave to assist in drafting necessary documents to implement the Commission. This Office has shared pertinent information that may assist the law firm in performing its work.¹

At the municipal election on November 3, 2020, City voters approved Measure B to amend the San Diego City Charter (Charter) and establish the Commission, superseding the City's Community Review Board on Police Practices, known as "CRB." Measure B amended the Charter to, among other things, add section 41.2, which establishes that the Commission is an investigatory body of the City, independent of the Mayor and the Police Department. The Commission provides civilian oversight of the City's Police Department by independently investigating specified incidents and complaints by members of the public against the City's police officers, who are "peace officers" under California Penal Code (Penal Code) section 830.1. The Commission is also authorized to review and advise the Chief of Police (Police Chief or Chief) on the discipline of City police officers, and to make recommendations to the Chief, Mayor, and City Council (Council) regarding the policies and practices of the Police Department. San Diego Charter § 41.2.

¹ The Commission must "retain its own legal counsel, who is independent of the City Attorney, for legal support and advice in carrying out the Commission's duties and actions." San Diego Charter § 41.2. However, the elected City Attorney remains the "chief legal adviser of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties," except the Commission and the Ethics Commission. San Diego Charter § 40. The City Attorney advises the City's Personnel Department, Human Resources Department, and Police Department, among other departments. Thus, this Memorandum is prepared under the City Attorney's Charter-mandated authority to advise those departments, as well as the Mayor and City Council.

Charter section 41.2 requires the Council to adopt an ordinance to fully implement the Commission. Further, Measure B added language to Charter section 115, authorizing the City's Civil Service Commission to determine police officer appeals of sustained findings of misconduct by the Commission. Therefore, in accordance with Charter sections 115 and 118, the Civil Service Commission and the Council must consider any necessary amendments to the City's Civil Service Rules to implement these legally required appeals.

Measure B did not change the authority of the Police Chief, who reports to the Mayor. San Diego Charter § 57. The Chief appoints, directs, and supervises the personnel in the Police Department and has "all power and authority necessary for the operation and control of the Police Department." *Id.* The Police Chief also has "charge of the property and equipment of the department." *Id.* This includes Police Department records.²

By San Diego Ordinance O-21318 (May 19, 2021), the Council created the Office of the Commission on Police Practices as a City department. This ordinance added section 22.5601 to the San Diego Municipal Code (Municipal Code or SDMC). It sets forth the following provisions: the Office of the Commission on Police Practices provides administrative staff and support for the Commission; the Executive Director serves as the administrative director of the department; the Executive Director serves as the appointing authority for all personnel in the department; the Executive Director is authorized to employ experts and consultants to assist with the Commission's work; the Commission must retain its own legal counsel, responsible for providing legal services related to those matters within the authority of the Commission; and the department's budget is established by the Council, must be reflected in the City's annual budget, and must be authorized by the annual appropriation ordinance.

The Public Safety and Livable Neighborhoods Committee is now considering amendments to Chapter 2, Article 6, Division 11 of the Municipal Code, to fully implement the Commission itself, including provisions related to the Commission's composition and operating procedures. The Civil Service Commission must also recommend to the Council procedures to conduct the legally required appeals.

This Memorandum is intended to answer fundamental questions that the Mayor and Council may have related to implementation of the Commission.

² The Charter requires the Executive Director of the Commission, who is appointed by the Council, to serve as custodian of the Commission's records. San Diego Charter § 41.2.

DISCUSSION

I. What must the Council include in the ordinance to implement the Commission?

Charter section 41.2 requires the Council, by ordinance, to establish the number, term length, qualifications, and method for appointing members of the Commission, and to define the circumstances and process under which the Council determines there is cause for removal of a Commission member. The Council also must define, by ordinance, the terms “police misconduct” and “police officer misconduct.” San Diego Charter § 41.2.

The Commission has certain mandatory duties and discretionary powers, expressly described in Charter section 41.2. The Council may, by ordinance, mandate additional duties and authorize additional powers for the Commission, consistent with the Charter and applicable federal and state laws. Further, the Council may establish additional rules and procedures related to Commission operations.

II. Does the Mayor have veto power over the implementation ordinance?

Yes. Charter section 41.2 provides that the Commission is an investigatory body of the City, independent of the Mayor and the Police Department. However, the Mayor plays a role in the legislative process through his veto power, which extends to all ordinances and resolutions adopted by the Council, with limited, express exceptions. San Diego Charter § 280. The Mayor’s veto power extends to ordinances and resolutions that affect the administrative service of the City, including the Police Department. *Id.* at § 280(a)(1).

III. Is the Commission independent of the City?

No. While the Commission is independent of the Mayor and Police Department, it is an investigatory and advisory body acting under the authority of the City, as a municipal corporation. Commission members are City officers under Charter section 117. The Charter grants Commission members express public powers and duties, and they must act in accordance with the Charter and controlling federal and state laws.³

IV. Is the Commission subject to the Ralph M. Brown Act?

Yes. The Ralph M. Brown Act (Brown Act), which is set forth at California Government Code (Government Code) sections 54950 through 54963, requires legislative bodies of local government agencies to conduct business in open and public meetings, unless an express exception applies. Cal. Gov’t Code § 54953(a). The Commission is an advisory body created by Charter, and is expressly included under the Brown Act. Cal. Gov’t Code § 54952(b). Therefore,

³ See, *Dibb v. County of San Diego*, 8 Cal. 4th 1200, 1213 (1994); *City Council v. McKinley*, 80 Cal. App. 3d 204, 210 (1978).

the Commission must conduct its business in open session except when a closed session meeting is expressly authorized by the Brown Act. *See, e.g.*, Cal. Gov't Code § 54957(b) (closed session related to personnel matters).⁴

V. Can the Council delegate its authority to appoint members of the Commission and Executive Director to others?

No. Charter section 41.2 requires the Council to appoint the Commission members and its Executive Director. The Council must also establish the initial annual compensation of the Executive Director. Generally, the power of appointment includes the power of selection and the power of removal, unless expressly provided otherwise.⁵ Therefore, the appointment process rests with the Council.⁶

However, the appointment process includes administrative tasks, such as advertising for open positions, performing outreach, receiving and reviewing applications, and initial screening of applicants. The Council may lawfully delegate some of these administrative tasks, so long as the Council maintains its legislative discretion to select Commission members and the Executive Director, and appoint them, as required by the Charter.⁷

If the screening tasks are delegated to others, the Council must maintain control of the process, in accordance with Charter sections 41.2 and 11.1 (covering nondelegable legislative powers). Moreover, the Council must consider whether the Brown Act will apply to any screening body, because the Brown Act generally applies to advisory bodies created by formal action of a legislative body. Cal. Gov't Code § 54952 (b).⁸

In addition, Commission members are considered non-compensated City employees in accordance with Charter section 117, and their selection is considered an employment process. Therefore, the Council must follow City employment processes.

⁴ The California Attorney General has advised that the personnel exception to the open meeting requirement may authorize a board of police commissioners established by charter to meet in closed session when the board is considering personnel matters that are confidential under state law. 61 Ops. Cal. Atty Gen. 220, Opinion No. CV 77-195 (May 4, 1978). *See also, San Diego Police Officers' Ass'n v. City of San Diego Civ. Serv. Comm'n*, 104 Cal. App. 4th 275, 287 (2002).

⁵ *See, Myers v. United States*, 272 U.S. 52, 119 (1926); *Gillespie v. San Francisco Pub. Libr. Comm'n*, 67 Cal. App. 4th 1165, 1174 (1998); *Lucchesi v. City of San Jose*, 104 Cal. App. 3d 323, 328 (1980); 3 McQuillin Mun. Corp. § 12:118 (3d ed. 2021) (authority to appoint).

⁶ Once appointed, the Commission's Executive Director "serves at the direction and will of the Commission. The Commission must conduct the annual performance review of the Executive Director, and may modify the Executive Director's annual compensation, consistent with the compensation schedules established by the City Council in adopting the annual salary ordinance." San Diego Charter § 41.2.

⁷ *See, Kugler v. Yocum*, 69 Cal. 2d 371, 375-376 (1968); *Bullock v. United States Bureau of Land Mgmt.*, 489 F. Supp. 3d 1112, 1126 (D. Mont. 2020); 3 McQuillin Mun. Corp. § 12:120 (3d ed. 2021) (authority to appoint -- nondelegability).

⁸ *See, McKee v. Los Angeles Interagency Metro. Police Apprehension Crime Task Force*, 134 Cal. App. 4th 354, 359, 362 (2005).

VI. Can the Council lawfully limit participation on the Commission?

Yes, so long as limitations are not based upon a protected classification, and are rationally related to a legitimate governmental purpose.⁹ Federal and state equal protection laws, including the Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution, provide that local government decisionmakers must treat people equally under the law regardless of race, ethnicity, gender, and other protected classes.¹⁰

If the Council limits Commission membership based on residence (*e.g.*, in the City, or by Council Districts or in neighborhood police divisions) or occupation (*e.g.*, excluding current and former law enforcement officers, prosecutors, and their immediate family members), the Council must make factual findings to support that a rational basis or relationship exists between the limitations and a legitimate City purpose.

VII. Can the City conduct a review of the criminal conviction history of Commission applicants?

Yes. Members of City boards and commissions are appointed officers of the City and fall under the City's unclassified service, as set forth in Charter section 117(a). Commission members will be issued City email accounts and have access to the City's email system, as well as access to confidential personnel-related documents.

All City employees are subject to a pre-appointment criminal background check focused on conviction history. City police officers and other employees in the City's Police Department who work in certain areas are subject to a more comprehensive pre-employment background review. All background reviews are conducted in a manner consistent with federal and state laws.

The Council can make a policy determination to require criminal history background reviews of prospective Commission members. If the Council makes that policy determination, it would be appropriate to provide notice to prospective Commission members by setting forth the pre-appointment requirements in the implementation ordinance.

VIII. Is the implementation ordinance subject to collective bargaining requirements under the Meyers-Milias-Brown Act?

Yes. Prior to adoption of the implementation ordinance, the Council must engage in collective bargaining with the City's recognized employee organizations (REOs) over those provisions in the proposed ordinance that impact mandatory subjects of bargaining.

⁹ See, *Board of Supervisors v. Local Agency Formation Comm'n.*, 3 Cal. 4th 903, 913 (1992); *City of Cleburne, Tex. v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985).

¹⁰ See, *People v. Chatman*, 4 Cal. 5th 277, 288-289 (2018); *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976).

The Meyers-Miliias-Brown Act (MMBA) requires a public agency to meet and confer in good faith with representatives of its REOs before making a determination of policy or course of action that involves a mandatory subject of bargaining. *See*, Cal. Gov't Code § 3505; City Council Policy 300-06 (amended by San Diego Resolution R-313698 (Sept. 22, 2021)). It is an unfair practice under the MMBA for a public agency employer, like the City, to refuse or fail to comply with this obligation. Cal. Gov't Code § 3506.5.

The scope of representation under the MMBA includes:

[A]ll matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

Cal. Gov't Code § 3504.¹¹

Disciplinary standards and procedures, including standards and procedures to investigate allegations of employee misconduct or wrongdoing, are subject to bargaining.¹²

IX. Are the activities of the Commission subject to the requirements of the MMBA?

Yes. By law, the Commission must comply with the City's Memoranda of Understanding with its REOs, which include the San Diego Police Officers Association (SDPOA), representing police officers, and the San Diego Municipal Employees Association, representing other Police Department employees. While the MMBA provides the City's represented employees with the procedural protections of collective bargaining, the law does not direct the City, in bargaining, to agree to any specific substantive provisions, only to act in good faith "to resolve differences and reach common ground." *Vallejo Police Officers Ass'n v. City of Vallejo*, 15 Cal. App. 5th 601, 622-623 (2017) (internal citation omitted).¹³

X. Is the Commission subject to other laws related to City employment?

Yes. As a public agency employer, the City, including the Commission, must comply with all applicable labor and employment laws. These laws include both constitutional and statutory provisions protecting employees' privacy and providing them with due process and other rights.

¹¹ *See also*, *San Francisco Police Officers' Ass'n. v. San Francisco Police Comm'n*, 27 Cal. App. 5th 676, 684-690 (2018).

¹² *See*, *Long Beach Police Officer Ass'n v. City of Long Beach*, 156 Cal. App. 3d 996, 1007, 1010-1011 (1984); *Rio Hondo Community College Dist.*, PERB Dec. No. 2313 (2013), at 14-16; *Fairfield-Suisun Unified School Dist.*, PERB Dec. No. 2262 (2012), at 12-13; *County of Sonoma*, PERB Dec. No. 2772-M (2021) (judicial appeal pending).

¹³ *See also*, *International Ass'n of Fire Fighters, Loc. 188, AFL-CIO v. Public Emp. Rels. Bd.*, 51 Cal. 4th 259, 271 (2011).

Among its other duties, the Commission plays an advisory role in the discipline of the City's police officers. The City's police officers are classified employees in the City's civil service system, and they are represented by the SDPOA. As public agency employees and peace officers under Penal Code section 830.1, City police officers have federal and state constitutional and statutory rights, which must be considered in establishing the Commission's processes to investigate, review, and audit the City's Police Department.

The Commission will likely also interact with other City employees, who may not be the subject of a Commission investigation but may be percipient witnesses to an incident under investigation, custodians of records, or subject matter experts. Most of these employees likely will be represented by one of the City's REOs with rights under the MMBA, which may impact the Commission's interaction with them.

XI. Is there an established definition of "misconduct"?

Charter section 41.2 requires the Council to define, by ordinance, the terms "police misconduct" and "police officer misconduct."

The Police Department, and the City as a whole, distinguishes between performance-related and misconduct-related discipline, with the latter defined as stemming "from negligent or intentional employee violations of City and/or Department policy." San Diego Police Department Discipline Manual for Sworn Personnel (June 2019), at 11.

Police Department Policy 9.00, covering Personal Conduct, defines the duty to report misconduct, at 9.33, as follows:

Members shall immediately report misconduct by another member.

For the purpose of this policy misconduct means conduct that causes risk to the health and safety of the public or impairs the operation and efficiency of the Department or member or brings into disrepute the reputation of the member or the Department. The conduct could involve a violation of any law, statute, ordinance, City Administrative Regulation, Department policy or procedure, act of moral turpitude or ethical violation.

In this context misconduct involves a willful act done with a wrong intention and is more than mere negligence, error of judgment or innocent mistake.

If any member has credible knowledge of another member's misconduct, they shall take immediate, reasonable action to stop the misconduct, and the member shall report the misconduct to a supervisor as soon as possible.

Supervisors shall assess the validity of any allegation of misconduct by a member. If there is evidence of misconduct, or the allegation appears credible, then the supervisor shall immediately notify their chain of command and/or the watch commander's office.

Police Department Policy 9.33 (April 29, 2014).

Additionally, under new state law, the California Commission on Peace Officer Standards and Training (POST) will soon review allegations of "serious misconduct" by peace officers for consideration of suspending or revoking their POST certification.¹⁴ By January 1, 2023, POST must adopt a regulation defining "serious misconduct" of peace officers, which will be used to determine ineligibility for, or revocation of, an officer's state law certification. Cal. Penal Code § 13510.8(b). The definition must include specific categories of conduct identified in Penal Code section 13510.8(b). The City's definition of "misconduct" should be consistent with state law.

XII. If the Commission finds that a police officer has engaged in misconduct, does the officer have the right to appeal that finding?

Yes. If the Police Chief agrees with the Commission and issues "property right" discipline to the officer, defined as termination, suspension, demotion, or reduction in compensation, the officer will have a right to appeal the discipline to the City's Civil Service Commission. San Diego Charter § 129; Civil Service Rule XI (codified at SDMC §§ 23.1201-23.1211).

Further, if the Commission makes a finding of misconduct, but the Police Department does not impose "property right" discipline against the officer, the officer still has a right to appeal the Commission's finding to the Civil Service Commission in accordance with Charter section 115 and Government Code section 3304(b).¹⁵

¹⁴ California's Governor signed Senate Bill 2 into law on September 30, 2021, which added provisions to the Penal Code, to create a Peace Officer Standards Accountability Division and advisory board, within POST. The division will be responsible for reviewing:

[I]nvestigations conducted by law enforcement agencies or any other investigative authority and to conduct additional investigations, as necessary, into serious misconduct that may provide grounds for suspension or revocation of a peace officer's certification, present findings and recommendations to the board and [POST], and bring proceedings seeking the suspension or revocation of certification of peace officers.

Cal. Penal Code § 13509.5(a)-(b).

¹⁵ See also, *Caloca v. County of San Diego*, 72 Cal. App. 4th 1209, 1223 (1999); *Caloca v. County of San Diego*, 102 Cal. App. 4th 433, 436-437 (2002).

XIII. Can the Commission compel the testimony of City employees and the production of Police Department and other City documents to the Commission?

Yes, with limitations. City employees will be required to cooperate with the Commission, under City Administrative Regulation 95.60.

If the Commission relies on its subpoena power to compel testimony or production of documents, the Commission must act in a manner consistent with the Charter and state law. Charter section 41.2 grants the Commission subpoena power as follows:

The Commission has the power to conduct investigatory proceedings, subpoena witnesses and compel their attendance and testimony, administer oaths and affirmations, and require by subpoena the production of any books, papers, records, or other items material to the performance of the Commission's duties or exercise of its powers, subject to the restrictions of and in accordance with this section and applicable federal and state law. The Commission may enforce its administrative subpoenas by initiating contempt procedures, upon a majority vote of the Commission and in the manner provided by applicable state law.

San Diego Charter § 41.2.

Administrative bodies, like the Commission, may issue subpoenas for the purpose of investigation, without filing formal charges or litigation, but the subpoenas must meet an established standard. Under California law, an administrative subpoena will be enforced if it “(1) relates to an inquiry which the administrative agency is authorized to make; (2) seeks information reasonably relevant to that inquiry; and (3) is not too indefinite.” *City and Cnty. of San Francisco v. Uber Techs., Inc.*, 36 Cal. App. 5th 66, 74 (2019).¹⁶ Further, a charter provision that provides an oversight body with subpoena power “does not (and may not) supersede general law governing privileges or confidentiality of records.” *Dibb v. County of San Diego*, 8 Cal. 4th at 1210, n. 5.

If the Commission issues an administrative subpoena, it must comply with all statutory requirements, including notice to any third parties, such as City employees, whose records are sought. Additionally, issuance of subpoenas triggers constitutional and statutory considerations for employees, including an employee's Fourth Amendment protections to be free from unreasonable searches and seizures by the government, due process protections, and the constitutional privilege against self-incrimination.

¹⁶ See also, *Brovelli v. Superior Court*, 56 Cal. 2d 524, 529 (1961) (internal quotations and citations omitted); *California Rest. Ass'n. v. Henning*, 173 Cal. App. 3d 1069, 1075 (1985).

XIV. Can the Commission's investigatory proceeding against an officer be public?

No. Under established California case law, the Commission may not freely disclose information from confidential personnel records at public disciplinary appeal hearings if the subject officer asserts an objection.¹⁷ However, the state law rules related to confidentiality of peace officer personnel records are evolving, and the City should continue to monitor legal developments in this area, to determine whether the rules regarding closed investigatory hearings change.

CONCLUSION

This Office is available to review the draft FAQ that will result from this Memorandum.

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By /s/ Joan F. Dawson
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JFD:cm
MS-2021-20 REV. (Feb. 10, 2022)
MS-2022-20 REV. (Dec. 30, 2021)
MS-2022-20
Doc. No. 2846426_4

¹⁷ See, *San Diego Police Officers' Ass'n v. City of San Diego Civ. Serv. Comm'n*, 104 Cal. App. 4th 275, 287 (2002).