CITY AND COUNTY OF SAN FRANCISCO

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# MEMORANDUM

TO: Mayor Gavin Newsom
Members, San Francisco Board of Supervisors
Members, San Francisco Police Commission
Chief of Police Heather Fong

FROM: Molly S. Stump
Deputy City Attorney

DATE: September 19, 2006

RE: Supreme Court decision in *Copley Press, Inc. v. Superior Court* – Police Commission disciplinary proceedings

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On August 31, 2006, the California Supreme Court issued its opinion in Copley *Press, Inc. v. Superior Court* (S128603). That opinion interpreted California Penal Code section 832.7, a state statute that provides for confidentiality of peace officer personnel records. The Court held that section 832.7 mandates the confidentiality of all records of peace officer disciplinary proceedings. Therefore, section 832.7 forbids the disclosure of these records to the public.

The Court expressly held that a public entity employing peace officers must keep the following records confidential: (1) the identities of peace officers involved in the disciplinary proceeding (*Copley Press*, pp. 13-14); (2) documents and evidence involved in the disciplinary proceeding; and (3) the transcripts or tapes of the disciplinary proceeding. (*Id.*, pp. 2, 7-14.) The Court held that the employing agency may release "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." (*Id.*, p. 13.)

The San Francisco Charter provides for a "fair and impartial trial" before the Police Commission before a police officer may be suspended for more than ten days or dismissed from employment. (Charter § A8.343.) The Charter authorizes the Police Commission to adopt rules governing disciplinary trials. (Charter §§ 4.104; A8.343.) The Police Commission's rules provide that "the taking of evidence shall be open to the public," except where a party requests a closed hearing and demonstrates "good cause." (*Rules Governing Trials of Disciplinary Cases,* III (A)(3), pp 2-3.) An officer may show good cause by "demonstrating that disclosure of information which is relevant to the case would result in an unnecessary invasion of the personal privacy of an individual and/or physical harm to an identified individual." The Commission's rules also provide that "records of open proceedings shall be available for public inspection, unless disclosure is otherwise prohibited by law." Traditionally, the Police Commission has held disciplinary trials in public.

**Memorandum**



The public agency involved in *Copley Press* was a county. Counties do not enjoy charter city home rule power over "municipal affairs." (Cal. Const., Art. XI, Sec. 5.) Nevertheless, a court would very likely conclude that Charter cities, such as San Francisco, are also bound by the confidentiality mandates of Penal Code section 832.7. The Court opined that the legislature intended section 832.7 to apply uniformly throughout the state, regardless of local procedures. (*Copley Press*, pp. 11-13.) Further, the Court's interpretation of section 832.7 relied in part on the burden that a different interpretation would place on an officer's right to appeal disciplinary action under the Public Safety Officers Procedural Bill of Rights Act, which is binding on Charter cities. (*Baggett v. Gates* (1982) 32 Cal.3d 128.) An interpretation of section 832.7 that allowed public entities to decide the extent to which they would disclose records of peace officer disciplinary proceedings would mean that peace officers in "open" jurisdictions may be less likely to pursue their remedies under the Peace Officer's Bill of Rights than officers in jurisdictions that maintained the confidentiality of records of disciplinary proceedings. (*Copley Press*, p. 13.) That rationale applies with equal force to Charter cities.

*Copley Press* involved records of and evidence used in disciplinary proceedings and not the disciplinary proceeding itself. Moreover, the Supreme Court stated: "We express no opinion regarding whether Copley has a constitutional right to attend Commission appeal hearings." (*Copley Press*, p. 18, fn. 27.) Based on this statement, some have suggested that the Court left open the possibility that the San Francisco Police Commission could continue to hold open disciplinary proceedings. A court faced with the question would almost certainly conclude that San Francisco Police Commission may *not*, without the consent of the officer involved, continue to conduct public disciplinary trials for the following reasons.

First, the *Copley* decision was not based solely on the Public Records Act, as some have suggested. The Court also held that Penal Code section 832.7 establishes "a general condition of confidentiality" for peace officer personnel records. (*Copley Press*, pp. 5-6.) While the Public Records Act incorporates the confidentiality created by Penal Code section 832.7, the Penal Code's mandate of confidentiality is "general," and not limited to responses to public records requests.

Second, as a practical matter, *Copley's* ruling on confidentiality presents an insurmountable obstacle to open disciplinary hearings, especially at the trial level. The *Copley* decision interpreted section 832.7 to bar a local agency from disclosing an officer's identity, documents or evidence related to an investigation of misconduct, and transcripts or recordings of any proceeding. It would be impossible to conduct a fair disciplinary trial without referring to the identity of the officer involved and permitting presentation and questioning about documents and evidence relating to the investigation of the officer's alleged misconduct. Further, by holding that records (transcripts and recordings) of disciplinary proceedings are confidential, the Court was recognizing that practical reality and recognizing that the proceedings themselves are confidential. The Commission's historic practice of holding disciplinary hearings in public cannot be squared with these confidentiality requirements.

For the foregoing reasons, a court is almost certain to hold that disciplinary trials—like records of those proceedings and evidence submitted in them—are subject to section 832.7's mandate of confidentiality. Further, a court is similarly likely to hold that the state's interest in uniformity evinced a legislative intent to set a rule of statewide application that overrides charter cities' home rule power to conduct open trials of discipline of police officers.

**Memorandum**



While some may question whether the Supreme Court's decision struck the right balance between the public's right to information about their government and protection of peace officers' privacy, the Supreme Court is California's highest and is endowed by the California Constitution with authority to issue final interpretations of the meaning and effect of state statutes, which, unless and until the Legislature changes the law, are binding on all public agencies. The Court has done so in *Copley Press*, and any court faced with the issue would almost certainly conclude that San Francisco is bound to comply with that decision. If the Police Commission continues conducting open disciplinary trials, a court will almost certainly hold that such proceedings violate officers' confidentiality rights under section 832.7. Further, officers could seek damages, attorneys' fees and possibly other monetary remedies for violation of their rights regarding disciplinary hearings under the Public Safety Officers' Procedural Bill of Rights Act. (Cal. Govt. Code § 3309.5(e).)

The Police Commission has three legally viable options:

1. Close disciplinary proceedings to the public, unless an officer waives his or her right of confidentiality. Where an officer consents to an open hearing, the Commission may allow the public full access to the proceedings involving that officer. If multiple officers are charged, it may be necessary to secure a waiver from all officers who are the subject of the proceedings.

2. Attempt to craft new procedures that maintain the confidentiality of peace officer personnel records, as defined by section 832.7 and the *Copley Press* decision, and allow for public access to the limited extent that any aspect of a disciplinary proceeding does not involve such records and does not identify the involved officer or officers. We are not aware of any procedure that would provide for meaningful public access without disclosing confidential peace officer personnel records.

3. Urge the Mayor and the Board of Supervisors to seek a change in state law. The California Legislature has the authority to amend section 832.7 to authorize the San Francisco Police Commission's historic practice of conducting public proceedings in cases involving allegations of serious misconduct.