



MEMORANDUM OFFICE OF THE CITY ATTORNEY

DATE: February 9, 2022

TO: Community Formation Commission

FROM: John S. Doimas, Assistant City Attorney

SUBJECT: Survey of Legal Issues Presented in the Community Formation Commission's Draft Recommendation

INTRODUCTION

Established by City Council to make recommendations for the creation of a community police oversight system in Santa Barbara, the Community Formation Commission (CFC) held its first meeting on March 17, 2021. Over that time, the CFC has fulfilled its directive by exploring Santa Barbara Police Department's (SBPD) existing standards, examining different civilian police review systems, and identifying the specific needs for all of Santa Barbara. That tremendous work effort is continuing to this day.

In less than a year's time, the CFC has produced a Draft Recommendation for Community Oversight in Santa Barbara providing detail that includes the powers and duties of the Commission, Commissioner qualifications, staffing, and consideration of what is needed in the budget for the Community Oversight Board (COB).

The CFC has asked the City Attorney's Office to conduct a legal review of the Draft Recommendation. This memo is careful to focus only on any conflict or Brown Act issues and does not provide an evaluation of the review systems or policies developed in the Recommendation.

ANALYSIS

Below is an analysis of the conflict issues presented in the Draft Recommendation:

A. Director Of Police Oversight Is Unable To Contract For Legal Services Without Following The Procedure Under Section 518 Of The Charter

Subsection X (ii) of the Draft Recommendations provides that the “COB shall have the ability to direct the Director of Police Oversight to contract with outside legal counsel and investigators as necessary.” This recommendation is inconsistent with two City Charter sections.

Section 703 describes the powers and duties of the City Attorney. The City Attorney shall have the power and may be required to:

“(a) Represent and advise the City Council and all City officers in all matters of law pertaining to their offices.”

However, the City Council is empowered as follows:

“The City Council shall have control of all legal business and proceedings and may employ other attorneys to take charge of or may contract for any prosecutions, litigation or other legal matters or business.”

Accordingly, contracting with legal counsel must be undertaken and approved by the City Council.

Section 518 provides the following:

“The City shall not be bound by any contract, except as hereinafter provided, unless the same shall be made in writing, approved by the City Council and signed on behalf of the City by the Mayor and City Clerk or by such other officer or officers as shall be designated by the City Council. Any of said officers shall sign a contract on behalf of the City when directed to do so by the City Council. By ordinance or resolution not inconsistent with this Charter the City Council may authorize the City Administrator or other officer to bind the City, with or without a written contract, for the acquisition of equipment, materials, supplies, labor, services or other items included within the budget approved by the City Council, and may impose a monetary limit upon such authority.”

Based on the language in the Charter, the COB and the Director of Police Oversight must seek approval and have the City Administrator execute a contract under \$35,000 and obtain City Council approval if the amount is over \$35,000, at a regularly scheduled meeting. If a contract is initially for under \$35,000, but costs run over, then City Council approval is required. The Director of Police Oversight cannot unilaterally enter into a contract.

B. Reviewing Details Of An Investigation In Closed Session Is Not Permissible Under The Brown Act

Section V of the Draft Recommendation provides that the “Board will meet in a closed session when discussing or reviewing the details or case files of open or closed complaint investigations to the **extent permitted by law.**” While the recommendation does provide the caveat “to the extent permitted by law,” there is no legal authority to hold a closed session to discuss an investigation unless the COB is also recommending discipline. However, recommending discipline is, in itself problematic, and discussed in the section below.

Only topics specifically authorized under the Brown Act may be held in closed session. The most common closed session topics are Litigation, Real Estate Negotiations, Personnel Matters, and Labor Negotiations. While a legislative body may meet in closed session to discuss personnel issues including complaints or charges made against the employee (California Government Code § 54957(b)(1), the Brown Act does not afford the opportunity to “only” review Internal Affairs investigations in closed session.

A potential counterargument is that the COB would be allowed to receive a complaint against an officer, but Civilian Review Boards that hold a closed session on investigations do so under Government Code § 54957(b)(1) because they can issue or recommend discipline. Simply reviewing the results of an investigation is not a sufficient basis to hold a closed session.

The CFC should be aware that Government Code § 54957(b)(1) provides that at least 24 hours before holding a closed session to hear specific complaints or charges brought against an employee, the employee must receive written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session. If notice is not given, any disciplinary action taken against the employee based on the specific complaints or charges heard in the closed session is invalid. There is no notice required if a legislative body was not “hearing” or evaluating the allegations, but instead considered only whether to investigate the charges.

C. The Case *Brown V. City Of Berkeley* Demonstrates Potential Conflict For The COB Recommending Discipline Or The Hiring/Firing The Director Of Police Oversight

Section II of the Draft Recommendation provides that “[T]he COB shall be involved in the hiring/firing process of the Director of Police Oversight.” Section VIII provides “[B]ased on its review of sustained SBPD misconduct investigations and use-of-force incidents, the DPO may make recommendations, with approval of a majority of the COB, to the Chief of Police regarding administrative action, **including possible discipline, for such personnel.**” These two sections in the Draft Recommendation conflict with the City Charter.

In *Brown v. City of Berkeley* (1976) 57 Cal.App.3d 223, the court invalidated provisions of Berkeley’s police review commission ordinance because the ordinance empowered a police review commission to intervene in individual disciplinary proceedings against individual police department employees. The City of Santa Barbara has a similar Charter provision.

Section 607 of the City Charter, titled Non-Interference with Administrative Service, provides the following:

“Except as otherwise provided in this Charter, **neither the Council nor any of its members shall order, directly or indirectly, the appointment** by the City Administrator, **or** by any of the department heads in the administrative service of the City, **of any person to any office or employment, or his removal therefrom.** Except for the purpose of inquiry, the City Council and its members shall deal with the administrative **service under the jurisdiction of the City Administrator solely through the City Administrator**, and neither the City Council nor any member thereof shall give orders to any subordinate of the City Administrator, either publicly or privately. This section shall not apply to any officer appointed by the City Council or to the members of his department.” (Emphasis Added)

Section 604 of the City Charter, which details the powers and duties of the City Administrator, provides in part the following:

“Without limiting the foregoing general grant of powers, responsibilities and duties, subject to the provisions of this Charter, including the civil service provisions thereof, the City Administrator shall have power and be required to: (a) Appoint, and he may promote, demote, suspend or remove all

department heads, **officers and employees of the City** except elective officers and those department heads, officers and employees the power of whose appointment is vested by this Charter in the City Council. He may authorize the head of any department or office to appoint or remove subordinates in such department or office. No department head shall be appointed or removed until the City Administrator shall first have reviewed such appointment or removal with the City Council and received its approval for such appointment or removal.”

These two Charter provisions provide that the City Administrator is tasked (or may delegate to a head of a Department) with appointing or removing employees of the City. Charter Section 607 also provides that City Council may not directly or **indirectly** appoint or remove any employees of the City (with the exception of the City Administrator & the City Attorney). The term “indirectly” is interpreted as making a recommendation. If Council is not permitted to interfere in the disciplinary process under the Charter, then that power cannot later be conferred to a subordinate and subsequent legislative body such as the COB.

In summary, the Charter clearly provides that appointment and removal of employees are within the sole jurisdiction of the City Administrator, and conferring the ability of the COB to hire or recommend discipline would be in conflict with the Charter, as it would constitute interference with the City’s Administrative process.

CONCLUSION

The foregoing describes three major areas of concern. There are, of course, many more issues raised by the Draft CFC Recommendation. I will be happy to discuss these issues at the Commission’s convenience.

JSD/lp

cc: City Council
Rebecca Bjork, City Administrator
Ariel Calonne, City Attorney