

## Commission on Police Practices

### Ad Hoc Transition Planning Committee Meeting

**Friday, January 7, 2022**  
**10:30 am-11:30 am**  
**Zoom Webinar Platform**

#### AGENDA

As an Ad Hoc Committee meeting, this meeting is not subject to the Ralph M. Brown Act; however, to promote transparency, the meeting will be available to the public via this Zoom webinar link:

<https://sandiego.zoomgov.com/j/1601580850?pwd=TCtEbEdIZjIoTUFFQ3AvSkROY2NUZz09>

The meeting will be available on the City's YouTube page after the meeting. Click [here](#) to view this meeting after its scheduled time.

- I. CALL TO ORDER/WELCOME (Committee Chair Doug Case)
- II. ROLL CALL
- III. PUBLIC COMMENT: (Fill out and submit comment using [webform](#). Please see instructions at the end of this agenda)
- IV. UPDATES
  - A. Budget Process
  - B. Staffing - Administrative Aide on Board!
  - C. Implementation Ordinance & Permanent Standard Operating Procedures (Request confirmation from PS&LN when the second draft of the implementation ordinance can be posted)
  - D. Office Space
  - E. Standing Rules
  - F. Community Outreach
  - G. Legal Counsel Contract – Status of review of RFP's for outside counsel
- V. UNFINISHED BUSINESS
  - A. Procedure to implement the requirement for the Commission's to review and evaluate the Police Department's compliance with federal, state and local reporting requirements
  - B. Hiring of the Deputy Executive Director, Policy Analyst and Performance Auditor
- VI. NEW BUSINESS
  - A. Discussion of the City Attorney's memorandum regarding CPP implementation
  - B. Preliminary budget requests for FY23 – financial analyst position, extension of outside counsel
- VII. AGENDA ITEMS FOR NEXT MEETING – January 14, 2022
- VIII. ADDITIONS TO THE LIST OF ITEMS FOR FUTURE AGENDAS (See below)

IX. OTHER ITEMS AND/OR CONCERNS

X. ADJOURN

**Materials Provided:**


- Meeting Notes from December 17, 2021 Meeting
- Tentative Implementation Timeline, Version 10.3 (November 19, 2021)
- City Attorney Memo dated December 28, 2021 on Implementation of CPP
- Handout on the City's FY23 Budget Process/Timeline

**Items for Future Agendas:**

- A. Transparency and Accountability Issues
- B. Quality Assurance Program
- C. Clarity of CPP Access to Training Bulletins and Special Unit Policies

In lieu of in-person attendance, members of the public may participate and provide comment via virtual attendance or using the webform, as follows:

**Virtual Testimony:**

Members of the public may provide comment on the comment period for Non-agenda Public Comment or Agenda Public Comment during the meeting, following the  [Public Comment Instructions](#).

**Written Comment through Webform:**

In lieu of in-person attendance, members of the public may submit their comments using the [webform](#). If using the webform, indicate the agenda item number you wish to submit a comment for. Instructions for word limitations and deadlines are noted on the [webform](#). On the [webform](#), members of the public should select Commission on Police Practices (even if the public comment is for a Commission on Police Practices Committee meeting).

The public may attend a meeting when scheduled by following the attendee meeting link provided below. To view a meeting archive video, click [here](#).

Only comments submitted no later than 4pm the day prior to the meeting using the public comment webform will be eligible to be read into the record. If you submit more than one comment on webform per item, only one comment will be read into the record for that item. **Comments received after 4pm the day prior and before 8am the day of the meeting** will be provided to the Commission or Committee and posted online with the meeting materials. All comments are limited to 200 words. Comments received after 8am the day of the meeting, but before the item is called, will be submitted into the written record for the relevant item.

If you attach any documents to your comment, it will be distributed to the Commission or Committee in accordance with the deadlines described above.

**Please click the link below to join the webinar:**

Join from a PC, Mac, iPad, iPhone or Android device:

Please click this URL to join.

<https://sandiego.zoomgov.com/j/1601580850?pwd=TCtEbEdIZjIoTUFFQ3AvSkROY2NUZz09>

Passcode: eMPmR4

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+16692545252,,1601580850#,,,,\*360827# US (San Jose)

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SIP: [1601580850@sip.zoomgov.com](mailto:1601580850@sip.zoomgov.com)  
Passcode: 360827

## Commission on Police Practices

### Ad Hoc Transition Planning Committee Meeting

**Friday, December 17, 2021**  
**9:30 am-10:30 am**  
**Zoom Webinar Platform**

#### NOTES

Meeting YouTube Link: <https://www.youtube.com/watch?v=gSVAIOuMSZQ>

- I. CALL TO ORDER/WELCOME – Committee Chair Doug Case called to order at 9:33am.
- II. ROLL CALL  
**Commission**  
Commissioner Patrick Anderson  
Committee Chair Doug Case  
Chair Brandon Hilpert  
**Absent/Excused**  
Commissioner Joe Craver  
Commissioner Diana Dent  
**Staff Present**  
Sharmaine Moseley, Interim Executive Director  
Alina Conde, Executive Assistant  
**Present**  
Kate Yavenditti, Member of Women Occupy representing San Diegans for Justice  
Henry Foster, Chief of Staff for City Council District 4
- III. PUBLIC COMMENT: No public comment received.
- IV. UPDATES
  - A. Budget Process – No current update.
  - B. Staffing – Administrative Aide has a start date of December 20<sup>th</sup>.
  - C. Implementation Ordinance & Permanent Standard Operating Procedures  
(Request confirmation from PS&LN when the second draft of the implementation ordinance can be posted) Hoping to get an answer from District 4 regarding when we can receive the draft. Chief of Staff, Henry Foster explained that there is no set date yet but when they know they will give an update to the CPP.
  - D. Office Space – No current updates.
  - E. Standing Rules – No current updates.
  - F. Community Outreach – No current updates.
  - G. Legal Counsel Contract – Status of review of RFP’s for outside counsel  
The RFP’s are under review and we have a meeting with the Liaison for P&C to go over those. We did not receive the link for Planet Bid so 1<sup>st</sup> Vice Chair Doug Case will reach out to get the link.
- V. UNFINISHED BUSINESS

- A. Procedure to implement the requirement for the Commission's to review and evaluate the Police Department's compliance with federal, state, and local reporting requirements  
Tabled.
- B. Hiring of the Policy Analyst and Performance Auditor  
Regarding the hiring of the Deputy Executive Director, the City has contracted with an executive search firm that will conduct all executive searches for the city. Interim Executive Director Sharmaine Moseley will coordinate a meeting with HR to see whether we can use a particular search firm for our Executive Search. There is also a meeting scheduled after this meeting to go over salary savings and how soon we can fill the two positions. The City also confirmed that they will need to conduct references and background checks for our positions.

VI. NEW BUSINESS

- A. Process for reviewing and obtaining community input on the second draft of the implementation ordinance once released  
We will want the Commission and the Ad Hoc Committee to weigh in on this item. Chief of Staff, Henry Foster recommended that Interim Executive Director Sharmaine Moseley go to the County Clerks website and disseminate the link to the legislative account calendar for 2022. The first meeting is on January 12, 2022 and the following will be early February. It is unlikely that the outside counsel will finish it, send it to the City Attorneys office to be reviewed in time for docketing by January 12<sup>th</sup>. This would give Council Members and public ample time to review. Tentative Plan of Action: If the draft is ready by the end of January then the plan would be to have a Community Roundtable on the 3<sup>rd</sup>, have the Committee make recommendations to the Commission on the 4<sup>th</sup>, schedule a Commission meeting on the 7<sup>th</sup> to provide feedback tot PS&LN, then have a PS&LN meeting on the 9<sup>th</sup>. This can be modified as soon as the draft is made available.

VII. AGENDA ITEMS FOR NEXT MEETING: January 7

VIII. ADDITIONS TO THE LIST OF ITEMS FOR FUTURE AGENDAS – (Upcoming Meetings: we can begin discussion of the investigation procedures and standard operating procedures).

IX. OTHER ITEMS AND/OR CONCERNS - None

X. ADJOURN at 10:16am.

**DRAFT City of San Diego Commission on Police Practices Timeline (Tentative)**  
**November 19, 2021 – Version 10.3**

*Disclaimer: This timeline is for Commission planning purposes only. The timing of certain items (e.g., docketing of City Council actions, meet and confer process, etc.) are beyond the control of the Commission. Additionally, the length of time required for some processes (e.g., hiring and contracting) may take longer than originally anticipated.*

November 3, 2020	General Election
November 2020 – June 2021	Community Input on the Implementation Commission Ordinance via Community Roundtables
November 2020 & December 2020	Meetings with All Continuing and Newly Elected Mayor and City Councilmembers
December 3, 2020	Election Results Certified
December 10, 2020	Mayor and City Councilmembers Installed
December 18, 2020	Secretary of State Chapters Measure B, Activating the New Commission
February 10, 2021	Presentation to City Council Public Safety and Livable Neighborhoods Committee (PS&LN)
March 10, 2021	PS&LN Considers Creation of Office of the Commission on Police Practices, Appointment of Interim Executive Director and Adoption of Interim Standard Operating Procedures
March and April 2021	Discussions with Department of Finance on CPP Budget Needs
April 20, 2021	Mayor Releases Budget for Fiscal Year 22 (July 1, 2021 – June 30, 2022)
April 26, 2021	City Council Approves Creation of Office of the Commission on Police Practices, Appointment of Interim Executive Director and Adoption of Interim Standard Operating Procedures
May 11, 2021	Budget Review Hearing on FY22 Budget
June 2021	Hiring of Executive Assistant
June 6, 2021	Civil Service Commission Approves Exempt Managerial Positions
June 14, 2021	City Council Adopts Budget for FY22
June 24, 2021	PS&LN Reviews First Draft Implementation Ordinance
July – October 2021	Obtain and Equip Commission Office Space
September – December 2021	Interim Outside Counsel Contract Bidding and Selection (Original RFP rebid)
December 2021	Hiring of Administrative Aide/Complaints and Finance Coordinator (Offer Extended)
March 2022 – April 2022	Selection and Hiring of Deputy Executive Director/Director of Community Engagement
December 2021 – July 2022	Develop proposed Standard Operating Procedures for Investigations (SOPs)

January 27, 2022	Anticipated date that PS&LN Reviews Second Draft of the Implementation Ordinance
February 2022	(Depends on whether PS&LN refers the second draft of the ordinance for further revision) PS&LN approves the implementation Ordinance and sends to the full Council.
March 2022	City Council Considers the Implementation Ordinance. They May Refer Back to Counsel or Refer for Meet and Confer.
March 2022	Development of FY23 Budget Proposal
May 2022	Budget Review Hearing for FY23 Budget
March 2022 – April 2022	Selection and Hiring of Deputy Executive Director/Director of Community Engagement
May – August 2022	Meet and Confer on the Implementation Ordinance.
May – December 2022	Recruitment and Selection of Permanent Commissioners (Including Independently Conducted Background Checks)
June 2022	Hire Supervising Investigator, Policy Analyst and Performance Auditor
June 2022	City Council Approves FY23 Budget
August – December 2022	Investigation SOPs Reviewed by PS&LN, City Council and Undergo Meet and Confer
September 2022	Hiring of 3 Staff Investigators and Selection of Pool of Contract Investigators (Contingency Basis)
September 2022	Adopt Memorandum of Understanding with SDPD (Including Complaint Processing and Sharing, Sharing of Records, etc.)
September 2022	City Council Adopts Implementation Ordinance (2 Readings Required)
October 2022	Implementation Ordinance Takes Effect; Independent Investigations Initiated
January 2023	City Council Appoints Permanent Commissioners
January – June 2023	National Search and Selection of New Executive Director
August 2023	City Council Appoints Permanent Executive Director
September – November 2023	Mediation Program Procedures Established
December 2023	Hiring of Commission General Counsel
January 2024	Hiring of Mediation Coordinator, Mediation Program Commences

**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

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**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.<sup>1</sup>

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 Council regarding the policies and practices of the Police Department. San Diego Charter § 41.2.

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<sup>1</sup> 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 (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.<sup>2</sup>

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 (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.

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<sup>2</sup> 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.<sup>3</sup>

### **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,

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<sup>3</sup> 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).<sup>4</sup>

**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.<sup>5</sup> Therefore, the appointment process rests with the Council.<sup>6</sup>

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.<sup>7</sup>

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).<sup>8</sup>

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.

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<sup>4</sup> 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).

<sup>5</sup> *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).

<sup>6</sup> 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.

<sup>7</sup> *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).

<sup>8</sup> *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.<sup>9</sup> 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.<sup>10</sup>

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.

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<sup>9</sup> 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).

<sup>10</sup> 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-Milias-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.<sup>11</sup>

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

**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).<sup>13</sup>

**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.

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

<sup>12</sup> *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).

<sup>13</sup> *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.<sup>14</sup> 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).<sup>15</sup>

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<sup>14</sup> 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 commission, and bring proceedings seeking the suspension or revocation of certification of peace officers.

Cal. Penal Code § 13509.5(a)-(b).

<sup>15</sup> 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).<sup>16</sup> 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.

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<sup>16</sup> 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.<sup>17</sup> 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.

MARA W. ELLIOTT, CITY ATTORNEY

By     /s/ Joan F. Dawson      
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Senior Deputy City Attorney

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

**Department of Finance**  
**Fiscal Year 2023 Budget Development Calendar**  
**Fiscal Activities & Deliverables (updated 11/16/2021)**

Task	Start	End
<b>August 2021</b>		
Fiscal Year 2022 Adopted Budget Released	8/31/2021	8/31/2021
<b>September 2021</b>		
Release Fiscal Year 2023 OM Position Maintenance Memorandum	9/13/2021	9/13/2021
Departments Request OM Position Modifications	9/13/2021	10/8/2021
Restructure Process Training for Departments	9/14/2021	9/14/2021
Release Budget Process Calendars	9/20/2021	9/20/2021
Restructure Review Panel Meetings	9/22/2021	9/23/2021
Release Fiscal Year 2023 Non Discretionary (ND) Budget Process Memorandum	9/23/2021	9/23/2021
Provider Departments Prepare ND Allotments	9/24/2021	10/29/2021
Notify Departments of Approved Restructures	9/30/2021	9/30/2021
<b>October 2021</b>		
ND Budget Process Training for ND Provider Departments	10/5/2021	10/5/2021
Deadline to Submit Restructures Forms	10/8/2021	10/8/2021
Deadline for Departments to Request OM Position Modifications	10/8/2021	10/8/2021
Release One-Time Memos	10/14/2021	10/14/2021
<b>November 2021</b>		
Extract Human Capital Management (HCM) Data to Public Budget Formulation System (PBF)	11/1/2021	11/1/2021
Release Fiscal Year 2023 Budget Development Process Memorandum	11/8/2021	11/8/2021
Release Fiscal Year 2023 HCM Extract PEP Projection	11/8/2021	11/8/2021
Post Preliminary ND Allotments	11/17/2021	11/19/2021
Base Budget Process Training	11/18/2021	11/18/2021
Provider Departments Enter Preliminary ND Allotments into PBF	11/19/2021	11/24/2021
Departments Review Baseline PEP Projection	11/22/2021	11/26/2021
Fiscal Year 2023 Budget Development Process Training	11/22/2021	11/22/2021
Departments Review and Redistribute Base Budget	11/22/2021	11/26/2021
Departments Review and Request Adjustments to Preliminary ND Allotments via ND Provider Departments	11/22/2021	12/5/2021

**Department of Finance**  
**Fiscal Year 2023 Budget Development Calendar**  
**Fiscal Activities & Deliverables (updated 11/16/2021)**

Task	Start	End
<b>December 2021</b>		
Budget Adjustment Process Training	12/6/2021	12/6/2021
Provider Departments Submit Updated ND Allotments to DoF	12/6/2021	12/7/2021
ND Budget Process Training	12/8/2021	12/8/2021
Post Updated ND Allotments	12/9/2021	12/9/2021
Departments Distribute ND Allotments in PBF	12/13/2021	12/20/2021
Departments Enter Budget Adjustments in PBF	12/13/2021	1/7/2022
<b>January 2022</b>		
Deadline to submit information for the KPI section.	1/20/2021	1/20/2021
<b>February 2022</b>		
Deadline to Submit Budget Narratives & KPI's	2/2/2022	2/2/2022
Departments Participate in Executive Budget Review Meetings (5 Days)	2/9/2022	2/16/2022
<b>March 2022</b>		
<b>April 2022</b>		
Release Budget Review Committee (BRC) Presentation Process Memorandum	4/8/2022	4/8/2022
Departments Submit BRC Presentation Introductory Slides	4/12/2022	4/13/2022
Release the Proposed Budget	4/15/2022	4/15/2022
Release the Mayor's May Revision Budget Process Memo	4/15/2022	4/15/2022
Departments Enter May Revision Budget Adjustments in PBF	4/15/2022	4/20/2022
Mayor Presents the Fiscal Year 2023 Proposed Budget at City Council	4/18/2022	4/18/2022
<b>May 2022</b>		
DoF, Departments, and Agencies Participate in the BRC Meetings on the Proposed Budget	5/4/2022	5/10/2022
Release the Mayor's May Revision to the Proposed Budget	5/17/2022	5/17/2022
Present the Mayor's May Revision at BRC	5/19/2022	5/19/2022
Release Appropriation Ordinance (AO) Memorandum	5/19/2022	5/19/2022

**Department of Finance**  
**Fiscal Year 2023 Budget Development Calendar**  
**Fiscal Activities & Deliverables (updated 11/16/2021)**

Task	Start	End
<b>June 2022</b>		
City Council Approves Final Modifications to the Budget	6/13/2022	6/14/2022
Release the Appropriation Ordinance - (Text Only)	6/15/2022	6/15/2022
Mayor's Veto Period	6/15/2022	6/21/2022
City Council Veto Period	6/21/2022	6/27/2022
Present the Appropriation Ordinance (Text Only) at Budget and Government Efficiency Committee	6/22/2022	6/22/2022
Present the Fiscal Year 2023 Appropriation Ordinance Introduction & Adoption at City Council	6/28/2022	6/28/2022
Load the Fiscal Year 2023 Adopted Budget to SAP	6/29/2022	6/29/2022
<b>July 2022</b>		
<b>August 2022</b>		
Release the Fiscal Year 2023 Adopted Budget	8/26/2022	8/26/2022