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Good News for Berkeley Police Officers: Court of Appeal Holds That "Civilian" Police Review Commission Records and Hearings Must be Kept Confidential Under Penal Code § 832.7

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For those police agencies which deal with "civilian" review boards (and I suspect that there are more in Northern California than in Southern California), the First District Court of Appeal has just last week issued a decision in the case entitled, *Berkeley Police Association v. City of Berkeley*, which requires that records and reports gathered by such boards be kept confidential and that hearings conducted by such boards be "closed" to the public.

For police agencies which do not have independent "civilian" review boards or commissions, the Court of Appeal decision simply affirms earlier determinations by California courts, including the Supreme Court, that the desirability of maintaining confidentiality of police officer personnel matters outweighs the asserted benefits to the public about the "openness and transparency of a public forum engaging in civilian oversight of police."

Background

I recall representing Officer Bill F., the very first Berkeley Police Officer who was ordered (under the threat of discipline) by the Berkeley Police Chief to attend and give testimony before the Berkeley Police Commission in 1984. Until that time, the participation of police officers in the hearing process had been voluntary, and most officers chose not to participate in the hearings because neither the officers nor their attorneys viewed the hearings to be fair and objective.

When Officer F. and I appeared for the hearing, we were descended upon by a handful of reporters and by an army of sign-wielding police critics, who were delighted about the prospect of seeing Officer F. cross-examined by the complainant's "activist" lawyer and three fire-breathing PRC Commissioners. Some of the signs had pig figurines. One sign I remember said "fire him today—shoot him at sunrise tomorrow."

The first mandatory appearance PRC hearing was closer to a raucous shouting match and audience-participation circus than it was to a fair, orderly, objective hearing intended to determine if Officer F. did what

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he was accused of. As I recall, Officer F. was sustained for something (if not everything), and when the decision was announced to the applause of the audience participants, Officer F. and I rolled our eyes and stormed out of the room, fully confident that no Police Department or City official in their right mind would uphold the findings of the PRC or try to rely upon them to recommend that Officer F. receive anything other than an apology for the way he had been treated.

As the years passed, those of us at Rains Lucia Stern who have dealt with Berkeley Police Review Commission matters on a regular basis saw a great deal of public grandstanding by complainants, their friends and witnesses, and Police Review Commissioners, which often turned what should be serious hearings into verbal slugfests and a feeding frenzy to sustain misconduct allegations against police officers. In particular, I also want to note that our former partner Alison Berry Wilkinson who was instrumental in litigating this case, had been representing many of those fine Berkeley officers maligned by the public while before the PRC.

When the Supreme Court issued it decision in *Copley Press, Inc., v. Superior Court* (2006) 39 Cal. 4th 1272, our office and Alison Berry Wilkinson seized on the language and holding of the Supreme Court to file a Petition for Writ of Mandate on behalf of the Berkeley Police Association in Alameda County, arguing that records and reports generated by the Berkeley Police Review Commission were confidential under Penal Code section 832.7 and that hearings conducted by the PRC must also be closed to the public in order to maintain the confidentiality guarantees to police officers.

In truth, neither the Berkeley Police Association nor this office has ever objected to a civilian review board which is truly fair and objective and committed to holding hearings in a serious fashion where all parties are given adequate opportunity to present their cases and to cross-examine their adversaries. Unfortunately, the "open" forum previously employed by the PRC, as described above, served largely as a public pulpit for self-styled Berkeley radicals and activists to spew often specious and exaggerated allegations of police wrongdoing to assigned Police Review Commissioners, who were often highly deferential toward and protective of the complainants and often unwilling to make decisions which were critical of the complainants and their customary groups of witnesses/followers/community activists in attendance.

We view the decision of the Court of Appeal in the Berkeley Police Association case to be one which will allow the PRC to continue to provide City charter-mandated "civilian oversight and public accountability for police conduct." Indeed, as the Court noted in its decision, this function can still be carried out even if records generated by the PRC remain confidential and hearings are closed to the public. What we like about this decision is that complainants, their witnesses, and accused officers will now be appearing before police commissioners who are not being actively lobbied to come to a particular decision by the complainants or their vocal supporters, and where Police Review Commissioners can hopefully evaluate evidence and deliberate in a forum

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which is untainted by the pressure of being publicly criticized for "caving in to the cops."

In that sense, the Berkeley Police Association decision is a victory for (hopefully) fair and objective civilian oversight, instead of decision making based on who yells the loudest or based upon the belief by Commissioners that they owe some allegiance to Berkeley's long-standing skepticism of the police and their role in the community.

In making its decision to treat records gathered by the PRC as confidential and to require that PRC hearings be closed to the public, the Court relied heavily, although not entirely, on the Supreme Court decision in *Copley Press, supra.* That Supreme Court decision held that a newspaper, *Copley Press*, could not obtain records of the San Diego County Civil Service Commission hearing concerning a police officer's disciplinary appeal when the appeal had been heard in a closed hearing. Although there were admittedly some minor factual differences between the *Copley Press* case and the situation in Berkeley, the opinion by the Supreme Court in *Copley Press* was so clear and emphatic that it is hard to imagine how or why the Berkeley City Attorney thought she could convince the Court of Appeal to come to any decision other than the one it did.

One of the key "distinctions" the City of Berkeley argued in this case was the fact that decisions by the Police Review Commission cannot lead to discipline against the officers because, historically, "sustained findings" of misconduct made by the PRC have never led to the imposition of discipline against an officer. Needless to say, the Court of Appeal quickly rejected this argument, noting that the Police Chief and the City Manager had the *right to* impose discipline against an officer based on PRC findings, even though neither had done so as a practical matter. Having represented the Berkeley Police Association for over 25 years, I think I can say with some degree of confidence that the reason discipline has not been imposed against Berkeley officers from decisions made by the PRC was a direct result of the lack of faith by City and Police Department leaders in the objectivity of the proceedings and/or the many "sustained" findings against police officers that resulted from those proceedings.

The City of Berkeley also argued in this case that *Copley Press* did not decide whether Penal Code section 832.7 bars public hearings on citizen complaints against officers. However, once again, the Court of Appeal noted that the holding of a public hearing on a complaint against a police officer would run afoul of the *Copley Press* decision because it would publicly disclose the identity of the officer who is the subject of the complaint (barred by *Copley*) and would require parties and witnesses to be examined or cross-examined based upon documents which the *Copley* case had declared to be confidential.

The City of Berkeley also argued that a closed civilian review process does not accomplish the laudable goals of civilian oversight of the police as effectively as does a public process. To this argument the Court stated: "To the extent, however, that a closed PRC investigative process is less effective than an open one in accomplishing the objectives of civilian oversight, that is a

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matter that must be addressed to the Legislature. By its enactment of the statutes in question, the Legislature has weighed the competing interests involved and come down on the side of protecting the confidentiality of records and information gathered in the course of investigating citizen complaints against police officers."

Finally, the City argued that the Public Safety Officers Procedural Bill of Rights Act does not apply to the Berkeley Police Review Commission because the PRC "...is an independent Commission that operates outside of the Berkeley Police Department, does not answer to the Police Chief or City Manager, and does not have the power to initiate or even recommend disciplinary actions against police officers." However, as indicated above, the Court found that findings made by the PRC could be adopted by either or both the Police Chief and the City Manager to initiate or recommend disciplinary action against police officers, even though that had not occurred historically. Even more significant was the Court's finding that, since Berkeley police officers are ordered by their Police Chief to participate in PRC hearings under the threat of disciplinary action, the Police Chief is "effectively participating in the PRC investigative and hearing process. The "participation" by the Chief in the PRC process was fatal to the City's argument that the PRC is an "independent commission that operates independently of the Police Department or its Police Chief."

Conclusion

It has been some 25 years since Berkeley Officer F. and I appeared before the barrage of police critics who demanded Officer F.'s firing for some innocuous conduct (which escapes me now) and whose vitriolic and unsupported accusations against Officer F. (and several other Berkeley officers as well) found their way into a host of newspapers for days on end. In my opinion, a lot of Berkeley police officers have been subjected to a great deal of indignities by Police Review Commissioners who believed fairness, objectivity and due process of the accused should take a backseat to Berkeley's very public displays of activism, denunciation of the government, and mistrust of the police. I am thrilled about this decision because I think it will bestow order and objectivity to future PRC hearings. Although many activists and police critics in Berkeley will denounce this decision as effectively undermining "civilian review of police," the fact of the matter remains that maybe for the first time in three decades the Police Review Commission will issue findings or a decision following a closed hearing and based upon confidential documents which will demonstrate sufficient objectivity as well as factual and legal accuracy to convince the Police Chief and/or City Manager to give serious consideration to the findings and decision of the Commission, something which the public hearings never accomplished.