

Introduced by Councilmember Kennedy

ORDINANCE NO. 7368

**AN ORDINANCE OF THE CITY OF PASADENA AMENDING VARIOUS PROVISIONS OF THE PASADENA MUNICIPAL CODE CREATING (A) A COMMUNITY POLICE OVERSIGHT COMMISSION; AND (B) AN INDEPENDENT POLICE AUDITOR**

The People of the City of Pasadena ordain as follows:

**SECTION 1.** This ordinance, due to its length and corresponding cost of publication, will be published by title and summary as permitted by Section 508 of the Pasadena City Charter. The approved summary of this ordinance is as follows:

**“Summary**

This ordinance creates a Community Police Oversight Commission and provides for the services of an Independent Police Auditor.

Ordinance no. 7368 shall take effect 30 days from its publication.”

**SECTION 2.** Pasadena Municipal Code, Title 2 (Organization and Administration), is amended to add a new Chapter 2.60 as follows:

**“Chapter 2.60 Community Police Oversight Commission**

**Sections**

- 2.60.010 - Short Title
- 2.60.020 - Establishment
- 2.60.030 - Membership – Appointment and terms
- 2.60.040 - Qualifications, orientation, and training
- 2.60.050 - Absences and vacancies
- 2.60.060 - Election of officers
- 2.60.070 - Meetings – Records
- 2.60.080 - Rules and regulations
- 2.60.090 - Annual report
- 2.60.100 - Disclosure requirements
- 2.60.110 - Purpose and functions
- 2.60.120 - Subpoenas

### **2.60.010 – Short Title.**

This chapter shall be known as the City of Pasadena "community police oversight commission ordinance."

### **2.60.020 – Establishment.**

There is created and established a commission of the city to be known as the community police oversight commission and hereinafter called "commission."

### **2.60.030 – Membership – Appointment and terms.**

- A. The commission shall consist of 11 members appointed by the city council as follows:
  - 1. Each of the 7 councilmembers and the mayor shall nominate 1 member for a total of 8 members.
  - 2. Three members shall be nominated representing community-based organizations.
  - 3. Each member shall be a resident of the city.
  - 4. All nominations are subject to ratification by the city council.
  - 5. At least 50 percent of the filled positions on the commission shall be women, if feasible.
  - 6. The city council shall, by resolution, establish a policy for the appointment of members to the commission.
- B. Members shall be appointed for a term of 3 years, which shall be staggered. The initial members shall be appointed to terms of 1, 2, and 3 years, respectively. Four members shall be appointed to serve a three-year term; four members shall be appointed to a two-year term; and the remaining members shall be appointed to a one-year term. Thereafter, all members shall serve a term of three years. Members shall serve no more than 2 consecutive terms. A term of less than 1 year shall not be considered a full term. Terms expire on June 30th of the applicable years. A member shall continue in office for the term for which he/she was appointed or until his/her successor is appointed. No member who has served 2 consecutive terms shall be eligible for reappointment to the commission prior to the passage of a two-year interval.
- C. If a member ceases to reside in the city prior to the expiration of a term, the member may complete the term only upon approval by the city council pursuant to Section 2.45.020.
- D. Any member of the commission may be removed by the city council at its pleasure.

#### **2.60.040 – Qualifications, orientation, and training.**

- A. The council district and at-large commission members shall be residents of the city.
- B. Members should have an interest in strengthening community-police relations.
- C. Practicing attorneys who handle, or are members of members of firms or entities that currently handle, criminal or civil matters involving the police department are ineligible to serve on the commission.
- D. Prior to appointment, each member shall take an oath in writing that they will not divulge confidential information, including identities of witnesses and contents of confidential testimony and documents, either during their term of office or thereafter.
- E. No later than 90 days after appointment, each member shall:
  - 1. Participate in a ride-along with the police department in a four-hour minimum shift; and
  - 2. Receive at least 30 hours of training in relevant subject matters facilitated by the police department on topics including, at a minimum, constitutional rights and civil liberties, fundamentals of procedure, evidence, and due process, procedural rights and confidentiality afforded to police officers by California law (including, but not limited to, Government Code Section 3300 *et seq.* and Penal Code Sections 832.7 and 832.8), police department operations, policies, practices, and procedures, and duties, responsibilities, procedures, and requirements associated with all ranks and assignments.

#### **2.60.050 - Absences and vacancies.**

- A. In the event a member has 3 consecutive unexcused absences from meetings of the commission, the city council may declare the office vacant. The staff to the commission shall advise the secretary to the mayor of any member with 3 consecutive unexcused absences. The chair of the commission may excuse absences.
- B. Vacancies, whether scheduled or unscheduled, shall be filled consistent with the process as set forth in Section 2.65.030.

#### **2.60.060 - Election of officers.**

At the first meeting of the commission, and thereafter at its first meeting of each subsequent year, the members shall elect a chair and a vice chair. In the absence or disability of the chair and the vice chair, the commission may designate a temporary chair.

### **2.60.070 - Meetings – Records.**

- A. The commission shall meet at least once a month and all its meetings shall be open to the public pursuant to the Ralph M. Brown Act. Special meetings may be called by the chair or a majority of the commission.
- B. A quorum shall be a majority of the commission seats filled by the city council. A seat is deemed to be filled after a nominee has been sworn in by the city clerk. No action of the commission shall be valid without the affirmative vote of at least six members.
- C. The commission shall keep a record, which shall be available for public inspection, of all its resolutions, proceedings and other actions.

### **2.60.080 - Rules and regulations.**

The commission shall adopt and amend, by the affirmative vote of six members, rules and regulations for the conduct of the commission's business consistent with this chapter. Such rules and regulations shall be submitted to the city council and shall not become effective until approved and ordered filed by the council.

### **2.60.090 - Annual report.**

The commission shall submit an annual report and workplan to the city council no later than September 1st of each year. Attendance records of members shall be included as part of the annual report.

### **2.60.100 - Disclosure requirements.**

Members of the commission shall be required to file annual statements of economic interest pursuant to the city's conflict of interest code.

### **2.60.110 - Purpose and functions.**

- A. The purpose of the commission is to enhance, develop, and strengthen community-police relations and review and make recommendations regarding the ongoing operations of the police department to the chief of police, city manager, and/or city council.
- B. The commission's function is to:
  - 1. Receive community feedback and complaints and refer them for further review, as appropriate;
  - 2. Monitor and receive reports from the police department on hiring, training, and promotions within the police department;
  - 3. Monitor and publish statistics on police uses of force, personnel complaints, and outcomes within the police department;
  - 4. Provide input on police department policy recommendations prior to adoption;

5. Receive reports from the independent police auditor regarding critical incidents, police department policies, and other matters;
6. Notwithstanding the right to play a role in reviewing and monitoring personnel matters, refrain from (a) directly or indirectly taking active participation in personnel matters; (b) taking personnel actions; (c) using records developed to take personnel actions; and/or (d) directing that action be taken on police department employees; and
7. Administer oaths and issue subpoenas for the production of records (in any form, other than personnel records) and attendance and testimony of witnesses (not employed by the City at all relevant times) to carry out the commission's functions, to the extent permitted by law; with the city clerk issuing such subpoenas under the seal of the city, and the chief of police causing such subpoenas to be served; and
8. Comply with all applicable laws, including, but not limited to, sections 411(B) and 604(J) of the City Charter, and preserve the privacy of police department employees, the confidentiality of their personnel files, the confidentiality of police department files, and the confidentiality of other confidential information to the maximum extent permitted by law, including, but not limited to the closing of meetings or portions thereof consistent with the applicable provisions of the Brown Act.

#### **2.60.120 - Subpoenas.**

- A. Subpoenas issued by the commission and/or the independent police auditor shall:
  1. Identify the commission as the body, or the independent police auditor as the person, issuing the subpoena;
  2. Identify the name and address of the party subpoenaed;
  3. State the time, place and location for the production of the records and/or testimony, at least seven days after service of the subpoena;
  4. Be narrowly tailored, and specifically describe the information which is sought;
  5. Identify the relevance of the records and/or testimony to the matters at issue;
  6. Notify the served party that if the records are not produced or the testimony is not given, the subpoenaing party may apply to the city council for an appropriate order or other remedy;
- B. Within no more than five (5) calendar days of being served with a subpoena issued in accordance with this article, the recipient of the subpoena may file a motion to quash the subpoena with the commission.
- C. If the records are not produced or the testimony is not given, the subpoenaing party may apply to the city council for an appropriate order or other remedy."

#### **SECTION 3.** In its 2021 annual report, the community police oversight

commission is directed to address, in addition to what is presently required, the

effectiveness of this ordinance and whether any proposed legislation or other changes to police oversight are recommended.

**SECTION 4.** Pasadena Municipal Code, Title 2 (Organization and Administration), Chapter 2.30, Section 2.30.020 (City Attorney – Powers and duties.), subdivision (A), is amended as follows:

- “A. As the city's civil legal advisor, the city attorney shall:
1. Attend all meetings of the city council;
  2. Advise the city council and all city officers and employees in all matters of law pertaining to their offices or duties or shall select outside counsel to so advise such persons unless a different selection procedure has been adopted by the city council;
  3. Have charge and control of all outside counsel engaged to advise the city council and any officer or employee in all matters pertaining to their offices or duties, except as otherwise provided by law;
  4. Represent and appear for the city and all city officers and employees and all former city officers or employees in any or all civil actions or proceedings in which the city, or any officer or employee or former officer or employee thereof by reason of an act or omission in the scope of his/her employment is concerned or is a party, or shall select outside counsel to so represent and appear for such persons;
  5. Have charge and control of all civil actions and proceedings in which the city or any officer or employee, or former officer or employee, is concerned or is a party by reason of an act or omission in the scope of his/her employment. The city attorney may commence any action or settle any claim or action of a gross amount of \$50,000 or less, exclusive of court costs; provided, however, that any such commencement of action or settlement in excess of \$25,000 exclusive of court costs, shall be with the approval of the city manager. No action or claim of more than a gross amount of \$50,000, exclusive of court costs, shall be commenced or settled without the prior approval of the city council;
  6. Approve the form of all bonds given to the city and all specifications, requests for proposals and contracts made by the city;
  7. Draft any and all proposed ordinances and resolutions for the city when required by the city council or at the request of the city manager;
  8. Retain and administer the services of an independent police auditor who reports to the city council, with the following duties:
    - a. Serve as a best-practices advisor to the community police oversight commission;
    - b. Have unimpeded access to all police department personnel complaints and investigations thereon, for auditing and reporting purposes, and, upon request and where feasible, be permitted to

- observe briefings received, interviews conducted, and deliberations on personnel matters including, but not limited to, use of force reviews, administrative reviews, and internal affairs reviews;
- c. Review all categorical uses of force by police department personnel to assess whether the police department's investigation into a use of force was complete, thorough, objective, and fair;
  - d. Review investigations of personnel complaints of bias-based policing;
  - e. As directed by or in conjunction with the community police oversight commission, recommend changes and additions to police department policies, procedures, and officer training;
  - f. Issue public reports and give public presentations to the commission regarding police department operations, to the extent permissible under applicable law;
  - g. Perform related duties;
  - h. Notwithstanding the right to observe various stages of personnel matters and to play a role in reviewing and monitoring such matters, refrain from (1) directly or indirectly taking active participation in personnel matters; (2) taking personnel actions; (3) using records developed to take personnel actions; and/or (4) directing that action be taken on police department employees;
  - i. Administer oaths and issue subpoenas for the production of records (in any form, other than personnel records) and attendance and testimony of witnesses (not employed by the City at all relevant times) to carry out the commission's functions, to the extent permitted by law and following the process set forth in section 2.60.120 of this code, with the city clerk issuing such subpoenas under the seal of the city, and the chief of police causing such subpoenas to be served; and
  - j. Comply with all applicable laws, including, but not limited to, sections 411(B) and 604(J) of the City Charter, and preserve the privacy of police department employees, the confidentiality of their personnel files, the confidentiality of police department files, and the confidentiality of other confidential information to the maximum extent permitted by law; and
9. Perform such other duties relating to the office as shall be required of him/her by law, ordinance, or the city council.

**SECTION 5.** The City Clerk shall certify the adoption of this ordinance and shall cause this ordinance to be published by title and summary.

**SECTION 6.** This ordinance shall take effect 30 days from its publication.

Signed and approved this 5<sup>th</sup> day of October, 2020.

/s/ Terry Tornek

Terry Tornek  
Mayor of the City of Pasadena

I HEREBY CERTIFY that the foregoing ordinance was adopted by the City Council of the City of Pasadena at its meeting held this 5<sup>th</sup> day of October 2020, by the following vote:

AYES: Councilmembers Gordo, Kennedy, Madison, Masuda, McAustin, Wilson, Vice Mayor Hampton, Mayor Tornek

NOES: None

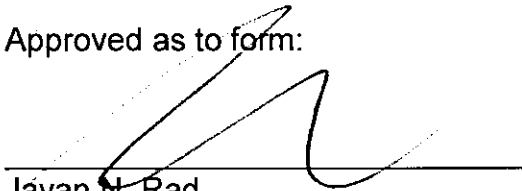
ABSENT: None

ABSTAIN: None

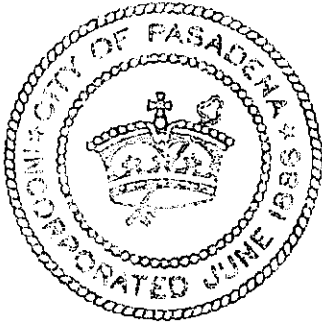
Date Published: October 9, 2020

  
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Mark Jomsky  
City Clerk

Approved as to form:

  
\_\_\_\_\_  
Javan N. Rad  
Chief Assistant City Attorney





# Agenda Report

July 8, 2020

**TO:** City Council Public Safety Committee

**FROM:** City Attorney/City Prosecutor's Department

**SUBJECT: REVIEW OF RELEVANT LAWS  
GOVERNING PASADENA POLICE DEPARTMENT REVIEW BOARDS**

**RECOMMENDATION:**

This report is intended to provide information to the City Council Public Safety Committee; no action is required.

**BACKGROUND:**

This provides a summary of the relevant laws governing review boards for the Police Department established by Pasadena Municipal Code Section 2.295.050, as well as options to address matters not presently covered by this section.

Given the Public Safety Committee's discussion at its June 24 meeting, we have also attempted to provide some options for the Council to implement changes in the membership, composition, and/or jurisdiction of the review boards by way of Municipal Code amendment, in lieu of seeking voter approval through a Charter amendment.

**1. Existing Structure of Review Boards to Advise the Chief of Police**

Pasadena Municipal Code Section 2.295.050 (Attachment A), adopted on April 18, 1994, establishes three review boards to advise the Chief of Police.

**A. Composition of Review Boards**

The Municipal Code gives the Chief of Police the authority to appoint members to the review boards. Each review board must consist of (a) up to five Pasadena Police Department members, including a peer of the employee, as designated by the Chief of Police; and (b) up to three individuals who reside in or are employed in Pasadena, with the requirement that such individuals all be graduates of the Citizens' Police Academy. The City Council does not have appointing authority for

the review boards, but the Council, as a body, may recommend nominees to the Citizens' Police Academy, for the City Manager's consideration.

The basis for the Council recommending nominees (instead of making direct appointments) appears to have been informed by an April 7, 1994 opinion from the City Attorney (Attachment B). The memo concludes that "direct City Council appointments to the Civilian Police Academy violate the Charter because such appointments interfere with the City Manager's exclusive authority under Section 604 of the Charter to discipline persons under his direct or indirect control and because such appointments constitute an attempt to influence a subordinate of the City Manager in contravention of Section 411 of the Charter." Below, we will explain how an amendment to the Municipal Code could potentially address the Charter concerns of the 1994 City Attorney memo.

Section 2.295.050 effectively gives the Chief of Police discretion on whether to refer a matter to review boards. The Chief of Police must appoint a new review board for each matter referred to the review board. The officer whose conduct is examined may exercise two objections to civilian members of the review board "on the grounds of prejudice or other demonstrated inability to consider the matter under discussion." Each review board is required to advise the Chief of Police for "any situation brought before it" by the Chief. If a review board is unable to issue a recommendation to the Chief (by consensus), the Chief of Police has the discretion to re-submit the matter to a review board within a reasonable time thereafter.

<b>Overview of Police Review Boards                      Established by Pasadena Municipal Code Section 2.295.050</b>		
<b>Review Board and                      Matters Considered</b>	<b>Review Board Advice to                      Chief of Police</b>	<b>Additional Provisions</b>
<b>Use of Force Review Board</b> – uses of force	"[W]hether such use of force was within or outside Police Department Policy on the use of force"	Disclosure of employee name and nature of incident is prohibited, unless authorized (in writing) by Chief of Police or City Attorney
<b>Disciplinary Review Board</b> – incidents which may lead to discipline "for violation of standards of conduct imposed by the Department, the City of Pasadena or by state or federal law"	"[W]hether a standard of conduct or other departmental policy or any statute or ordinance was violated" and, if there were a violation, the recommended discipline.	PPD employee and his/her representative may (but are not required to) make a presentation; proceedings must be kept in strict confidence, unless authorized (in writing) by Chief of Police or City Attorney
<b>Risk Management Review Board</b> – loss of or damage to City property, private property, or accidental injury	"[W]hether the incident was preventable and if so, whether any corrective measures should be undertaken"	n/a

It is important to note that the Municipal Code provides that the review boards have the authority to review matters, as presented. The Municipal Code does not expressly authorize review boards to (a) initiate or conduct investigations on their own (other than the Disciplinary Review Board receiving testimony from PPD employees); (b) play a role in development of Police Department policies and procedures; and/or (c) utilize a budget to have staff or consultants to perform a portion of the board's work.

## **2. Other Laws Informing Review Board Proceedings**

### **A. The Council-Manager Form of Government, as Expressed In the Charter and Municipal Code**

Most California cities, like Pasadena, use a Council-Manager form of government. In this model, the City Council sets policy, passes ordinances, approves projects and programs, and adopts the annual budget. The City Manager implements the policies, advises the City Council, makes recommendations on City Council decisions, formulates the budget, and oversees the administration and management of staff and resources.

One aspect of the Council-Manager form of government is that it enables the Council to hold a limited number of officials accountable for the City's administration. Two provisions of the Charter inform how the City Council may consider approaches to police review boards. Sections 411 and 604(J) of the Charter permit the City Council to "inquire" into administrative matters under the City Manager, and also to "instruct" the City Manager in all matters of policy. Section 604(J) provides as follows:

It shall be competent for the City Council to instruct the City Manager in all matters of policy, and any action, determination or omission of the City Manager shall be subject to review by the City Council, but no such action, determination, or omission shall be overruled or modified by a vote of less than five members thereof, nor shall any otherwise valid contract previously made by the City Manager be subject to review.

The City Manager has certain powers and duties, such as the responsibility to exercise "supervision and control over all departments, divisions, and offices of the City," with the exception of staff under the direction of the City Attorney/City Prosecutor or City Clerk. Charter § 604(D)); PMC § 2.40.030(D), (E). Additionally, the City Council may not "attempt to influence or to direct any subordinates of the City Manager." Charter § 411(B); see also *Levy v. City of Santa Monica*, 114 Cal.App.4th 1252, 1262 (2004) (interpreting similar charter provision as allowing inquiry, but prohibiting orders by individual Councilmembers to staff subordinate to the City Manager). Furthermore, the City Council has delegated to the Chief of Police, subject to the City Manager's approval, the "authority . . . to adopt rules and regulations for the administration and discipline of officers and employees of the department." PMC § 2.295.030.

## **B. SB 1421**

SB 1421 (Skinner) was signed by Governor Brown in September 2018, and took effect in January 2019. The purpose of this legislation is to bring additional transparency to police records related to officer-involved shootings, uses of force resulting in great bodily injury, sustained allegations of sexual assault by a police officer, and cases where police officers were found to be untruthful, in specified circumstances.

Prior to the passage of SB 1421, most police officer personnel records were considered confidential even after-the-fact, and only disclosable in limited circumstances, pursuant to a series of laws known as the *Pitchess* statutes. SB 1421 essentially gives the public a right of access to records related to the investigation and discipline of police officers, in the categories of matters as set forth above. A law enforcement agency's production of records may be delayed if there is an active criminal or administrative (personnel) investigation, or an active criminal prosecution.

We believe it is possible that during this legislative session, the Legislature may further increase public disclosure requirements for police officer personnel records. For example, on June 29, 2020, SB 776 (Skinner) was introduced in the Legislature. As relevant here, this bill, if passed, would expand the personnel records required to be disclosed to records of all uses of force (not just those resulting in great bodily injury), as well as records showing that an officer engaged in biased or discriminatory behavior. We will continue to monitor this bill and other bills that may inform the Committee's deliberations on police review boards.

## **C. AB 748**

AB 748 (Ting) took effect in July 2019, and generally requires the release of audio and video of critical incidents (as defined) within 45 days of the incident. Law enforcement agencies may delay disclosure of the audio and video from the initial 45 days up to one year, but only if disclosure would "substantially interfere" with an ongoing criminal or administrative investigation. Since AB 748 has taken effect, PPD has complied with it by releasing raw (and where required, redacted) audio and video – but PPD has also, on occasion, prepared a Critical Incident Video, providing a briefing of a critical incident, with relevant clips of the incident, as well, to aid in public viewing.

PPD's practice has been to provide hyperlinks of audio and video to the public without charge, although other agencies have sought to charge for redacting videos due to privacy or confidentiality reasons. In May 2020, the California Supreme Court held that such charges violate the California Public Records Act. *National Lawyers Guild v. City of Hayward*, 9 Cal.5th 488 (2020). The Supreme Court's decision merely validates PPD's existing practice of furnishing hyperlinks to audio and video under AB 748, without charge.

### 3. Possible Non-Substantive Amendments to Review Boards

The Police Department has not convened the Municipal Code-authorized review boards for approximately the past 10 years. However, during that time, the City has received written reports of independent reviews of officers' conduct in incidents (and the Police Department's ensuing administrative review) involving the 2009 officer-involved shooting death of Leroy Barnes, the 2012 officer-involved shooting death of Kendrec McDade, and the 2016 in-custody death of Reginald Thomas.

To the extent the review boards were to re-convene, the City Council may wish to consider the following amendments to the Municipal Code, at a minimum.

- A. **Confidentiality.** Clarify that the proceedings of the review boards may be confidential, and would be addressed on a case-by-case basis, considering the confidentiality of police officer personnel records (the *Pitches* statutes), as well as recent transparency laws passed by the Legislature (SB 1421 and AB 748), depending on (a) the type of records and information presented to the review board; and (b) the timing of such presentation (for example, whether review board is acting as part of the personnel process; or reviewing a matter, after-the-fact;
- B. **Brown Act Compliance.** Clarify that the review boards are subject to the open meeting requirements of the Brown Act, recognizing that there may be a need to consider matters in closed session due to the *Pitches* statutes, referenced above; and
- C. **Form 700 Filers.** Remove the statement that review board members are, as a matter of law, not required to file a Statement of Economic Interest (Form 700), as that requirement is governed by the City's Conflict of Interest Code, which is updated periodically by resolution of the City Council.

If the Council made only the above-mentioned non-substantive modifications, it is possible that the "meet-and-confer" requirement under the Meyers-Millias-Brown Act (MMBA), which gives public sector employees the right to collective bargaining, might not apply.

However, we believe meet-and-confer under the MMBA may be required if the Council made changes beyond such minor modifications to the existing 1994 ordinance. Under the terms of the MMBA, the City is required to meet and confer with labor unions "prior to arriving at a determination of policy or course of action" on matters affecting the "terms and conditions of employment." Government Code Section 3505. For example, one court has found that meet-and-confer is required where a city changes the rules for police officers' disciplinary appeals. *Cerini v. City of Cloverdale*, 191 Cal.App.3d 1471 (1987).

#### **4. Substantive Amendments by Municipal Code or Charter?**

If the City Council wished to consider additional changes to the review boards (beyond the items mentioned in the Section 5, below), it could likely implement most actions by way of amendment to the Municipal Code.

##### **A. Charter Amendment**

We believe a voter-approved Charter amendment would be required if the City Council sought to, among other things, (a) make direct appointments to the review boards; or (b) appoint members to the pool(s) from which review board members would be selected – where such board were an integral and mandatory (not discretionary) part of the personnel process. As mentioned above, there are Charter provisions that presently (a) limit the City Council's role in administrative service, delegating that authority to the City Manager (Section 604); and (b) prohibit Councilmembers from influencing or directing subordinates of the City Manager (Section 411).

##### **B. Municipal Code Amendment**

We note that several cities that have police oversight bodies established by ordinance (Municipal Code) and/or resolution, where members include City Council appointees, and the bodies appear to play a role in the personnel process. Those cities include both charter cities (Berkeley, Inglewood, Richmond, and Riverside) and general law cities (Claremont and Novato). Although Berkeley's Police Review Commission is established through its Municipal Code, it was established by way of a voter-approved ordinance (not Council action).

If the Council wished to make direct appointments to a body that participates in the personnel process, we would recommend the Council clarify that the body would only participate in a personnel matter at the discretion of the City Manager and/or Chief of Police. This option is presented in section 5(B)(2), below. Most of the above cities make mention that their applicable review boards receive and investigate personnel complaints, and make findings or recommendations. Novato adds some additional clarification, and states that its review board only participates in a personnel process where “[t]he City Manager determines that further investigation by the [Board] would serve the interests of fairness and due process.”

We believe that expressly clarifying the discretion of the City Manager and/or Chief of Police to refer matters to review boards would help address the concerns expressed in the 1994 City Attorney opinion. We further believe that such amendment, if adopted by the Council, would (a) help ensure consistency with the City Manager's role in administrative service, through Section 604 of the Charter; and (b) clarify that the City Manager (or Chief of Police, through the City Manager)

is, at his/her discretion, submitting a personnel matter to a review board, and not at the influence/direction of the City Council.

## 5. Possible Options for Amendments

Some options that the Council could consider by Municipal Code amendment could include the following menu of options, in addition to the recommendations suggested, above. This list is not exclusive, and the Council could modify or combine more than one of the options, below.

- A. **Make only Non-Substantive Amendments.** Discussed in Section 3, above
- B. **Adjust Membership.** Adjust membership and/or composition of review boards
  - 1. Current review board members are from Citizens' Police Academy and PPD employees, appointed to review board by Chief of Police
  - 2. Consider whether City Council may wish to appoint review board members
    - i. Additionally, clarify that, for personnel matters in particular (which certainly involves the Disciplinary Review Board, and possibly the other two review boards, if they are participating within the personnel process, and not after-the-fact), the review boards would receive personnel matters for consideration at the discretion of the Chief of Police and/or City Manager (and not the City Council)
- C. **Adjust Jurisdiction.** Adjust the jurisdiction to clarify and specify whether review boards should play a role in advising through PPD's:
  - 1. Personnel process
    - i. Advising the Chief of Police on pending personnel matters – i.e., direct participation in individual matters, but meetings would need to proceed in closed session (*Berkeley Police Assn. v. City of Berkeley*, 167 Cal.App.4th 385, 401 (2008) (finding public meetings on personnel complaints improper as they are "records pertaining to citizen complaints [and] are protected regardless of whether they are associated with disciplinary proceedings against the subject officers"))
      - 1. Consider whether to allow for additional evidence beyond that which is developed by PPD personnel investigators, including whether further records or witnesses (such as officer testimony) are prohibited, optional, or required
    - ii. Conducting independent personnel investigations (same as (i), above)
    - iii. Monitoring PPD's handling of personnel matters, whether through the body's own work or an outside police auditor (would not inform personnel decisionmaking in a matter, but,

depending on what is discussed and/or if records have been disclosed through SB 1421, meeting may be able to be open to the public)

2. Policies and procedures
  3. Annual budget process
- D. Creation of New Umbrella Body.** Create a new umbrella body, of sorts, to consider general matters such as reports from the Police Department about its policies, procedures, and programs
1. Members of (larger) new body could be among those considered for (smaller) review boards, when convened
  2. Consider whether to adjust membership of new umbrella body
- E. Combine Existing Review Boards.** Combine two or more of the existing review boards, consolidating duties, which could allow for more focused review board participation

#### **ENVIRONMENTAL ANALYSIS:**


Should the City Council seek an amendment to the Municipal Code or other action relating to the review boards, staff will return with CEQA analysis for that action, at a later date.



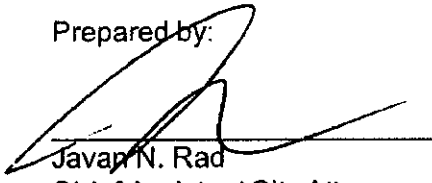
**FISCAL IMPACT:**

This report is for information only, and will not result in any fiscal impact. However, if the City Council were to restructure the police review boards, the fiscal impact is unknown, and depends on the option(s) pursued.

Respectfully submitted,

  
MICHELE BEAL BAGNERIS  
City Attorney/City Prosecutor

Prepared by:

  
Javan N. Rad  
Chief Assistant City Attorney

Attachments: (2)

**Attachment A** – Pasadena Municipal Code Section 2.295.050

**Attachment B** – Public Memo from City Attorney to City Council, Opinion on Council Appointments to Civilian Police Academy, the Graduates of Which are Eligible for Service on the Disciplinary Review Board of the Pasadena Police Department, April 7, 1994

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# Attachment A

**Pasadena Municipal Code Section 2.295.050**

**Advisory boards for review of incidents of use of force, risk management matters and disciplinary actions.**

- A. There are established under this section three review boards for the purpose of advising the Police Chief on matters of use of force, risk management and disciplinary review, to be known as the Use of Force Review Board, the Risk Management Review Board and the Disciplinary Review Board, respectively. A new Review Board shall be appointed by the Police Chief for each matter referred by the Police Chief to a review board, in accordance with departmental policy.
1. The Use of Force Review Board shall review any situation brought before it by the Police Chief in which force was employed by any employee of the Police Department. The Use of Force Review Board shall advise the Police Chief as to whether such use of force was within or outside Police Department policy on the use of force. The identity of any employee appearing before the Review Board and the nature of the incident under consideration shall be kept in strict confidence. No member of any Use of Force Review Board shall disclose to any person the matters or individuals discussed or the advice given by such Review Board, except with the express written permission of the Police Chief or the City Attorney.
  2. The Risk Management Review Board shall review any situation brought before it by the Police Chief involving loss of or damage to City property, private property or accidental injury by members of the Police Department and render an advisory opinion to the Police Chief as to whether the incident was preventable and if so, whether any corrective measures should be undertaken.
  3. The Disciplinary Review Board shall review those incidents brought before it by the Police Chief which may lead to the imposition of disciplinary action, including demotion, suspension or discharge, against employees of the Police Department for violation of standards of conduct imposed by the Department, the City of Pasadena or by state or federal law. After hearing presentations by the department and by the employee or the employee's representative and examining the relevant files, subject to Paragraph 4 of this section, the Board may advise the Police Chief as to whether a standard of conduct or other departmental policy or any statute or ordinance was violated and if so, propose for the Police Chief's consideration an appropriate penalty to be imposed, subject to the rights of appeal or grievance provided by statute, City policy or under any applicable Memorandum of Understanding.
  4. Employees whose conduct is to be reviewed by the Disciplinary Review Board shall be given ten calendar days' written notice of the proceeding thereon. The employee shall have the option to appear or not appear at the proceedings of the Disciplinary Review Board. Should the employee elect not to appear, that employee's name and employee identification number shall be deleted from all documents presented to the Board. The Disciplinary Review Board may make a disciplinary recommendation to the Police Chief regarding the incident under review notwithstanding the employee's failure to appear or to present oral or written evidence or argument. Such recommendation together with the reasons and evidence supporting it may be considered by the Police Chief in any subsequent stages of the disciplinary process.
  5. Any proceeding before the Disciplinary Review Board shall be kept in strict confidence. No member of a Disciplinary Review Board shall disclose to any person other than those listed in Section 2.400.020 of this Code the matters or individuals discussed or the advice given by such Board, except with the express written authorization of the Police Chief or the City Attorney. Any member of the Disciplinary Review Board who without authorization to do so intentionally discloses the identity of an employee whose conduct is before the Disciplinary Review Board or the recommendation as to the discipline of such employee to any person not listed in Section 2.400.020 shall be guilty of a misdemeanor.
- B. Each review board shall be composed of up to five members of the Pasadena Police Department, including, unless waived, a peer of the employee under review, as designated by the Police Chief.

# Attachment B

OFFICE OF CITY ATTORNEY  
PASADENA, CALIFORNIA

TO: CITY COUNCIL  
FROM: CITY ATTORNEY  
DATE: April 7, 1994  
RE: OPINION ON COUNCIL APPOINTMENTS TO CIVILIAN POLICE  
ACADEMY, THE GRADUATES OF WHICH ARE ELIGIBLE FOR  
SERVICE ON THE DISCIPLINARY REVIEW BOARD OF THE  
PASADENA POLICE DEPARTMENT

QUESTION PRESENTED

The City Council has requested that the City Attorney opine in writing on the following question:

Do direct City Council appointments to the Civilian Police Academy, the graduates of which form the pool of persons from which the Police Chief must select civilian members to the Police Department's Disciplinary Review Board, Use of Force Review Board and Risk Management Review Board, violate the City Charter?

CONCLUSION

It is my opinion that direct City Council appointments to the Civilian Police Academy violate the Charter because such appointments interfere with the City Manager's exclusive authority under Section 604 of the Charter to discipline persons under his direct or indirect control and because such appointments constitute an attempt to influence a subordinate of the City Manager in contravention of Section 411 of the Charter.

ANALYSIS

FACTUAL BACKGROUND

The City Council had before it on March 29, 1994, an ordinance of the City of Pasadena adding Section 2.295.050 to the Pasadena Municipal Code Establishing a Use of Force Review Board, a Risk Management Review Board and a Disciplinary Review Board for the

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Pasadena Police Department. Subsection C of said ordinance, as provided to the Council in the agenda package, read as follows:

"C. In order to be eligible to serve on a review board, citizen members shall first successfully complete a course of instruction entitled the "Citizens' Police Academy" to be administered by the Pasadena Police Department as prescribed by the Police Chief and police department policy. Entrance into the Citizens' Police Academy shall be by nomination. The Police Chief shall nominate one half of the members of each class of the Citizens' Police Academy, and the other one half of each class shall be nominated by the City Council. The City Council shall determine the process by which its nominees are selected."

This language was in error and reflected language in an earlier draft that had not been fully reviewed. Subsection C should have read as follows:

"C. In order to be eligible to serve on a review board, citizen members shall first successfully complete a course of instruction entitled the "Citizens' Police Academy" to be administered by the Pasadena Police Department as prescribed by the Police Chief and police department policy. Entrance into the Citizens' Police Academy shall be by nomination. The Police Chief shall nominate one half of the members of each class of the Citizens' Police Academy, and the other one half of each class shall be nominated by the City Manager. The City Council may recommend nominees to the City Manager for his consideration."

This is the language that was before the Council on September 28, 1993. At the meeting of March 29, 1994, the City Attorney orally advised that the Council should hold first reading on the ordinance with the corrected language. Nevertheless, the Council held first reading on the ordinance without the corrected language. First reading passed with Vice Mayor Nack voting no. The City Attorney was requested to provide a written opinion prior to adoption of the ordinance on second reading.

#### THE LAW

The law in the instant case is the Charter of the City Of Pasadena which controls over any City ordinance to the contrary. Subsection b of Section 411 of the Charter reads as follows:

"(b) Except for the purpose of inquiry, the Board and its members shall deal with the administrative service under the City Manager solely through the City Manager; and neither the Board

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nor its members shall attempt to influence or to direct any subordinates of the City Manager."

Further, Sections 601 and 604 of the Charter read, in pertinent part, as follows:

"Section 604. POWERS AND DUTIES OF CITY MANAGER. The administrative and executive functions, powers, and duties provided in this Section, in addition to others specified in this Charter, hereby are delegated to and vested in the City Manager. He shall have the power and it shall be his duty:

(a) To supervise, coordinate and administer the various functions of the City.

(b) To see that the provisions of this Charter and all laws and ordinances of the City are enforced.

(c) To appoint, promote, discipline and terminate the employment of all officers and employees of the City in accordance with the personnel system created pursuant to this Charter except those officers appointed by the Board which officers shall have the power to appoint their respective staffs; (Subsection (c) amended by Stats 1976.)

(d) To exercise supervision and control over all departments, divisions, and offices of the City except the City Attorney, City Prosecutor, and City Clerk, and their respective staffs.

\* \* \* "

#### APPLICATION OF LAW TO FACTS

The City of Pasadena Charter provides for a City Manager/Council form of government. Section 601 of the Charter provides that the City Manager is the Chief Administrative Officer and shall head the administrative branch of city government. The Council's role with respect to the administrative branch is clearly limited as set forth in Section 411 that provides that "[e]xcept for the purpose inquiry, the Council and its members shall deal with the administrative service under the City Manager solely through the City Manager, and neither the Council nor its members shall attempt to influence or direct any subordinates of the City Manager." Further, the City Manager has the exclusive authority to discipline employees under him pursuant to Subsection (c) of Section 604.

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Therefore, as to all three Boards, it is my opinion that there is a violation of Section 411 by having half of the eligible pool of persons to serve as civilian members on such Boards appointed by the City Council. Such an appointment system contravenes to requirement to deal with the administrative service solely through the City Manager and the proscription against attempting to influence subordinates of the City Manager. To believe otherwise is to disregard reality; the Police Chief is put in the untenable position of never selecting any of the Council appointees to avoid Council influence or of selecting some Council appointees to avoid political controversy.

More particularly, with respect to the Disciplinary Review Board, such an appointment system would violate the City Manager's exclusive authority to discipline under him pursuant to Subsection (c) of Section 604. Again the only way the Police Chief could avoid the issue would be to never select any of the Council appointees.

The corrected language for Subsection C avoids the above described violations of the Charter by having all appointments to the Civilian Police Academy made by the Police Chief or the City Manager. The City Council retains a role because it may recommend persons to the City Manager. Thus the corrected language is in harmony with the Charter because the Council is dealing with the administrative service through the City Manager and the City Manager retains his authority over discipline of his subordinates.

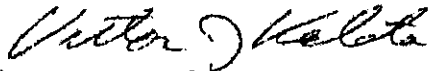
A similar situation arose in the City of Berkeley when it passed an ordinance creating a Police Review Commission with appointments by the City Council. The Berkeley Charter was similar to the Pasadena Charter but was broader in that it granted the Council the power to organize and maintain a Police Department. In Brown v. City of Berkeley, 57 Cal. App. 3rd 223 (1976), the Court struck down the ordinance because it interfered with the City Manager's authority to discipline. A copy of the case is attached for your review. Although, the case is different than the instant case, the principle of non-interference with the City Manager's authority is the same. In the Berkeley case, 100% of the Police Review Commission's appointees were made by the City Council. In the instant case, if the language as to appointments remains unchanged from that included for first reading of the ordinance, 50 % of the appointees to the Civilian Police Academy, the graduates of which form the pool of eligible for appointment to the three Boards, are made by the City Council. If 100% is clearly a violation of the Charter, is any lesser percentage not a violation? In my



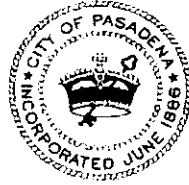
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opinion, any lesser percentage is a violation, unless it is de  
minimis. However, this Office is not aware of any Court that has  
ruled on such a case.

Respectfully submitted,



Victor J. Kaléta  
City Attorney



OFFICE OF THE CITY ATTORNEY/CITY PROSECUTOR

**MEMORANDUM**

**TO: Honorable Mayor and Members of the City Council**

**FROM: Michele Beal Bagneris, City Attorney/City Prosecutor** *MBB*

**DATE: August 3, 2020**

**RE: Responses to Questions Related to Proposal to Create a Community Police Oversight Commission and Independent Police Auditor Reporting to the City Prosecutor**

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A number of questions have arisen as the City Council considered community police oversight at its meeting on July 27, 2020. The following is a summary of some general questions, and brief responses.

**1) What is the current subpoena authority held by the Council, and how could subpoena authority be conferred to, for example, a Community Police Oversight Commission and/or proposed independent auditor?**

The basis for local governmental authority for subpoena power arises out of state law and the California Constitution. For general law cities, California Government Code Section 37104 provides: "The legislative body may issue subpoenas requiring attendance of witnesses or production of books or other documents for evidence or testimony in any action or proceeding pending before it." Charter cities have the authority to issue subpoenas pursuant to the powers contained within the California Constitution irrespective of the powers conferred by the Government Code, through adoption of a charter enumerating further powers. See generally, Cal. Const. Art. XI section 3(a).

The City of Pasadena Charter confers subpoena authority on the City Council as a body. Section 504 of Pasadena's Charter provides: "OATHS AND SUBPOENAS. Each member of the City Council shall have the power to administer oaths and affirmations in any investigation or proceeding pending before the City Council. The City Council shall have the power to compel the attendance of witnesses, to examine them under oath, and to compel the production of evidence." Accordingly, pursuant to Pasadena's Charter, individual Council members do not have the authority to compel testimony and issue subpoenas, the Council as a body has such authority.

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In view of the City's authority as a charter city, and unless prohibited by the Charter, the City Council may authorize commissions, commission members, or employees to issue subpoenas. Through this authority, the Council has delegated the power to administer oaths and issue subpoenas to individual members of the Code Enforcement Commission, as set forth in Pasadena Municipal Code Section 2.55.140.B. Similarly, the Council could delegate the power to issue subpoenas to subordinate commissions or an auditor, if consistent with the Charter, as further discussed below.

**2) Can the Pasadena City Charter be amended to give individual Councilmembers subpoena authority?**

Yes, Section 504 could be modified by Pasadena voters to give individual Councilmembers the authority to compel testimony and issue subpoenas. However, any such amendment would have to be internally consistent with any other affected provisions of the Charter. For example, any subpoena power could not conflict with the Council-Manager form of government expressed in the Charter, unless the provisions regarding that form of government were also amended, so that the Charter was internally consistent. One aspect of the Council-Manager form of government, as expressed in Sections 604(D) and 411(B) of the Charter, is that the City Manager oversees personnel under his direction, and the City Council may not attempt to influence or direct those under the City Manager. These provisions may need to be addressed for subpoena power, depending on the subject matter the Council sought to regulate.

**3) Are there limits on any transfer of Council authority to a subordinate body or person?**

Yes, there are limits to any delegation of Council authority to subordinate bodies or persons. All delegations must be consistent with the applicable law. Depending on the subject matter the Council sought to transfer, we could evaluate provisions in the Charter or Municipal Code that would need to be reconciled by voter approval (for the Charter) or Council adoption of an ordinance (for the Municipal Code), if necessary.

For example, one court invalidated provisions of an ordinance that conflicted with the city's charter, where the ordinance empowered a police review commission to intervene in individual disciplinary proceedings against police department employees and officers, to require the city clerk to supply clerical and secretarial assistance, and to request and receive information, documents, and materials from other city officers and departments. *Brown v. City of Berkeley*, 57 Cal. App. 3d 223, 236 (1976). Similarly, another court found it to be improper for a City Council to delegate its duty to certify environmental documents pursuant to CEQA to a nonelected and nondecisionmaking body, where state law only allowed for such delegation to nonelected but decisionmaking bodies (with an attendant appeal right to the elected decisionmaking body). *California Clean Energy Committee v. City of San Jose*, 220 Cal.App.4th 1325, 1339-40 (2013).

**4) Could an Independent Police Auditor position be created who reports to the City Prosecutor, and could that position be delegated subpoena power?**

An Independent Police Auditor position could be created who reports to either a City Prosecutor (which would be a position separate from the City Attorney, as suggested by Vice Mayor Hampton) or the City Attorney/City Prosecutor (which is the existing framework, and is the same person), and as discussed above, could be delegated subpoena authority consistent with the City Charter and any applicable federal or state law. The same principles would apply to allow such a position and reporting relationship, whether within the existing City Attorney/City Prosecutor's Department or within a separately created City Prosecutor's Department, and as such, references to "Department" hereafter refer to either arrangement. Any auditor that is housed within the Department, however, will need to be separated (by an ethical "wall") from both the Civil Office and the Prosecution Office, so as to avoid potential conflict of interest issues. Functionally, the auditor could review cases regarding activities of law enforcement officers, and report on its conclusions. If the report were purely disciplinary in nature, the report could be referred directly to the Chief of Police, bypassing all others. Only if the auditor's report finds potential criminal violations would the report be considered the equivalent of a criminal referral, at which step in the process it would go to the Prosecutor for potential prosecution as a crime.

The auditor's use of compelled statements from officers is limited, both due to confidentiality, as well as case law limiting the use of compelled statements in a criminal proceeding. In short, police officer personnel records are considered confidential, subject to certain discovery procedures and transparency laws, such as SB 1421. Additionally, should a matter be referred by an auditor to the Prosecution Office for criminal prosecution, the compelled statements (and likely any evidence obtained therefrom) would not be available in the prosecution of a criminal case against the officer.

As to subpoena authority, it may be possible for an Independent Police Auditor employed in the Prosecutor's Office to have such authority. However, a Charter amendment would be required if the Council wished the auditor to be able to use subpoena powers for purpose of conducting personnel investigations of City employees, including police officers, due to Charter provisions delegating that authority to the City Manager (Section 604).

Finally, separate consideration would have to be given as to staffing and budgeting for an auditor, as necessary staff would also have to be hired (an attorney, investigator, and clerical staff at minimum), in effect creating a new and separate unit in the Department.