



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

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.