

Dear Deputy City Attorney Harvey:

Thank you for your willingness to attend the Police Accountability Board (PAB) meeting on 9/8/21 to discuss the legality of complainants' ability to participate fully in the PAB hearings related to their complaints of alleged police misconduct.

Although I am a member of the PAB (and was a PRC Commissioner for 3 years), I am writing to you as a concerned individual. My PhD is in sociology (specifically, sociology of law) and I am not an attorney; however, I have studied carefully the Public Safety Officers Bill of Rights (POBRA), and the California Penal Code Sections 832.5, 832.7, and 832.8, as well as the relevant court cases (especially the most recent *Berkeley Police Association v. City of Berkeley* 2008).

Three points emerge from these documents: 1) police officers have a right of privacy regarding items in their personnel records, including their identity in cases of alleged misconduct; 2) the public at large may not attend oversight hearings regarding alleged misconduct of officers; and 3) plaintiffs may not have access to, nor inquire about, the specific items in officers' personnel records listed in Penal Code 832.8 (a) (1-6).

I have found no record of previous City Attorneys interpreting these legal materials, and it is unclear to me how it came to be that in the Berkeley Police Review Commission the *complainant* in a case of alleged police misconduct was considered "the public", was thus excluded from the officers' questioning, and therefore precluded from fully participating in his/her own case. In my reading of it, the Courts had meant to close hearings that had previously been open to the Berkeley public, but nowhere in those legal cases was it implied that a participant in the case (the complainant) was to be considered "the public." Indeed, cases cited in *BPA v City of Berkeley* (e.g. *City of San Diego v. Superior Court* [1981]) assume complainants' participation when referring to plaintiffs' right to question officers in formal legal proceedings (but put limits on what they may inquire about).

Analogous cases can be found in family court and juvenile court where the proceedings are closed to the public but where all parties to the case participate fully. Procedural justice principles could hardly allow otherwise.

I understand that this is about officer privacy and closed hearings versus open ones. Hearings that are closed to the public protect officer privacy; however, I see nothing in POBRA, case law, or statute that implies that one party to the misconduct hearing must be excluded from full participation. To the contrary, statements about protecting officer identity, as well as placing limitations on what plaintiffs may ask about, point to the opposite reading: that the legal authorities meant to exclude the public but not complainants (who of course are already aware of the officer's identity).

I do not consider the law here to be ambiguous, but in cases of ambiguity a balancing test is useful. One function of complaint procedures is to enhance public trust and transparency. There is evidence that was eroded after the exclusion of complainants from the process. Anecdotal evidence suggests as much,

but so do the statistics regarding complaints. From 2000 to 2008, the average annual number of complaints received by the Berkeley PRC was 46. From 2009 to 2020, the annual average had plummeted to 20 with comparable drops in the number of Black complainants. In 2000, African Americans comprised 50% of complainants. Last year, there were zero African American complainants. Someone might argue that this is evidence that residents are more satisfied with Berkeley police officers than they were in the past. However, it is notable that the sharpest decline in complaint filings occurred immediately following the 2008 court decision to close hearings and exclude complainants, falling from 42 complaints in 2008 to 29 the following year.

PAB members (several of whom are practicing attorneys) voted unanimously to allow complainants to attend all phases of the misconduct hearing in which they are plaintiffs. Given this unanimous PAB support, the apparent meaning of the case law, and the need to restore confidence in and legitimacy to complaint procedures while still protecting officer privacy, it is my hope that PAB complaint hearings will allow complainants to participate in the officer questioning phase of hearings but prohibit them from inquiring about items in officers' personnel records.

Thank you again for considering these issues and for your upcoming participation in the PAB meeting on 9/8/21.

Respectfully,

Kitty Calavita

September 2, 2021

Sam Harvey  
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Re: Police Accountability Board Interim Regulations

Dear Mr. Harvey,

I'm a member of the Berkeley Police Accountability Board ("PAB") and serve on its Regulations Subcommittee. I'm also an attorney and the former Legal Director of the Giffords Law Center to Prevent Gun Violence, where I worked for more than 20 years on the development, drafting and defense of state and local gun safety laws in California and nationwide. I'm writing to you as a PAB member, but this letter has not been submitted to nor approved by the PAB, so I do not speak officially on the Board's behalf. The letter is reflective, however, of many discussions the Subcommittee and PAB have had regarding the PAB regulations, and is consistent with comments we have received from the public on numerous occasions.

As I believe you know, the first task of the Regulations Subcommittee was to make recommendations to the PAB regarding interim regulations for the handling of complaints against sworn officers. To expedite the process, the Interim Director of Police Accountability provided the Subcommittee with draft interim regulations modeled after the regulations governing the PAB's predecessor entity, the Berkeley Police Review Commission ("PRC"). The Subcommittee felt very strongly, however, that the draft interim regulations perpetuated some of the significant inequities contained in the PRC regulations (which had also been flagged by the PRC) and the Subcommittee voted to recommend that the regulations be changed to provide a more accessible and even-handed process.

In addition to expanding the categories of individuals who may file a complaint (to include witnesses to alleged misconduct and, upon a vote of five Board members, the PAB) and extending the complaint filing deadline to 180 days, the Regulations Subcommittee recommended that the regulations regarding the hearing process create more parity between the complainant and the subject officer. Specifically, the Subcommittee voted to allow the complainant to: 1) be present when the subject officer is questioned by the PAB; and 2) question the subject officer. Under the PRC regulations and draft interim PAB regulations, the complainant was permitted to do neither. We were advised that these prohibitions were adopted in response to an opinion of the office of the former City Attorney concluding that to allow the complainant equal participation in the hearing process would violate state law and the decision in *Berkeley Police Association v. City of Berkeley* (2008) 167 Cal. App. 4<sup>th</sup> 385.

On August 4, 2021, the PAB unanimously voted to recommend that the City Council approve the changes proposed by the Regulations Subcommittee. The PAB understood, however, that the changes

regarding the hearing process could conflict with the opinion of the former City Attorney. As a result, the PAB asked that the Office of the City Attorney revisit that opinion. You have agreed to do so and to present your opinion at the PAB's September 8, 2021, meeting.

Although I have not conducted extensive legal research in this area, I have reviewed state law and the *Berkeley Police Association* case and do not see how either could serve as an obstacle to the interim regulations proposed by the PAB. The Public Safety Officers Procedural Bill of Rights Act ("POBRA") (Government Code Section 3303 et seq.) mandates that certain conditions apply to investigations and interrogations of officers by their commanding officer or other member of the employing public safety department that could lead to punitive action. Penal Code Section 832.7 provides that personnel records of police officers must, with certain exceptions, be kept confidential.

In the *Berkeley Police Association* case, the court held that PRC hearings were subject to POBRA and violated Penal Code Section 832.7 because they were open to the public and permitted public access to PRC investigations, reports, hearings and findings. The case did **not** raise the issue of whether a complainant could be present during the questioning of the subject officer or whether the complainant could question the officer. Indeed, the court noted in its description of the hearing process that existed at the time that, "All parties and witnesses are subject to cross-examination by the other side and to questioning by the PRC commissioners."

It was clearly appropriate, as a response to the *Berkeley Police Association* case, for the PRC regulations to be amended to prohibit public attendance at hearings and public access to confidential personnel records. It was not appropriate nor necessary, however, for the regulations to be amended to: 1) prohibit questioning of the officer by the complainant; and 2) require that the complainant be excused from the hearing while the PRC commissioners questioned the officer. These regulations are fundamentally unfair to the complainant and violate basic principles of due process. They have also undermined public confidence in the PRC, and will, if they are not corrected, undermine public confidence in the PAB.

I have been advised that the opinion of the former City Attorney, apparently issued in 2008, was provided verbally and not in writing. This is surprising, given the dramatic and consequential changes that were made in response to the opinion. The absence of a written opinion also makes it difficult to understand and respond to the rationale for the opinion. I can only surmise, however, that the opinion was based on a misreading of and overly cautious response to the *Berkeley Police Association* case.

I hope that in taking this opportunity to revisit the opinion, you will conclude, for the reasons stated above, that neither state law nor case law precludes the modest changes the PAB has proposed to make the hearing process more equitable. Thank you very much for your consideration.

Best regards,

Juliet A. Leftwich