



Workplace Investigations

A Practical Guide for City Attorneys

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By: Daphne M. Anneet
Burke, Williams & Sorensen, LLP

www.bwslaw.com

danneet@bwslaw.com

Presentation Overview

- **Why Investigate?**
- **City Attorney's Role**
 - Responding to Complaint
 - Defining Investigation
 - Overseeing Investigation
 - Concluding Investigation



Presentation Overview-Key Issues

- Whether an investigation is necessary
- Immediate interim measures
- Privileges and waiver
- Safeguarding employee rights
- Disclosure of results





WHY CONDUCT WORKPLACE INVESTIGATIONS?

Legal Duty to Investigate



- **FEHA**
 - “**Take all reasonable steps to prevent discrimination and harassment from occurring.**”
 - **Gov. Code § 12940(k)**

Legal Duty to Investigate



- **Title VII**
 - **“Take all steps necessary to prevent harassment from occurring.”**
 - **29 C.F.R. Section 1604.11(f).**
 - **EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999).**

Investigations Reduce Liability

- California
 - May reduce liability for harassment claims
 - Limit damages to date employee made complaint
 - *McGinnis*
 - Good faith basis for adverse employment action
 - *Cotran and Silva*



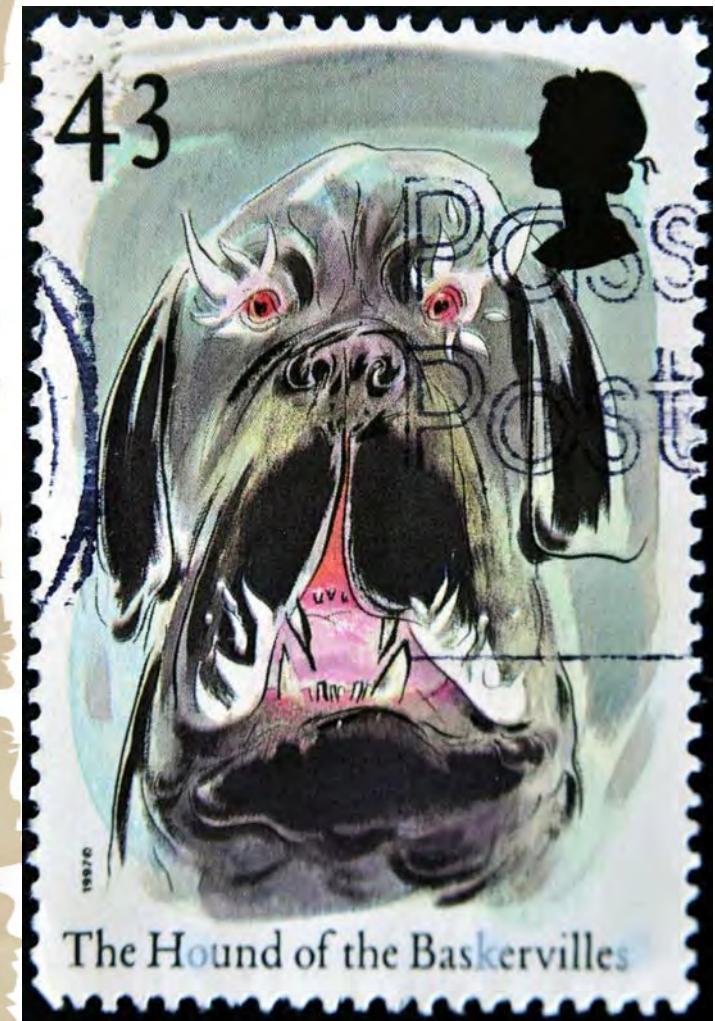
Investigations Reduce Liability

- **Federal**
 - **No liability for harassment claims**
 - No tangible action
 - Employer took action to prevent and correct harassment
 - Employee failed to avail itself of preventive corrective measures
 - *Ellerth and Faragher*



Consequences of Failure to Investigate

- **Violation of City policy and state and federal law**
- **Policies perceived as ineffective and meaningless**
- **Discourages complaints**
- **Undermine City's defense**
 - **Bolster weak claims**
 - **Evidence of pretext/retaliation**
 - **Reversal of discipline**
 - **Undermine summary judgment**
 - **Significant liability exposure**





RESPONDING TO THE COMPLAINT

When to Investigate

Alleged conduct, if true, could lead to discipline



- **Harassment, discrimination, retaliation**
- **Alcohol or drug use**
- **Violence or threats of violence**
- **Dishonesty**
- **Attendance**
- **Insubordination**
- **Falsification of records**
- **Criminal conduct**

Interim Actions



- **Assess safety issues**
- **Take immediate action to stop ongoing harassment or harm**
- **Anti-retaliation steps**
- **Preserve evidence**
- **Establish notification protocol**

Interim Measures – Administrative Leave

Should Respondent Be Placed On Paid Administrative Leave?



- Civil service employees: due process rights
 - Unpaid leave
 - Involuntary retirement
 - Paid involuntary leave
- At-Will employees: liberty interest

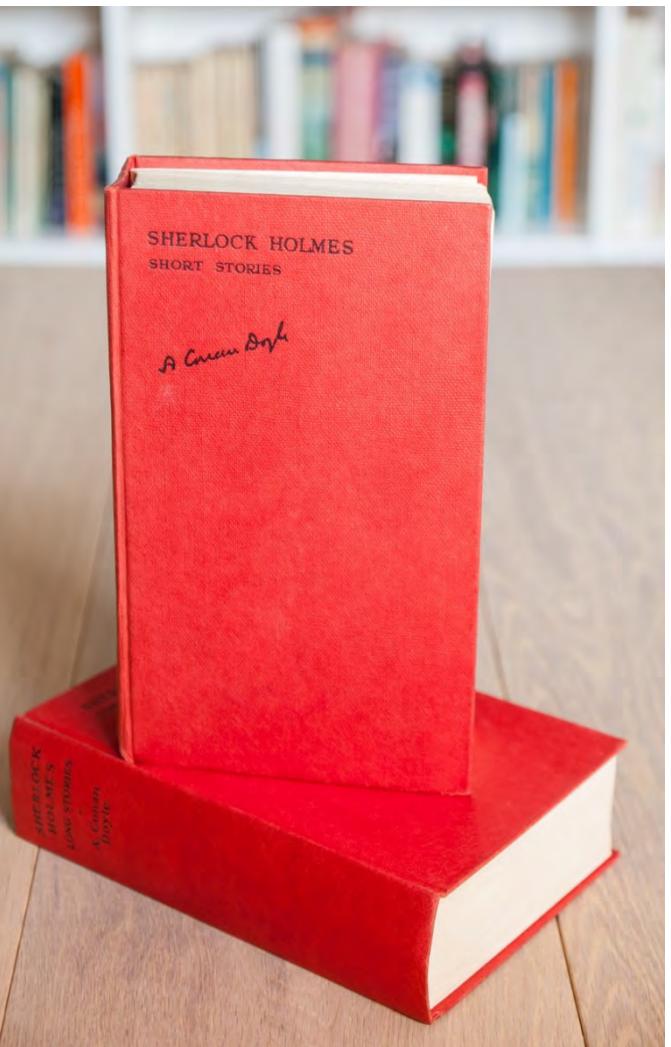
Interim Measures – Administrative Leave

**Can Complainant
be Moved?**



- **No involuntary transfer = retaliation**
- **What is Complainant's preference?**

Interim Actions – High Ranking

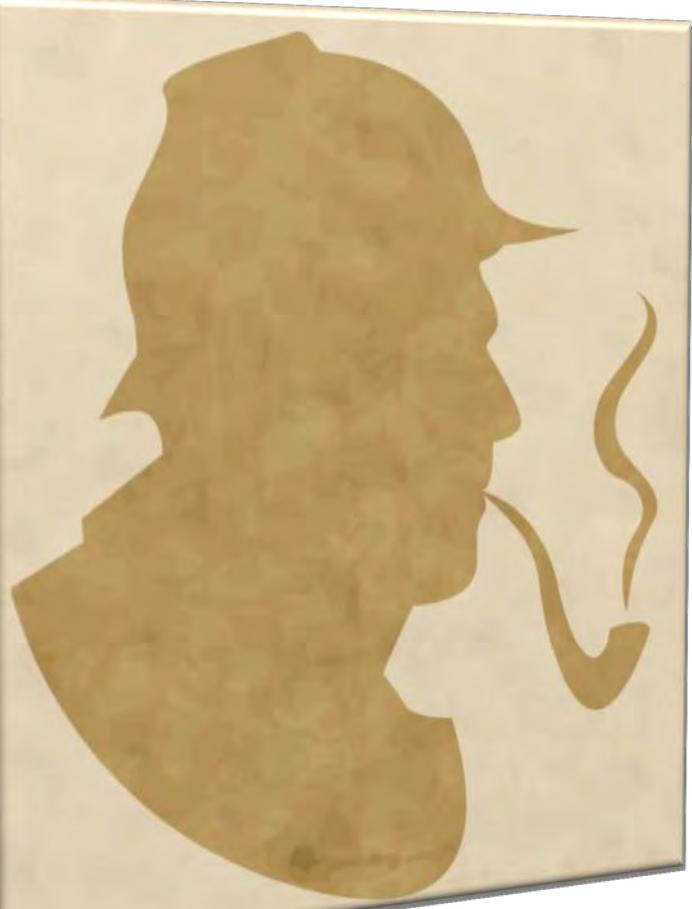


- **Respondent a direct report to City Manager**
- **Respondent an elected official**
 - Confidentiality key
 - Who is final decision-maker?
 - Who will hear disciplinary appeal?



DEFINING THE INVESTIGATION

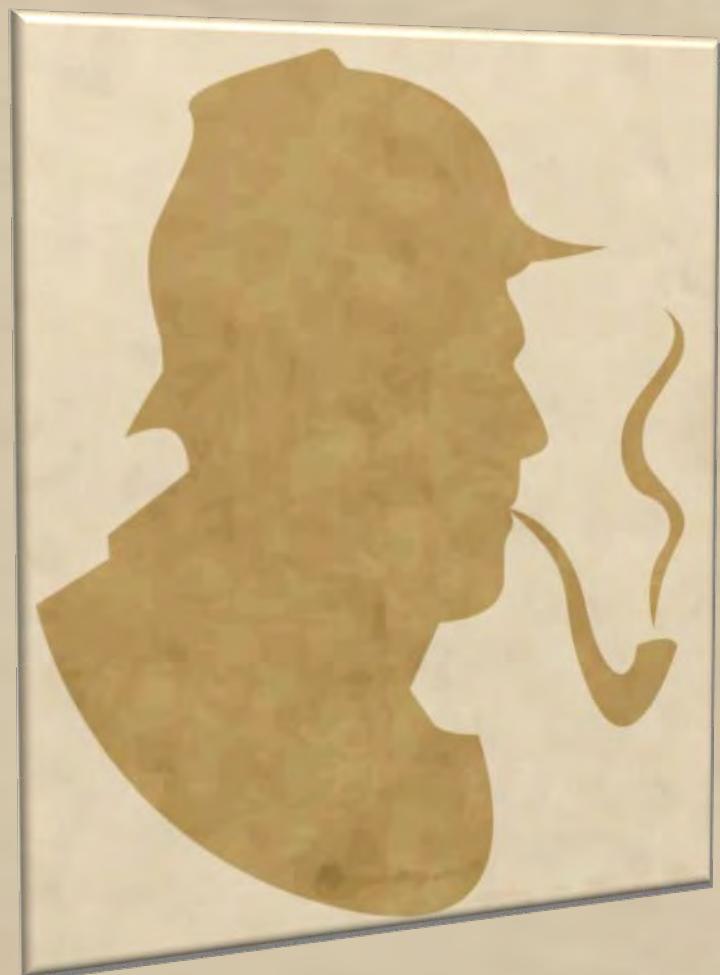
Who Should Investigate?



- **Qualities of Investigator:**
 - **Impartial**
 - **Professional**
 - **Experienced**
 - **Available**
 - **Knowledgeable of relevant laws, policies**
 - **Excellent writing skills**
 - **Strong witness**

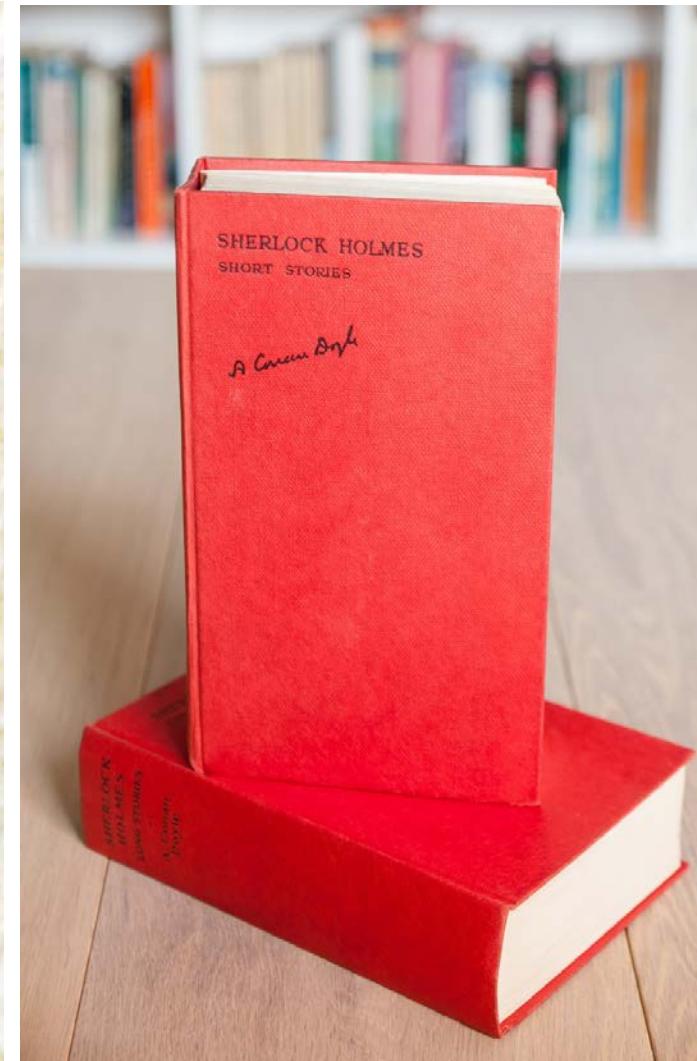
Who Should Investigate?

- Internal vs. External
 - Internal Investigator
 - Supervisor
 - In-house HR
 - In-house attorney
 - External Investigator
 - Outside Counsel
 - Outside special counsel
 - Outside *qualified* HR professional

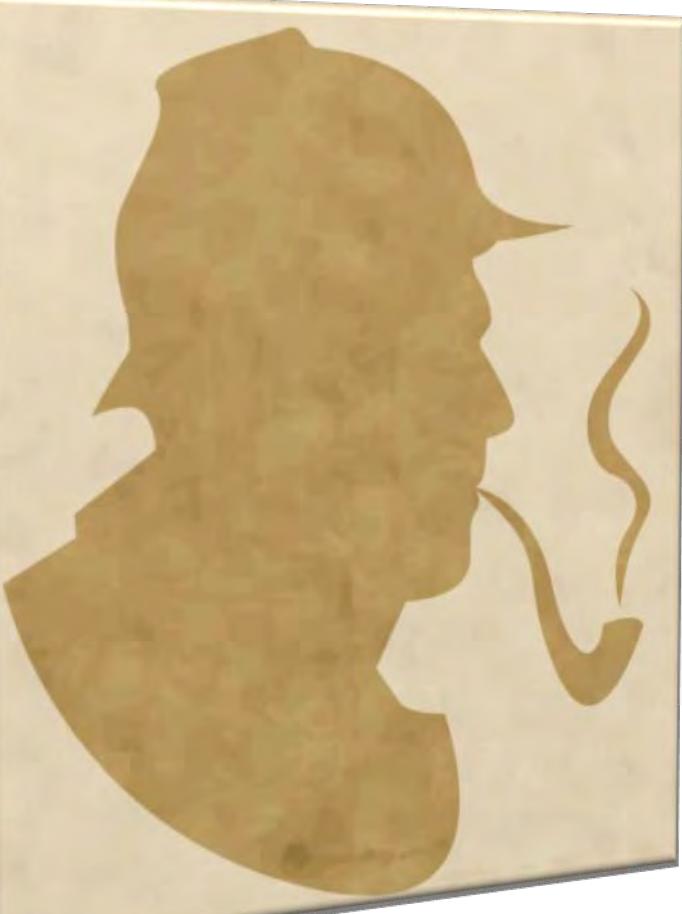


Use of External – High Ranking

- **Liability exposure**
- **Remove potential conflicts of interest**
- **No role in future disciplinary action**
- **Potential perceived bias of internal investigator**



Using Outside Investigators



California Private Investigator Act ("CPIA")

- State licensed private investigator, or
- State licensed attorney
- Unlicensed human resources consultants *cannot* legally conduct workplace investigations
 - Cal. Bus. & Prof. Code §§ 7520-7539

Investigations by Attorneys

CPIA -Attorney Exemption



- Attorney does not have to be a licensed private investigator
- Must be acting as an attorney
- Fact-finding is a necessary part of rendering legal services under CIPA
 - Cal. Bus. & Prof. Code § 7522(e)

Investigations by Attorneys

Special Considerations



- Duty to notify City of “reasonably foreseeable legal problems” discovered during investigation
- Fiduciary duties
 - Competence, loyalty, avoid conflicts of interest, protect confidential information
- Ethical duties
 - No communication with represented employees

Investigations by Attorneys

Attorney-Client Privilege



- **Dominant Purpose Test:**
 - Dominant purpose of workplace investigation must be to obtain legal advice or legal services

- *Costco Wholesale Corp.*

Investigations by Attorneys

Anticipate Waiver of Privilege



- **Investigation report key evidence to defend employment claims**
 - Must waive privilege to rely on investigation in defense
 - *Wellpoint*
- **Report as basis for disciplinary action**
 - Must produce all documentation relied upon by decision-maker
 - *Skelly*

Investigations by Attorneys

Anticipate Waiver of Privilege



- **Structure investigation to secure protection of legal analysis**
- **Bi-furcation of fact-finding and legal advice to decision-maker**
 - *Kaiser Foundation Hospital*

Retaining The Investigator

- Define Scope
 - Limit to set allegations
 - Identify in scope of work
 - No work beyond scope without authorization
 - Only City Attorney power to expand scope or order a separate investigation
 - Communications not privileged



Retaining The Investigator

- **Investigator's Role**
 - **Factual Findings**
 - Specify that City Attorney will rely on report to render legal advice
 - **Define Findings**
 - Sustained, Not Sustained, Unfounded
 - **Require Credibility Determinations**
 - **Affirm Independence**



Retaining The Investigator

- Communication Protocol
 - Right to Representation
 - Safety: right to representative of choice
 - Non-safety: right to union representative
 - Recording of Interview
 - Safety: right to record
 - Non-safety: no right
 - Recalcitrant witness
 - Lybarger warning



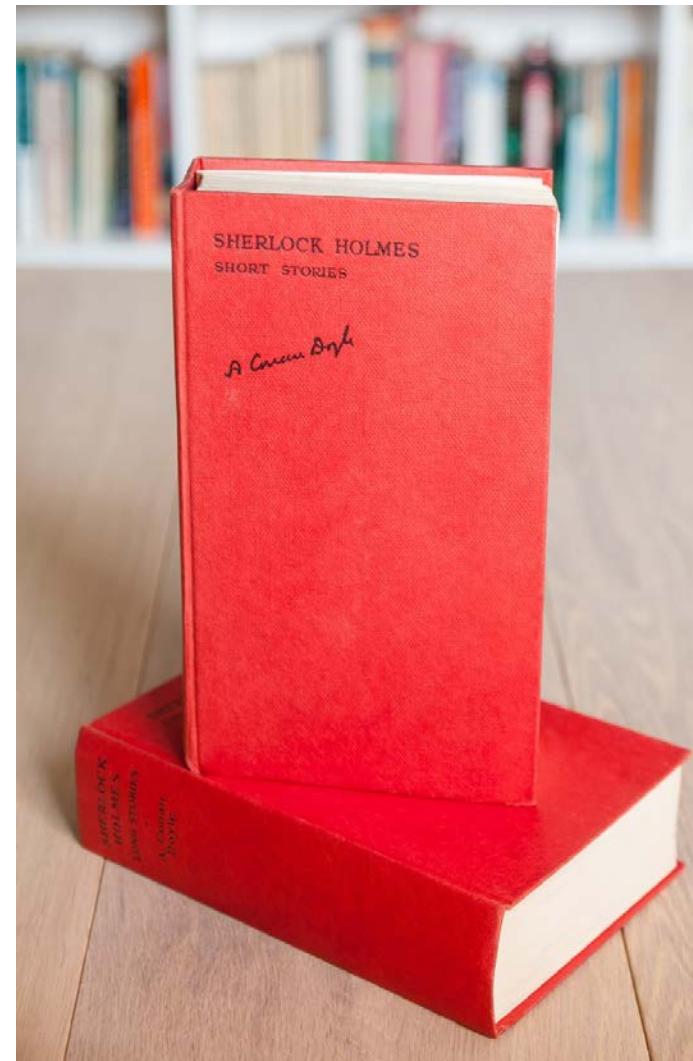
Retaining The Investigator

- **Communication Protocol**
 - Employer representative
 - Limit communications
 - Maintain communications re legal advice separate
 - Proper advisements
 - Safety officers
 - Nature of investigation *before* interview
 - Anti-retaliation policy



Considerations for High Ranking

- **Strong public interest in disclosure of report**
- **Potential for leaks in confidentiality of investigation**
- **Strong investigator to protect integrity of process**





CONFIDENTIALITY AND PRIVACY

City's Interest in Confidentiality

- **Support investigative process**
- **Protect privacy rights of parties and witnesses**
- **Protect parties and witnesses from retaliation**
- **Protect evidence**
- **Preserve privileges**



Employee's Interest –Concerted Activity



- **Meyers-Milias-Brown Act ("MMBA")**
 - Right to freely participate in activities of employee organizations, including open discussion regarding working conditions

Employee's Interest –Free Speech



- **First Amendment right to speak freely on matters of public concern**

Limitation on Confidentiality

- **Balancing Test: Does City's Legitimate Business Justification Outweigh Associational Rights**
 - Will dissemination of information about investigation/complaint among employees interfere with City's ability to conduct effective investigation?

No Blanket Confidentiality

- **Federal Law: National Labor Relations Board (“NLRB”)**
 - Blanket policy that prohibits employees from discussing complaint under investigation violates employee's associational rights
 - Employee entitled to ask co-workers for help to preserve evidence for a harassment claim
 - *Banner Health*



No Blanket Confidentiality

- California Law: Public Employment Relations Board (“PERB”)
 - No-contact instruction issued pursuant to standard policy interfered with employee’s associational rights
 - No specific showing of risk that employee would taint evidence
 - *Perez v. LACC*



Limitation on Confidentiality

- **Blanket confidentiality instruction does not justify restrictions on employees' associational rights**
 - City must make specific showing of need to justify issuance of confidentiality instruction while investigation is pending

Protecting Confidentiality



- **Modify any policy that requires blanket confidentiality instruction**
- **Adopt case-by-case approach**
- **Specify investigation under attorney-client privilege**
- **Except union and attorney from any instruction**



**OVERSEEING
THE INVESTIGATION**

Overseeing the Investigation

Limited Role



- Scope issues
 - Due process issues
 - Retaliation issues
 - Investigation on track?
- ✓Prompt, fair, thorough



CONCLUDING THE INVESTIGATION

Concluding The Investigation

- **Review of Report**
 - Is investigation properly documented?
 - Scope
 - Investigation process
 - Applicable policies/procedures
 - Evidentiary standard
 - Identification of evidence
 - Summary of evidence
 - Evaluation of evidence
 - Statement of findings



Concluding The Investigation

Review of Report



- Are findings consistent with scope?
 - Findings of fact
 - Well-reasoned
 - Credibility determination
- Proper evidentiary standard?

Concluding The Investigation

Review of Report



- Handling Deficiencies
 - Discoverability
 - Draft report
 - Contract management
 - Resolve evidentiary issues
 - Seek clarification

Concluding The Investigation

Considerations

- Nature of allegations
- Respondent's status
- Potential conflict
- Potential liability
 - Enforcement action/civil action/discipline





PROTECTING REPORT FROM DISCLOSURE

Protecting Report From Disclosure



- **Privileges that may provide protection**
 - Attorney-Client
 - Attorney Work-Product
 - Deliberative Process
 - Closed Session Reporting
 - Employee's Right to Privacy

Protecting Report From Disclosure

Disclosure to Complainant



- **Do not:**
 - Volunteer disclosure of report
- **Do report:**
 - Outcome
 - Appropriate action being taken
 - Anti-retaliation process
 - Thank employee
- **May have to disclose if subsequent claim**

Protecting Report From Disclosure

Disclosure to Respondent



- **Disciplinary action:**
 - Disclosure required in *Skelly process*
 - What decision-maker relied on
 - Redact to protect privacy rights of third parties
- **No disciplinary action:**
 - No obligation to disclose for non-safety*
 - Report results
 - Anti-retaliation reminder

Disclosure to Public Safety Officers

- **“Adverse Comment” Rule:**
 - Notice and opportunity to respond to “adverse comments” in personnel file
 - Gov. Code §§3305 and 3255
 - Any document that may affect employment
 - No need for direct punitive action
 - Document maintained in *any* file
 - Not necessarily entitled to entire file
 - Applies regardless of outcome of investigation

Protecting Report From Disclosure

Disclosure to Union



- In response to demand for disclosure, City may:
 - Assert objections based on privileges
 - Demand showing that information is necessary and relevant to representation

Disclosure to the Union

- **“Necessary and Relevant” Standard:**
 - Under the MMBA, Union entitled to information that is “necessary and relevant” to representation of members
 - Gov. Code §3505
 - Refusal to provide report or portions of it may constitute an unfair labor practice.

City of Redding

Protecting Report From Disclosure

Disclosure to Union



- Necessary and Relevant?
 - ≠ General concern with investigation process or outcome insufficient
 - ≠ Investigation of employee outside bargaining unit insufficient
 - ✓ Concern of potential ongoing harassment and unsafe working conditions of members sufficient

Disclosure to the Public

- **“Substantial Nature” and “Reasonably Well-Founded” Standard:**
- **Under California Public Records Act (“CPRA”), personnel records are generally exempt from disclosure.**
 - Gov. Code §6254(c)
- **Apply balancing test for disclosure of investigation reports that reflect allegations of a “substantial nature” and are “reasonably well-founded.”**

Protecting Report From Disclosure

Disclosure to Public



- Substantial Nature & Well Founded?
- ≠ Unfounded charges against attorney
 - Irreparable harm to reputation

Protecting Report From Disclosure

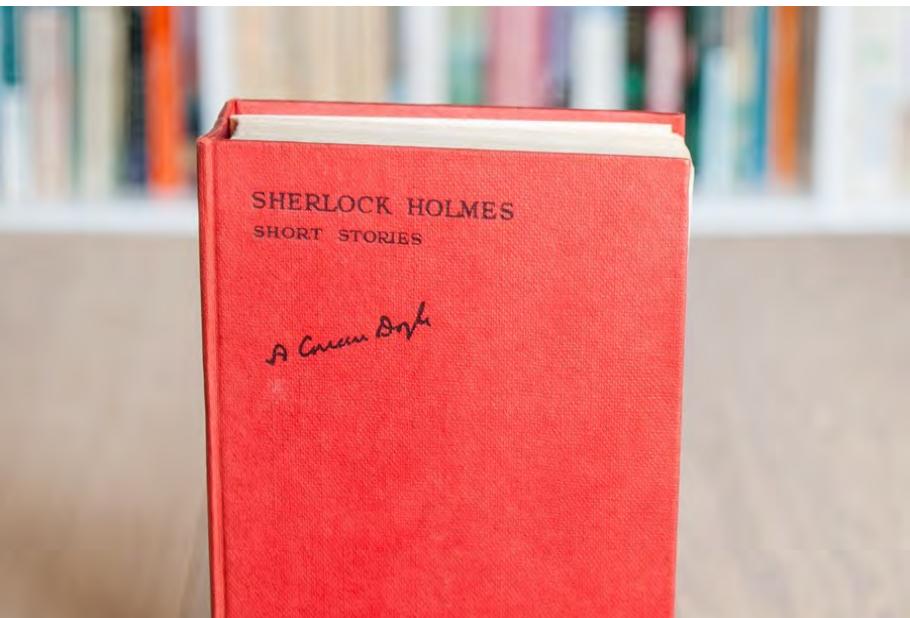
Disclosure to Public



- Substantial Nature & Well Founded?
 - ✓ High ranking official: investigation of sexual harassment of pupils by superintendent following voluntary resignation
 - ✓ Position of trust: investigation of alleged sexual harassment of pupils by teacher who received reprimand
 - ✓ Redact to protect privacy

Protecting Report From Disclosure

**High Ranking
Managers and
Officials**



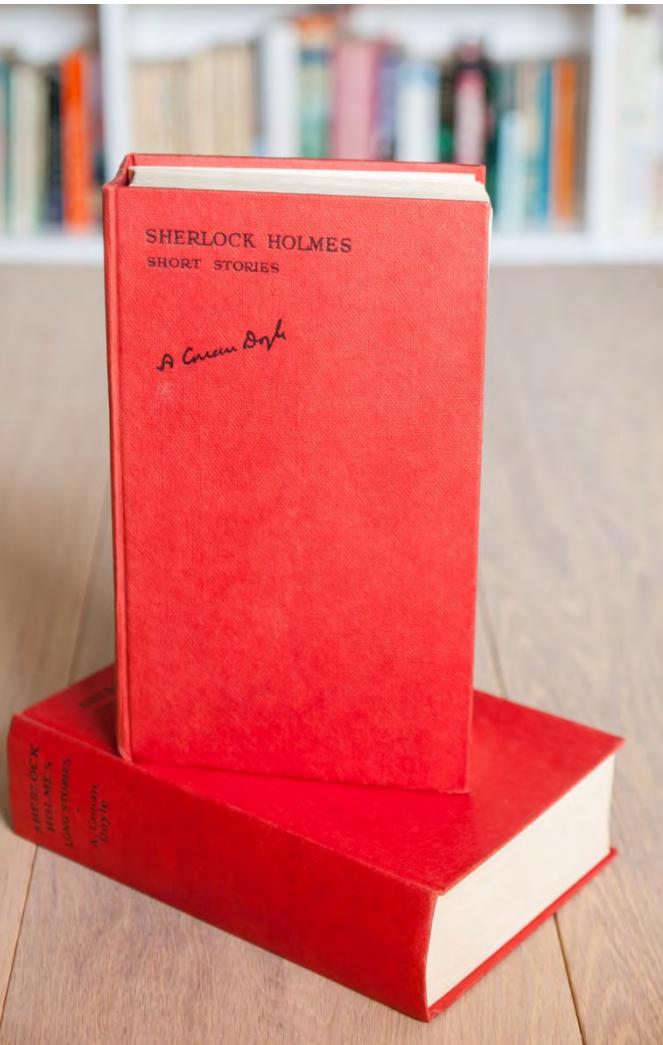
- **Greater likelihood of disclosure**
 - High rank
 - Position of trust
- **Name clearing**
 - Nature of finding
 - Sustained
 - Not sustained
 - Unfounded

Post Investigation Measures



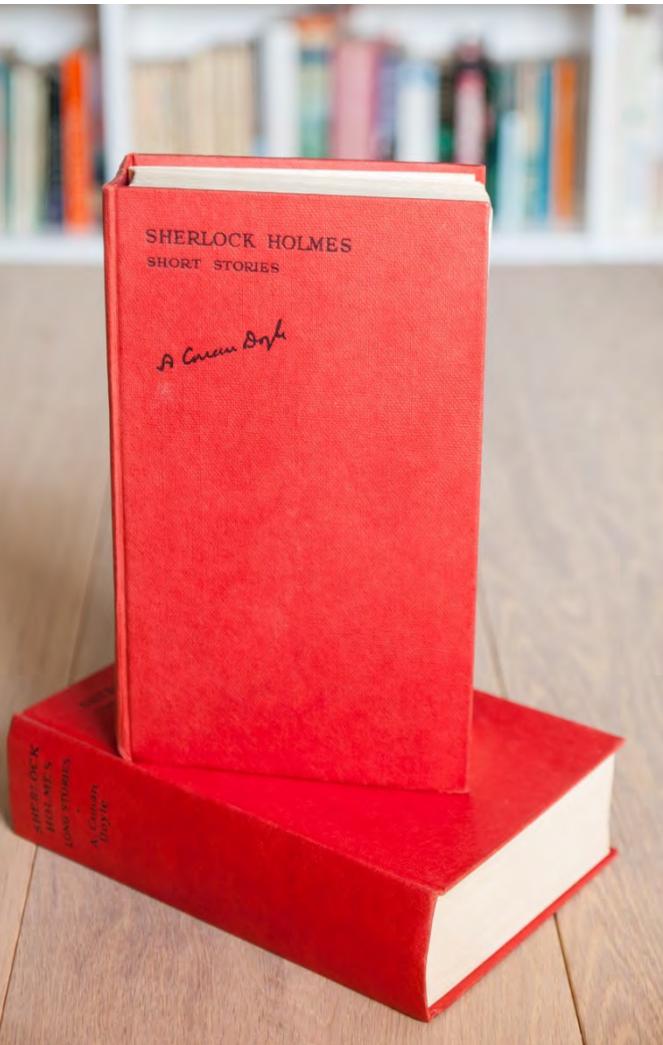
- **Implement remedial measures**
 - Training
 - Create/revise policies and procedures
- **Disciplinary process**
- **Protect against Retaliation**
- **Prepare City's defense**

High Ranking Respondents: Recap



- **City's duty to protect employees extends to conduct of elected officials**
- **Notification Protocol**
 - Chain of Command
 - Need to know

High Ranking Respondents: Recap



- **Conflicts of Interest**
 - Final decision-maker
 - Who reviews appeal of decision
- External investigator
- Prepare for disclosure of report/portion thereof



QUESTIONS?