Webinar:
Workplace Investigations – A Practical Approach for City Attorneys

Wednesday, July 29, 2015; 10:00 – 11:30 a.m.

Daphne Anneet, Partner, Burke, Williams & Sorensen, LLP

WORKPLACE INVESTIGATIONS
A Practical Guideline for City Attorneys

Presented to the League of California Cities®

July 29, 2015

By Daphne M. Anneet
Burke, Williams & Sorensen, LLP
444 South Flower Street, Suite 2400
Los Angeles, California 90071
danneet@bwslaw.com
213.236.2802
www.bwslaw.com

I. INTRODUCTION

Allegations of employee misconduct present serious liability risks for cities as employers. When presented with an employee complaint, a City will be judged by its response to the complaint as well as the steps taken to prevent future recurrence. A prompt, fair and thorough investigation is not only legally required, it is critical to instill confidence that the process was fair and trustworthy and it may give grounds for defending against certain claims that could be asserted if the employee challenges the adjudication of the misconduct in arbitration or the courts. Conversely, a failure to investigate or a poorly executed investigation can expose the City to risk and potential claims as well as seriously damage a City's credibility and public trust, both internally and among the public at-large.

The City Attorney is called upon to oversee the workplace investigation process to ensure the investigations meet legal requirements and comply with the unique substantive and procedural issues that arise when investigating public employees or high level public officials. The investigative process typically consists of the following phases: (1) Responding to the Complaint; (2) Defining the Investigation; (3) Overseeing the Investigation; and (4) Concluding the Investigation. Throughout the process, issues often arise that require legal advice, including: (1) whether an investigation is required; (2) whether any interim measures are necessary and appropriate; (3) whether the investigation should be conducted under the attorney-client privilege protection; (4) how to safeguard confidentiality, privacy, due process and First Amendment rights; and (5) whether and how to disclose the results of the investigation.

Every employee complaint presents a unique set of issues and concerns, which will dictate the City's options for a specific response. This paper is intended to provide practical guidance for City Attorneys by highlighting the various issues that should be considered when responding to complaints of employee misconduct.[1] By understanding the investigative process and common issues, the City Attorney will be in a strong position to ensure that the investigation is done correctly.

1 For a focused discussion of the City Attorney's role see also, "The City Attorney's Role in Employment Investigations" presented at the League of California Cities 2013 Spring Conference, http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2013/2013-Spring-CLE/5-2013-Spring-Hilda-Cantu-Montoy-The-City-Attorney; http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2013/2013-Spring-CLE/5-2013-Spring-Hilda-Cantu-Montoy-City-Attorneys-Ro

II. WHY CONDUCT WORKPLACE INVESTIGATIONS?

A. Legal duty to investigate

Employers have a duty under state and federal law to adequately investigate any employee's charges and claims of discrimination, retaliation, or harassment. Under the Fair Employment and Housing Act (FEHA) and Title VII, taking steps necessary to prevent discrimination and harassment usually includes a prompt and appropriate investigation of the charges and claims.

1. FEHA provides that employers must "take all reasonable steps necessary to prevent discrimination and harassment from occurring."[2]

2. Title VII requires employers to "take all steps necessary to prevent sexual harassment from occurring."[3]

3. Employers should also have written policies that prohibit discrimination, harassment and retaliation, as well describe the employer's complaint procedure.

4. When presented with a complaint, the employer has no discretion to decide not to investigate.

B. Importance of a Well Done Investigation

1. Facilitates resolution of workplace issues at the lowest possible level

2. Conveys message that City expects its employees to comply with policies and procedures governing employee conduct

3. Instills confidence and trust in the process

4. Defends City's position in future disciplinary proceedings or litigation

C. California Law: Prompt and Effective Investigation As A Means To Reduce or Prevent Liability

Under FEHA, "an employer is strictly liable for all acts of sexual harassment by a supervisor."[4] However, if an employer has adequate policies and procedures for reporting and responding to employee complaints, it may

---

2 Cal. Gov. Code, § 12940(k).

3 Title VII of the Civil Rights Act of 1964; 29 C.F.R. § 1604.11(f); see also Equal Employment Opportunity Commission, "Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors," June 18, 1999, http://www.eeoc.gov/policy/docs/harassment.html.

4 *State Department of Health Services v. Superior Court (McGinnis)* (2003) 31 Cal.4th 1026, 1042.

be able to reduce potential damages to the time the employee made the complaint.

The employer must establish that: "(1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered."[5] The courts may also consider the employer's anti-harassment policies and procedures and past record of acting on harassment complaints.[6]

Where employment is "at-will," an investigation can support the employer's "good faith belief" that the employee engaged in conduct that warranted termination, even if employer is later proven to be mistaken.[7]

D. Federal Law: Proper Investigations Can Prevent Liability

Under Title VII, "an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."[8] However, if employee suffers no tangible employment action and the employer has adequate policies and procedures for reporting and responding to employee complaints, there is no liability for a victim who unreasonably fails to use the procedures.[9]

The employer must establish: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[10]

---

[5] *Id.* at 1044.
[6] *Id.* at 1049.
[7] *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93 (following an investigation that was appropriate under the circumstances, employer had had reasonable grounds to believe plaintiff had sexually harassed other employees); *King v. United Parcel Service* (2007) 152 Cal.App.4th 426 (affirming summary judgment on discrimination claims where a proper investigation established that the employer "had an honest, good faith belief" that the employee violated its policy); *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256 (affirming summary judgment on wrongful termination claim where defendant conducted a prompt investigation in which it interviewed critical witnesses, took written statements from witnesses, and gave the accused employee ample opportunity to present his position and correct or contradict relevant statements against him); see *also*, *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 278-279(FEHA decision holding that there was "a triable issue whether the investigation was, in the language of *Cotran*, 'appropriate'").

[8] *See Burlington Indus., Inc. v. Ellerth* (1998) 524 U.S. 742, 765; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 807.
[9] *See Ellerth, supra*; *Faragher, supra*.
[10] *Ellerth, supra*; *Faragher, supra*.

E. Potential Consequences of Failure to Investigate and/or Inadequate Investigation

1. Violation of City policy and state and federal law

2. Employees will view anti-discrimination policies and procedures as ineffective and meaningless, and risk that employees may perceive that investigations are used as a tool for retaliation

3. Discourages future complaints, depriving City the opportunity to resolve workplace issues prior to litigation

4. Undermines City's position in disciplinary appeals and litigation

   a. Investigation put "on trial" in disciplinary appeals and civil litigation

      (i) Inadequate investigation may bolster weak underlying claims

      (ii) Inadequate investigation used to undermine credibility of City decision-makers, even if underlying claims are weak

      (iii) Inadequate investigations can be used to establish ratification of misconduct, pretext and retaliation

   b. Undermines employer's ability to obtain summary adjudication of employment claims[11]

   c. Creates significant liability exposure[12]

---

[11] *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995) (overturning summary judgment where internal investigation gave the appearance of bias against plaintiff: no percipient witnesses interviewed; no interview of plaintiff for several months; harasser's version of events accepted without any corroboration); *Humphries v. CBOCS West, Inc.,* 474 F.3d 387 (7th Cir. 2007) (reversing summary judgment on retaliation claim where no investigation conducted); *Ortega v. Neil Jones Food Co.*, 2014 WL 232358 (N.D. Cal. 2014) (denying summary judgment where investigation did not begin until after several years of prior complaints); *cf. Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830 (affirming summary judgment in favor of defendant as to all of plaintiff's claims, including retaliation, harassment, defamation, and others where defendant conducted an appropriate investigation, which included providing plaintiff a fair opportunity to present her position and correct or contradict relevant statements prejudicial to her case, interviewing pertinent witnesses and providing plaintiff an opportunity to appeal decision).

[12] *Bradley v. California Dept. of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1612 (affirming jury verdict in favor of plaintiff totaling $449,000 in damages where defendant's "bureaucratic" and "removed" investigation was found to be an insufficient remedial measure); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) (affirming jury's verdict of $35,000 in compensatory damages in favor of plaintiff where defendant failed to perform any investigation into plaintiff's allegations of harassment, reversing $50,000,000 punitive damages award, and suggesting an award of $350,000 would be reasonable); *McInerney v. United Air Lines, Inc.*, 463 Fed. Appx. 709 (10th Cir. 2011) (affirming jury verdict in favor of

F. Elements of a Well Done Workplace Investigation Process

1. Conducted by an impartial investigator

2. Prompt and thorough

3. Designed to ensure that all witnesses are interviewed, all relevant documents are gathered and reviewed, and all relevant facts are uncovered

4. Investigation process is well documented

5. Investigation findings are well-reasoned, based on appropriate standards, are supported by evidence and appropriate credibility determinations, and provide basis for City decision-maker to draw reasonable conclusions and take appropriate action

6. Confidentiality and privacy rights are protected to the extent possible

7. Results of the investigation are communicated to the Complainant and Respondent in an appropriate manner

8. Appropriate action is taken to end the inappropriate conduct, if applicable

9. Process improvements and training opportunities that are identified by investigator are shared with proper officials and action taken to rectify process or other shortcomings

III. RESPONSE TO A COMPLAINT OF EMPLOYEE MISCONDUCT

A. Allegations that trigger the need for a workplace investigation

1. Employee complaints of discrimination or harassment

2. Employee complaints of retaliation

3. Whistleblower complaints

4. Allegations of misconduct that could lead to discipline due to violation of City rules or policies

5. Reports of workplace safety issues

---

plaintiff in the amount of $3,000,000 (reduced to $300,000 due to statutory limit) in compensatory damages and $89,877 in back pay, where the employer failed to perform any investigation into plaintiff's sex discrimination complaint); *May v. Chrysler Group, LLC*, 716 F.3d 963 (7th Cir. 2012) (affirming jury verdict of $709,000 where investigation failed to interview key witnesses or take effective remedial measure; reversed $3.5 punitive damages award).

6. Grievances

7. Administrative claims or lawsuits

8. Follow-up investigation items or circumstances identified by an investigator of a related or unrelated allegation or complaint

B. **Refer complaint to appropriate office per City policy and procedure**

1. Supervisors need to be made aware of proper reporting procedures

   a. Harassment, Discrimination and Retaliation

   b. General workplace misconduct

   c. Whistleblower

   d. Special procedures for police and fire as set forth in Department manuals

C. **Evaluate whether any immediate interim actions are necessary**

1. Safety Considerations

   a. Does the alleged misconduct/situation implicate a Workplace Violence policy?

   b. Should a threat assessment team be convened?

   c. Should local law enforcement be notified?

   d. Does the alleged misconduct create an environmental health or safety risk in the workplace?

   e. Should an interim reassignment of an employee or a supervisor be considered pending the outcome of the investigation?

2. Ongoing harassment or harm

3. Institutional Risks

   a. Any risk to financial security/controls

   b. Public relations concerns?

4. Preservation of evidence

   a. Litigation hold

b. Assistance of IT Department in e-mail retention such as when the employer recently changed to a more time-limited "Cloud" or other third-party server storage process

c. Determine who should be notified

D. **Assess whether Respondent Should be Placed on Administrative Leave Pending Investigation**

1. Considerations

a. Allegations, if proven, would be a terminable offense

b. Probability of interference with investigation

c. Probability of misconduct during investigation

d. Respondent in Complainant's chain of command

e. Impact on City operations

f. Can Respondent be transferred, telecommute?

g. Schedule changes to avoid contact with Complainant

2. Due Process Rights

a. Unpaid Leave. Employees are entitled to a *Skelly* meeting not only before a disciplinary termination,[13] but also before any other significant deprivation of a property right in employment, such as unpaid leave[14] or suspension.[15]

b. Involuntary Retirement. An employee who is placed on involuntary retirement also has a right to a pre-deprivation hearing.[16]

c. Paid Involuntary leave. Employees who are placed on *paid* involuntary leave while the employer investigates misconduct charges may, under some circumstances, have due process rights that entitle them to a *Skelly* meeting.[17]

---

[13] *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.
[14] *Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95 (employee on an unpaid involuntary unpaid leave of absence is entitled to a Skelly meeting); cf. *Jadwin v. County of Kern* (E.D. Cal. 2009) 610 F.Supp.2d 1129.
[15] *Civil Service Assn. v. City and County of San Francisco* (1978) 22 Cal.3d. 552.
[16] *Barberic v. City of Hawthorne* (C.D.Cal. 1987) 669 F.Supp. 985; *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (9th Cir. 2011) 648 F.3d 986 (retired employees are also entitled to pre-deprivation due process procedures).
[17] *See Bostean, supra.*

However, with the exception of deprivations short of termination, demotion, or unpaid suspension, the full due process protections are not necessarily required; rather, the procedural due process requirements are determined based on a balancing test.[18]

d. Limitation on *Skelly* Rights. Under certain *limited* circumstances, an employer may substantially limit an employee's *Skelly* rights. For example, an employee who occupies a high profile position and has been charged with a felony can have their rights to a pre-deprivation hearing limited by the employer, so long as they receive adequate post-deprivation hearings.[19]

3. Limited Rights of an "At-Will" Employee

a. No property interest in their position.

b. At will employees have a liberty interest which may entitle employee to a 'name clearing' hearing if their liberty interest or reputation is involved.[20]

c. "Liberty interest" may be demonstrated by the following elements: (1) there must be a stigmatizing charge; (2) the employee must deny the charge; and (3) there must be a public disclosure of the charge.[21]

4. Exclusion of Respondent From Collective Bargaining Process

a. Employer cannot protest inclusion of a terminated employee unless individual's participation creates a "clear and present danger to the bargaining process."[22]

---

[18] *Matthews v. Eldridge* (1976) 424 U.S. 319, 335.
[19] *Association for L.A. Deputy Sheriffs v. County of L.A.* (9th Cir. 2011) 648 F.3d 986.
[20] *Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340.
[21] *Stretten v. Wadsworth Veterans Hospital* (9th Cir. 1976) 537 F.2d 361 (liberty interest is found only when an employer makes a charge that might seriously damage an employee's standing in the community).
[22] *Anaheim Union High School District v. American Federation of State, County and Municipal Employees, Local 3112* (2015) PERB Decision No. 2434 (employee who was terminated for violation of District's anti-harassment policy, among other things, did not present a clear and present danger to preclude participation on union's bargaining team where District did not present evidence to demonstrate employee's presence had a negative impact on the bargaining process).

E. Assess Whether Complainant Can Be Moved

1. Considerations

a. Complainant should not be involuntarily transferred or otherwise burdened as such actions will be viewed as retaliatory.[23]

b. Inquire as to Complainant's preference

(i) Has Complainant indicated a preference for remaining in same position, being transferred, or taking an administrative leave?

(ii) Document the inquiry and Complainant's response

F. Implement anti-retaliation measures

1. Retaliation is an additional risk to the City and individual respondents.

a. A person who has come forward with a complaint, or a witness in a complaint proceeding should not be subjected to any adverse action as result of their participation.[24] Federal and state statutes, as well as local city polices and whistleblower laws prohibit retaliation.

b. Retaliation claims continue to be on the rise and form a large percentage of all claims filed with the United States Equal Opportunity Commission.[25] Issue anti-retaliation warnings to all involved.

2. Provide specific guidance to the Respondent regarding retaliation concerns during a workplace investigation.

a. Explain that any 'bad act' against the Complainant, witness or anyone closely associated with them could be viewed as punishment for complaining or participating in a complaint process.

b. Provide specific examples of what may be viewed as unlawful retaliation/bad acts.

---

[23] *Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F.3d 1459, 1464 (employer failed to take appropriate corrective measures in response to supervisor harassment where it changed plaintiff's shift rather than the supervisor's shift or work location).

[24] *Burlington Northern & Santa Fe R.R. Co. v. White* (2006) 548 U.S. 53, 68.

[25] Equal Employment Opportunity Commission, "Charge Statistics for FY 1997 Through FY 2014," http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

c. Explain the process clearly to the Respondent and let Respondent know that he/she will have full opportunity to tell his/her side of the story and respond to the allegations.

d. Advise Respondent not to take adverse action against the Complainant or the witness before talking with the City Attorney.

IV. DEFINING THE SCOPE OF THE INVESTIGATION

A. Selection of the Investigator

The selection of an investigator, especially in high-profile cases, raises some important considerations upon which the City Attorney and/or labor and employment counsel may be called upon to provide advice. Most important is the consideration of whether the investigation should be conducted with the protection of the attorney-client privilege. Additionally, if it is anticipated that the complaint may result in discipline or litigation, the selection process should closely evaluate whether the investigator has sufficient experience, expertise and demeanor to serve as an effective witness.

1. Recommended qualities of investigator to prepare a prompt, fair and thorough investigation

   a. Impartiality

   b. Professionalism

   c. Experience

   d. Availability

   e. Knowledge of Relevant Laws

   f. Excellent Writing Skills

   g. Articulateness and bearing in the event she/he may become a witness in later proceedings

2. General options

   a. Internal investigator

      (i) Supervisor

      (ii) In-house human resources professional

      (iii) In-house attorney

b. External investigator

(i) Outside counsel. If regular counsel, consider potential loss of attorney-client privilege, potential perception of bias, may become witness

(ii) Outside special counsel. Retained for the limited scope of conducting a workplace investigation.

(iii) Outside *qualified* human resources consultant or private investigator (see below)

3. Who should conduct the investigation

a. Nature and scope of allegations

(i) Requirement of specialized knowledge

(ii) Potential liability to the City

(iii) Number of claimants/witnesses involved

b. Position of the alleged wrong-doers in the City's structure

c. Potential conflicts of interest or relationships that would undermine fairness or impartiality of investigator

(i) No supervision by accused

(ii) No supervisory authority over Complainant

(iii) No role in future disciplinary actions

(iv) Limited prior experience with involved parties

d. Existence or likelihood of administrative, enforcement (DFEH, EEOC, DOL) or civil action

(i) Investigator may later be called as a witness

(ii) Consider attorney-client privilege issues (see below)

(iii) Potential perceived bias of City employee

4. Should the investigation be outsourced?

a. Significant potential liability

b. High level manager or elected official is the accused

c. Human Resources is involved as a party or witness

d. Limited internal resources

e. Limited internal skills and/or time

f. "Problem" employee

5. Legal Qualifications of an Outside Investigator

a. California Private Investigator Act ("CPIA")

(i) An external investigator hired to conduct a workplace investigation must either be a state-licensed attorney or state-licensed private investigator.[26] It is a misdemeanor to engage in business of private investigator without a license and to knowingly engage a nonexempt unlicensed person to conduct a workplace investigation.

(ii) Human resources consultants (external) who are not licensed attorneys or licensed private investigators cannot legally conduct workplace investigations.

6. Special Considerations When Selecting An Attorney As Investigator

In evaluating whether or not to utilize an outside attorney to conduct the investigation, it is important to understand the various legal and ethical obligations that govern the attorney's investigation so that the scope of the investigation and the relationship between the outside investigator and the City's team can be properly addressed and structured.[27] The obligations which should be considered when defining the scope and role of the attorney investigator in the workplace investigation include the following:

a. An attorney can conduct an investigation without being a licensed private investigator, but must be acting as an attorney in order to come within the attorney exemption to the California Private Investigator Act.[28]

b. Attorneys who perform fact investigations and do not render legal advice or make recommendations as part of the investigative process are considered to be providing legal

[26] Cal. Bus. & Prof. Code, §§ 7520-7539.
[27] *See* Lindsey E. Harris and Mark L. Tuft, *"Attorneys Conducting Workplace Investigations: Avoiding Traps for the Unwary."* California Labor & Employment Review, Volume 25, No. 4, July 2011.
[28] Cal. Bus. & Prof. Code, § 7522(e).

services for purposes of the CPIA exemption, as fact finding is considered a necessary part of rendering legal services for purposes of the CPIA exemption.[29] However, the fact investigation may not be protected by attorney client privilege unless the dominant purpose of the report is to provide legal advice. (See, section IV.A.8).

c. An attorney conducting a limited scope investigation may have an obligation to notify the City client of reasonably foreseeable legal problems that the attorney discovers during the investigation, even if those issues fall outside the scope of the agreed upon scope of representation.[30]

d. An attorney retained to conduct a workplace investigation still owes certain fiduciary duties that may not apply to a non-attorney investigator. Such duties include: competence[31], loyalty,[32] avoid conflicts of interest, protect confidential information,[33] and keep clients reasonably informed of significant developments.[34]

e. An attorney retained to conduct a workplace investigation is also bound by ethical rules regarding communications with third parties, such as the duty to refrain from communications with individuals known to be represented by counsel.[35]

7. Extension of Attorney-Client Privilege to Non-Attorneys

a. If a non-attorney is assigned to conduct, or assist, in the investigation, the City Attorney should consider giving the non-attorney an *Upjohn* letter formally documenting that the non-attorney is working at the direction of legal counsel

[29] *Wellpoint Health Networks, Inc. v. Superior* Court (1997) 59 Cal.App.4th 110, 121-22 (attorney performing fact investigation pursuant to an attorney client relationship may be acting as lawyer for purposes of asserting privilege as it relates to the report); United *States v. Rowe*, 96 F.3d 1294 (9th Cir. 1996) (fact finding is a necessary part of rendering professional legal services to clients); *Sandra T.E. v. South Berwyn School Dist.* 100, 600 F.3d 612 (7th Cir. 2010) (law firm's fact investigation of sexual harassment allegations was "an integral part of the package of legal services for which it was hired").
[30] *Nichols v. Keller* (1993)15 Cal.App.4th 1672, 1683-84 (denying motion for summary judgment in a legal malpractice claim finding that attorney retained to represent plaintiff for a limited scope workers' compensation matter may "still have a duty to alert the client to legal problems which are reasonably apparent even if they fall outside the scope of legal representation.").
[31] Cal. Rule of Prof. Conduct, 3-110.
[32] Cal. Rule of Prof. Conduct, 3-310.
[33] Cal. Rule of Prof. Conduct, 3-100.
[34] Cal. Rule of Prof. Conduct, 3-500.
[35] Cal. Rule of Prof. Conduct 2-100.

to gather facts necessary for the attorney to give the City legal advice. [36]

b. Give all witnesses *Upjohn* warnings. Advise all individuals who are interviewed that the investigation is confidential and being done at direction of legal counsel in order to gather facts necessary for the City attorney to provide legal advice.

8. Applicability of Attorney Client Privilege To Protect Report From Disclosure

a. General Standard. For an investigation report to fall within the protection of the attorney-client privilege, the "dominant purpose" of the workplace investigation must be to obtain legal advice or legal services.[37]

b. Waiver of the Attorney Client Privilege. In the litigation context, when faced with an employment discrimination and possibly other claims, the City will most likely want to utilize the investigative efforts as an affirmative defense to the case. If the attorney client privilege is invoked to preclude discovery of the investigation report, that employer cannot do so. [38] Thus, the City should anticipate the need to waive the attorney-client privilege and work product protection to assert that it either took reasonable measures to prevent and correct the situation or that the employee unreasonably failed to take advantage of these measures.[39]

c. Waiver of Attorney-Client Privilege Does Not Apply To All Communications Relating to the Internal Investigation

(i) Where the internal investigation is performed by a non-attorney investigator and in-house counsel, production of non-privileged investigation files created during course of investigation does not waive

[36] *Upjohn* warnings are named after *Upjohn v. United States* (1981) 449 U.S. 383 (1981) (corporate attorney-client privilege applied to a much wider group of Constituents than the corporation's "control group.").

[37] *Costco Wholesale Corp. v. Superior* Court (2009) 47 Cal.4th 725, 746 (courts must determine the dominant purpose of the relationship between the attorney investigator and the employer claiming the privilege); *In re CV Therapeutics, Inc.,* 2006 WL 1699536 at *3-4 (N.D. Cal. June 16, 2006).

[38] *Wellpoint Health Networks, supra.*

[39] *See, e.g., Ellerth, supra*, 524 U.S. at p. 765 (where employee suffers no tangible employment action, employer's reasonable care and/or employee's failure to take advantage of corrective or preventive opportunities is an affirmative defense); *Faragher, supra*, 524 U.S. at pp. 807-809 (evaluated whether the city exercised reasonable care to prevent and correct promptly any sexually harassing behavior); *McGinnis, supra*, 31 Cal.4th at pp. 1043-44 (if employer has good policies and procedure for reporting and responding to complaints, employee's damages cut off to the time when employee made complaint).

the attorney-client privilege, except potentially if the investigation report relies on those files in making a finding and the report is produced.[40]

(ii) Bi-furcating fact-finding and legal advice may help to preserve privilege so long as the attorney assigned to advise the City Attorney and/or decision-maker does not actively participate in the fact-finding process.

(iii) Enter into stipulation that limited production of non-attorney investigation files does not waive attorney-client privilege as to communications between City and its attorneys during course of investigation. Create a privilege log describing nature of document withheld or redacted on attorney-client privilege grounds.

d. Report as a Basis for Disciplinary Action. The City should anticipate disclosure of the investigative report where it is used as a basis of discipline. In such cases, the employee's due process rights require that all materials upon which the City bases its decision be attached to the disciplinary notice.[41] Whether the entire report, along with all supporting documentation, must be produced will ultimately depend upon what the decision-maker reviewed and relied upon and the context.

B. Retention of the Investigator

Once a determination has been made as to who will conduct the investigation, the retention process presents the City with the opportunity to establish a relationship with the investigator that best protects the City's interests. Defining the scope of the investigation and the role of the investigator is essential to ensure that the investigation passes muster as being prompt, thorough and fair. In the case of the attorney investigator, the City should retain the outside investigator to establish an attorney-client relationship directly with the City and the relationship should be structured to maximize the preservation of the attorney-client privilege. [42] Setting forth key expectations of the investigative report at the outset reduces the potential for a report that does not meet expectations. The specification of general terms and conditions provides a legitimate basis for City Attorney oversight as well as a "neutral" basis to communicate

[40] *Kaiser Foundation Hospital v. Superior Court* (1998) 66 Cal.App.4th 1217, 1219-1220.
[41] *Skelly*, *supra*.
[42] If an outside law firm retains the attorney investigator on behalf of the City client, there is the potential that the attorney investigation may not qualify as legal services, since there is no attorney-client relationship established between the attorney investigator and the outside law firm.

with the investigator should concerns arise during the investigation.

1. Definition of Scope.

   Defining the scope helps to minimize the potential for a "run-away" investigation and provides the City with a legitimate basis to direct the investigator to limit the investigation to the scope as agreed upon at the outset of the investigation.

   a. Identify the allegations that are the subject of the investigation and clearly specify that the scope of the investigation is limited to the allegations, as identified.

   b. Specify that if, during the course of the investigation, the investigator becomes aware of issues that are beyond the scope of the investigation, the investigator should contact the City Attorney directly before engaging in any additional investigative work. Further specify that the City Attorney will determine whether to broaden the investigation, or investigate the issues in a separate investigation.

   c. Be extremely wary of any attempt to change the scope of the investigation for reasons other than broadening the investigation to include additional, related concerns as the investigator may document such requests.

   d. Language in the communication of instructions to the investigator is scrutinized by counsel for the disciplined employee for possible bases to challenge objectivity or to infer employer interference. Instructions such as "follow the facts where they may take you" can help mitigate these risks.

2. Instruction Regarding Investigator's Role.

   Defining the investigator's role in the retainer letter reduces potential for insufficient reports and may serve as independent evidence regarding the neutrality and independence of the investigator.

   a. Factual findings vs. findings of violation of policy/law.

   b. Investigator's preferred role is to gather facts and make factual findings that the City attorney or outside counsel will rely upon to render legal advice to decision-maker regarding violation of policy/law.[43]

[43] *Costco*, *supra* (courts must determine the dominant purpose of the relationship between the attorney investigator and the employer claiming the privilege).

c. Description of Findings

(i) Based on City policy and procedure, identify the appropriate terminology the investigator should use to describe findings. (i.e. Sustained, Not Sustained, Unfounded)

d. Credibility Determinations

(i) Instruct the investigator to make every effort to make a determination as to whether the alleged conduct occurred.

(ii) Instruct the investigator to resolve disputed facts by making credibility determinations to the greatest extent possible.[44]

(iii) A best practice is to have the investigator articulate the standards used to gauge credibility, e.g., uses of CACI 107, and a paragraph or section of the report explaining how specific answers, witness demeanor, etc., did or did not meet the standards

e. Investigator's Independence

(i) Affirm the independence of the investigator to develop the investigation plan, including identification of witnesses, review of documents, and timing of interviews as well as the independence of the investigator to make factual findings regarding the allegations set forth in the scope.

3. Instructions Regarding Communications With City Representatives and Witnesses

a. Specify the method of communication during the pendency of the investigation process. Designate an employer representative to serve as the liaison for logistical purposes, if necessary. Limit communications between the City Attorney and the investigator to factual communications regarding logistics and/or issues specified in the retainer letter.

b. If the attorney investigator is also asked to provide legal advice during the investigative process, keep that advice separate and apart from the investigation file.[45]

[44] *See., e.g.,* EEOC 1999 Enforcement Guidance, *supra,* §V(C)(1).

c. Provide the investigator with proper advisements and documentation of advisements to ensure the due process rights of public employees are respected.

(i) Police officers and firefighters must be informed of the nature of the investigation before they are interviewed[46]

(ii) All parties and fact witnesses must be advised of the City's anti-retaliation policy

d. Instructions regarding employee's request to have third parties present during the investigation process.

(i) Police officers have right to representation of choice[47]

(ii) Firefighters also have right to representation of choice[48]

(iii) Represented employees have right to union representation[49]

e. Instructions regarding responses to request to record interviews

(i) Public Safety Investigations. Both parties may interview. If employer records the interview, police officers and firefighters have right to have interviews recorded and to review a transcript of the interview.[50]

(ii) Represented employees do not have a right to a recording of the interview, but a protocol should be consistently applied if a fact witness requests to record the interview..

---

[45] For example, a small City may retain an outside attorney to conduct an initial review of the complaint to determine whether an investigation is necessary and/or advise the City of its options and any immediate measures that must be taken. Any advice the attorney renders at this stage, should be clearly marked as confidential attorney client communications and maintained in a file separate from any investigation file should the City decide to conduct an investigation and retains the same attorney to conduct the investigation.

[46] Cal. Gov. Code, §§ 3303(c) (police); 3253(c) (firefighter); *Hinrichs v. County of Orange* (2004) 125 Cal.App.4th 921.

[47] Cal. Gov. Code, § 3303(h)(i) (police); *Cal. Correctional Peace Officers Assn. v. State of Cal.* (2000) 82 Cal.App.4th 294.

[48] Cal. Gov. Code, § 3253(i).

[49] *N.L.R.B. v. J. Weingarten, Inc.* (1975) 20 U.S. 251, 265-267.

[50] Cal. Gov. Code, §§ 3303(g) (police); 3253(g) (firefighter).

f. Instructions to a Recalcitrant Complainant, Respondent or witness

(i) Public employee can be instructed to answer question truthfully so long as the employer first gives the employee a "*Lybarger*" warning.[51]

(ii) If an employee continues to stand on a Fifth Amendment right to remain silent in the face of a *Lybarger* admonition, the employee risks disciplinary action for refusing to answer. If the employee agrees to answer questions after the *Lybarger* admonition, the employer can use the employee's answers for administrative purposes, but not for criminal prosecution.

(iii) A *Lybarger* warning informs the employee that:

- although the employee has the right to remain silent, the employee's silence will be deemed insubordinate and lead to administrative discipline; and

- any statement made to investigators under these circumstances will not and cannot be used against the employee in any subsequent criminal proceeding.[52]

V. CONFIDENTIALITY AND PRIVACY CONCERNS

A. Employer's Interest in Confidentiality of Investigative Process.

Employers legitimately consider confidentiality of the investigative process to be a critical aspect of ensuring an effective investigation. As a result, it has been almost standard operating procedure for employers, when directing employees to appear for an investigation, to maintain strict confidentiality. Common reasons for requiring confidentiality include:

1. Creation of a climate more likely to support the investigative process and to protect process integrity such as freedom from taint or coaching of later witnesses

[51] Cal. Gov. Code, §§ 3303(h)(police); 3253(h); *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704; *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822; *see also TRW, Inc. v. Superior Ct.* (1994) 25 Cal.App.4th 1834 (*Lybarger* principles apply to all California employees, not just police officers).

[52] *Lybarger v. City of Los Angeles, supra*, 40 Cal.3d at p. 829; Cal. Gov. Code, §§ 3303(f)(1)-(4) (police); 3253(f)(1)-(2) (firefighter).

2. Protection of the Complainant and witnesses from harassment, retaliation and intimidation

3. Protection of the Respondent from public humiliation when charged with claims later found to be baseless

4. Protection of privacy rights of third party witnesses

5. Prevention of the destruction or fabrication of evidence and cover-ups

6. Preservation of the attorney-client privilege and work product protections

7. Compliance with EEOC Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors states that when conducting workplace investigations, the employer should keep the matter confidential to the extent possible.[53]

B. Employee's Interest In Exercising Association Rights and First Amendment Rights

Employer confidentiality instructions have come under increased scrutiny for their potential to interfere with employees' rights to engage in "concerted activities." Recent decisions from the National Labor Relations Board ("NLRB") and the Public Employment Relations Board ("PERB") have invalidated blanket confidentiality instructions to participants in workplace investigations as an unlawful interference on employees' rights under the Meyers-Milias-Brown Act ("MMBA") and the National Labor Relations Act ("NLRA"). [54]

1. Under the MMBA, employees have the right to form, join, and participate in the activities of employee organizations in matters concerning employee-employer relations, and engage in a "wide range of activities without fear of sanction."[55] Protected rights include: hold union office,[56] file grievances,[57] report safety concerns to the employer or union representative,[58] and file complaints with

[53] EEOC 1999 Enforcement Guidance *supra,* § (V)(C)(1).
[54] The MMBA is codified at Cal. Gov. Code, §§3500 – 3511. The NLRA is codified at 29 U.S.C. section 151 et seq.
[55] Cal. Gov. Code, § 3502; *Social Workers' Union v. Alameda County Welfare Department* (1974) 11 Cal.3d 382, 388.
[56] *See Santa Clara Valley Water District* (2013) PERB Dec. No. 2349-M.
[57] *See Bay Area Air Quality Management District* (2006) PERB Dec. No. 1807-M; *City of Modesto* (2008) PERB Dec. No. 1994-M.
[58] *See Menlo Park Fire Protection District* (2008) PERB Dec. No. 1983-M.

the employer regarding collective employment-related concerns shared by other bargaining unit members.[59]

2. Public employee also have the right to speak freely on matters of public concern, and to freely associate with others including unions.[60] Free speech protections apply to police officers as well as other public employees.[61]

C. Employer's Ability to Limit Communications Regarding An Ongoing Investigation

1. Balancing test. A City may restrict communications only if it can show that a legitimate business justification outweighs associational rights, and that the dissemination of information regarding the investigation among employees would interfere with the City's ability to conduct an effective investigation.[62]

2. Blanket Policies Do Not Justify Restrictions on Employee's Associational Rights.

   a. NLRB – *Banner Health.*[63] The Board has ruled that a blanket policy that requires employees not to discuss a complaint with other employees while it is under investigation violates employees' rights under Section 7 of the NLRA to communicate with coworkers about wages, hours, and other working conditions. Employer must demonstrate a legitimate business justification that outweighs the employee's Section 7 rights. A blanket policy does not meet the employer's burden *per se*.

   b. PERB – *Perez v. LACC*. The Board, following *Banner Health,* ruled that a "no-contact" instruction issued to a Respondent in an investigation interfered with Respondent's employee rights under EERA (statute governing labor relations in

[59] *See City and County of San Francisco* (2011) PERB Dec. No. 2206-M; *Metropolitan Water District* (2009) PERB Dec. No. 2066-M; *Los Angeles Union School District* (2003) PERB Dec. No. 1552.
[60] *See, e.g., Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361; *American Federation of Gov. Employees Local 1 v. Stone* (9th Cir. 2007) 502 F.3d 1027, 1030.
[61] *Kannisto v. San Francisco* (9th Cir. 1976) 541 F.2d 841, 843.
[62] *See, e.g., Caesar's Palace* (2001) 336 NLRB 271 (employer's confidentiality rule which prohibited discussion of an ongoing drug investigation constituted sufficient business justification to warrant intrusion on protected rights); *but see Phoenix Transit Systems* (2002) 337 NLRB 510 (blanket rule restricting discussion regarding sexual harassment complaint after investigation concluded did not constitute a legitimate business justification).
[63] *Banner Health System (2015)* 362 NLRB 137, *affirming Banner Health System* (2012) 358 NLRB 93; *Fresh & Easy Neighborhood Market, Inc.,* 361 NLRB 12 (employee who asked co-workers to help preserve evidence for a sexual harassment case was engaged in "concerted activity" for "mutual aid and protection" under Section 7 of the NRLA). *See also* NLRB Advice Memorandum from NLRB Associate General Counsel, dated January 29, 2013.

public schools and community colleges).[64] The employer included the "boilerplate" language pursuant to District policy that was aimed at preventing the employee from tainting evidence. No evidence of any specific concerns was presented.

D. City's Options For Protecting Confidentiality of Investigations

1. Modify any policy that contains a blanket confidentiality provision.

a. NLRB's General Counsel has suggested the following language may pass muster: "[Employer] may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If [Employer] reasonably imposes such a requirement and we do not maintain confidentiality, we may be subject to disciplinary action up to and including immediate termination." [65]

2. Implement a policy that requires documentation, on a case-by-case basis, of the reasons for deciding to instruct the witnesses to keep an investigation confidential.

3. Specify that the investigation is being conducted pursuant to attorney-client privilege in order to provide legal advice to the City.

4. Affirm the directive not to communicate to others except the employee's union representative and/or counsel.

VI. OVERSIGHT OF INVESTIGATION PROCESS

Although the City Attorney has a legitimate oversight function, to minimize the potential of appearance of improper involvement/influence, the City Attorney's role during the investigation process should be limited to the following:

A. Evaluation of any additional issues the investigator identifies to determine whether or not to expand the scope of the investigation

B. Addressing any questions regarding proper advisements and issues related to ensuring employees' due process rights are respected during the process

C. Responding to any concerns regarding retaliation

[64] Cal. Gov. Code, §§ 3540- 3549. *See Los Angeles Community College District* (2014) PERB Dec. No. 2404-E.
[65] *See* NLRB Advice Memorandum from NLRB Associate General Counsel, dated January 29, 2013.

D. Insuring the investigator's procedures are consistent with the City's objective to have the investigator conduct a prompt, thorough, and fair investigation[66]

1. Remember that if the City later seeks to rely on the sufficiency of the investigation as a defense to plaintiff's claims in the litigation or to support disciplinary action, communications with the investigator regarding the investigation will likely be considered non-privileged and subject to discovery.

VII. CONCLUSION OF THE INVESTIGATION PROCESS

A. Review of the Investigation Report

The City Attorney's review of the draft investigative report is essential to make sure that the investigation will pass muster as being objective, fair and thorough. Effective reports will meet the City's expectations as set forth at the outset during the selection and retention process. Once the report is finalized, it should be provided to the decision-maker for review and, if findings are made, a determination of what disciplinary action is warranted. The following determinations will facilitate a thorough review of the report:

1. Whether The Investigation Has Been Properly Documented – Key Elements of the Report

    a. Statement of scope

    b. Explanation of the investigation process

    c. Identification and discussion of applicable policies/procedures

    d. Identification of evidentiary standard used

    e. Discussion of the evidence reviewed and relied upon

    f. Summary of key evidence

    g. Summary of witness statements

    h. Evaluation of evidence

    i. Statement of investigator's findings and conclusions

2. Whether Findings Are Consistent With Scope of Investigation As Defined By Retention Letter

[66] *Silva, supra.*

a. Findings of fact vs legal conclusions

b. Are findings well-reasoned and supported by the evidence?

c. Is there a basis for credibility determinations?

3. Whether Evidence Is Weighed According To Applicable Standard

a. Preponderance of evidence standard

4. Handling Deficiencies In The Report

a. Discoverability: Be mindful that communications with investigator are likely discoverable if investigation is used for discipline or defense in litigation

b. Issue draft report. Request that the draft be circulated to City Attorney prior to issuance of final review

c. Proper management of contract. Identify a deficiency as it relates to the scope and instructions as set forth in the retainer letter

d. Resolve Evidentiary issues. If evidentiary support is weak, inquire as to whether there were any limitations on access to evidence that, if corrected, may help resolve the concern

e. Seek Clarification. If the analysis to support a finding is weak, seek clarification regarding the evidentiary basis for the finding

5. Whether to meet with the investigator prior to adjudicating disciplinary consequences of the factual findings

a. City attorney, HR manager(s), and decision makers often attend such review meetings which can be followed by a candid discussion of legal consequences after the investigator leaves the meeting

b. Opportunity to secure explanation of portions of the report or of key findings so that decision makers have clarity and can resolve ambiguities in the report

c. Such meetings may or may not be privileged under attorney-client privileged

B. Communication of Findings

As noted above, the protection of confidentiality and privacy of the

victim, accused and witnesses, and confidential communications relating to the investigative process, to the extent possible, remain important goals throughout the investigative process. Generally, an investigation report should not be disclosed to the Complainant, Respondent or anyone unless there is a substantiated need to know. However, as discussed below, there will likely be circumstances where the disclosure of the report is appropriate or required by law.

1. Privileges That May Protect Disclosure of an Investigative Report

    a. Attorney- Client Privilege[67]

    b. Attorney Work-Product Privilege[68]

    c. Deliberative Process Privilege[69]

    d. Closed Session Privilege[70]

    e. Employee's Right to Privacy - Confidential Personnel Matter[71]

2. Disclosure to the Complainant

    a. Inform the Complainant that the investigation has concluded and that each of the issues was thoroughly investigated.

    b. Inform the Complainant of the outcome (sustained, not sustained).

    c. Report that appropriate action is being taken, with due consideration to the privacy interests of the Respondent.

    d. Identify a contact person if the Complainant believes retaliation has occurred.

    e. Thank the Complainant for participating in the investigation and invite him or her to ask questions.

    f. Disclosure may be required in the litigation context if the Complainant subsequently pursues a claim.

---

[67] Cal. Evid. Code, § 952.
[68] Cal. Civ. Proc. Code, § 2018.020.
[69] Common law privilege protecting certain pre-decisional recommendations and analysis considered and discussed by City management team and counsel.
[70] Cal. Gov. Code, §54957; 54956.9(b).
[71] Cal. Const. art. 1, section 1; Cal. Gov. Code, § 6254(c), which exempts "Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy"; Cal. Penal Code, § 832.7.

3. Disclosure to Respondent

a. Investigative Report to Support Discipline. Disclosure required as part of the *Skelly* process if decision-maker relies on the report for purposes of disciplinary action.[72]

(i) Production may be limited to what the decision-maker relied on, which may, or may not, include investigator's notes, third-party interviews, etc. Further, the report may be redacted to protect privacy rights of third-party witnesses.[73]

b. Investigative Reports Involving Public Safety Officers. Public safety officers are entitled to notice and opportunity to respond to "adverse comments" entered into their personnel files.[74]

(i) Courts have interpreted this language broadly to include any document that "may serve as a basis for affecting the status of the employee's employment."[75]

(ii) The comment does not have to directly result in punitive action. The mere potential of creating an adverse impression that could influence future personnel decisions concerning an officer suffices.[76]

(iii) Adverse comments placed in any file maintained by the employer are protected, including Internal Affairs files,[77] and files maintained outside the department such as files maintained by an affirmative action or equal opportunity office.[78]

c. Limits on Production. While an officer is entitled to "to discover and respond to any adverse comment about" him/her, the officer is not necessarily "entitled to the entirety

---

[72] *Skelly*, *supra*.
[73] *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264.
[74] Under Cal. Gov. Code, § 3305, "[n]o public safety officer shall have any comment adverse to his interest entered in his personnel file, or any other file used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment indicating he is aware of such comment, except that such entry may be made if after reading such instrument the public safety officer refuses to sign it."; *See Cal.* Gov. Code, §§ 3305 and 3306 (police officers); *McMahon v. City of Los Angeles* (2009) 172 Cal.App.4th 1324 (officer entitled to review copy of investigator report but not the supporting documentation referenced in the report); Gov. Code, §§ 3255 and 3256 (firefighters).
[75] *Aguilar v. Johnson* (1988) 202 Cal.App.3d 241, 251.
[76] *Sacramento Police Officers Association v. Venegas* (2002) 101 Cal.App.4th 916, 926.
[77] *County of Riverside v. Superior Court* (2002) 27 Cal.4th 1324,1327.
[78] *Seligsohn v. Day* (2004) 121 Cal.App.4th 518.

of the Department's investigative record." Thus, a thorough review of the complaint and investigation process should be conducted to prepare a limited production. [79]

4. Disclosure to the Union

Under the MMBA, public employers have a duty to provide information to the exclusive representative for purposes of representing the bargaining unit. [80] The union is entitled to information that is necessary and relevant to effective representation. An employer's refusal to provide such information violates the duty to bargain in good faith unless the employer can show adequate reasons for its failure to provide the requested information.[81] Objections to a request for production of an investigation report may include: confidentiality, privacy rights of third parties, attorney-client privilege and work-product, and not necessary for representation.

a. Necessary and Relevant Standard. Disclosure of an investigation report may be required if the union can establish the report, or specific portions of it, are "necessary and relevant" to effective representation.

(i) An investigation of claims of hostile work environment and unsafe working conditions was necessary and relevant where union showed it was necessary to represent its members in being free from hostile work environment and to work in a safe workplace.[82]

[79] *McMahon, supra,* 172 Cal.App.4th at 1327(Department provided the officer with a copy of the citizen complaint, the complaint face sheet, the complaint adjudication form, the employee interview form, the commanding officer's letter of transmittal, and a redacted version of an eight page "fact sheet" that resulted from an internal investigation).

[80] Cal. Gov. Code, § 3505 states, in relevant part: "'Meet and confer in good faith' means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely, information, opinions and proposals, and endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year."

[81] *Stockton Unified School Dist.* (1980) PERB Dec. No. 143, 4 PERB ¶ 11189.

[82] *City of Redding* (2011) PERB Dec. No. 2190-M (City ordered to produce report and witness statements, subject to redaction of all employee names and identifying information where union asserted access to report necessary to represent its members in being free from a hostile work environment and to work in a safe workplace); *American Baptist Homes of the West d/b/a/ Piedmont Gardens* (2015) 362 NLRB 139 (employer failed to establish any specific basis to preclude production of report, along with witness statements to the union).

(ii) An investigation report of a supervisor who was outside the bargaining unit is not necessary and relevant.[83]

(iii) Investigation report into applicant's threats not necessary and relevant where union claimed it wanted to determine whether investigation was "thorough." [84]

5. Disclosure To The Public

In general, the California Public Records Act exempts the disclosure of public records that would result in an unwarranted invasion of privacy, which includes personnel files.[85] However, the courts engage in a balancing act that weighs the individual's right to privacy against the public's interest in disclosure and have ordered the disclosure of investigation reports (or portions thereof), where the reports reflect allegations of a "substantial nature" and are reasonably "well-founded."[86]

a. A report may be subject to production, even if no discipline was imposed, if the court determines that the complaints reflect allegations of a substantial nature and there is reasonable cause to believe the complaint was well-founded.[87]

b. Public's interest in disclosure is greater where the investigation involves a high-ranking official.[88]

c. Public interest in disclosure is greater where the investigation involves a public employee in a position of trust.[89]

---

[83] *State of Cal. (Dept. of Consumer Affairs)* (2004) PERB Dec. No. SA-CE-1385-S, 28 PERC 98 (union not entitled to investigation report of a supervisor who was outside the bargaining unit.).

[84] *State of Cal. (Dept. of Consumer Affairs)* (2004) PERB Dec. No. SA-CE-1385-S, 28 PERC 98 (no production of investigation report into applicant's threats where union claimed it wanted to determine whether investigation was "thorough").

[85] Cal. Gov. Code, § 6254(c), which exempts "Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."

[86] *Chronicle Pub. Co. v. Superior Court* (1960) 54 Cal.2d 548, 569 (unfounded charges against members of the state bar would cause irreparable harm and should not be disclosed, sustained charges subject to disclosure); *American Federation of State, County and Municipal Employees v. Regents of the University of California* (1978) 80 Cal.App.3d 913 (ordering limited disclosure of portions of an audit report)

[87] *Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041.

[88] *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 755 (investigation report into a high school superintendent, who voluntarily resigned following an investigation into allegations that he verbally abused students and sexually harassed female students, was disclosed with limited redaction to protect privacy interests of pupils).

6. Waiver of the Privilege To Assert An Affirmative Defense In The Litigation Process

The investigative report will likely serve as a critical piece of evidence to support a number of defenses to employment claims. Where the City puts the investigation at issue, privileges are waived and disclosure is required.[90] However, even where production is appropriate, the City should seek to redact those portions necessary to protect third party privacy rights. [91] Common defenses that require a waiver, include:

a. Adequacy of investigation [92]

b. Same decision defense

(i) CACI 2731 Labor Code Section 1102.6 (whistleblower) requires clear and convincing evidence in a mixed-motive whistleblower case

(ii) FEHA and Title VII apply preponderance of evidence to mixed-motive discrimination/harassment/retaliation cases[93]

c. Good Cause/Business Judgment (CACI 2404, 2405)[94]

d. After Acquired Evidence Defense [95]

C. Post Investigation Measures

Once the investigation process is concluded, the City Attorney's role does not end. The City Attorney's role in the post investigation process depends on the outcome of the investigative process. The most significant steps at this stage of the process include:

1. Implementation of remedial measures, if necessary

---

[89] *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250 (investigation of allegations of sexual harassment by a teacher subject to disclosure even though it only resulted in a reprimand).

[90] *Southern California Gas Co. v. Public Utilities Commission* (1990) 50 Cal.3d 31, 41(waiver where "client has put the otherwise privileged communication at issue and that disclosure is essential for a fair adjudication of the action."); *Walker v. County of Contra Costa* (N.D. Cal. 2005) 227 F.R.D. 529, 535 (employer waived attorney-client privilege by asserting adequacy of pre-litigation investigation as a defense to discrimination claims*); see also*, *Wellpoint Health Networks, supra,* 59 Cal.App.4th at 121-129.

[91] *Wellpoint Health Networks, supra; Kaiser, supra,* 66 Cal.App.4th 1217 at 1223.

[92] *Id.*

[93] *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 239.

[94] *Pugh v. See's Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330; *Cotran, supra,* 17 Cal. 4th at 107.

[95] *Finegan v. County of Los Angeles* (2001) 91 Cal.App.4th 1, 9.

a. What steps, if any, should be taken to make Complainant whole?

b. Training of supervisors regarding anti-harassment/discrimination policy and procedure

c. Create or revise policies to address the misconduct at issue, if necessary

2. Commencement of disciplinary process, if applicable

3. Protection against retaliation

4. Preparation of City's defense in any employment-related claim arising from the conduct that triggered the investigation in the first place