City Attorney’s Role in Employment Investigations

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I. Introduction

The City Attorney’s role in investigation and litigation is inherently substantive. This paper emphasizes and takes a focused approach to the City Attorney’s role in selecting and retaining an investigator, overseeing the investigation and preparation of the report, protecting that report from unnecessary disclosures, and defending the investigator as a witness in litigation. By taking the suggested proactive precautions, City Attorneys help ensure that investigations are done correctly the first time, will stand up to scrutiny at a hearing, that reports will not inadvertently disclose inappropriate (or damaging) legal or policy judgments, and that the City’s investigator will appear competent and credible on the witness stand should litigation ensue. Assuming this is the case, cities will enjoy additional protection from frivolous lawsuits, while at the same time working to identify and remove problem employees from the work environment.

II. The City’s General Duty to Investigate

It goes without saying that cities must generally investigate employee misconduct. Cities enact policies and procedures for a reason, and it is imperative that they be generally obeyed. For example, a thorough workplace investigation can be crucial to establishing just cause in a disciplinary appeal proceeding or other legal proceedings. However, it is also the case that cities may violate the law if they fail to investigate certain types of misconduct. For example, Title VII "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult", and cities may be liable for failing to address known hostile or offensive work environments.1 As a result, City Attorneys must conduct prompt and thorough investigations any time they (or the city manager, the city council, other supervisors, department heads, etc.) receive a complaint regarding employee misconduct.

Case Study

In Meritor Savings Bank v. Vinson2, the U.S. Supreme Court addressed the circumstances under which employers may be held liable for tolerating an offensive working environment. The plaintiff in Meritor alleged that her supervisor constantly subjected her to sexual harassment both during and after business hours and on and off the employer's premises, that he forced her to have sexual intercourse with him on numerous occasions, fondled her in front of other employees, followed her into the women's restroom and exposed himself to her, and even raped

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her on several occasions. The plaintiff also alleged that she submitted for fear of jeopardizing her employment. The plaintiff testified, however, that this conduct had ceased almost a year before she first complained in any way. The employer (and supervisor) also denied the allegations.

On the issue of employer liability for supervisory misconduct, the Supreme Court held that employers could conceivably be liable for the actions of supervisors and that express notice by the employee is not always required. As a result, City Attorneys must be proactive in addressing potentially hostile employment situations where evidence of such exists and not just where an employee has complained.

III. Step One: Selecting and Retaining an Investigator

Once it is clear that an investigation will be necessary, the City Attorney’s first—and probably most important—responsibility is choosing an investigator. Investigators will be responsible for: (1) conducting the investigation; (2) evaluating the facts; (3) rendering a factual determination; and (4) writing the report. Errors in this regard can be serious. For example, employees in discipline cases may challenge the fairness or accuracy of the investigation, thereby subjecting the investigation itself to scrutiny at a hearing or judicial proceeding. If litigation ensues as a result of alleged harassment, the written report and the investigator’s binder, including the investigator’s notes, may be discoverable. For these reasons, it is crucial that City Attorneys select individuals who are capable of conducting prompt, fair, and thorough investigations.

A. Who should be selected?

City Attorneys have a range of options available when it comes to selecting an investigator. It is important to remember that no one “type” of investigator is superior. Different situations call for different skillsets, and investigators can be any of the following persons:

- Supervisor
- Human resource or personnel employee,
- A licensed consultant or a private investigator, or
- Another attorney.

Standard disciplinary investigations of a regular employee could probably be handled well enough by his supervisor, or a City Human Resources/Personnel Department employee. This person would have the benefit of being acquainted with the City’s policies and procedures, would be a familiar face to the employees, and would likely not be affected by the investigation such that his report would appear biased or partial.

On the other hand, such an individual would probably not be as suitable for conducting an investigation into a high level employee (e.g., a City Manager, a Department Head, or a City Councilmember). In these instances, an outside attorney or a private investigator may be a better
choice, as the investigation will necessarily be more complex, and city employees may not be free from influence in such circumstances; local or internal politics could also prove distracting.

Regardless of who is chosen, all investigators must ultimately share the same three characteristics: credibility, rank, and experience. In general, it is preferable to have the investigation conducted by an upper management employee who is higher ranking and has established credibility within the agency. However, a lower ranking investigator can be vested with authority by a supervisor to require employees who are otherwise above him/her in the chain of command to participate in an administrative interview. The investigator should also be someone who is knowledgeable in the area that is being investigated, such as harassment, including the agency’s policies and procedures that prohibit the alleged conduct and the type of conduct that violates the agency’s policy. Since investigating is a learned skill, the investigator should also either be trained or have experience in conducting investigations.

Personality, impartiality, capacity for the job, and report writing ability are also all very pertinent.

1. Personality, Demeanor, and Character

All investigators should be patient, thorough, and assertive. Many investigations involve interviewing people who are reluctant to provide information. The investigator must be capable of pursuing lines of questioning with individuals who are reluctant or deceptive during an interview while remaining unbiased and maintaining a non-accusatory, positive rapport with interviewees.

Administrative investigations in particular should always be conducted in a professional and courteous manner. Nevertheless, any proceeding which can result in the imposition of discipline may become adversarial and confrontational. The most effective investigators will be those persons who avoid appearing to be advocates for one party or another (or even the City itself). Neutrality and objectivity enhance the credibility of the investigator and the investigation; thus, investigators who demonstrate impartiality and integrity will be more effective in conducting investigations.

2. Impartiality

More important than personality is impartiality. Fair investigations require unbiased investigators. Moreover, investigators must not have any biases toward the nature of the allegations being investigated (e.g., harboring a belief that women who complain about sexual harassment at work tend to be dishonest). Another investigator should be assigned where there is any doubt as to the investigator’s ability to remain impartial throughout the course of the investigation.
3. Accountability, Continuity, and Experience

Also essential are the traits accountability, continuity and experience. For this reason, it’s recommended that one person from within the agency be responsible for investigating all harassment complaints. Of course, some situations will warrant exceptions; however, whenever possible, one person should be responsible from start to finish.

4. Report Writing Ability

Lastly, investigators must be able to compile and analyze the data from the investigation in a concise and organized manner. Good reports will include credibility assessments and specific factual evidence supporting their conclusions. It is also imperative that investigators understand the difference between making factual findings (appropriate) and conclusions of law (probably inappropriate).

B. Special Considerations Regarding the Use of Attorneys

As discussed above, investigators must gather facts, make credibility determinations, prepare factual findings and issue a report (which will likely be discoverable). It is generally then the City Attorney’s responsibility to conduct a legal analysis and develop conclusions about the conduct, potential liability and similar legal issues. As a result, this report would probably be privileged and not subject to mandatory disclosure.

Will this privilege necessarily attach to an investigative report simply because it was prepared by an attorney? It is uncertain. It is possible that, when an attorney is the investigator, the attorney-client privilege and attorney work-product doctrine may prevent disclosure of the attorney/investigator’s notes, reports, and other information gathered during the investigation. Thus, when an investigation involves highly sensitive allegations, the agency may consider having an attorney conduct the investigation. However, it is becoming more difficult to shield investigative reports even when an attorney is acting in an investigative capacity. Eventually, it may be necessary to disclose information gathered during the investigation in order to establish that a fair and thorough investigation was conducted. In fact, if litigation ensues as a result of the investigation, the investigator may be compelled to disclose the details of the investigative process, their notes, the report(s), and any other work product created as part of the investigation.

Case Study

In Wellpoint Health Networks, Inc. v. Superior Court\(^3\), an employee complained to the employer that he was subjected to racial discrimination. A law firm conducted an investigation of the allegations. Litigation followed, and the employer defended suit on the grounds that it had made a full and thorough investigation and taken appropriate remedial action. The plaintiff-employee sought discovery of the investigation report, but the employer refused on the grounds that it was

privileged.

Here, the court held that if an employer defends a lawsuit by claiming that it conducted a thorough investigation and took an appropriate corrective action, “it does so with the understanding that the attorney-client privilege and the work product doctrine are thereby waived.” Here, the employer put the investigation at issue by setting forth a defense that a proper investigation was conducted. However, the court in Wellpoint did note that by retaining an attorney to conduct an investigation, an employer establishes a prima facie claim of attorney-client privilege.35

City Attorneys may also wish to consider using an attorney to direct a third-party investigation. When an attorney directs a third party investigation, but takes no part in the fact finding, the attorney work-product doctrine may temporarily prevent disclosure of the investigator’s notes, reports, and other information gathered during the investigation.4 However, as in Wellpoint Health Networks, Inc., it may be necessary to subsequently disclose the investigation report to establish that a fair and thorough investigation was conducted. In fact, if a complainant files a charge and/or lawsuit for alleged violations of harassment, discrimination and/or retaliation laws, the investigator may be compelled to disclose the details of the investigative process, his/her notes, report, etc.

Thus, as a matter of best practices, the attorney directing the investigation should direct their investigator to only gather facts, make credibility determinations, prepare factual findings and issue a report. Although this report will likely be discoverable, the directing attorney may then conduct a legal analysis and develop conclusions about harassment, potential liability, and similar legal issues. As long as the directing attorney does not participate in the fact finding functions, the attorney’s legal analysis is privileged.5

C. Special Considerations Regarding the Use of Private Investigators

Many times, employers are unclear whether the persons conducting investigations on their behalf must hold private investigator licenses. California Business and Professions Code, sections 7521, et seq., sets forth California’s “Private Investigator Act.” Under the Act, any person engaging in a business as a private investigator without a license is guilty of a misdemeanor punishable by a fine of $5,000 and/or by imprisonment in the county jail not to exceed one year. Similarly, any person who knowingly engages a nonexempt unlicensed person also is guilty of a misdemeanor punishable by the same amount of fine and term of imprisonment.

The Act defines a “private investigator” as:

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[A] person...who...engages in business or accepts employment to furnish, or agrees to make, or makes, any investigation for the purpose of obtaining, information with reference to:

(b) The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person.

(e) Securing evidence to be used before any court, board, officer, or investigating committee.

For purposes of this section, a private investigator is any person, firm, company, association, partnership, or corporation acting for the purpose of investigating, obtaining, and reporting to any employer, its agent, supervisor, or manager, information concerning the employer’s employees involving questions of integrity, honesty, breach of rules, or other standards of performance of job duties.

Notably, however, the Act specifically exempts “an attorney at law in performing his or her duties as an attorney at law.” Thus, under the plain language of the Act, only outside consultants, other than attorneys, hired to investigate claims of harassment or misconduct need to be licensed private investigators.

D. Suggested Retention Language

Selecting an investigator is only one-half of the selection and retention process. If an outside investigator is chosen, the City Attorney should pay special attention to properly defining the scope of the investigation; e.g., what specific allegations are going to be investigated and how findings should be described, etc. These parameters should be set forth clearly in the retention documents. For example:

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Example 1: Retention Language Identifying the Scope of Investigation

Dear Investigator:

Your role as investigator is to gather facts and make factual findings, which this office will use to assess a recommendation as to the allegations and the appropriate course of action. Your investigation is limited to the allegations listed above. Please advise me of any additional, related allegations that may arise in the course of the investigation so that this office can determine whether to broaden the scope of the investigation. You are not to investigate any additional allegations unless this office has broadened the scope of the investigation.

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Example 2: Retention Language Identifying How to Describe Findings

Please use the following terminology to describe your findings:

Sustained: The alleged conduct occurred.

Not Sustained: There is insufficient evidence to determine whether the alleged conduct occurred.

Unfounded: The investigation established that the allegation is not true.

Example 3: Retention Language Requiring Credibility Determination

You are directed to make every effort to resolve credibility issues in order to reach a determination regarding whether the alleged conduct occurred. For this reason, you should not reach a “not sustained” finding merely because there are no witnesses to the allegations aside from the complainants. To the greatest extent possible, you should resolve credibility issues through an examination of potential motives to fabricate or deny charges, and through circumstantial evidence such as timing or similar sustained charges.

Example 4: Retention Language Establishing Neutrality

You are solely responsible for making factual findings that address the allegations listed above. Neither the [Agency] nor the attorneys of this office will participate in these tasks. You retain complete discretion regarding which witnesses to interview and which documents to review. The one exception to this rule is that upon receipt of your report, this office may request further investigation or findings, as needed, to assist in rendering an accurate legal opinion or appropriate legal advice. Our primary concern is that the investigation and resulting report be thorough and impartial.

Similar language may be used in explaining the scope of the investigation to internal investigators as well.

IV. Step Two: Controlling Employee Speech During the Investigation (Legally)

City Attorneys must keep investigations as “clean” as possible and avoid unnecessary interference from gossip or other similar practices. The City can be vulnerable here. For example, the National Labor Relations Board (“NLRB”) recently determined that employers may violate the “association rights” of employees under the National Labor Relations Act (“NLRA”) by maintaining broad policies that require employee-witnesses in an investigation to refrain from discussing the matter with other employees.7 Similarly, the Equal Employment Opportunities

Commission ("EEOC") has suggested that such policies may be unlawful under Title VII insofar as they chill "protected opposition" to discriminatory, retaliatory, or harassing conduct.\(^8\)

For now, the NLRB’s broad interpretation of “association rights” under the NLRA is not binding on government agencies. Nevertheless, NLRB precedent is relevant (and often persuasive) for the California Public Employment Relations Board (“PERB”), and it is foreseeable that they may adopt a similar position in the future regarding the scope of employees’ rights under the Meyers-Milias-Brown Act (“MMBA”).\(^9\) Moreover, Title VII is applicable to government agencies, raising the possibility that policies prohibiting employees from discussing possible discrimination, harassment, or retaliation are \textit{per se} unlawful.

It is too soon to tell now whether these recent developments signal a permanent change in the law. In the meantime, City Attorneys should consider three possible responses to these changes:

1. Review and modify, where appropriate, all internal investigation policies, procedures and forms to determine whether there are nondiscretionary requirements that employees always be instructed to maintain confidentiality of workplace investigations.
2. Ensure that internal investigation policies provide guidance on when such confidentiality instructions are appropriate.
3. Focus on increasing the speed of investigations, i.e., ensure that investigators are well qualified, can complete the investigation in an efficient manner, and therefore mitigate risks of witness contamination during the investigative process.

**Case Study**

In \textit{Banner Health}, a private hospital’s practice of asking employees who made complaints not to discuss the complaints until the hospital had completed its investigation.\(^10\) At some point, a technician filed a complaint with the hospital regarding its method of sterilizing surgical instruments. Despite being instructed not to discuss the complaint, the technicians went ahead and did so anyway, claiming that continuing to clean the instruments as directed would endanger patients. He received a "coaching" from his supervisor, and filed a complaint with the NLRB alleging that the coaching was retaliation for protected activity, e.g., filing a complaint.

The NLRB eventually held that that the request for investigation confidentiality violated the NLRA rights of the employees involved. Section 7 of the NLRA protects the rights of employees to communicate with coworkers about wages, hours, and other terms and conditions of employment. The NLRB stated that in order to justify a prohibition on employee discussion of ongoing employee misconduct investigations, the employer must demonstrate a legitimate

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\(^8\) EEOC Enforcement Guidance: \textit{Vicarious Employer Liability for Unlawful Harassment by Supervisors} (June 18, 1999), EEOC Compliance Manual (BNA), N:4075 [Binder 3].


business justification that outweighs the employee's section 7 rights. It stated that the employer's generalized concern about protecting the integrity of its investigations was insufficient. Rather, the employer has an obligation to determine whether witnesses need protection, evidence is in danger of being destroyed, testimony may be fabricated, or there is a need to prevent a cover up. The NLRB found that the application of no-discussion policy to this particular context had a reasonable tendency to coerce employees, and so constituted an unlawful restraint of Section 7 rights."

V. Step Three: Allowing the Investigator Latitude

City Attorneys necessarily take different perspectives regarding the appropriate level of their involvement in the investigation once it has begun. For example, some City Attorneys prefer to be fairly involved in the investigation. Some do not. Accommodating the City Attorney’s desires in this context can sometimes be difficult for investigators because the need to keep the City Attorney apprised of developments in the investigation may infringe on the investigator’s discretion to conduct the investigation as they deem necessary. On the other hand, some investigators appreciate receiving direction during the course of their investigation.

Where this issue arises, it is ultimately the City Attorney who must take responsibility for identifying (and respecting) the line between proper oversight/facilitation of the investigation and improper direction of the investigation. The latter should be avoided, as too much interference may taint the investigation rendering the report unusable and any subsequent discipline invalid. We suggest that this balance is properly struck where the City Attorney intervenes: 1) if/when the scope of the investigation may necessarily be modified based on changed allegations (City Attorney decides if scope of investigation broadens or not and so directs investigator); and/or 2) to ensure that the relevant legal standards are being observed.

However, this raises a question regarding the relevant legal standards: What are they? The courts have not been specific. Addressing this inherent ambiguity, Justice Stanley Mosk once wrote:

Although we do not dictate the precise form that the employer must adopt, fair procedure requires that the employee have a truly meaningful opportunity to tell his or her side of the story and to influence the employer’s decision.\(^{11}\)

This is only the minimum, however, and California courts have not all agreed on any definite set of criteria.

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Case Study

In Silva v. Lucky Stores, Inc.\(^{12}\), the Fifth District California Court of Appeal considered whether

Lucky Stores had conducted an “appropriate investigation” into an employee’s allegation that she had been sexually harassed. The investigator in Silva interviewed two sexual harassment complainants, the alleged aggressor, and several other Lucky Stores employees. The alleged aggressor was interviewed three separate times. At the completion of his investigation, the investigator concluded in a written report that it was “reasonable to assume” that both complainants had suffered sexual harassment. The employee was terminated as a result. The employee subsequently brought suit, alleging breach of an implied contract not to terminate except for good cause and breach of the implied covenant of good faith and fair dealing.

The Silva court began by stating that: “The question critical to defendants’ liability is not whether plaintiff in fact sexually harassed other employees, but whether at the time the decision to terminate his employment was made, defendants, acting in good faith and following an investigation that was appropriate under the circumstances, had reasonable grounds for believing plaintiff had done so.”

In analyzing the employer’s good faith and the appropriateness of the investigation under the circumstances, the Court considered the following evidence:

- The employer maintained a written policy specified how harassment claims would be investigated.
- The investigator, an HR employee, had training on conducting investigations.
- The investigator followed the investigation policy.
- The investigator asked open-ended questions.
- The investigation began promptly.
- The interviews were recorded and some witnesses gave written statements.
- The investigation was kept confidential.
- The investigator re-interviewed the accused, giving him/her the chance to comment on information gathered from other witnesses.

Despite this prima facie evidence that a good faith, appropriate investigation occurred, the employee challenged the sufficiency of the investigation on several grounds. He argued that: (1) inconsistencies were present in witnesses’ statements; (2) the investigator failed to verify what employees were working on what days and were able to witness the alleged misconduct; (3) the investigator failed to interview various key employees; (4) the investigator failed to consider information suggesting an ulterior motive, information regarding complainants’ work histories, and omitted other information that may have benefitted the employee’s claims. Despite this criticism, the Court concluded: “While the investigation was not perfect, it was appropriate given that it was conducted ‘under the exigencies of the workaday world and without benefit of the slow-moving machinery of a contested trial.’”

Thus, while Silva ultimately held that this investigation was “appropriate” and the employee’s termination was warranted, it also demonstrates just how much an investigation can be critiqued.

Accordingly, the City Attorney should do his/her best to ensure that the investigation procedures (and actual practices) reflect the following:

- An effective intake procedure for complaints.
- Understanding regarding the complaint’s allegations.
- Recognition of the need to investigate.
- That the City took the complaint seriously.
- That the investigator had training and experience conducting investigations.
- That the investigator was neutral and not biased.
- That the investigation was thorough.
- That the investigation’s findings are supported by the evidence.
- That the investigation began promptly and took a reasonable amount of time.
- That the investigator’s report is well-written, clear, and reflects a thorough investigation.
- That the City took prompt, corrective action (where appropriate) once the investigation was completed.
- That the City took steps during the entire process to prevent retaliation.

We also recommend that the City Attorney designate one individual to serve as the investigator’s logistical contact; e.g., an individual he/she may contact regarding the scheduling of interviews or for arranging for the production of documents. More importantly, the City Attorney should also ensure that this individual does not “poison the well”; i.e., ask investigator for legal advice, express opinions to or “gossip” with the investigator, or divulge privileged communications to investigator.

Thus, the City Attorney’s role may be very important during the investigation depending on the level of experience the investigator has and the complexity of the investigation.

VI. Step Four: Preparing the Report

Ensuring that the investigative report is prepared properly is probably the City Attorney’s most important task with regards to overseeing the investigation. Effective reports will contain the investigator’s factual findings and credibility determinations, but should omit legal and policy conclusions. Given the importance of the investigative report, it is crucial that the City Attorney set forth his/her expectations of the report at the outset of the investigation.

A. Familiarity with City Policies and Procedures

Preparation for the report actually begins as soon as the investigator is chosen. Acquiring familiarity with the type of behavior prohibited by the City’s policies and procedures should be the investigator’s first duty. For example, an investigator investigating a possible abuse of sick leave must know how abuse of leave is defined in agency policy in order to gather relevant facts. Similarly, many cities have policies against romantic relationships between employees,
especially between superior and subordinate, against the use of their computers for non-work related email, and other similar, legal—yet prohibited—conduct. In these circumstances, investigators who do not understand the relevant City policies may fail to include all of the relevant information in their report. For this reason, City Attorneys (or their agents) must ensure that investigators review city policies prior to undertaking the actual investigation.

B. Making Factual Findings

While most City Attorneys will not oversee investigations at the day-to-day level, it remains their responsibility to ensure that the report is valid. In this regard, the City Attorney’s first concern is checking that the investigator has made appropriate factual findings.

“Appropriate” factual findings do all of the following:

- Address every factual allegation in the complaint (if there is one);
- Identify the factual bases for any of the allegations;
- Identify the absence of factual bases for any such allegations;
- Identify the factual bases for any responses/counter-allegations raised by witnesses or accused individual; and
- Identify the absence of factual bases for any responses/counter-allegations raised by witnesses or accused individuals.

A report that fails to do any of the above will be inherently unreliable and—worse—subject to successful challenge at a hearing or trial. Clearly, this possibility should be mitigated against as much as possible.

C. Making Credibility Determinations

It is likely that important material facts will be in dispute after the investigation has concluded. In these circumstances, investigators must weigh the relative credibility of the complainant, alleged harasser, and witnesses. Any differences in their recollection may be honest; e.g., the result of inattention of a witness at a particular time, reliance on hearsay, influence of personal friendships, or the possibility that a witness was not in an adequate position to have heard or observed the matters in dispute. Moreover, witnesses may not tell the complete truth because they do not want to subject themselves or others to possible discipline or other adverse treatment. These considerations necessitate “credibility determinations” on behalf of the investigator and will ideally be resolved after consideration of the following:

- What is the basis of the factual discrepancy?
- Was each witness in a position to observe the conduct in question?
- Does any witness have a motive to lie or tell less than the full truth?
- Were there other possible witnesses to the events?
- Did one of the witnesses make a contemporaneous statement to another person regarding the event?
- Did either witness make a contemporaneous note or write a complaint recording the event close in time to the incident?
- Were all of the statements internally consistent
- Were all of the statements consistent with each other?

These determinations are important, as conflicting statements are routine and the investigator is usually in the best position to credibly judge every interviewee’s veracity for truth; a judgment call the City may have to rely on in litigation.

D. Legal/Policy Conclusions

It will often be in the City’s best interest to have an investigator refrain from making legal or policy conclusions. This is especially problematic where an investigator may not fully understand the relevant legal (or agency) standards, and the investigator goes on to make erroneous conclusions about violations of law or policy as a result. The employer will then be left with nothing other than an erroneous investigation report that could nonetheless prove extremely damaging at hearing or trial. For these reasons, it is almost imperative that City Attorneys consider using only legal counsel to make conclusions of law.

E. Bad Reports

Despite the City Attorney’s best efforts, it is inevitable that some investigative reports will turn out poorly. For whatever reason, factual findings were not made, key witnesses will not have been identified or spoken to, key documents may not have been considered, credibility determinations may not have been made, etc. It is the City Attorney’s responsibility to address these issues head on when they arise. If the investigator’s role was spelled out clearly with appropriate retention language, the City Attorney should not hesitate to go back to the investigator to ask him/her to complete the job he/she was asked or retained to do, and if needed, to supplement the report; however, proceeding with caution is imperative as the City Attorney does not want to be perceived as inappropriately influencing the investigation outcome, especially since the communications between the City Attorney and the investigator may be discoverable. City Attorneys should consider asking for a draft report to make sure all assigned tasks were completed and not because the City Attorney wants to change the findings. It is recommended that any follow up with the investigator be focused, specific, and in writing.

VII. Step Five: Protecting the Report from Unnecessary Disclosure

Once the report is prepared, City Attorneys should do their best to ensure that the investigator’s written report is maintained in confidence. A copy should not be given to the complainant, alleged wrongdoer, or anyone else, unless they have a substantiated need-to-know. There are circumstances, however, where disclosure of the report may be appropriate or required by law.
A. Disclosure to the Complainant

In some instances, it may be appropriate to disclose the contents of an investigative report to a complainant. How much should be disclosed depends on the circumstances. For example, the decision to share the investigation results and disciplinary action with the complainant may mean that employees will not want to participate in workplace investigations, and even if they do, may not reveal all the key information they possess. On the other hand, certain complainants may insist that they have a right to the investigation report or claim a need to acquire a copy of it. Generally, these demands must be balanced against the offending employee’s privacy rights.

Where unlawful harassment is concerned, the City’s interest in disclosure may outweigh the offending employee’s right of privacy. Communicating the results of the investigation to the complainant may be a critical aspect of the employer’s obligation to respond effectively to the complaint. While the offending employee may have a right to privacy as to the general public, the right of privacy is not absolute and triggers a balancing of the public interest in disclosure against protection of the individual’s right to confidentiality.

City Attorneys should be mindful that this balance sometimes favors disclosure to the complainant. Communication to the complainant should demonstrate the employer’s belief that claims of employee misconduct are serious and that the employer is committed to a safe and non-hostile working environment. A complainant who has knowledge of the disciplinary action taken against the perpetrator of misconduct is also less motivated to pursue further legal action knowing that the perpetrator has been appropriately disciplined for the conduct triggering the complaint.

B. Disclosure to the Respondent

Disclosures to the accused will often depend on the findings of the investigation. Where the City determines that a complaint is unfounded, the accused may simply be advised of the findings. However, if misconduct is found and discipline ensues, the offending employee’s due process rights affect the City’s disclosure obligations. Specifically, where a City relies on the investigation report as a basis for the discipline, Skelly requires that the report be attached to the Notice of Intent to Discipline. Nonetheless, the City Attorney should review the report prior to attaching it so as to protect the privacy rights of witnesses or others who may be named therein. Ideally, during the investigation, the investigator has informed each witness that while the investigation is confidential, in the event the agency must take disciplinary action, the accused has the right to confront his or her accusers.

It is important to note that an employee facing discipline is only entitled to the materials upon which the City bases its disciplinary action. This may not include each and every supporting statement or document collected during the investigation, or a list of every witness interviewed.

C. Disclosures “Necessary and Relevant” For Effective Union Representation

PERB has ruled that disclosure an investigation report must be made where it is relevant and necessary for effective union representation.\(^\text{14}\)

**Case Study**

In *City of Redding*\(^\text{15}\), a customer service representative for the Redding Electric Utility filed a harassment complaint. The city hired an outside investigator to investigate the complaint. During the investigation, some witnesses who were also customer service representatives raised general workplace concerns. Consequently, the city expanded the scope of the investigation to include the employees' other concerns. As a result of the investigation, the city proposed various changes to the supervision of the customer service representatives. The union requested a copy of the investigation report. In order to protect the witnesses' privacy, the city denied the union's request.

The union filed an unfair practice charge with PERB alleging the city's refusal to provide the report violated the MMBA. The ALJ found in favor of the union. In a split decision, PERB adopted the ALJ's proposed decision, finding that the investigation report was relevant and necessary for the union to represent its members in being free from a hostile work environment, and to work in a safe workplace. Consequently, the city was required to produce the investigation report and witness statements, subject to redaction/deletion of all employee names and other identifying information in such documents.

Thus, it appears to the rule that an exclusive representative is entitled to all information that is necessary and relevant to discharging its duty to represent unit employees in negotiations, processing of grievances, and administration of the contract. A union may be entitled to such information even absent a specific grievance.

D. Discoverability

Investigation reports are subject to disclosure under the California Public Records Act (“PRA”).\(^\text{16}\) In *Bakersfield City School District v. Superior Court*\(^\text{17}\), a school district challenged a newspaper’s request for the disciplinary records of a district administrator. The investigation concerned an alleged incident of a sexual and violent nature, but no discipline resulted from the allegations. The Court of Appeal found that the disciplinary records were subject to disclosure under the PRA because the employee’s right to privacy in employment records did not outweigh the public’s right to know of the alleged wrongdoing. The Court reasoned that it must find in favor of disclosure where records reflect allegations of a substantial nature and there is reasonable cause.

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\(^{14}\) *City of Redding* (2011) PERB Dec. No. 2190-M.
\(^{15}\) *City of Redding* (2011) PERB Dec. No. 2190-M.
\(^{16}\) Cal. Gov. Code § 6250 et seq.
to believe the complaint was “well-founded.” The Court went on to state that neither a finding that the allegations were true, nor evidence that discipline was imposed, is necessary to determine that a complaint is “well-founded” justifying disclosure.

Similarly, in *BRV, Inc. v. Superior Court*\(^{18}\), a school district’s board of trustees received numerous complaints that the district superintendent (and high school principal) was verbally abusing and sexually harassing students. The board hired an investigator who prepared a confidential report. The superintendent subsequently agreed to resign in exchange for certain payments and the board’s promise to keep the report confidential. A local newspaper and the public suspected a “sweetheart deal” and demanded access to the report. The Court of Appeal ordered release of the full report, finding that the public’s interest in disclosure outweighed the superintendent’s privacy interest in the report, especially because the superintendent was a high ranking official. The Court also noted that the public had a substantial interest in knowing how the district responded to allegations of misconduct by a high ranking official. But the Court did allow the district to redact the names of the persons interviewed, including students, parents, staff members, and faculty members.

Recently, in *Marken v. Santa Monica-Malibu Unified School Dist.*\(^{19}\), the Court of Appeal held that the district complied with the PRA by disclosing a redacted investigation report and written reprimand for sexual harassment. The Court held that while the teacher certainly has a privacy interest in the investigation report and the reprimand, the public’s interest is greater. The Court found that a classroom teacher occupies a position of trust and the public has an interest in knowing whether and how the district enforces its sexual harassment.

Because an investigation report could be subject to public disclosure, it is generally advisable that investigators make only factual findings and not reach conclusions regarding whether the accused violated any laws or policies. The investigative report should also be detailed with respect to how the investigator reached the relevant factual and credibility determinations.

**VIII. Step Six: Preparing Investigators to be Witnesses**

If a matter proceeds to an administrative hearing or trial, the investigator may be called to testify as a witness. Whatever litigation arena ensues, the City Attorney should make sure, as with any other witness, that the investigator is fully prepared to credibly testify about the investigation and the report. In fact, preparation of the investigator to be a witness should be done on the front end – in selection of the investigator. Consider when selecting the investigator how the person will ultimately come across as a potential future witness. The investigation report and the investigator’s testimony are the cornerstone of successful litigation.

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IX. Conclusion

Any investigation will benefit from implementation of the suggestions made above. In all cases, the investigator matters, employees must be controlled to some extent, reports should be bullet-proof, sensitive information should be protected from disclosure, and the investigator must testify well if the city is to adequately defend itself at hearing or trial. City Attorneys from cities of all sizes have a very significant role to play in making sure that this is the case as often as possible. It is true that no two investigations are alike, and that every investigation presents new and unique challenges but all can benefit from having more and better information. This advice brings City Attorneys that much closer to that goal.