LEGAL DEFENSE TRUST TRAINING BULLETIN

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EMPLOYEES ENTITLED TO DISCOVERY OF INVESTIGATIVE MATERIALS AT PRE-DISCIPLINARY STAGE OF PROCEEDINGS

Fourth Appellate District Distinguishes Pasadena Case Limiting Discovery at Pre-Interrogation Stage

In 1990, the California Supreme Court determined that *Government Code* §3303(f)[1] did not entitle interrogated officers to pre-interview discovery of "...transcribed copies of any notes made by a stenographer or to any reports or complaints made by investigations or other persons..."[2]

The *Pasadena* court overturned a decision by the Second Appellate District which held that an interrogated officer was entitled, by virtue of the wording of the statute, to pre-interrogation (interview) discovery of the materials described in §3303(f); now found at §3303(g). The *Pasadena* court resolved an "ambiguity" in the section (the "ambiguity" being *when* an officer is entitled to the materials described) by construing the legislative intent to be that an officer is entitled to the materials *after* interrogation, but not before.

The question of "when" there is an entitlement to discovery apparently resolved, the Fourth Appellate District recently confronted the question of "what" the language of §3303(g) includes; in other words, what materials are included within the phrase "...transcribed copy of any notes made by a stenographer ...any reports or complaints made by investigators or other persons..."?

For example, does this admittedly vague and ambiguous phraseology *include* the investigator's raw notes or tape recordings (of witness statements) that contain "reports" or "complaints"?

Disagreement developed between the San Diego Police Officers Association and the City of San Diego on this question.

Principally, the City and Department argued that compliance with this statute *only* required production (to the subject officer) of the *completed, final written report* of the investigation, and a copy of the *complaint* that started it all. Specifically, the City and Department took a very narrow view of §3303(g): while "reports or complaints" are mentioned in the section, raw notes and tape recordings are not. Therefore, reasoned the City and Department, they had no obligation to turn these things over on demand. The Association sued, contending the City's reading of the statute was too narrow and circumscribed. Since "raw notes" and "tape recordings" contain "complaints and reports made by

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[1] *Government Code* §§3300-3311 comprise the "Public Safety Officers Procedural Bill of Rights Act" ("POBRA" or "POBR"). §3303(f) is currently renumbered to §3303(g). When the Supreme Court reviewed this section, it was found at §3303(f). The language remains unchanged.

[2] See: *Pasadena Police Officers Association v. City of Pasadena* (1990) 51 Cal 3d 564.

investigators or other persons", these underlying materials are included within the mandatory disclosures required by §3303(g), unless they are deemed to be "confidential".[3]

The trial court agreed with the Association, not with the City's restrictive view. In a unanimous decision, certified for publication on May 23, 2002, the three-judge panel affirmed the trial court decision to grant the Association's request for a writ of mandate to compel production of raw notes and recordings.

Application Of The Rule Of This Case

The rule of this case can be applied in connection with a pre-disciplinary proceeding (*Skelly* process) or a post-discipline appeal, to require the department to disgorge raw notes and tape recordings of witnesses, and probably any other investigative materials that precede or underly the final investigative report. Logic dictates that if these materials are to have maximum benefit for the accused officer, they should be sought and obtained at the earliest point when the interviews or investigation are complete.

Since the right to production of the materials is mandatory by statute, and not dependent upon a court order for its vitality, the right to discovery also implies a requirement upon the department that preliminary investigative materials such as raw notes be maintained in the case investigator's file permanently, and not destroyed. Otherwise, a department could avoid the production requirement by permitting the investigators to destroy their notes once the final report is prepared.

To be on the safe side, we recommend that each representative or lawyer who represents a member in an investigation, make a demand (preferably in writing) to the investigators, that all notes and preliminary investigatory materials be preserved with the case file.

[3] Materials, data and information underlying a disciplinary investigative report could hardly be considered confidential, if they are incorporated to any extent in the completed report.

A form demand may be used for this purpose, for consistency; such as the following:

MEMORANDUM

To:
From:
Date:
No./Name:
Subject: Demand For Preservation of Investigator's Notes and All Other Preliminary Investigatory Materials.

Demand is respectfully made for preservation of any and all preliminary investigatory materials including but not limited to the following:

1. Investigators' and other persons' raw notes and summaries;
2. Preliminary reports, complaints, memoranda, and other "writings" as defined in *Evidence Code* §250;
3. Any and all tape recordings of any kind, connected with this investigation;
4. Any and all electronic mail, notes, data or other information generated, received or transmitted by any persons, connected with this investigation.

YOU ARE HEREBY NOTIFIED that production of all of these items will be demanded, and herewith is demanded, to be turned over to the employee or his representative, at the earliest time after the employee's interviews or interrogations are completed, and certainly to accompany, if not previously provided, any notice of proposed disciplinary action, regardless of whether or not the materials are reviewed or considered by any disciplinary authority. (*See*: *Government Code* §3303(g); *San Diego Police Officers Association v. City of San Diego* (2002) _Cal. App 4th_, 2002 DAR 5775; *Pasadena Police Officers Association v. City of Pasadena* (1990) 57 Cal. 3d 564.) Thank you.

This case was handled by LDF panel and SDPOA attorneys Everett L. Bobbitt and Bradley M. Fields. Our congratulations to them for a fine result to the benefit of California peace officers.

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