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Office of the City Attorney
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April 26, 2005

**PUBLIC SAFETY COMMITTEE
Oakland, California**

Chairperson Larry Reid and Members of the Committee

**Subject: The Consent Decree Resolving Actions Filed By PUEBLO
and the ACLU and the OPOA's Request for Immediate
Dispute Resolution Related to the CPRB**

I. Background

The Public Safety Committee requested an explanation of the terms of the Consent Decree entered into on January 11, 2001 by the City and the Oakland Police Officers Association to resolve lawsuits filed in 1998 by People United for a Better Oakland (PUEBLO) and the American Civil Liberties Union (ACLU) against the City, and by the City against the Public Ethics Commission, Alameda County Superior Court Case Nos. 805369-1 and 805568-8. The Oakland Police Officers Association (OPOA) was brought in as a necessary party in both suits. The Committee also requested an explanation of the Office of the City Attorney's advice concerning a demand by the OPOA to utilize the Immediate Dispute Resolution provision of its collective bargaining agreement to challenge an order by the Chief of Police that its officers appear at hearings of the Citizens Police Review Board (CPRB) and answer questions when a tort claim has been filed regarding the matter at issue at the CPRB hearing, but no lawsuit has been initiated.

II. The Consent Decree resolving actions filed by PUEBLO and the ACLU

In the first action that was resolved by the Consent Decree, PUEBLO and the ACLU requested declaratory and injunctive relief against the City for alleged violation of the Brown Act, Government Code section 54950 et seq. and the City's Sunshine Ordinance, OMC No. 11957. Plaintiffs claimed that the City Council had improperly met

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in closed session to discuss proposed changes to the City's CPRB and had failed to adequately describe CPRB issues discussed in closed session on agendas posted prior to the meetings. The Alameda County Superior Court granted summary judgment in the plaintiffs' favor and the City appealed.

In the second action, in which the Council sued the City's Public Ethics Commission, the Council sought a determination that certain proposed changes to the CPRB were within the "scope of representation" as that term is defined in the Meyers-Milias-Brown Act, Government Code section 3504, requiring the City to meet and confer with the OPOA prior to implementing them. The Alameda County Superior Court concluded that the proposed changes were not subject to a meet and confer obligation and the City appealed the court's ruling. While the two cases were on appeal, the parties resolved the pending issues at mediation and entered into a Consent Decree that resulted in the City dropping its appeal in the two cases.

The terms of the parties' agreement are set out in the Consent Decree, Appendix A. They are as follows:

1. The City must comply with the Brown Act and Sunshine Ordinance when discussing issues pertaining to the CPRB.
2. The Meyers-Milias-Brown Act provides the relevant standard for determining when a change to the CPRB alters the terms and conditions of OPOA members' employment, requiring a meet and confer process with the OPOA prior to implementation.
3. Any meeting of the City Council to discuss or consider legislation or recommendations concerning the organization, management or policies pertaining to the CPRB will be conducted in public, at open session. The City may, however, meet with its attorneys in closed session concerning "pending" litigation.
4. CPRB legislation, reports or recommendations that "relate to the terms and conditions of employment" of OPOA members and that the OPOA contends are subject to the meet and confer requirements of the Meyers-Milias-Brown Act will be handled as follows:

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- a. If the City and OPOA disagree on whether an issue is within the scope of representation or bargainable (subject to a meet and confer obligation), the issue of the scope of representation and bargainability must be resolved at a binding arbitration. The arbitration must be publicly noticed under the Brown Act and Sunshine Ordinance and the public may attend the arbitration as observers, but may not participate. The process for arbitrator selection is spelled out in the Decree.
- b. If the City agrees to, or is ordered by an arbitrator to negotiate a CPRB issue with an employee union, the City Council's direction to the City's labor representative must be given in open session.
- c. The City may, but need not negotiate with the OPOA concerning policies and procedures of the CPRB, subjects that the Superior Court found "as a matter of law...do not primarily relate to employment conditions" and instead "involve managerial policy decisions not subject to negotiation under the Meyers-Miliias-Brown Act." If the City chooses not to negotiate over the CPRB's policies or procedures the OPOA is not entitled to go to arbitration under Section 910 of the City Charter. Should the City choose to negotiate over such subjects, the City does not waive the contention that the matter is not arbitrable.
- d. The City may meet and confer with the OPOA over any issue related to the CPRB, provided staff direction and reports from staff are given publicly.

III. The current controversy: police officers' refusal to appear and testify at CPRB meetings while tort claims are pending but no litigation has been filed

At a March 25, 2004 CPRB hearing, counsel for the subject officers requested cancellation of the hearing because the complainant had filed a tort claim with the City pursuant to the Tort Claims Act, Government Code section 810 et seq. Counsel for the officers contended that the filing of a claim precludes the CPRB from hearing a case. Ordinance No. 12444 C.M.S. Section 6(G)(10) states: "Cases that are the subject of

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litigation will be investigated but not brought to hearing while the litigation is pending." Counsel for the subject officers advised her clients to leave the hearing and the officers left.

Counsel for the CPRB, Antonio Lawson, prepared a written opinion, Appendix B, advising the Board that filing a tort claim pursuant to the Tort Claims Act does not constitute "pending litigation," but rather, is a requirement with which an individual must comply prior to filing litigation. Mr. Lawson's opinion emphasized that the purpose of the Tort Claims Act was to provide public agencies with notice of potential litigation, affording them the opportunity to investigate and resolve the matter short of litigation. The Tort Claims Act specifically states that once a public agency rejects a filed claim, "suit must be brought within six months." Gov't. Code section 945.6(a)(1). Case law draws a clear distinction between a tort claim and litigation, e.g., *Wurts v. County of Fresno* (1996) 44 Cal.App.4th 380 ("the filing of a tort claim with the involved agency does not necessarily evidence an intent to sue"); *Bell v. Tri-City Hospital Dist.* (1987) 196 Cal.App.3d 438 ("Compliance with the tort claims prerequisites, being merely a procedural prerequisite to suit and not an element of a cause of action, need not be alleged in the complaint"). The City Attorney's office concurred with Mr. Lawson's opinion and did not issue a separate opinion. Police Chief Word then issued a direct order to the officers who were the subjects of the March 25, 2004 hearing to appear at a rescheduled hearing and respond to questions.

On July 29, 2004, counsel for the OPOA wrote Chief Word, Appendix C, contending that officers need not appear and testify at public hearings on matters for which tort claims have been filed but a lawsuit has not been initiated. The OPOA challenged "the validity of the underlying order" from Chief Word that the officers must appear and testify at a CPRB hearing. The OPOA's letter "formally grieve[d]" the order to the officers, and demanded that it be afforded "immediate dispute resolution" pursuant to Article IX, Subsection E of its Memorandum of Understanding (MOU) with the City of Oakland, claiming that its grievance affected a "substantial number of its members." It requested that Chief Word and Employee Relations enter into "immediate resolution discussions" with the OPOA. The letter also sought to confirm an agreement with Chief Word that OPOA members would not be ordered to appear at the CPRB hearing rescheduled for that day.

On August 2, 2004 the City Attorney's Office issued a legal opinion concluding that the OPOA was not entitled to immediate dispute resolution pursuant to its MOU

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with the City. On August 6, 2004, the City Attorney's Office provided the Independent Monitoring Team that is charged with overseeing the City of Oakland's compliance with the Settlement Agreement in *Allen v. City of Oakland*, United States District Court Case No. C00-4599 THE (the Agreement that resolved legal claims arising out of the conduct of the Riders officers), with its opinion. The City Attorney's opinion is as follows:

This Office finds that the OPOA's letter requesting immediate dispute resolution does not trigger the immediate dispute resolution process provided by Article IX E of the Memorandum of Understanding between the City and the OPOA. Immediate dispute resolution is limited to disputes "regarding the interpretation or application of this Agreement that imminently affect the Association or a substantial number of members represented by the Association." The "Agreement" is the MOU between the City and the OPOA.

Although the OPOA's letter avoids identifying with specificity the dispute for which it is requesting immediate dispute resolution, the actual dispute between the OPOA and the City for which immediate dispute resolution is sought is about whether officers have to appear at a CPRB meeting and answer questions when a tort claim has been filed but a civil action has not been instituted. The OPOA contends that a tort claim constitutes "litigation" pursuant to the CPRB ordinance and that the Board may not hear cases in which litigation has been initiated. Counsel for the Board, Tony Lawson, has advised the Board that a tort action does not constitute litigation and that the CPRB may hear cases in which a tort claim has been filed. The "dispute" is thus about the interpretation of the revised CPRB ordinance, rather than about the "Agreement."

The City Attorney's Office concludes that whether the CPRB should hear cases in which tort claims have been filed is a policy question for the Council. Since the CPRB ordinance is an expression of Council policy, the Council could, if it chose to, amend the ordinance to hold in abeyance, or bar hearings, when the complainant has filed a tort claim. There are strong legal arguments for such an amendment: specifically, allowing CPRB hearings to take place when a claim has been filed provides potential plaintiffs with a forum in which to preview the testimony of officers. This is not in the City's interest in the specific case being

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heard by the CPRB. Council will have to balance this consideration against the benefits of a broad rather than narrow scope of review for the CPRB.

On February 8, 2005 Director of Personnel Marcia Meyers wrote counsel for the OPOA, responding to the OPOA's July 29, 2004 letter, Appendix D. Ms. Meyers responded, "I have reviewed your request and determined that this matter should be set for immediate dispute resolution and that an arbitrator should be selected pursuant to the process in the MOU."

Therefore, the City Attorney's Office has advised the Department of Personnel that any arbitration concerning this matter must be publicly noticed and open to the public.

Respectfully Submitted,



JOHN A. RUSSO
City Attorney

Attorney Assigned:
Vicki Laden

Appendix A
Consent Decree

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IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

PEOPLE UNITED FOR A BETTER
OAKLAND, AMERICAN CIVIL
LIBERTIES UNION OF NORTHERN
CALIFORNIA, and M. LOUISE
ROTHMAN-RIEMER, a taxpayer,

Plaintiffs,

vs.

CITY OF OAKLAND, MAYOR ELIHU
HARRIS, COUNCIL MEMBER JANE
BRUNNER, COUNCIL MEMBER JOHN
A. RUSSO, COUNCIL MEMBER
NANCY J. NADEL, COUNCIL
MEMBER DICK SPEES, COUNCIL
MEMBER IGNACIO DE LA FUENTE,
COUNCIL MEMBER NATE MILEY,
COUNCIL MEMBER LARRY REID,
COUNCIL MEMBER HENRY CHANG,
JR., and DOES I through X, inclusive,

Defendants.

Consolidated Case No.: 805369-1.

CONSENT DECREE

CITY OF OAKLAND AND THE CITY
COUNCIL OF THE CITY OF
OAKLAND,

Plaintiffs,

vs.

PUBLIC ETHICS COMMISSION OF
THE CITY OF OAKLAND,

Defendants.

Case No.: 805568-8

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CONSENT DECREE

This Consent Decree arises from two civil actions filed in the Alameda County Superior Court. The first action was filed on November 5, 1998, by People United for a Better Oakland ("PUEBLO"), the American Civil Liberties Union of Northern California ("ACLU"), and M. Louise Rothman-Riemer (collectively, the "Plaintiffs") against the City of Oakland, the City Council of the City of Oakland, and the City Council Members, individually, as Action No. 805369-1 ("Action No. 805369-1" or the "*PUEBLO Litigation*"). The second action was filed on November 9, 1998, by the City of Oakland against the Public Ethics Commission of the City of Oakland as Action No. 805568-8 ("Action No. 805568-8" or the "*Public Ethics Litigation*"). The Oakland Police Officers' Association ("OPOA") was named as a necessary party plaintiff by the City of Oakland in Action No. 805568-8 and, by stipulation of the parties, the OPOA and the Public Ethics Commission were made parties in intervention in Action No. 805369-1.

I. BACKGROUND:

The *PUEBLO Litigation* is an action for declaratory relief under the Brown Act and the City of Oakland Sunshine Ordinance in which PUEBLO, the ACLU and Riemer requested declaratory and injunctive relief against the City of Oakland and the City Council of the City of Oakland for alleged violations of the Ralph M. Brown Act, Govt. Code § 54950 *et seq.*, and the City of Oakland Sunshine Ordinance, OMC No. 11957. Plaintiffs claimed the Oakland City Council had improperly met in closed session to discuss certain recommendations for changes to the City's Citizens' Police Review Board Ordinance proposed by the City's Citizens' Police Review Board ("CPRB"). The Plaintiffs sought a declaration that the Brown Act and Sunshine Ordinances were violated (i) by the City Council's purported failure to describe adequately CPRB issues allegedly discussed in closed sessions on agendas posted prior to the meetings; and (ii) by allegedly conducting closed sessions to discuss three of the CPRB's recommendations, namely

1 Recommendations B, G and K. Summary judgment was granted in the Plaintiffs' favor in the
2 *PUEBLO Litigation* by the Alameda County Superior Court on March 20, 2000, and a judgment
3 for declaratory and injunctive relief was entered on March 20, 2000. The City of Oakland filed a
4 Notice of Appeal on April 19, 2000. That appeal has been dismissed.

5 In the *Public Ethics Litigation*, the Oakland City Council sued the City of Oakland Public
6 Ethics Commission ("PEC") for declaratory relief and writ of prohibition. In the *Public Ethics*
7 *Litigation*, the City Council sought declaratory relief to determine whether six of the proposed
8 CPRB recommendations, namely Recommendations A, B, C, E, G and K, were within the "scope
9 of representation" as that term is defined in the Meyers-Milias-Brown Act, Government Code §
10 3504, and made applicable to the City of Oakland Sunshine Ordinance, the Oakland City Charter
11 and the Ralph M. Brown Act. The City Council also sought to overturn Resolution 98-002 issued
12 by the PEC on September 17, 1998, and sought declaratory relief regarding the scope of the PEC's
13 jurisdiction. On June 25, 1999, the Alameda County Superior Court denied the City's motion for
14 summary judgment against the PEC, and, in denying the motion, issued certain rulings of law the
15 parties deemed to be dispositive of the issues in the case. On March 20, 2000, the Superior Court
16 ruled on the remaining issues in the case. The parties thereafter deemed all dispositive issues in
17 the case to have been decided and stipulated to the entry of judgment, with a full reservation of
18 appellate rights. On entry of the judgment on August 15, 2000, the City of Oakland filed an appeal
19 on October 12, 2000. That appeal has been dismissed.

20 On August 4, 2000, and November 15, 2000, following a mediation before the Honorable
21 Winslow Christian, the parties, in order to avoid protracted and costly litigation, agreed in principle
22 for the disposition of both cases through the issuance of a consent decree. The parties have agreed,
23 as part of that mediated agreement, without further appellate proceedings or further adjudication on
24 the merits following appeal, to the terms and conditions set forth below.

25 II. TERMS OF CONSENT DECREE

26 1. All appeals filed in the *PUEBLO Litigation* and the *Public Ethics Litigation* have been
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1 dismissed.

2 2. All parties agree that as to issues concerning the City of Oakland's CPRB, the open
3 meeting requirements of the Ralph M. Brown Act and the City of Oakland Sunshine Ordinance
4 shall be fully applicable.

5 3. The parties agree that as to all matters concerning the terms and conditions of
6 employment relating to the working conditions of police officers or other City of Oakland
7 employees who are subject to the jurisdiction of the CPRB, the Meyers-Milias-Brown Act shall
8 provide the standard for determining the statutory "scope of representation" within the meaning of
9 Government Code § 54957.6, and the Sunshine Ordinance § 2.20.013(a) and (b).

10 4. The parties agree to the following procedure:

11 (i) Any meeting of the Oakland City Council to discuss or consider CPRB issues including,
12 but not limited to, legislation, subcommittee reports or staff recommendations concerning the
13 organization, management or policies pertaining to the CPRB, shall be conducted in public, and
14 shall not be subject to the closed meeting exceptions enumerated in § 54957.6 of the Brown Act, or
15 City of Oakland Sunshine Ordinance § 2.20.130(a) and (b). Nothing in this section 4(i) shall
16 preclude the City of Oakland City Council from receiving in closed session legal advice from its
17 attorneys concerning pending litigation as that term is used in Government Code § 54956.9 and
18 Sunshine Ordinance § 2.20.120.

19 (ii) CPRB legislation, committee reports and staff recommendations that may relate to the
20 terms and conditions of employment of City of Oakland employees who are subject to the
21 jurisdiction of the CPRB, which the employee organization contends are subject to the meet and
22 confer requirements of the Meyer-Milias-Brown Act, shall be addressed by the following
23 procedure:

24 (a) If the City of Oakland and an employee union representing City of Oakland
25 employees who are subject to the jurisdiction of the CPRB disagree on whether an issue is within
26 the scope of representation or bargainable, the issue of scope of representation and bargainability

1 shall be resolved under binding arbitration pursuant to Code of Civil Procedure §§ 1280 *et seq.* If
2 the parties cannot agree on an arbitrator, either may request a list of five arbitrators from the
3 California State Mediation and Conciliation Service. The parties shall strike alternately from the
4 list until only one name remains. That named person shall be the arbitrator. The first party to
5 strike shall be determined by lot;

6 (b) Any arbitration proceeding conducted to determine "scope of representation" or
7 "bargainability" issues as between the City of Oakland and the employee union shall be noticed for
8 determination under § 54954.2 of the Brown Act and § 2.20.070 of the Sunshine Ordinance.
9 Members of the public may attend the arbitration as observers, but may not participate in the
10 arbitration;

11 (c) The arbitration shall be conducted on the record, and the reasons for the award shall
12 be given in writing;

13 (d) Any challenge to the determination of the arbitrator shall be by the appropriate
14 petition pursuant to Code of Civil Procedure §§1280, *et seq.*;

15 (e) If the City of Oakland agrees to, or is ordered by an arbitrator to, negotiate a CPRB
16 issue with an employee union, the Oakland City Council's direction to the City of Oakland's labor
17 representative shall be given in open session;

18 (f) The City of Oakland's labor representative and staff may meet and confer with the
19 representatives of the employees' bargaining representatives, privately;

20 (g) Staff reports from the City of Oakland's labor representative and other staff on the
21 results of the meet and confer process shall be considered by the City Council in open session;

22 (h) On the issues before Judge Needham, the City retains its right to determine whether
23 it wishes to negotiate with the OPOA on all or any of them. However, if it chooses not to
24 negotiate, the OPOA may not go to arbitration under this decree or under § 910 of the City
25 Charter. On any other CPRB issues, again the City initially may decide whether it wishes to
26 negotiate with the OPOA and/or feels legally compelled to. In any event, by negotiating such

1 subjects, the City does not waive any contention, regarding Charter § 910 and/or the Meyers-
2 Miliias-Brown Act (MMBA), that it does not have to submit any or all such subjects to arbitration
3 under § 910 (or any successor), *i.e.*, when the City chooses to negotiate on a CPRB matter, it still
4 reserves any contentions that such matter is not arbitrable under § 910. Further, the OPOA may
5 not contend under the arbitration process of this decree that any MOU or arbitration ruling before
6 12-1-00 provides any grounds for negotiability; and

7 (i) Any issue related to the CPRB may be subject to permissive meet and confer as
8 between the OPOA and the City of Oakland, provided staff direction and the reports from staff are
9 given publicly, as provided in sections (e) and (g), above.

10 5. In the event there is a material change that substantially affects the rights of a party
11 to this Consent Decree in the Ralph M. Brown Act, the Sunshine Ordinance, or the Meyers-Miliias-
12 Brown Act, or in the case law construing the Ralph M. Brown Act, the Sunshine Ordinance, or the
13 Meyers-Miliias-Brown Act, then any party to this Consent Decree may seek modification of this
14 Consent Decree in this court.

15 6. This Consent Decree shall not create a precedent as between the City of Oakland
16 and any employee union or organization as to any other labor issue or matter not specifically
17 addressed by this Consent Decree. The OPOA specifically acknowledges and agrees that the City
18 of Oakland shall not be obligated to meet and confer or provide direction to its labor
19 representatives in public, except as specifically provided herein.

20 7. Pursuant to Judge Ford's order dated July 25, 2000, the City of Oakland will pay the
21 amount of \$55,000.00 to plaintiffs made payable to "Amitai Schwartz Attorney Trust Account," in
22 full satisfaction of all attorneys' fees. The appeals regarding the attorneys' fees award shall be
23 dismissed. *Payment shall be made within 90 days of the date this Consent Decree is filed in the*
24 Alameda County Superior Court. Each party otherwise to bear its own costs and attorneys' fees.

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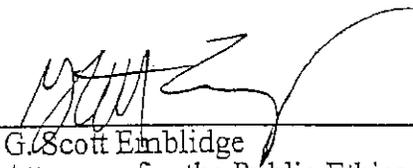
1 III. ADMINISTRATION OF CONSENT DECREE

2 This Consent Decree shall remain in effect unless otherwise modified by this court. The
3 Alameda County Superior Court shall retain jurisdiction of this action for the purposes of enforcing
4 this Consent Decree. The parties to this Consent Decree shall endeavor to resolve informally any
5 differences regarding interpretation and compliance with this Consent Decree prior to bringing
6 such matters to the Superior Court for resolution. Any petition to change the terms of this Consent
7 Decree shall be filed with the Superior Court of Alameda County.

8 The undersigned counsel on behalf of their respective parties agree to this Court's entry of
9 this Consent Decree:

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11 DATED: 1/11/01

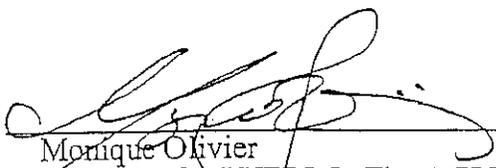
MOSCONE, EMBLIDGE & QUADRA

12
13 By: 

14 G. Scott Emblidge
15 Attorneys for the Public Ethics Commission
16 of the City of Oakland

17 DATED: January 11, 2001

LAW OFFICES OF AMITAI SCHWARTZ

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19 By: 

20 Monique Olivier
21 Attorneys for PUEBLO, The ACLU
22 Foundation of Northern California, and
23 M. Louise Rothman-Reimer

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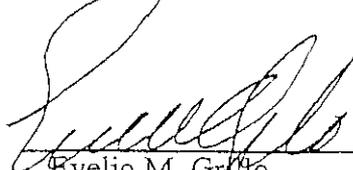
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DATED: 1-23-2001

GRILLO & STEVENS LLP

By: 
Evelio M. Grillo
Attorneys for the Oakland City Council and
the City of Oakland

DATED: 1-22-01

CARROLL, BURDICK & McDONOUGH

By: 
Ronald Yank
Attorneys for Oakland Police Officers'
Association

ORDER

IT IS SO ORDERED.

JUDITH D. FORD

DATED: JAN 25 2001

JUDGE OF THE SUPERIOR COURT

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Appendix B

Written Opinion Prepared by Antonio Lawson, CPRB Counsel

April 29, 2004

Joyce Hicks
Executive Director
Citizens' Police Review Board
Oakland, CA 94612

Re: **Tort Claims Act/Complaint Filing**

Dear Ms. Hicks:

Pursuant to your request, I have drafted the below memorandum addressing whether the filing of a claim with the City in accordance with the Tort Claims Act constitutes the commencement of litigation.

BACKGROUND

At the March 25, 2004 CPRB hearing, counsel for the subject officers requested that the hearing be cancelled because the complainant had filed a claim with the City pursuant to the Torts Claims Act. Counsel argued that the filing a claim with the City is tantamount to the filing of litigation and therefore the CPRB was precluded from hearing the case. As Board Counsel, I responded that the filing of a claim with the City does not commence "litigation" and is merely a precursor to litigation. I further advised that the purpose of a Tort Claim filing is to put the

¹Ordinance No. 12444 C.M.S. Section 6(G)(10) states that "Cases that are (stet) subject of litigation will be investigated but not brought to hearing while the litigation is pending."

public agency on notice of possible litigation and persons filing Tort Claims do not necessarily file lawsuits.

Although she offered no legal authority for her position, Counsel for the subject officers advised her clients to walk out of the hearing and they did so.

Because of the subject officers' actions and position of its counsel, the CPRB has requested that I research whether filing of a notice pursuant to the Tort Claims Act precludes a CPRB hearing on the matter.

BRIEF SUMMARY

As discussed more fully below, the filing of a claim pursuant to the Tort Claims Act does not constitute "pending litigation." Filing a claim with the City or appropriate public entity is merely a procedural requirement precedent to the filing of a lawsuit. The purpose of the Tort Claims Act is to provide public agencies with notice of potential litigation. Early notice provides an opportunity for the agency to settle the claim before litigation or budget for possible expenses incurred in litigation.

DISCUSSION

A. City Ordinance

The authority of Oakland's Police Review Board is governed by City Ordinance No. 12444 C.M.S. which states, in part:

The Board will provide policy direction to staff for determining case priority. Using those policy guidelines, staff will assign a priority to all complaints. **Cases that are [the] subject of litigation will be investigated but not brought to hearing while the litigation is pending.**

Ordinance NO. 12444 C.M.S. Section 6 (G)(10)(emphasis added).

The crucial passage for purposes of this memorandum is the determination as to when litigation is "pending."

B. Tort Claims Act

Before 1963, there was a disorderly array of decisional law and scattered statutes concerning government tort liability. In 1963, the legislature enacted several interrelated statutory provisions effective September 20, 1963. Although these provisions were not given a 'short title' by the legislature, they have become known as the Tort Claims Act" (*Cal. Government Tort Liability Practice (Cont.Ed.Bar 1992) § 2.1, pp. 69-70.*)

The Tort Claims Act "was enacted in six separate legislative measures: [¶] Substantive liabilities and immunities of public entities and employees were treated principally in Stats 1963, ch 1681, which enacted Govt C §§ 810-895.8 [¶] *Procedural provisions for claims presentation, actions and judgments concerning public entities and public employees were enacted by Stats 1963, ch 1715 as Govt C §§ 900-978.8, together with conforming amendments and repeals* . These sections constitute Govt C Title 1, Div. 3.6, pts. 3-5.... [¶] Insurance coverage against tort liability of public entities and public employees was authorized by Stats 1963, ch 1682, which enacted Govt C §§ 989-991.2 and 11007.4, ... [¶] The defense of public employees in tort actions arising out of their official duties was the subject of Stats 1963, ch 1683, which enacted Govt C §§ 995-996.6 [¶] Workers' compensation benefits for persons assisting in law enforcement and fire suppression were provided by Stats 1963, ch 1684, which added Lab C §§ 3365-3366 [¶] A formal procedure for maintaining a 'Roster of Public Agencies,' applicable to local entities other than cities and counties and affecting claims presentation and service of process, was enacted by Stats 1963, ch 1805, which added Govt C §§ 945.5, 960-960.5, and 53050-53052." (Cal. Government Liability Practice, *supra* , § 2.5, pp. 73-74, italics added.)

These statutory provisions, covering a range of diverse topics, have been referred to collectively as the Tort Claims Act.

Pursuant to section 911.2, claims against local governmental entities are required to be presented to the relevant entity within six months (personal injury or property damage) or one year (other causes of action) of the date of accrual of the cause of action. "The public entity has 45 days to grant or deny the claim; if the claim is not acted upon within 45 days, it is deemed rejected. (§ 912.4.) If written notice of rejection is sent, suit must be brought within six months. (§ 945.6, subd. (a)(1).) If no written notice is given, the claimant is allowed two years from the accrual date to file the suit. (§ 945.6, subd. (a)(2).)" (*Chalmers v. County of Los Angeles* (1985) 175 Cal.App.3d 461, 464 [221 Cal.Rptr. 19].)

Section 910 directs that a claim must show (1) the name and address of the claimant, (2) the address to which notices are to be sent, (3) the date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted, (4) a general description of the indebtedness, obligation, injury, damage or loss incurred, (5) the name or names of the public employee or employees causing the injury, damage, or loss,

and (6) the amount claimed if it totals less than \$10,000. The claim should be presented to the clerk, secretary or auditor of the relevant public entity. (§ 915.)

The purpose of the claims presentation requirement is to facilitate early investigation of disputes and settlement without trial if appropriate, as well as to enable the public entity to engage in fiscal planning for potential liabilities and to avoid similar liabilities in the future. (*Phillips v. Desert Hospital Dist.* (1989) 49 Cal.3d 699, 709 [263 Cal.Rptr. 119, 780 P.2d 349]; *Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1079 [195 Cal.Rptr. 576].)

C. The Filing of A Tort Claim Does Not Commence Litigation

The Tort Claims Act specifically states that once a public agency rejects a filed claim, “suit must be brought within six months. (§ 945.6, subd. (a)(1).)” The clear implication is that the filing of the tort claim is not itself a lawsuit. This conclusion is supported by case authority.

In *Bahten v. County of Merced* (1976) 59 Cal.App.3d 101, the Court held that “Compliance with the Tort Claims Act is a Procedural Prerequisite; {Slip Opn. Page 4} It neither creates nor is an element of a cause of action for tort against a government entity.” *Id* at p. 107. Other cases have agreed. “[C]ompliance with the tort claims prerequisites, being merely a procedural prerequisite to suit and not an element of a cause of action, need not be alleged in the complaint.” *Bell v. Tri-City Hospital Dist.* (1987) 196 Cal.App.3d 438.

Further, as noted in *Wurts v. County of Fresno* (1996) 44 Cal.App.4th 380, “the filing of a tort claim with the involved agency does not necessarily evidence an intent to sue. A potential plaintiff may for any number of reason decide not to pursue a lawsuit against the public entity after a claim has been made or denied, perhaps because of an intervening favorable settlement with another potential defendant or a more informed or revised conclusion about the likelihood of succeeding in a lawsuit against the agency. *Id* at 386.

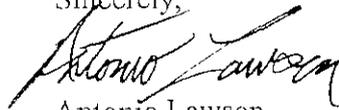
Finally, courts have dismissed lawsuits as untimely for failure to file a complaint within the time prescribed by the Tort Claims Act. In *Chase v. State of California* (1977) 67 Cal.App.3d 808, plaintiff filed a timely claim under the Tort Claims Act for damages for personal injuries alleged to have resulted from the State’s negligence. Plaintiff’s claim was rejected by the State Board of Control. The State then issued notice to plaintiff that he had six months to file a lawsuit as proscribed by the Torts Claim Act. Plaintiff filed a complaint within the six month time deadline, however, he failed to name the State as a defendant. Subsequently, plaintiff sought to amend his complaint, after the six month deadline, and add the State as a defendant. Plaintiff’s claim against the State was rejected as untimely. The Court found that plaintiff did not commence an action against the State within the six month period. *Id* at 813.

The *Chase* decision is consistent with *Bahten* and *Bell*. The filing of a tort claim does not commence litigation.

CONCLUSION

The Oakland City Ordinance empowering the CPRB restricts hearing those cases that are the subject of pending litigation. As stated by the Tort Claims Act and confirmed by interpreting cases, litigation does not commence with the filing of a tort claim. Litigation is pending only when a civil complaint is filed in Court. Therefore, as written, City Ordinance No. 12444 C.M.S. does not preclude the CPRB from hearing cases where a tort claim has been filed.

Sincerely,



Antonio Lawson

Appendix C

Letter from OPOA Counsel to Chief Word, July 29, 2004

Please respond to Pleasant Hill office

July 29, 2004

VIA FACSIMILE [510/238-2251] & U.S. MAIL

Richard Word
Chief of Police
Oakland Police Department
455 7th Street
Oakland, CA 94607

Re: OPOA - CPRB Grievance/ Immediate Dispute Resolution

Dear Chief Word:

As you know, our client, the Oakland Police Officers' Association ("OPOA") has objected to the Citizens Police Review Board ("CPRB") conducting public hearings on matters that are the subject of litigation. In particular, the CPRB conducts hearings on cases where governmental tort claims have been filed with the City. The Department has ordered officers to appear and testify at these hearings.

The OPOA has made its position very clear to the CPRB in a public forum, as well as in communications with your office, the City Administrator's office and the CPRB Executive Director. Despite the OPOA's protestations concerning its members testifying in matters subject to litigation, you have specifically ordered sworn members of the Department to appear at the CPRB hearing set for today, July 29th. In that regard, the Department has ordered Officers Donald Koch, Emelington Reese, Albert Smith and Sgt. James Beal to testify at the hearing later today. We have also been advised that a claim has been filed on the case as well.

Despite the fact that the OPOA made overtures to have this dispute resolved through less formal means, it now appears that the City is standing by the legal opinion of the CPRB legal counsel, Tony Lawson and insisting that the filing of a tort claim does not cause a CPRB case to be the "subject of litigation."

It is my understanding that the Oakland City Attorney's office has concurred in Mr. Lawson's legal opinion and has not rendered a separate and independent legal opinion on the matter. I should also note that the OPOA, nor this office have received any formal legal opinion disputing the OPOA's position that the filing of a claim draws the matter into litigation and, therefore, precludes testimony to be offered by officers.

In light of the fact that you have issued a direct order to the aforementioned Officers, and that order contradicts Oakland City Ordinance No. 12454, in particular Section 6G.(10)(b), the OPOA challenges the validity of the underlying order.

Richard Word
July 29, 2004
Page 2

Pursuant to the provisions of the Memorandum of Understanding between the City of Oakland and the Oakland Police Officers' Association (effective July 1, 2001 through June 30, 2006) ("MOU"), the OPOA hereby formally grieves the above-referenced order. Article IX "Grievance Procedure" Section A, defines grievance as a dispute which involves the interpretation or application of a Departmental rule or order. In this case, the order to have the Officers appear and testify is such an order.

Also be advised that pursuant to Article IX, Subsection E of the MOU, the OPOA formally invokes the "immediate dispute resolution" provision and therefore the order shall be stayed "pending discussion/review." This grievance affects the Association and a substantial number of its members. We further request that the dispute proceed to "immediate resolution discussions" with yourself and the Employee Relations Officer. Finally, the OPOA formally requests suspension of the grievance procedure identified in Section 3 of Article IX.

In furtherance of the immediate dispute resolution provisions of the MOU, we are prepared to move toward the selection of an arbitrator and secure arbitration dates. We will await the response from you, the Employee Relations Officer, or the City Attorney's office to jointly develop the selection procedure for the arbitrator.

Finally, in light of our recent discussions with your office, I would also like to confirm that the aforementioned members of OPOA shall not be ordered to appear at the CPRB hearing scheduled for later today pending resolution of this grievance.

Thank you for your attention to this matter.

Very truly yours,

RAINS, LUCIA & WILKINSON LLP



Rockie A. Lucia, Jr.

RAL:sjs

cc: Robert Valladon, President OPOA
Deborah Edgerly, Chief Administrative Officer
✓ John Russo, City Attorney
Joyce Hicks, CPRB
Donald Koch
Emelington Reese
Albert Smith
James Beal

Appendix D

**Letter from Director of Personnel Marcia Meyers to OPOA Counsel,
February 8, 2005**

CITY OF OAKLAND



150 FRANK H. OGAWA PLAZA • 3RD FLOOR • OAKLAND, CALIFORNIA 94612-2021

Office of Personnel Resource Management

(510) 238-3307
FAX (510) 238-2976
TDD (510) 839-6451

February 8, 2005

Rockne A. Lucia, Jr. Esq.
Rains, Lucia & Wilkinson LLP
2300 Contra Costa Blvd. Ste. 230
Pleasant Hill, CA 94623

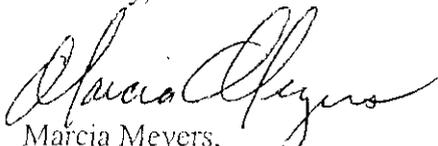
Dear Mr. Lucia:

This is written in response to your July 29, 2004, letter to then Chief of Police, Richard Word.

In your letter, you request that, pursuant to Article IX, Subsection E, of the Memorandum of Understanding dated July 1, 2001, through June 30, 2006, between the City of Oakland and the Oakland Police Officers' Association (OPOA) that: the OPOA be allowed to proceed to immediate dispute resolution for the purpose of determining, whether OPOA members must appear and answer questions at a meeting of the Citizen's Police Review Board, when a tort claim has been filed by the CPRB complainant, but, no lawsuit has been filed.

I have reviewed your request and determined that this matter should be set for immediate dispute resolution and that an arbitrator should be selected pursuant to the process in the MOU.

Sincerely,


Marcia Meyers,
Director of Personnel

Cc: Deborah Edgerly, City Administrator
Susan Mosk, City Attorney's Office
Claire Landoli, Employee Relations

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PUBLIC SAFETY CMTE.
APR 26 2005