

September 20, 2011

BOARD OF FIRE COMMISSIONERS
FILE NO. BFC 11-140

Date: September 12, 2011

To: Board of Fire Commissioners

From: Genethia Hudley-Hayes, President, Board of Fire Commissioners
Casimiro U. Tolentino, Vice President, Board of Fire Commissioners

Subject: SUBCOMMITTEE REPORT ON DISCUSSIONS WITH THE CITY ATTORNEY'S
OFFICE RELATED TO THE INDEPENDENT ASSESSOR'S ACCESS TO
DEPARTMENT INFORMATION

FINAL ACTION:	<input type="checkbox"/> Approved	<input type="checkbox"/> Approved w/Corrections	<input type="checkbox"/> Withdrawn
	<input type="checkbox"/> Denied	<input type="checkbox"/> Received & Filed	<input type="checkbox"/> Other

Recommendation:

That the Board of Fire Commissioners approve the report and recommendations.

Summary:

This subcommittee of the Fire Commission was created in September 2010 for the express purpose of discussing in private the City Attorney's August 23, 2010 advice regarding the Commission's and the Independent Assessor's access to Department information. Despite repeated attempts by the members of this subcommittee and the Independent Assessor to meet, discuss and resolve the issues involved, many of the critical questions remain unanswered. We are now providing the full Fire Commission with a report on what we have done over the past year to accomplish this goal, the City Attorney's responses, and what issues we believe are still outstanding.

Analysis:

The Fire Commissioners were told by their general counsel on August 17, 2010, that "any advice from your legal counsel is confidential and it is your privilege to waive or not to waive," and that they could discuss and ask questions about the City Attorney's legal advice, "but it is something that the public has the right to observe." Accordingly, the City Attorney's August 23, 2010 advice concerning the Independent Assessor's authority to access Fire Department information was placed on the September 21, 2010 meeting agenda as item 5B for public discussion. That advice was subsequently released to the public as BFC 10-110 in anticipation

of the public discussion at that meeting.¹ A copy of the August 23, 2010 advice is attached to this report as Exhibit 1.

When the Fire Commission was about to discuss the advice in public on September 21, 2010, Chief Assistant City Attorney Pete Echeverria proposed the Commission appoint a subcommittee to meet with the City Attorney's Office in private in order to fully answer questions and discuss the issues related to the Independent Assessor's authority and the City Attorney's August 23, 2010 advice. Mr. Echeverria proposed a private meeting with a subcommittee *"in order to maintain the confidentiality, to the extent that you agree needs to be maintained, you as a Commission...."* (Emphasis added.) The Commission appointed President Genethia Hudley-Hayes and Vice President Casimiro Tolentino to serve on this subcommittee, and the City Attorney's Office was informed that the Independent Assessor and the Fire Chief would also participate in the meeting.

Private Meeting Scheduling Problems and Subcommittee Questions

At the September 21, 2010 meeting, the Commission's general counsel said she would be "glad to coordinate" the private meeting. One week later on September 27, 2010, the Commission's executive assistant sent an email to Deputy City Attorney Janet Jackson asking if a date for the private meeting has been set. Ms. Jackson informed her the next day that Mr. Echeverria's assistant would "coordinate the setting of the meeting." On November 15, 2010, Ms. Jackson wrote to President Hudley-Hayes stating, "Pete suggested meeting with you, the Fire Chief and the IA to discuss the opinion. I believe Pete's secretary is coordinating a meeting."

When the City Attorney's Office had still not scheduled the private meeting, the Commission subcommittee, in an attempt to prompt the City Attorney to schedule the private meeting and narrow the issues to be discussed, sent a letter to the City Attorney on January 18, 2011. This letter asked that the meeting be promptly scheduled and included questions about the City Attorney's advice (concerning access and other issues) with a request for written answers to those questions. A copy of the written questions sent to the City Attorney by the subcommittee concerning access is attached to this report as Exhibit 2.

The private meeting finally took place on March 1, 2011; however, the questions were not answered by the City Attorney's Office and the issues were not discussed to the satisfaction of the subcommittee or the Independent Assessor. Accordingly, the City Attorney's Office was asked to schedule a follow-up meeting for the purpose of only discussing the Independent Assessor's authority. The follow-up meeting was never scheduled, and the same issues that have been pending since the City Attorney's Office proposed the private meeting one year ago remain unresolved.

Chemerinsky Opinion

On May 16, 2011, the City Attorney's Office issued an advice memorandum that briefly discussed the Fire Commission's role in the Department's disciplinary process. That memorandum cited authorities previously omitted from the August 23, 2010 opinion, most notably formal City Attorney Opinion No. 2006:1, dated May 9, 2006, and the Court of Appeal decision in *Patton v. Board of Harbor Commissioners* (1970) 13 Cal.App.3d 536, for the

¹ City Attorney Opinion No. 96-5, dated May 17, 1996, states at page 8, "[w]here there is no litigation or threat of litigation, attorney-client communications involving a single department or office may be under the control of the department head or officer of the City."

proposition that the Fire Chief's functions of discharging and suspending Department employees are "subject to review and corrective instruction from the Fire Commission."

When the City Attorney failed or refused to answer questions or address issues related to their August 23, 2010 advice after ten months, and given the apparent conflict between the August 23, 2010 and May 16, 2011 advice, the Independent Assessor contacted Dean and Distinguished Professor of Law Erwin Chemerinsky in an attempt to clarify the issues. Please recall that Dean Chemerinsky previously served as Chair of the Elected Los Angeles Charter Reform Commission that was instrumental in writing the current City Charter. Dean Chemerinsky is a preeminent legal scholar with an international reputation. He is often asked to provide training to members of the Federal judiciary.

One week after reviewing voluminous materials, including formal City Attorney opinions and reports dating back to 1946, Dean Chemerinsky provided a written opinion that was entirely consistent with prior formal City Attorney opinions and the Court of Appeal decision in *Patton*. Dean Chemerinsky opined that the Independent Assessor clearly has access to all personnel files, disciplinary records and investigative materials because, as a managing head of the Fire Department under Charter sections 500 and 506, the Fire Commission has access to all Department materials and Charter section 523 says the Independent Assessor "**shall have the same access to Fire Department information as the Board of Fire Commissioners.**" (Emphasis by Dean Chemerinsky.)

Outstanding Issues

Over the course of the past year, the Independent Assessor and Commission subcommittee have raised a number of questions with the City Attorney's Office regarding their August 23, 2010 advice concerning access to Fire Department information. These questions have been raised in a number of different ways, to a variety of individuals within the City Attorney's chain of command, but have gone unanswered. What follows is a list of the principal questions, which illustrate the crux of this dispute:

1. Why does the City Attorney's August 23, 2010 advice memorandum, which fails to mention either formal City Attorney Opinion No. 2006:1 or the *Patton* case, say the Fire Commission "has no role in personnel actions or discipline of Department employees, and has no role in oversight of the disciplinary process" when the City Attorney's May 16, 2011 advice memorandum, that does reference those authorities, says the Fire Chief's functions of discharging and suspending Department employees are "subject to review and corrective instruction from the Fire Commission?"
2. How can the Fire Commission appropriately and responsibly review the Fire Chief's discharge and suspension of Fire Department employees and issue appropriate corrective instructions to the Fire Chief, pursuant to Charter section 509, City Attorney Opinion No. 2006:1, the *Patton* opinion and the City Attorney's May 16, 2011 advice memorandum, without having access to the same confidential information the Fire Chief uses in imposing suspensions and discharges?
3. Why is the Board now being told it does not have access to Fire Department personnel information when the City Attorney's Office has repeatedly advised the Board to hold closed session meetings to discuss Fire Department disciplinary and personnel matters both before and after the August 23, 2010 advice was issued?

4. Why does the City Attorney's August 23, 2010 advice memorandum cite Charter sections 509(b) and 574(c) for the proposition that both the Police Chief and the Fire Chief have exclusive jurisdiction over discipline in their respective departments when: 1) it is Charter section 571(b)(1) (and not either section 509 or 574) that says only the Police Chief has such exclusive jurisdiction; and 2) the City Attorney's May 16, 2011 advice says the Fire Chief's functions of discharging and suspending Department employees are "subject to review and corrective instruction from the Fire Commission?"
5. How can the August 23, 2010 statement that the Fire Commission "has no role in oversight of the disciplinary process" be reconciled with either of the following: 1) the City Attorney's repeated advice to the Board to hold closed session meetings to discuss Department disciplinary and personnel matters; and 2) the Civil Service Commission approved class specification that says the Independent Assessor "assists the Board of Fire Commissioners in providing civilian oversight by monitoring the disciplinary process in the Los Angeles Fire Department (LAFD) to ensure that investigations are conducted in a thorough, fair, and effective manner?"

This subcommittee believes the issue boils down to this:

Why don't the Fire Commission and the Independent Assessor have access to confidential Fire Department information if:

- 1) the Fire Chief's functions of discharging and suspending employees are "subject to review and corrective instruction from the Fire Commission;"²
- 2) the Fire Commission cannot appropriately and responsibly review the Fire Chief's discharge and suspension of Fire Department employees without having access to the same confidential information the Fire Chief relies on in imposing such suspensions and discharges;
- 3) the doctrine of implied or presumed powers presumes the Fire Commission has all powers essential to carry out its ability to review and issue corrective instruction to the Fire Chief;³ and
- 4) all Charter section 523 says about access is, "The Independent Assessor ... shall have the same access to Fire Department information as the Board of Fire Commissioners?" (Emphasis added.)

Fiscal Impact:

None.

Conclusion:

The City Attorney's Office sent a letter to this Commission and the Interim Fire Chief on August 8, 2011. In it the City Attorney's Office reiterated their intent to stand by the August 23, 2010 advice, and stated that "[t]he Charter does not mandate that the City Attorney engage in debate or negotiation over the legal advice or opinions this Office renders." It appears the City Attorney's Office is no longer willing to answer the Commission's questions regarding the August 23, 2010 advice, or discuss any of the issues related to that advice.

² This is stated in the City Attorney's May 16, 2011 advice memorandum.

³ The doctrine of implied or presumed powers is set forth in 33 Ops.L.A.City Atty 46, 49, the City Attorney's January 6, 1997 advice letter to LAPD Inspector General Katherine Mader and *California Civil Code* section 3522.

On September 7, 2010, the Commission's general counsel provided advice stating the Board of Fire Commissioners may decide whether or not to follow the City Attorney's advice. Given the conflicts and contradictions of advice previously rendered we believe the more prudent approach is to follow the City Attorney's May 16, 2011 advice, which relies on the Court of Appeal's published decision in the *Patton* case and formal City Attorney Opinion No. 2006:1. These legal authorities were not cited in the August 23, 2010 advice memorandum.

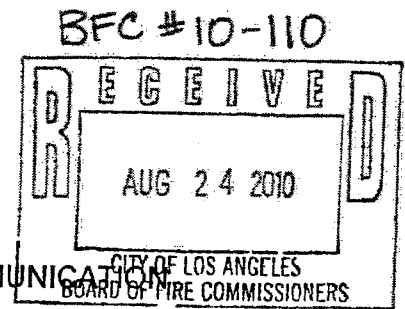
It is the opinion of this subcommittee that the Independent Assessor is not seeking to expand his powers and duties to audit, assess and review. All he is seeking is the same access to Fire Department information as the Board of Fire Commissioners that is granted to him by the Charter.

Accordingly, this subcommittee urges our fellow Commissioners to join us in:

1. Receiving and filing the Independent Assessor's Policy Statement so that he can move forward with his important work, assisting us with oversight of the Los Angeles Fire Department; and
2. Reaffirming the Fire Commission's *Policies and Authority of the Independent Assessor*, approved unanimously on December 15, 2009, which are attached as Exhibit 3.

EXHIBIT #1

MEMORANDUM



CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

TO: THE HONORABLE BOARD OF FIRE COMMISSIONERS
STEPHEN MILLER, INDEPENDENT ASSESSOR

FROM: ZNA PORTLOCK HOUSTON, ²⁰¹⁴ SENIOR ASSISTANT CITY ATTORNEY
VIVIENNE SWANIGAN, DEPUTY CITY ATTORNEY

DATE: AUGUST 23, 2010

RE: LOS ANGELES FIRE DEPARTMENT INDEPENDENT ASSESSOR'S
AUTHORITY TO ACCESS FIRE DEPARTMENT PERSONNEL AND
DISCIPLINARY RECORDS AND INFORMATION

This opinion memorandum addresses your request for advice concerning the scope of the Los Angeles Fire Department ("LAFD" or "Fire") Independent Assessor's authority to access Fire Department personnel files and records, including disciplinary records, in order to fulfill his duties under the Los Angeles City Charter ("Charter"). Based on the information provided to us, we assume your inquiry concerns both Fire Department sworn and unsworn employee personnel records, including all disciplinary records relating to allegations of alleged misconduct by Fire Department personnel.

QUESTION :

What is the scope of the LAFD Independent Assessor's legal authority to access employee personnel records (sworn and unsworn), including disciplinary records and documents created during the course of an administrative investigation?

ANSWER :

The Los Angeles City Charter grants the LAFD Independent Assessor "the same access to Fire Department information as the Board of Fire Commissioners." Charter Section 523. The inquiry, therefore, must determine the legal authority of the Board of Fire Commissioners (Board) to access Department personnel and disciplinary records and information. As discussed below, given the confidentiality of, and legal limitations on access to, personnel and disciplinary records and information, the Board has authority to access only those records and information as are required to perform its Charter mandated duties, as expressly granted in the Charter. Because the Board has no authority over individual personnel matters in the Department and no authority over the imposition of discipline in individual cases, as that authority is expressly granted by the City Charter to the Fire Chief, the Board's access to such documents and

information, although not non-existent, is clearly limited by the Charter and other provisions of law.¹ Without such authorization being granted to the Board, Fire personnel and disciplinary records and information are similarly precluded from being disclosed, either orally or in writing, to the Independent Assessor by relevant provisions of the California Constitution, the California Government Code, and the Los Angeles Administrative Code. See California Constitution, Article I, Section 1; California Government Code Section 6254(c),² and Los Angeles Administrative Code Section 12.21(c).³ Accordingly, the legal authority of the Independent Assessor (IA) does not grant him access to individual Fire Department personnel records, including disciplinary records, or to such information, except as otherwise provided.⁴ Unauthorized disclosure of such records and information might likely result in City liability for violation of the right to privacy.

Notwithstanding the foregoing, the IA is granted access by the Charter to a wide array of documents and information about personnel and disciplinary matters. Charter Section 1060, for example, requires the filing of a verified complaint with the Board which "shall contain a statement in clear and concise language of all of the facts constituting the charge or charges" against an accused sworn employee, and, therefore, makes these documents accessible to the IA. In addition, all statements of suspension or removal must be filed with the Board. Moreover, the Board of Review Hearings, and the transcripts of the proceedings are accessible to the IA, as they are accessible to the public. These and other documents and information enable the IA to inquire further about those matters in an informed way, and to request other records (which would have to be redacted to remove confidential information) or request preparation of

¹ A municipal corporation created by Charter derives all its powers from the California Constitution and the City Charter under which it operates. A charter is therefore a limitation, rather than a grant, of powers. *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal.4th 161, 170; 36 CalRptr.2d 521 (1994). "In other words, the City Charter represents the supreme law of the city, subject only to conflicting provisions in the state and federal law," and "supercedes all municipal laws, ordinances, rules or regulations that are inconsistent with its provisions." – See McQuillin Mun. Corp. §9.03, pg. 165 (3rd Ed.)

² Government Code Section 6254(c) is contained in Title I, Division 7, Chapter 3.5 governing inspection of public records, and contains exemptions to the Public Records Act disclosure requirements, stating that "[N]othing in this code shall be construed to require disclosure of records that are any of the following: (c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."

³ Los Angeles Administrative Code Section 12.21 states that "Nothing in this chapter shall be construed to require disclosure of records that are:.....(c) Personnel, medical, hospital or similar records, the disclosure of which would constitute an unwarranted invasion of personal privacy;..."

⁴ Disclosure may also be prohibited, to the extent the personnel records contain medical records, under Evidence Code Section 994 (governing the physician-patient privilege) and Government Code Sections 6276 and 6276.16 (governing confidentiality of disciplinary investigation information of emergency medical technicians and emergency medical technician-paramedics), citing Health and Safety Code Sections 1798.200 and 128736. Similarly, disclosure of peace officer personnel records (i.e., Fire Arson Unit sworn employees) may be precluded by Penal Code Sections 832.7 and 832.8; see also, generally, *Berkeley Police Asso. v. City of Berkeley* (2008), 167 Cal. App. 4th 385 and *Copley Press v. Superior Court of San Diego* (2006), 39 Cal.4th 1272.

reports or summaries that will provide the information the IA requires to perform his duties and function. In addition, the IA has legal access to general reports or other documents prepared by Fire Department staff that pertain to or have information about disciplinary matters, such as documents maintained or compiled by the Fire Department that provide general disciplinary information or trends (for example, a document listing employees' position or rank, charges alleged against him or her, and the discipline imposed, if any) or policies, and documents which would not be considered protected personnel records. Such documents do not involve a risk of invasion of privacy, particularly in the context of public employment. In addition, in appropriate cases, the IA may seek a written waiver of the right to privacy from an affected employee for the release of particular records. As discussed below, all such records and information, although limited, are available to the IA, and may be utilized to perform his duties.

LEGAL DISCUSSION

A complete analysis of the question presented requires review of the relevant provisions of the California Constitution and other applicable laws governing personnel records and the right to privacy, the rules of statutory construction, and the legislative history and provisions of the Charter as it pertains to the duties and authority of the Independent Assessor.

A. Personnel Records Privacy Provisions

Personnel records, which include records of disciplinary matters, are generally protected by the right to privacy that is firmly grounded in the California Constitution, as well as the federal Constitution. *San Diego County v. Superior Court* (2001), 87 Cal.App.4th 1083. The California Constitution, Article I, Section 1, contains an individual right of privacy, and provides that employment records - to the extent they contain private information - are within the category of private information protected by that provision. As noted by the court in *El Dorado Savings and Loan Assn. v. Superior Court* (1987) 190 Cal.App.3d 342, 364 (citation omitted):

"[I]n the context of discovery of confidential information in personnel files, even when such information is directly relevant to litigation, discovery will not be permitted until a balancing of the compelling need for discovery against the fundamental right of privacy determines that disclosure is appropriate. And, even when the balance tips in favor of disclosure, constitutional concerns require a strict circumspection of the scope of the disclosure."

The fundamental right of privacy that protects personnel records has long been recognized by California courts (See, e.g., *Vercaci v. Superior Court* (2005), 127 Cal.

App. 4th 805, noting an underlying purpose to "protect the employee from public embarrassment and to permit candid discussions of personnel matters by local government entities", at p. 822; See also *Duval v. Board of Trustees* (2001), 93 Cal.App. 4th 902, 908[same], and the legislature has been "mindful of the right of individuals to privacy" (Government Code § 6250)

At the same time, the legislature has also declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." *Ibid*; see also California Constitution, Article I, § 3, subd. (b)(1). In 2004, Proposition 59 was approved by California voters, which incorporated into the California Constitution the public's right to access records of public agencies.⁵ (California Constitution, Article I, Section 3, subd (b), par. (2)). However, the California Public Records Act (Government Code §§ 6250, *et. seq.*) governing public access to government records contains a specific *exception* for disclosure of personnel records. (Government Code § 6254(c)) Such records are also given special consideration under Code of Civil Procedure Section 1985.6(b), which requires notice to an employee before his or her employment records can be released pursuant to a lawful subpoena.

On the local level, Los Angeles Administrative Code Section 12.21(c) recognizes that disclosure of personnel records may constitute "an unwarranted invasion of personal privacy." Additionally, under certain circumstances – such as where medical records or police or paramedic personnel are involved - other laws may preclude disclosure of personnel records as well.⁶

The right to privacy in personnel records, however, is not absolute. In determining whether a public agency's personnel records should be disclosed, the courts first determine whether disclosure would compromise "substantial privacy interests". Second, a court must "determine whether the potential harm to the privacy interest from disclosure outweighs the public interest in disclosure." *BRV, Inc. v. Superior Court of Siskiyou Co.* (2006), 143 Cal. App. 4th 742, 755, citing *Versaci v. Superior Court of San Diego Co.* (2005), 127 Cal. App. 4th 805, 818. This weighing process has concluded in varying fact-specific results, but, in general, courts have protected records from disclosure where: (1) the records were not truly private, such as in the case of employees' position, rank, and salary disclosures; (2) misconduct accusations were against a public official in a position of authority and the allegations were of a public nature; and (3) the allegations of misconduct were substantial in nature, such as involving sexual conduct, threats of violence, and violence and there was reasonable cause to believe they were well founded, allowing limited disclosure. See

⁵ The Amendment did not actually modify or further limit an individual's right of privacy as protected by the Constitution and the Public Records Act. *California State University, Fresno, v. Superior Court* (2001), 90 Cal App.4th 810, 831; *BV, Inc. v. Superior Court of Siskiyou Co*(2006), 143Cal.App.4th 742, 750-751.

⁶ See footnote 4, above. See also California Civil Code §56.10(c)(8).

International Federation v. Superior Court of Alameda Co. (2007), 42 Cal.4th 319; *BRV, Inc. v. Superior Court of Siskiyou Co.* (2006), 143 Cal. App. 4th 742; *Versaci v. Superior Court of San Diego Co.* (2005), 127 Cal. App. 4th 805; *Bakersfield City School District v. Superior Court of Kern County* (2004), 118 Cal. App.4th 1041; *Teamsters Local 856 v. Priceless, LLC* (2003), 112 Cal.App.4th 1500 (disapproved in part in *International Federation, supra.*); citations omitted. Generally, in instances where disclosure of personnel records has been approved, the disclosure has been a limited, rather than wholesale, disclosure.

Of paramount import in the analysis found in these and other cases involving a request for access to personnel records is the actual need to access such records. *Harding Lawson Associates v. Superior Court* (1992), 10 Cal.App.4th 7,10. In light of the lack of authority of the Board of Fire Commissioners over individual personnel matters and the imposition of discipline, we next look to the rules of statutory construction, and examine the legislative history of the creation of the Independent Assessor position to determine whether those new Charter provisions establish in the Board, and therefore in the IA, a new legal need for access to such records.

B. Statutory Construction Rules

The fundamental rule of statutory construction is to ascertain the intent of the Legislature with a goal of effectuating the purpose of the statute or law in question. In accomplishing this, courts look to the words of the statute in order to give effect to the usual, ordinary meaning of the language, without rendering any language mere surplusage. Words must be construed "in context and in light of the nature and obvious purpose of the statute where they appear." If the language of a statute is clear, it should not be added to, or altered, to accomplish a purpose which does not appear on its face or from its legislative history. In addition, statutes should be harmonized, both internally and with each other. *Travis v. Board of Trustees of California State Univ.* (2008), 161 Cal.App.4th 335, 340-341, citing *Pasadena Metro Blue Line Construction v. Pacific Bell Telephone* (2006), 140 Cal.App.4th 658, 663-664.

Furthermore, the language of a statute should not be given a literal meaning if doing so would result in absurd consequences the Legislature did not intend. And, to the extent the statutory language leaves uncertainty, it is appropriate to consider the consequences that would flow from a particular interpretation. Indeed, where more than one statutory construction is possible, courts favor the construction that leads to the more reasonable result, selecting the construction "that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statute's general purpose". *Commission on Peace Officer Standards v. Superior Court of Sacramento Co.* (2007), 42 Cal.4th 278, 290, citations omitted. Legislative committee reports, and other legislative records, may be utilized to determine legislative intent. See, generally, *California Teachers Association v. Governing Board of Rialto Unified*

School Dist. (1997), 14 Cal.4th 627, and *Copley Press v. Superior court of San Diego Co.* (2006), 39 Cal.4th 1272.

C. Application of Statutory Construction Rules to the Duties, Role, and Access to Personnel Records of the Fire Independent Assessor

In applying the rules of statutory construction, we first look to the plain language of the Charter, establishing the position of Independent Assessor and the role of the Board of Fire Commissioners, to determine the parameters of the authority of the Independent Assessor. The authority for the position and duties of the IA are prescribed in Los Angeles City Charter Section 523:

"Sec. 523 Independent Assessor

The Independent Assessor shall report to the Board of Fire Commissioners and shall have the same access to Fire Department information as the Board of Fire commissioners. The Independent Assessor shall have the power and duty to:

- (a) under rules established by the Board of Fire Commissioners, *audit, assess and review* the Fire Department's handling of complaints of misconduct committed by employees, sworn or civilian, of the Fire Department;
- (b) conduct any audit or assessment requested by majority vote of the board;
- (c) initiate any assessment or audit of the fire Department or any portion of the Fire Department with prior notice to the Board of Fire Commissioners, and subject to the authority of the board by majority vote to direct the Independent Assessor not to commence or continue an assessment or audit;
- (d) keep the board informed of the status of all pending assessments and audits; and
- (e) appoint, discharge, discipline, transfer and issue instructions to employees under his or her direction." *Emphasis added.*

The Charter prescribes for the IA the power and duty to "audit, assess and review the Fire Department's handling of complaints of misconduct committed by employees...of the Fire Department." Each of these terms encompassing the duties of the IA must be looked at individually.

First, the IA has the duty to "audit" the Department's handling of complaints of employee misconduct. Webster's Collegiate dictionary, Tenth Edition, defines "audit" as: (1a) a formal examination of an organization's or individual's accounts or financial situation (1b): the final report of an audit (2) a methodical examination and review. Next, the IA has the duty to "assess" the same. Webster's Collegiate defines "assess" as: (1): to determine the rate or amount of (as a tax), (2a): to impose (as a tax) according to an established rate (2b): to subject to a tax, charge, or levy, (3) to make an official valuation of (property) for the purposes of taxation, (4) to determine the importance, size, or value of, and (5) to charge (a player or team) with a foul or penalty. Finally, the IA must "review" the Department's handling of complaints. Webster's Collegiate defines "review" as: (1) to view or see again; (2) to examine or study again, especially to reexamine judicially; (3) to look back on - take a retrospective view of; (4) a: to go over or examine critically or deliberately b: to give a critical evaluation of; (5) to hold a review of. After removing all references to financial, tax, property, and sports - which are clearly not applicable here - and utilizing the reasonable and clear remaining definitions of the words utilized in the statute, it is clear that the duties of the IA are to (1) conduct a methodical examination and review of the Department's handling of complaints of misconduct, (2) determine the importance, size, and value of the Fire Department's system for handling such complaints, (3) conduct a critical and deliberate evaluation of Fire's handling of such complaints, and (4) issue a final report of such audit(s). Such audit or assessment may be requested by a majority vote of the Board, or initiated by the IA on his own, subject to the authority of the Board to direct the IA not to start or not to continue an assessment or audit.

Charter Section 523 grants the IA "the same access to Fire Department information as the Board of Fire Commissioners" Webster's Collegiate Dictionary, Tenth Edition, defines "information", in relevant portion, as: (1) the communication or reception of knowledge or intelligence, (2) knowledge obtained from investigation, study, or instruction, (3) intelligence, news, or (4) facts, data.⁷ Accordingly, the clear intent of this passage was to ensure that the IA was privy to all information and knowledge of the Department that the Board of Fire Commissioners has available to it, both by way of past records and reports and by way of news, facts, data, or other knowledge obtained by the Board in its official role as head of the Fire Department.⁸

It is readily apparent that the Board, as the head of the Fire Department, already possesses the authority to "audit, assess and review the Fire Department's handling of complaints of misconduct committed by employees. . .", and did, prior to the creation of the IA position. The Charter provides that the Board "shall have the power to supervise, control, regulate and manage the department" and, in doing so, the Board

⁷ Other inapplicable definitions of "information" go to technology and/or criminal accusations.

⁸ Charter Section 500 confers on the Board of Fire Commissioners, as well as other departments (including Police), the role of "head of the department".

has the power to "make and enforce all rules and regulations necessary for the exercise of the powers and the performance of the duties conferred upon that board by the Charter." However, under Charter Section 509, only the Chief Administrative Officer of a Department under the control of a Board⁹ (e.g., the Fire Chief) has authority to "appoint, discharge, suspend, or transfer the employees of the department or bureau, other than the secretary of the board and the chief accounting employee of the department", and the power to "issue instructions to employees in the line of their duties",¹⁰ all subject to the civil service provisions of the Charter.¹¹ No such power resides in the Board, despite the Board's ability to affect Department rules and provide general instructions. Thus, the power and duty granted to the IA is not an expansion of the power of the Board. Rather, it is a concentration in one person directly accountable to the Board of the powers it already has but which are cumbersome and less than effectual when exercised by the Board as a body. The Charter provisions that pertain to the IA do not, expressly or impliedly, amend the several other provisions that prescribe and limit the authority of the Board over individual personnel matters and over the imposition of discipline in individual cases and its access to personnel and disciplinary records. The grant to the IA of "the same access to Fire Department information as the Board of Fire Commissioners" is both a grant and a limitation. A charter is a limitation, rather than a grant, of the City's powers. *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal.4th 161, 170; 36 Cal.Rptr.2d 521 (1994).

Accordingly, the City Charter does not allow the Board of Fire Commissioners to legally access individual Fire Department personnel and disciplinary records.¹² This is in accord with the application of the Ralph M. Brown Act (Brown Act), which governs meetings of governmental bodies (referred to in the Brown Act as "legislative bodies") such as the Board of Fire Commissioners. The Brown Act does not allow a closed session to be held by bodies such as the Commission to discuss personnel or disciplinary records protected by an employee's right to privacy outside of the purview of the public. In concluding the Brown Act does not allow such a closed session by a body with powers and limitations similar to the Board, the Attorney General's Office opined:

"We have previously examined the duties of a board and a superintendent with respect to the appointment, discipline, and establishment of salaries of certified and classified county personnel. We concluded that the superintendent, and not the

⁹ With the specific exception of the Police Department, whose Chief Administrative Officer (CAO) and Board of Police Commissioners are handled differently. See Charter Sections 509. Police Department CAO (Police Chief) and Board duties are covered elsewhere in the Charter.

¹⁰ See Charter Section 1060 requiring filing of very limited disciplinary records with the Board.

¹¹ Charter Section 509(b) and 509(c).

¹² This does not include general records, and other records not involving privacy rights that may be designated as part of personnel records. See also footnote 14, below.

board, is authorized to appoint, discipline, and establish the salaries of certified and classified employees. A decision of a superintendent to employ persons in positions requiring certification qualifications does not require consideration by, or the approval of, the board. Likewise, a superintendent's decision to employ classified employees does not require the board's approval of consideration. The purposes of section 54957 [of the Brown Act] would be ill served by allowing a board to meet in closed session to consider the superintendent's appointment, employment, evaluation of performance, discipline or dismissal of certified and classified school employees. "The purposes of the personnel exception are (1) to protect employees from public embarrassment and (2) to permit free and candid discussions of personnel matters by a local governmental body." *Citation omitted*. These purposes presuppose a need to consider such employment matters. *Citations omitted*.

We must construe the personnel exception narrowly in favor of the Act's general requirement of holding open and public meetings. *Citations omitted*. We find no substantial reason for a board, which is neither the employer of, nor disciplinary authority for, certified or classified employees of the superintendent, to meet in closed session for considering the superintendent's appointment, employment, evaluation of performance, discipline, or dismissal of such employees. Accordingly, we conclude that a board may not meet in closed session under the personnel exception of the Act to consider the appointment, employment, evaluation of performance, discipline, or dismissal of certificated or classified employees of the superintendent." *California Attorney General Opinion No. 01-505, April 20, 2002.*¹³

Because the Board of Fire Commissioners has no role in personnel actions or discipline of Department employees, and has no role in oversight of the disciplinary process, the Board is without authority, except as otherwise expressly provided, to access private personnel records of Department employees¹⁴, nor can it meet in closed session to

¹³ A report on this opinion was given to the Board of Fire Commissioners at its June 18, 2002, commission meeting by the City Attorney's Office.

¹⁴ The Board of Fire Commissioners' ("Commission"), and thereby the IA, does have access to limited personnel related documents for purposes of performing IA duties, including:

(1) Fire Department complaints of alleged misconduct by employees, including names of employees, and the specific charges alleged against them;
(2) Board of Rights proceedings held in sworn employee discipline matters, including the transcript of such hearings and the final written decision;
(3) Departmental reports redacted of all identifying and confidential information, and not otherwise constituting a violation of the Right to Privacy;

discuss such records. See also 89 Ops. Cal. Atty. Gen 110, *Office of the Attorney General of the State of California*, Opinion No. 05-701, May 25, 2006 (confirming closed session allowed when local agency has jurisdiction over personnel related matters).¹⁵

D. Legislative Intent and History of the IA Position

The conclusion that the clear language of the Charter does not grant the Board or the IA access to individual personnel or disciplinary records or information is further supported by the legislative history of the Charter proposal¹⁶ to establish the position of Independent Assessor.

The events leading to the creation of the position of the IA began with a City Council motion on approximately April 22, 2005, in which the Fire Department, Human Relations Commission, Commission on the Status of Women, and the Personnel Department were directed to report to the Council's Personnel Committee with a review of the Fire Department's grievance process for discrimination complaints, including record keeping, and a review of the Department's hiring standards. (Los Angeles City Council File ["Council File"] No. 05-0801) This request resulted in the Personnel Department taking the lead, and issuing an Audit of the Fire Department's selection and employment practices issued on or about January 30, 2006.¹⁷ This was the second audit of the Fire Department conducted by the Personnel Department, with the first having been completed in November 1994.¹⁸ That 2006 audit had been

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- (4) The final disciplinary action, if any, taken against any employee;
(5) Information regarding the staffing, size, procedures, time frame, investigative methods, training, and other tools and/or systems utilized by the Fire Department in administering discipline;
(6) All other information regarding the Fire Department disciplinary system not contained in privileged personnel records.

¹⁵ "Opinions of the California Attorney General....while not binding on [courts], are entitled to great weight, especially when the Legislature either amends a statute to conform to such an opinion, or fails to pass an amendment that is contrary to an earlier Attorney General's opinion. *Travis v. Board of Trustees of the California State Univ.* (2008), 161 Cal.App.4th 335, 344-345, citing *Orange Co. Employees Assn., Inc. v. County of Orange* (1993), 14 Cal.App.4th 575, 578.

¹⁶ For all legal purposes, a municipal corporation "is a miniature state, the council is its legislature, the charter is its constitution." *McQuillin Mun. Corp.* §9.03, *supra*.

¹⁷ The Executive Summary of the Personnel's Department audit of the Fire Department is dated January 31, 2006. Both documents are contained in Council File No. 05-0801. See also Council File Nos. 05-1294-S1, 06-2929 and 06-2959.

¹⁸ The Personnel Department's original audit (1994) of the Fire Department's personnel practices, working environment, and disciplinary process was conducted by the Personnel Department without review of privileged personnel and disciplinary records. The Personnel Department relied on general records, training records, compilations of general computer records, and employee interviews. In its second audit (2006), the Personnel Department relied on general records, training records, compilations of general computer records, employee interviews, city attorney records, its own EEO investigation records, EEOC (Equal Employment Opportunity Commission) complaint records, limited Fire Department personnel disciplinary records, and a stakeholders working committee. It should be noted that the Personnel Department is entitled to access Fire and other Department personnel records pursuant to its

immediately preceded by a January 2006 Audit of the Fire Department by the City Controller's Office¹⁹, and followed by a Board of Fire Commissioners "Fire Commission Audit Action Plan" dated April 25, 2006, (approved by the Commission May 2, 2006), which was followed by a proposal to the Mayor's Office on June 5, 2007, from the Fire Department, through its Stakeholder group, for establishment of a Professional Standards Division dedicated to the investigation and processing of sworn disciplinary matters.²⁰

The Personnel Department then provided a detailed report to the Public Safety and Audits & Governmental Efficiency Committees of City Council regarding "Development of a Professional Standards Division within the Los Angeles Fire Department" dated January 24, 2008. The City Controller's Office subsequently issued a May 30, 2008, "Follow-Up Audit of LAFD's Management Practices" addressing leadership, handling of discipline, communication, training, the Professional Standards Division plan, disciplinary standards, *Skelly* procedures, and other matters.²¹ A response to the Follow-Up audit was submitted by the Fire Department on August 26, 2008, by then Fire Chief Douglas Barry, who forwarded the Department's Audit Information Plan in response to the Controller's audits. The Controller's Office responded again on September 30, 2008.²²

In the meantime, on a parallel track, City Council addressed a proposed creation of an Inspector General for the Fire Department, patterned on the Inspector General position in the Police Department, suggested due to the *Tennie Pierce v. City of Los Angeles* civil litigation matter,²³ and the Controller's January 2006 audit of the Fire Department. This proposal was referred to Council Committee(s) and never acted upon.²⁴

authority to maintain personnel records, and investigate complaints filed with the EEOC and the ODCR (City of Los Angeles Office of Discrimination Complaint Resolution).

¹⁹ This audit was actually conducted on behalf of the City Controller's Office by Sjoberg Evashenk Consulting, Inc.

²⁰ See Board of Fire Commissioners Audit Action Plan dated May 18, 2006, and the Personnel Department report dated January 14, 2008, Council File No. 06-2959. There is no indication either of these lengthy reports required review of confidential personnel records.

²¹ This Follow-Up Audit indicates that City Controller staff reviewed "five disciplinary cases", but is silent as to the detail involved in those case reviews or whether or not this Office was contacted for advice as to the legality of such review. We can make no assertion here as to the legality of this original review. See Council File No. 06-2959. All other observations and conclusions came from other audit methods, including management and staff interviews, demographic statistics of recruit classes and probationary firefighters, grade reports for a sample Drill Tower recruit class, and review of the Complaint Tracking System, Disciplinary Tracking System, and the Information Portal.

²² See September 30, 2008 correspondence to Fire Chief Barry re: Evaluation of the Fire Department's Response to the Follow-Up Audit sent from then City Controller Laura Chick. Council File No. 06-2959.

²³ In this matter, Firefighter Pierce was allegedly fed dog food in his spaghetti by other members of his firehouse.

²⁴ See Council File 06-2930, and City Council motion contained therein.

Later that same year, on December 1, 2006, a new Council motion was made in regard to the Fire Department audits, in which additional information was requested regarding, among other things, "[t]he role and effectiveness of an Inspector General" for the Fire Department. The Personnel Department's January 14, 2008, report was also referred to Council Committee²⁵, with no further action taken.

By October 2008, the proposed Fire Inspector General position was described by City Council motion as a need for "an Independent Assessor to monitor the Department's reform efforts".²⁶ The Motion requested that the City Attorney, with the assistance of the Chief Legislative Analyst, report on the need for Charter changes to place the Independent Assessor position on the March 3, 2009, ballot. This original motion also states that "[t]he Independent Assessor's oversight role is to ensure that the work of the PSD is fair, thorough and objective." In response, the Chief Legislative Analyst provided a report to the Rules and Government Committee dated October 17, 2008. The CLA's report acknowledged that, based on the City Attorney's advice, a Charter amendment would be required to create the IA position, and submitted the wording of the Police Department's Board of Police Commissioners and Inspector General Charter sections (Sections 571 and 573) as proposed wording for the new Charter provision establishing the Independent Assessor position²⁷.

On October 22, 2008, the Public Safety Committee's Legislative Assistant (LA) sent correspondence to the Rules and Government Committee Chair stating that two Council Committees (Public Safety, and Audits and Governmental Efficiency) had approved the motion to proceed with the steps necessary for placing a ballot measure on the March 2009 ballot for the IA position, but noted that a decision had also been made to "INSTRUCT the Fire Department, the City Administrative Officer, and Chief Legislative Analyst, in consultation with appropriate employee associations, to report back with a detailed description of the new Independent Assessor position, a clarification as to whether the new position can initiate investigations or *solely serves an audit function*, and a more clear definition of the position's scope of work and area of responsibility" (emphasis added)²⁸. The Council File (No. 08-2693) was then forwarded

²⁵ See Council File 06-2959.

²⁶ See Council Motion dated October 3, 2008, Council File No. 08-2693, assigned to Public Safety, Audits & Governmental Efficiency, and Rules and Government Committee.

²⁷ Council File No. 08-2693.

²⁸ The Report of the Public Safety and Audits and Government Committee meeting (held jointly) states: "At their joint meeting held October 20, 2008, the Public Safety and Audits and Governmental Efficiency committees discussed this matter with representatives of the Fire Department, City Attorney, and CLA. At that time, several committee members questioned the proposed duties of the Independent Assessor position. Specifically, questions were raised relative to whether the position would perform audit functions, or have a broader area of responsibility including the ability to independently initiate investigations." The Committee(s) report then requests a report be provided clarifying the duties and "scope of work and area of responsibility" of the IA position. Council File No. 08-2693.

to the Rules and Government Committee with the LA correspondence. On October 24, 2008, the Rules and Government Committee adopted the Motion generally, but apparently amended it to conform with the concerns expressed by the other two committees. The summary of the Rules and Government Committee meeting states that "[d]uring the discussion of this matter, Councilmembers Weiss and Zine expressed concern that the Independent Assessor position serve an auditor role as opposed to an investigative role. Councilmember Weiss stated that the Board of Fire commissioners will need to revise the job description for the Independent Assessor position to reflect the position as an auditor and remove any reference to investigative functions." The CLA report recommending steps be taken to amend the City Charter to establish an Independent Assessor position was then approved, and the matter was forwarded on to Council.

Thereafter, the instruction to "remove any reference to investigative functions" was followed by the City Attorney's office, and a verbal motion was presented by Councilmembers Weiss and Huizar. Instead of being given the broad power to "audit, investigate and oversee" the handling of complaints of misconduct which had been granted to the Police Inspector General, the draft resolution and Charter amendment establishing the position of the Fire Independent Assessor contained a much more limited power to "audit, assess and review" the Department's handling of complaints of misconduct by Department employees.²⁹ The legislative history of the Charter amendment to create the IA position and prescribe its authority supports the results of the statutory construction analysis that the IA's access to Fire Department information was not intended to extend to individual personnel and disciplinary records or information. Moreover, there is clear evidence of the framers' intent that the IA not have the authority to conduct investigations or oversee the Fire Department's handling of complaints of misconduct. Thus, the IA has no authority to direct or participate in the disciplinary process of the Department, or to conduct either directly or through employees he might supervise any investigations of employee misconduct, the handling of complaints of misconduct, or the imposition of discipline by the Department. Consequently, since the IA has no authority to investigate, it is impermissible for the IA to have investigators as direct reports, or to otherwise receive investigative material or information regarding confidential personnel or disciplinary matters, such as by attending Department meetings where those matters are discussed.

E. Comparison of the Fire Independent Assessor to Police
Inspector General, and Related Analysis of Access to Personnel
Records

While there are basic similarities between the allocation of powers in the Fire Department and the allocation of powers in the Police Department, there are also

²⁹ Council File No. 09-1100-S6.

important differences. In both Departments, the Chief Administrative Officer (i.e., the Police Chief or the Fire Chief) has exclusive jurisdiction over the appointment, discipline, and transfer of employees in the department. Charter Sections 509(b) and 574 (c). Also, both departments operate "under the control and management of a board of commissioners" and, in both Departments, the Commission is the head of the Department.

But the powers and duties of the Board of Police Commissioners differ significantly from the powers and duties of the Board of Fire Commissioners and, indeed, from those of all other City commissions that function as the head of their respective departments.³⁰ This different treatment of the Board of Police Commissioners can be traced to the evolution of the City of Los Angeles Charter and deliberate policy decisions affecting only that department.

In early versions of the Charter, the Board of Fire Commissioners and the Board of Police Commissioners had essentially the same powers. But by the 1925 City Charter, although both boards acted as the final forum of appeals of disciplinary matters filed by employees of the department, the Board of Police Commissioners had additional duties and powers, including the power to divide the work, organization and employees of the police department into two Bureaus, and the power to name a general manager or chief administrative officer for each.³¹ By 1946, appeal of sworn discipline had moved to a Board of Rights, consisting of three sworn officers, for both departments, but the Police Commission retained the option to reorganize the employees into two Bureaus. Furthermore, the Chief of Police was now appointed by, and could be removed by, the Board of Police Commissioners.³²

In 1998, just before the enactment of the newly revised City Charter, the Charter provided for in depth involvement of the Board of Police Commissioners in the hiring of the Police Chief. Furthermore, the Charter provided that "[t]he Board of Police Commissioners may remove the Chief of Police at any time prior to the expiration of a first or second five-year term."³³ The power to divide the work and organization of the Department into two bureaus was also retained.³⁴

Finally, under the current Charter, the Board of Police Commissioners is initially portrayed as the same as the Fire Department, as both are departments under

³⁰ Los Angeles City Charter, Sections 506 and 571.

³¹ See also 1925 City Attorney Opinion No. 598, issued December 10, 1925, finding a suspended employee of the Humane Animal Department had no right to appeal to the Humane Animal Commission, even though the Charter allowed Police Department employees the right to apply for such a hearing before the Police Commission.

³² Los Angeles City Charter, 1946, Section 199. See also Los Angeles City Charter, 1967 Edition, Revised, with Amendments up to and including those effective July 1, 1971.

³³ Los Angeles City Charter, 1998, Section 199(b), subdivisions 1, 3, and 4.

³⁴ Los Angeles City Charter, 1998, Section 204.

the control and management of a board.³⁵ However, at Charter Section 509 governing the powers of a Chief Administrative Officer of a department under the control of a board, the Charter treatment of the Police Department digresses.³⁶ A separate series of sections of the Charter specifically addresses the powers of the Police Chief and, in particular, the differing powers of the Board of Police Commissioners.³⁷ Under Section 571 of the Charter, the Board of Police Commissioners is specifically given authority to "evaluate the Chief of Police annually". The new Charter also retained the Board of Police Commissioners involvement in the hiring of the Police Chief, as well as its ability to fire the Police Chief.³⁸ Accordingly, this ability to evaluate the Police Chief and determine whether the Police Chief should be retained, would necessarily involve the ability to directly determine the Police Chief's direct handling of Department matters, including disciplinary matters, and, therefore, require a review of relevant personnel files, if deemed necessary, toward that end. The Police Inspector General's grant of access to the same information available to the Board of Police Commissioners³⁹ thereby differs significantly from the grant of access to the Fire Independent Assessor, which at first glance might appear to be the same, but is not.⁴⁰

In addition, the Los Angeles City Council specifically chose to establish duties for the Police Inspector General which would necessarily involve review of personnel records. The Police Inspector General is tasked with the duty to "audit, investigate and oversee the Police Department's handling of complaints of misconduct by police officers and civilian employees and perform other duties as may be assigned by the board". (Emphasis added.)⁴¹ Not only is the clear language of the Charter provision much broader than that contained in the section setting forth the duties of the Fire Independent Assessor,⁴² but this wording clearly incorporates the exact wording (i.e., references to "investigate" and "oversee") which the Los Angeles City Council specifically chose to remove from the powers of the proposed Fire Department

³⁵ Los Angeles City Charter Section 500.

³⁶ Los Angeles City Charter (current) Section 509 exempts the Police Department from its recitation of the powers of such CAOs. However, the Board of Fire Commissioners has the identical role and powers as the Boards of such Departments as the Library, Public Works, and Recreation and Parks, but has the added position of the Independent Assessor.

³⁷ See Charter Sections 570-572.

³⁸ See Charter Section 575, subdivisions (a), (c), and (d) and Section 576(b).

³⁹ Los Angeles City Charter (current) Section 573.

⁴⁰ See also City Attorney Opinion Re: What Role May the Police Commission Give the Inspector General in Regard to Receiving Reports of Possible Police Officer Misconduct?, dated September 20, 1999, Opinion No. 99-7. It should be noted that the broad access to records granted to the Inspector General does not alter this Office's previous advice that the Police Commission is the head of the Police Department, but discipline rests with the Police Chief. See City Attorney Opinion Re: Board of Police Commissioners Head of Police Department, But Discipline of Police Officers Rests with Chief of Police, dated March 14, 1962, 1962 City Attorney Opinions at p. 214.

⁴¹ Charter Section 573. See Ballot for Charter Amendment 3, adding the position of Police Inspector General.

⁴² Los Angeles City Charter Section 523.

Independent Assessor. The clear import of the Charter, and the intent of the Council and the voters, is to treat these two positions differently, and to grant the Independent Assessor significantly less authority in regard to the Fire disciplinary process, granting the IA only the power to "audit"⁴³, review and assess"⁴⁴ which, as noted above, does not authorize access to privileged personnel or disciplinary records or information.⁴⁵

It should also be noted that the Board of Fire Commissioners has no legal authority to grant the Independent Assessor access to personnel documents it does not itself have legal access to, and which have not otherwise been statutorily authorized for disclosure. In a report to Council addressing proposed Charter amendment language as to the Police Inspector General position, our Office wrote:

"Regarding access to information, this is clearly within the authority of the Commission to grant to the Inspector General – bearing in mind that the Commission, as head of the Police Department, may access all information available to the Department. The Commission's rules grant the Inspector General '[c]omplete, unrestricted and prompt access to all Los Angeles Police Department records.....' We believe that the Council lacks the authority to require such access, for in doing so the Council would be interfering with the Commission's Charter authority over the Inspector General. Indeed, in receiving such authority the Inspector General would then possess a measure of independence from the Commission – a notion contrary to the Charter's conception of the Inspector General as an instrumentality of the Commission." City Attorney Report No. R99-0021, dated January 25, 1999, Re: The Police Inspector General, Council File No. 99-1762-S1, at pp. 10-11.

The Police Inspector General's access to Department information, including privileged personnel records, mirrors the information uniquely available to the Police Commission under which the Inspector General serves. The broader access to such documents

⁴³ It should be noted that access to individual personnel records is not required to conduct an audit. This is abundantly clear based upon prior audits of the Fire Department conducted by both the Personnel Department (twice) and the City Controller's Office.

⁴⁴ See Ballot for Charter Amendment A, adding the position of Fire Independent Assessor.

⁴⁵ As to the Police Department, this Office has previously opined that "[g]iven the Charter's broad grant of authority to 'audit, investigate, and oversee' departmental disciplinary matters and to perform such other duties as may be assigned by the Board", it appears that the IG's authority in these areas is limited only by the parameters set forth in the rules established by the Board or otherwise beyond the Board's power. For instance, because the Board has no authority to issue instructions to the Chief of Police concerning exercise of his disciplinary authority conferred by the City Charter Section 202, the IG has no such authority." Letter to Inspector General Katherine Mader, Los Angeles Police Department, dated January 6, 1997, re: Authority of the Office of the Inspector General. See also City Attorney Council Report No. R99-0021, dated January 25, 1999, Re: The Police Inspector General, Council File No. 99-1762-S2, and City Attorney Council Report No. R99-0334, dated October 22, 1999, Re: Authority of the Inspector General Under the New City Charter, Council File No. 99-1762-S2.

held by the Police Commission is based upon (1) the Police Commission's role in hiring and retaining the Police Chief, (2) its duty, through the Inspector General, to "investigate and oversee" the Police Department's handling of complaints of misconduct by its personnel, and (3) its authority to evaluate the Police Chief annually, including the Chief's administration of discipline, all conferred upon the Board of Police Commissioners by the Charter. In contrast, the Fire Department Independent Assessor's access to Department information mirrors that of the Board of Fire Commissioners, which does not include access to confidential, privileged, personnel and disciplinary records or information.

The broader powers of the Police Inspector General in this regard are acknowledged by the Los Angeles Administrative Code, which contains an entire article (at Division 4, Chapter 7, Article 11) codifying the protection of employees who are contacted or who contact the Police Inspector General, including a section requiring that information received by and investigations conducted by the Inspector General be kept confidential. No such corresponding statutory scheme is necessary for the position of Fire Department Independent Assessor, since the Independent Assessor does not have investigative or oversight powers justifying complete access to personnel records.⁴⁶

Notwithstanding the foregoing, the IA may still access all information legally available to the Commission, including disciplinary reports required by the Charter to be filed with the Commission, reports and other records prepared by the Department which do not contain confidential personnel information, and reports of disciplinary and personnel complaints, investigations, actions, proceedings, discipline, and similar matters that are redacted of all identifying details and confidential information and do not constitute an invasion of privacy. Such reports can be prepared at the direction of the Commission, or agreed upon between the Fire Chief and the IA. In addition, the Commission is always free to recommend to the Mayor and Council that its powers, as well as the duties of the IA, be changed by Charter amendment to provide authority over such matters and, therefore, access to such records and information.

cc: Honorable Antonio Villaraigosa, Mayor
Millage Peaks, Fire Chief
William W. Carter, Chief Deputy City Attorney
Pedro B. Echeverria, Chief Assistant City Attorney
Carlos De La Guerra, Assistant City Attorney
Janet Jackson, Deputy City Attorney

⁴⁶ As noted above, where the language of a statute is clear, it should not be added to, or altered, to accomplish a purpose which does not appear on its face or from its legislative history, and related statutes should be harmonized, both internally, and with each other. *Travis v. Board of Trustees of California State Univ.* (2008), 161 Cal.App.4th 335, 340-341, citing *Pasadena Metro Blue Line Construction v. Pacific Bell Telephone* (2006), 140 Cal.App.4th 658, 663-664. See also City Attorney Report No. R99-0042 dated February 5, 1999, Council File No. 95-1000-S5.