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What City Attorneys Need to Know When Law Enforcement Investigates Elected Officials

INTRODUCTION

No work of the city attorney is more important nor more difficult than the management of an investigation of an elected official by law enforcement.¹

The confidence and leadership of the city attorney will be critical to maintaining the public's trust in government and the city's ability to deal with the crisis. Any significant investigation will immediately call into question the public's trust of everyone in city government, and not just the official who is the subject of the investigation. Elected officials, staff and the public will rely upon the city attorney for guidance on how to handle the various demands of the investigation upon the city.

As the investigation develops the city attorney will need to maintain a precarious balance between many seemingly conflicting obligations. The city attorney must protect the interests of the city and yet must avoid being perceived as protecting the elected official being investigated. The city attorney is expected to know all that is going on, yet will not be privy to any substantive information from law enforcement concerning the investigation. Through this legal quagmire and management challenge, public perceptions, and the perceptions of the city's officials and staff, are often at odds with the legal duties and practical realities facing the city attorney.

Finally, do not underestimate the emotional toll such an investigation can take on the city attorney and the staff. The elected official being investigated is likely to be someone the city attorney and staff have worked closely with in the past, maybe even over the course of many years, and with whom the city attorney and staff have likely developed a close professional relationship. The realization that the official may have violated the public trust and have committed a crime is very difficult. Confusion, suspicion, distress and

¹ My special thanks to my partner Steven Orr for his wise counsel and comments on this paper.

disruption to the city organization frequently accompany the initial stages of an investigation and continue throughout the protracted period thereafter until its ultimate conclusion. The city attorney must remain calm, in control, confident, and provide reassurance and assistance to the city and its staff, and cooperate with the investigation authorities.

During the course of my career I have served a number of cities during a criminal investigation of elected city officials. Faced with the unfortunate reality that city attorneys will continue to be faced with the unexpected challenges posed by criminal investigations of elected officials of cities that they represent, I offer my personal observations and perspective on the problems facing city attorneys when elected officials are investigated.

I. RELATIONSHIP WITH LAW ENFORCEMENT

A. Status of the Investigation

As soon as word is received that an investigation has been initiated, the city attorney will need to contact the law enforcement agency to ascertain the scope and status of the investigation. Everyone assumes that the city attorney will know all that is going on and will have the "inside information" from law enforcement. In reality, the city attorney will receive very little information from law enforcement about the investigation. Prosecuting attorneys and investigators are understandably reluctant to provide any information about the investigation to city attorneys out of a fear that the city attorney will be forced to reveal information received from law enforcement to the city council, and thus to the subject of the investigation. Even so, it is important to develop a relationship with the prosecutors in order to handle requests for information in way which will avoid the service of a search warrant and to provide reassurance to the staff and officials that the city attorney knows as much as can be known about the investigation.

Prosecutors will generally advise a city attorney as to the general status of city elected officials or staff members in an investigation. Persons involved in the investigation are categorized as "witnesses," "subjects," or "targets." One does not ever want to be referred to as a "target" as it means just what it says--the government believes the person has committed a crime and the investigation is proceeding to collect the evidence sufficient to convict the person in a court of law. "Subjects" are persons who are close to the actions, which are being investigated but are not yet suspected of being involved criminally. A "witness" simply has information concerning the acts or incidents being investigated. One's status as a witness or subject can quickly change to a subject or a target as the investigation progresses and more facts are discovered. While the prosecutors heading an investigation will not likely provide the city attorney with the details of an investigation, you can gather quite a bit of information based on who they consider to be witnesses and subject as well as the type of documents that are requested by the investigators.

B. Assistance to Law Enforcement

At the outset of the investigation it is very important to offer to assist the prosecutors in their investigation to the extent of the city attorney's ethical constraints. In almost every investigation of wrongdoing by elected officials in their official capacities, prosecutors will need many city documents. These documents can be obtained by search warrant or grand jury subpoena or through the city attorney's voluntary cooperation. Most documents sought will be public records, which would normally be released pursuant to a simple Public Records Act or Freedom of Information Act request (subject to applicable exemptions and privileges). As such there is little need to invoke the need for subpoenas, except as may be needed to protect privileged documents. The service of grand jury subpoena on the city staff or the full-scale execution of a search warrant for documents can be devastating on the staff and the public's perception of the city. It should be noted that similar concerns, though to a lesser degree, might arise when city staff are called upon to respond to multiple Public Records Act requests calling for production of huge volumes of records. Document management is addressed in greater detail later in this paper.

The city attorney can also provide informal explanations of city procedures and policies for prosecutors. Knowledge of how the city works and why certain procedures were used will enable the prosecutor to focus on the issues most important to the investigation. The assistance also reduces the risk that unfounded rumors will spread that the city acted illegally because the prosecutor did not understand the city's procedure.

C. Stages of the Investigation

The investigation will consist of many stages. The first is the collection of information. This consists of the executing search warrants, collecting city documents and interviewing city employees. Following the flurry of activity in the initial stages of the information-gathering phase, the city attorney may hear nothing from the prosecutors for weeks or months. Generally at this time, the prosecutors and investigators are analyzing the data collected and deciding how to proceed.

Another stage of the investigation occurs when the prosecutors and investigators return to ask for more documents or to re-interview employees. At this point the effort is being made to confirm facts and make sure that all of the necessary foundational facts are present for the introduction of evidence in the criminal case which may be filed. The prosecutors may ask to view the originals of the documents the city attorney's office or the city clerk's office so painfully copied for them in order to confirm the manner in which they were maintained and prepare to rebut any challenge to their introduction in court proceedings. This is the point at which the custodian of records become concerned that their credibility is being challenged and needs reassurance that this is a normal part of the investigation.

Finally, when city employees and members of the community are subpoenaed to testify before a grand jury, it is likely that some criminal action will be forthcoming against one or more of the subjects of the investigation.

II. COMMUNICATION

Constant communication by the city attorney with the city council, city manager, staff and often the public is critical to the successful management of the city's response to the investigation.

Rarely will a city get a quiet "heads up" that a criminal investigation has been initiated against an elected official. The first sign of a criminal investigation is often the dramatic execution of a search warrant on the home and office of the elected official with a dozen or so federal agents or district attorney investigators. Another dozen or so uniformed law enforcement officers may also be present to control the area and impress upon the community the serious nature of the investigation. The publicity and media scrutiny attendant to such searches heightens the sense of consternation, panic, and confusion in the community and among the staff whose elected official has been placed in such a different public light than that to which they are accustomed.

As soon as the city attorney has contacted law enforcement to try to determine what is happening, he or she should immediately prepare a written communication (via email and a letter or memorandum) to the council, city manager, and the executive staff explaining what has occurred and what will or is likely to occur in the future. The communication needs to:

- (1) provide whatever information the city attorney has learned concerning the investigation;
- (2) explain that the city attorney's office and the staff will fully cooperate with law enforcement in the investigation;
- (3) explain that the city attorney represents the city as a political entity and not the individual elected official or other investigative targets;
- (4) assure the council that the city will not provide legal counsel for the elected official unless the council elects to do so after making certain written findings as required by law;
- (5) explain that you will answer all of their questions and provide a copy of your response to all council members;
- (6) explain that you may be employing special counsel to assist the city in the investigation (and obtain the requisite approval for such engagement); and

(7) explain that the elected official being investigated is presumed innocent and will not leave office unless actually convicted of a felony, recalled, or voluntarily resigns.

While email is an effective tool for immediate communication, it is often not treated as an important communication device or is quickly deleted. A letter or formal memorandum providing this information will be a more permanent record of the information presented to the council and staff. It is likely the city attorney will be asked the same questions several months into the investigation. It is important to answer these questions again and to reference your earlier written communication, reminding the council and staff that you have not ignored the issues, which have now become important to them.

During the course of the investigation the city attorney is likely to continue to receive new and perhaps different inquiries from council members concerning the investigation. Treat such inquiries as an important tip that these questions are circulating in the community. A follow up letter should be sent to the council members identifying the inquiry and providing a response.

During the investigation the city attorney and city manager will of necessity be in close and frequent contact with respect to the investigation. Make sure, however, that in cooperation with the city manager, the executive staff member or department heads are advised of the status of the investigation and the likely impact on their departments. Executive staff members have significant contacts with the community and the various city commissions and can identify damaging rumors in the community. If not properly briefed, executive staff members may also inadvertently create concerns in the community. Make sure the executive staff knows what is likely to occur next in the investigation, and of the importance of keeping the communications among the staff confidential.

Communication with the community is also important though it will likely be handled directly by the city manager. As soon as word of the investigation becomes public, the city will be flooded with inquiries ranging from wild rumors to legitimate concerns. Many people believe that a public official is automatically removed from office at the time the investigation begins. Others will believe that the city attorney is responsible for defending the public official being investigated and may be angered by this belief. As a practical matter most city attorneys have prosecutorial responsibilities for code enforcement and cannot defend a person in a criminal matter. The city attorney needs to work closely with the city manager in coordinating the city's response to the community concerning the investigation.

Finally, there is communication with the media. Immediately following execution of search warrants, which, as noted above, can be highly publicized, city officials, staff and the city attorney are likely to be bombarded with calls from the media. Media interest will likely continue throughout the pendency of the investigation through its ultimate conclusion, and will heighten every time an important event, such as grand jury testimony, further search warrants, arrests, court appearances, as well as press

conferences, protests, and rallies occur. The city attorney must both advise staff in how to handle such calls and must handle such calls himself or herself following coordination with the city manager.

In dealing with the media, it is helpful to meet with the city manager and the media representatives assigned to the city, particularly the local newspaper reporters who cover the city on a regular basis. This meeting provides an excellent opportunity to explain, in some detail, that the city will fully cooperate with law enforcement in the investigation, but that the city attorney and city manager will have little or no information concerning the details of the investigation. The media will complain that they receive little or no information from law enforcement and are surprised to learn that city staff will not receive any information as well. The city attorney should welcome calls from the media on the investigation. There is really very little you can comment on, but the questions asked may reveal a great deal about the rumors and information circulating in the community.

III. ANTICIPATE ADDITIONAL LEGAL ISSUES ARISING FROM THE INVESTIGATION

The initiation of a criminal investigation will prompt a number of legal issues for which the city attorney must prepare in addition to the direct management of the city's response to the investigation.

A. Government Code Section 1090, *et seq.*

If the scope of the investigation involves the alleged acceptance of a bribe or an improper financial relationship with a city contractor, it is likely that the city attorney will need to deal with a potential civil action under Government Code Section 1090, *et seq.* Section 1092 provides that contracts entered into by a city in which a member of its legislative body has a "financial interest" are void. The application of this section provides for harsh sanctions against the contractor. The agreement is not only void but the city may be able to recover payments made under the contract. See *Thompson v. Call* (1985) 38 Cal. 3rd 633. Monitor the applicable statute of limitations for the action. The evidence necessary to prove a violation of Government Code Section 1090 will be in the hands of the prosecutors and it is unlikely the critical evidence necessary to establish the case will be released until the trial has been completed or the prosecutors decide not to indict the elected official. Additionally, the effort to void such a contract will require that the city prove that one of its council members committed a crime, raising substantial ethical issues for the city attorney.

B. Effect of Potential Resignations Affecting City Council Actions

If the investigation involves more than one council member, there is a real possibility that a five-member council could be reduced to a minimum quorum or less than a quorum. Council members lose their office on the entry of a judgment of conviction and not

simply on an indictment. Government Code Section 1770(h). However, particularly in the federal system, a great deal of negotiation between prosecutors and the target of an investigation goes on prior to the indictment. If indictments are handed down by the grand jury, a real possibility exists that some defendants will have entered into a plea agreement, which for elected officials often includes an agreement to immediately resign from elected office.

Therefore, at a minimum, the city attorney will need to prepare to deal with advising the city on how to fill the vacancy(ies), how to pay the city's bills, and what votes are required for particular actions with less than a full council. A general law city with a five-member city council can clearly provide the basic city services with only three members. Politically, however, the council may have some difficulty in acting. The council will lose its three-member quorum for action if one member chooses not to participate.

The procedures for filling the vacancy are described in Government Code Section 36512. Generally this section requires that the council, within 30 days of the vacancy, take an action to either fill the vacancy by an appointment or call for a special election to be held to fill the vacancy. The election must be held at least 114 days from the date of the call for the election.

Government Code Section 53910, *et seq.*, enables the city's bills to be paid without prior council action, but only if the procedure is adopted by ordinance.

The voting requirements for action for the payment of funds is set forth in Government Code Section 36936. Note that Section was amended effective January 1, 2003. The new statute continues to provide that in a general law city three affirmative votes are required for the payment of but has created some additional ambiguities.

IV. SPECIAL COUNSEL TO ASSIST IN RESPONDING TO THE INVESTIGATION

As soon as word of the investigation is received, the city attorney should consider whether to retain special counsel to assist in the response to the investigation. Most Fortune 500 companies will now routinely retain special counsel to represent the corporation in an investigation of corporate practices or a particular incident, which may result in a criminal action.

Criminal defense counsel who specialize in corporate investigations are usually former prosecutors, particularly federal prosecutors, and can provide some very important and useful service for the city. To begin with, a former prosecutor who now serves in the defense role "knows the ropes" and can provide the city and the city attorney with invaluable insight of a general nature as to the nature, scope and place of the investigative proceedings, and of the significance (or lack thereof) of activities by law enforcement and the prosecuting agency. The special counsel will usually know of the prosecutor heading

the investigation and may even be personally acquainted with him or her. While the relationship may be cordial, it is a very professional one and the special counsel will not receive any information that the prosecutor does not want him or her to receive. The special counsel knows the investigative protocols and can provide guidance on what to expect from the investigation.

Special counsel's primary value is in the counseling of city employees who are naturally quite concerned at the prospect of being interviewed by DA investigators and FBI agents or testifying before a grand jury. The city attorney and special counsel must not in any way direct a witness regarding his or her testimony and therefore should avoid any communication with such a witness about any anticipated testimony, even though the staff person may request such guidance. Nevertheless, special counsel who are former prosecutors can provide some assistance and reassurance, including helping to explain what the employee can expect. The level of anxiety in employees is greatly reduced when they are told of such mundane things as the layout of the room where the interview will take place, the number of people expected in the room, and the format of the questions. Particularly in grand jury proceedings where the witness is not accompanied by counsel, it is important for the witness to know what to expect so that the witness may focus on the questions being asked.

The city attorney may also want to rely on the independence of special counsel. The city attorney will have had an established relationship with members of the council and the staff members involved in the investigation, including the elected official who is the target of the investigation. Employees may be concerned about the political ramifications of their testimony and may feel more comfortable discussing what they know with an outside attorney.

The primary disadvantage of special counsel is the expense and concern by the council that the expense is not needed. Be careful as well that the retention of special counsel is not perceived as providing a defense for the elected official who is the subject of the investigation. Once again, perception – and misperception – is frequently the predominant factor in connection with responding to and cooperating with an investigation.

V. DOCUMENT MANAGEMENT

One of the most important and least glamorous jobs during an investigation of an elected official is the production of documents for the prosecutors.

A. Locate and Secure Relevant Documents

Once word of the investigation is received, the city attorney should immediately locate and secure the documents that may relate to the investigation. The documents should be identified and placed into a locked room so that staff can testify to the security and “chain of custody” of the documents following notice of the investigation. The city attorney should actively assist the staff in locating the documents and determining the appropriate

room for their storage. A memorandum needs to be sent to all employees with any responsibility for the documents reaffirming the verbal commands that the documents must be secured, access to the room limited, and no documents can be copied or reviewed without the written consent of the city attorney. As the investigation progresses and new issues are pursued, the city attorney and the staff will need to repeat this procedure for the new records.

While this may seem overly dramatic, the reaction of staff where this has been done is generally quite positive. The procedure protects the staff, at least from the date of knowledge of the investigation, from allegations of improper destruction of records or lax management resulting in the loss of records.

B. Privileged Documents

Once the records are assembled, the city attorney should carefully review each document to identify information on the transactions or incidents under review and to separate out those documents which are privileged. The privileged documents should be identified and a privilege log generated. This is a time-consuming process for the city attorney and should be started as soon as possible following notice of the investigation.

As discussed earlier, one of the city attorney's first conversations with the prosecutor should concern the procedures for requesting, gathering and producing documents. When a request is made the documents should be copied and numbered with a Bates-stamp. The transmittal letter to the prosecutor should describe the nature of the documents and the numbers of the documents being delivered.

Prosecutors are concerned about receiving privileged documents. If there are privileged documents in the documents requested by the prosecutors, the city attorney should immediately call and discuss the nature of the documents and the applicable privilege. The prosecutor may not be aware of the privileged documents and an explanation of the nature of the privileged document, short of a waiver or course, may convince the prosecutor that he or she does not really need the document. The prosecutor may at this point simply note the existence of the document and not pursue it unless something comes up later in the investigation.

If privileged documents are requested, the city attorney will need to formally object to their production. At this point the city attorney and prosecutor can negotiate an appropriate procedure for determining the validity of the privilege. Normally this will be by the issuance of a subpoena for the document and a motion by the city to quash the subpoena, or other motion for protection from the disclosure of privileged materials.

Keep in mind that the release of a privileged document to a prosecutor may well waive whatever privileges would otherwise be applicable to that document and allow the opposing party in a related civil case to obtain the document. The city's interests may not be adversely affected by the disclosure of a document to a prosecutor in the criminal investigation, but may very well be adversely affected by the disclosure in a civil case

resulting from the investigation. The tendency of all law-abiding people is to cooperate with law enforcement, but do not forget that there may be some unpleasant consequences of that cooperation with respect to privileged documents.

C. Public Records Act Requests

During the course of the investigation there will be many Public Records Act requests for documents relating to the subject(s) of the investigation. Naturally all of the newspaper reporters and interested citizens will want to know what has happened. For the most part these requests can be handled as any other request for public records.

A request, however, to review copies of "documents which have been provided to prosecutors" does raise some interesting questions. Such information is valuable to the press and to the subject of the investigation as it reveals the scope of the investigation being conducted and what information the prosecutors may or may not have collected. The natural course of an investigation of an elected official will reveal all kinds of allegations which the prosecutors will justifiably need to pursue. A fair argument can be made that while the individual documents given to a prosecutor may be a matter of public record, the production of documents based upon what has been provided to law enforcement, letters from the prosecutor identifying the documents to be produced, and letters transmitting the requested documents to prosecutors are exempt from disclosure under the investigation exemption of Government Code Section 6254 (f) and the balancing test under Government Code Section 6255. As with all Public Record Act Requests, and particularly in the context of a criminal investigation, it is essential to keep a careful record of the documents which are provided for review or copied in response to the requests.

D. Search Warrants

Despite the intimidating nature of the execution of a search warrant at city hall, the city attorney will still need to preserve the privileges which may be present in documents or in computers. Again, as soon as notice is received of the investigation it is recommended to begin discussion with the prosecutor to provide all non-privileged information so as to avoid the stigma of the execution of a search warrant on city property. The city attorney should also be prepared for the possibility that his or her office may be searched. The federal government is very concerned about searches of attorneys' offices or suspects' premise where privileged material may be present. The Justice Department has published guidelines for conducting such searches and protecting the attorney client privilege. These guidelines can be found at the Justice Department's website, www.usdoj.gov, under "US Attorney's Manual." The guidelines involve a very interesting discussion of the manner in which federal prosecutors should proceed when it is likely they will need to obtain documents from attorney offices or privileged attorney documents. Federal prosecutors are encouraged to conduct negotiations where possible to obtain the

necessary documents as well as utilizing a special master to review material on the site as the search is being conducted.

VI. CITY-PROVIDED CRIMINAL DEFENSE

The issue of whether the elected official who is the subject of the investigation can be defended at the expense of the city will be raised at the beginning of the investigation. Either the elected official will ask whether the city can provide a defense or other persons will ask the question out of concern that the city might provide a criminal defense.

The city is authorized but not required to provide a defense to an elected official or employee in a criminal action. Under Government Code Section 995.8, the Legislature has established specific findings which must be made in order for a city to defend the official:

"A public entity is not required to provide for the defense of a criminal action or proceeding (including a proceeding to remove an officer under Sections 3060 to 3073, inclusive, of the Government Code) brought against an employee or former employee, but a public entity may provide for the defense of a criminal action or proceeding (including a proceeding to remove an officer under Sections 3060 to 3073, inclusive, of the Government Code) brought against an employee or former employee if:

(a) The criminal action or proceeding is brought on account of an act or omission in the scope of his employment as an employee of the public entity; and

(b) The public entity determines that such defense would be in the best interests of the public entity and that the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent interests of the public entity."

This is in stark contrast to civil proceedings, in which the Legislature *requires* that cities defend employees who are sued for acts and omissions made in the scope of their employment. Government Code Sections 995, 996.4.

There are few cases interpreting Government Code Section 995.8, but they generally confirm that the city has discretion to decide whether to defend a criminal action. In *Los Angeles Police Protective League v. City of Los Angeles*, 27 Cal. App. 4th 168 (1994), a court of appeal held that Los Angeles was not required to provide the defense of police officers accused of vandalism and conspiracy to commit vandalism:

"In contrast to the provisions relating to the mandated defense of public employees in civil actions, Government Code section 995.8 affirmatively declares that public entities are not required to provide for the defense of criminal actions brought against their employees, but instead permits the entities to provide defenses in certain circumstances." *Id.* at 176.

Again, it is important to note that this decision is not entirely discretionary—Government Code Section 995.8 only authorizes the city to provide the defense if the councilmember’s activities arise within the scope of employment, and if the City determines that the defense “would be in the best interests of the public entity and that the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent interests of the public entity.”

California courts have articulated several different factors in the determination of whether an action falls within the scope of employment. In a widely cited scope of employment case, *Alma W. v. Oakland Unified School District*, 123 Cal.App.3d 133 (1981), a court of appeal articulated the following test:

"The determination as to whether an employee committed a tort during the course of his employment turns on whether or not: 1) the act performed was either required or “incident to his duties,” or 2) the employee’s misconduct could be reasonably foreseen by the employer in any event." *Id.* at 139 (citations omitted).

Using these criteria, the court in *Alma W.* concluded that it was not within the scope of employment for a school custodian to rape and molest a student on school premises. “Sexual molestation is in no way related to mopping floors, cleaning rooms, or any of the other tasks that are required of a school custodian.” *Id.* at 140.

In *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 222 (1991), the Supreme Court found that a sexual assault was “incidental” to employment when the perpetrator was a police officer, given that the officer used his authority to effectuate the assault:

"Sergeant Schroyer was acting within the scope of his employment when he detained plaintiff for erratic driving, when he ordered her to get out of her car and to perform a field sobriety test, and when he ordered her to get in his police car. Then, misusing his authority as a law enforcement officer, he drove her to her home, where he raped her. When plaintiff attempted to resist Sergeant Schroyer’s criminal conduct, he continued to assert his authority by threatening to take her to jail. Viewing the transaction as a whole, it cannot be said that, as a matter of law, Sergeant Schroyer was acting outside the scope of his employment when he raped plaintiff." *Id.* at 219.

The court distinguished *Alma W.*, discussed earlier, because the janitor’s employment did not confer any authority that was improperly exerted, whereas in *Mary M.*, “the very nature of law enforcement employment requires exertion of physical control over persons whom an officer has detained or arrested.” *Id.* at 218.

VII. CONCLUSION

As daunting as the task may be of managing your city's legal response to a criminal investigation of one or more elected officials, have faith that your constant worry and hard work will enable you to guide the council, staff and community through very trying times.