

1 ALAN L. SCHLOSSER (State Bar No. 49957)  
2 MARK SCHLOSBERG (State Bar No. 209144)  
3 AMERICAN CIVIL LIBERTIES UNION  
4 FOUNDATION OF NORTHERN CALIFORNIA  
5 39 Drumm Street  
6 San Francisco, CA 94111  
7 Telephone: (415) 621-2493  
8 Facsimile: (415) 255-8437

9 Attorney for Amicus Curiae ACLU-NC

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 COUNTY OF ALAMEDA

12 UNLIMITED JURISDICTION

13 BERKELEY POLICE ASSOCIATION,

14 Petitioner/Plaintiff,  
15 v.

16 CITY OF BERKELEY AND CITY OF  
17 BERKELEY POLICE REVIEW  
18 COMMISSION,  
19 Respondents/Defendants.

Case No. 2002 057569

AMICUS CURIAE BRIEF OF THE  
AMERICAN CIVIL LIBERTIES  
UNION OF NORTHERN  
CALIFORNIA

Hearing Date: Nov. 14, 2006  
Time: 9:00 a.m.  
Dept: 31

1                   **I.       INTRODUCTION AND INTEREST OF AMICI CURIAE**

2                   The Berkeley Police Review Commission (“PRC”) is the longest continually functioning  
3 civilian review board in the nation. It was created in 1973 with the specific purpose of providing a  
4 forum for “community participation” and “a means for prompt, impartial, and fair investigation of  
5 complaints brought against the Berkeley Police Department.” Berkeley City Ordinance No. 4644-  
6 N.S. Petitioner, the Berkeley Police Association (“BPA”), relying largely on the recent California  
7 Supreme Court decision in Copley Press v. Superior Court, seeks to undo over thirty years of  
8 public oversight in the City of Berkeley by closing off important information relating to  
9 complaints by members of the public about police conduct from public access. Such an outcome  
10 is not required by the Copley decision or statute, contravenes the controlling statute, and would  
11 erode public trust in the Department, and will negatively impact police-community relations.

12                   Civilian oversight provides an open and independent alternative to internal affairs  
13 investigations and – when fully empowered – provides a much needed check against police  
14 misconduct. According to the United States Commission on Civil Rights, “in the end, the  
15 empowerment of civilian review boards may prove to be the most effective weapons in the battle  
16 to end police brutality.” United States Commission on Civil Rights, Revisiting Who Is Guarding  
17 the Guardians (2000), p. 62.

18                   While some advocates of civilian oversight stress the increased effectiveness that comes  
19 from independent investigations, it is the openness that outside oversight brings to police  
20 departments that is most important. Luna and Walker, A Report on Oversight Mechanisms of the  
21 Albuquerque Police Department (1997), p. 131, available at  
22 <<http://www.cabq.gov/council/abqrpt9.html>>.

23                   Dissemination of information serves as a deterrent against misconduct and generates  
24 public confidence in the ability of government to hold police accountable when necessary. There  
25 is “broad agreement that whether or not the police retain the power to investigate themselves, law  
26 enforcement’s business, in general, is the public’s business, and therefore must be an open and  
27 transparent process.” Bobb, Civilian Oversight of the Police in the United States (2003) 22 St.  
28 Louis U. Pub. L. Rev. 151, 158. In fact, the value of public communication about police

1 misconduct is so great that the information released can be as important as the actual result of the  
2 misconduct investigation itself. See Phillips and Trone, Building Public Confidence Through  
3 Oversight (2002), Vera Institute of Justice, p. 8, available at  
4 <www.parc.info/pubs/pdf/verapaper.pdf> .

5 Civilian review agencies not only benefit the public. Because they are open, independent,  
6 and transparent, an outside civilian review finding can convincingly clear a police officer of  
7 misconduct allegations in the eyes of the public. According to Skolnick and Fyfe: "In the long  
8 run, only an independent investigative body can allay public suspicions of the police and render a  
9 convincing exoneration of police who have been accused of misconduct." Skolnick and Fyfe,  
10 Above the Law (1993), p. 230

11 Finally, civilian review bodies increase public confidence in law enforcement generally.  
12 Providing a public forum where questions and complaints about law enforcement are listened to  
13 and answered "can help police regain credibility and restore public confidence in law  
14 enforcement." Hecker, Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review  
15 Board (1997) 20 Colum. Human Rts. L. Rev. 551, 603-604; see also Bobb, supra at 166  
16 ("Civilian oversight not only corrects deficient systems, but also bolsters public confidence in the  
17 police, and thereby makes policing better and more effective."). Closing off the PRC process to  
18 the public will only serve to increase suspicion of the Police Department and generate mistrust by  
19 members of the community.

20  
21 **II. CONFIDENTIALITY PROVISIONS OF PENAL CODE SECTIONS 832.7 AND**  
22 **832.8 DO NOT APPLY TO THE POLICE REVIEW COMMISSION AND THE**  
**COMMISSION'S RECORDS ARE THEREFORE NOT CONFIDENTIAL.**

23 The Petitioner BPA argues that Penal Code sections 832.7 and 832.8 require PRC records  
24 and hearings to be confidential and closed to the public. In doing so, the BPA relies on the recent  
25 Supreme Court decision in Copley Press v. Superior Court (2006) 39 Cal.4th 1272, which held  
26 that records created by a Civil Service Commission were covered by those provisions. This  
27 argument, however, presents a distorted reading of the Penal Code and an overly expansive  
28 interpretation of the Court's holding in Copley. PRC records are not confidential records because

1 the PRC is not an agency which employs peace officers within the meaning of Penal Code §  
2 832.5. Further, unlike the Commission at issue in Copley, the PRC does not mete out or  
3 recommend discipline and therefore “is not functioning as part of the department or agency that  
4 employs peace officers.” Copley at 1291. Rather, the PRC provides an independent mechanism  
5 for public input and evaluation of police conduct, policy and practices.

6  
7 **A. The PRC is Not an Agency That Employs Peace Officers and Therefore Penal  
8 Code Sections 832.7 and 832.8 are Inapplicable.**

9 In order for the confidentiality provisions of 832.7 and 832.8 to apply, and department or  
10 agency must be one that “employs peace officers.” Since the PRC does not employ peace officers,  
11 its records are not confidential.

12 This court’s “primary task in construing a statute is to determine the Legislature’s intent,  
13 and “ ‘the statutory language, of course, is the best indicator of legislative intent.’ ” Williams v.  
14 Superior Court (1993) 5 Cal.4th 337, 350. “Where the words of the statute are clear, we may not  
15 add to or alter them to accomplish a purpose that does not appear on the face of the statute or  
16 from its legislative history.” Burden v. Snowden (1992) 2 Cal.4th 556, 562.

17 The critical phrase “department or agency in this state that employs peace officers” first  
18 appears in section 832.5.

19 Penal Code § 832.5 requires that:

20 (a)(1) Each department or agency in this state that employs peace officers shall  
21 establish a procedure to investigate complaints by members of the public against  
22 personnel of these departments or agencies, and shall make a written description of  
the procedure available to the public.

23 This subsection is plainly and unequivocally addressed to “each department or agency in  
24 this state that employs peace officers.” A department is clearly a component of some larger  
25 body. In most cases a police “department” is a component of some public entity, such as the  
26 Berkeley Police Department, which is a component of the City of Berkeley.

1 An "agency" is also a component of some larger body. The root of agency is "agent." An  
2 agent acts for someone or something else with respect to others. "An agent is one who represents  
3 another, called a principal, in dealings with third persons." Civ. Code § 2295. An "agency"  
4 therefore is commonly understood as "an organization providing a particular service" or "a  
5 government office or department providing a specific service." Oxford Compact English  
6 Dictionary (2005), Oxford Online available at <[http://www.askoxford.com/  
7 concise\\_oed/agency?view=uk](http://www.askoxford.com/concise_oed/agency?view=uk)>.

8 For section 832.5 to apply, a department or agency must employ peace officers. The  
9 statutory scheme requires that each police department or police agency employing peace officers  
10 must have a procedure for investigating complaints, must keep the records for five years in one  
11 file or another, and that those records are confidential. §§ 832.5 (b), 832.5(c), and 832.5(d)(1).

12 Section 832.7(a), which Petitioner relies upon here, provides that peace officer and  
13 custodial officer personnel records, and "records maintained by any state or local agency  
14 pursuant to Section 832.5, or information obtained from these records, are confidential and shall  
15 not be disclosed in any civil or criminal proceedings except by discovery pursuant to Sections  
16 1043 and 1046 of the Evidence Code" (emphasis added). Personnel records are defined in  
17 section 832.8. To be a personnel record a "file" must be "maintained under that individual's  
18 name by his or her employing agency..." (emphasis added). Under subparagraph (e), personnel  
19 records include, "[c]omplaints, or investigations or complaints, concerning an event or transaction  
20 in which he or she participated, or which he or she perceived, and pertaining to the manner in  
21 which he or she performed his or her duties." § 832.8(e). Again the operative phrase making this  
22 section applicable is "employing agency." Clearly, this phrase is given a parallel construction  
23 and used in the exact same sense in §§ 832.5, 832.7, and 832.8, because they are each part of the  
24 same scheme. "One "elementary rule" of statutory construction is that statutes in pari materia --  
25 that is, statutes relating to the same subject matter -- should be construed together." Droeger v.  
26 Friedman, Sloan & Ross (1991) 54 Cal.3d 26, 50. See People v. Cartwright (1995) 39  
27 Cal.App.4th 1123, 1142 (when two "statutes are in pari materia and therefore the interpretation of  
28 a phrase in one controls the interpretation of the identical language in the other.").

1           This statutory scheme certainly does not apply to the PRC because the PRC does not fit  
2 the section 832.5, 832.7 or 832.8 description of a department or agency whose records are  
3 confidential. The PRC does not employ peace officers or maintain personnel files and its records  
4 are not compiled pursuant to the section 832.5 complaint and investigative procedure. The PRC  
5 operates separately from the Police Department's internal affairs division. It neither reviews  
6 internal affairs investigations and findings nor makes disciplinary recommendations, a fact noted  
7 by the court of appeal on at least two occasions. See Brown v. City of Berkeley (1976) 57  
8 Cal.App.3d 223, 233 (upholding the ability of the PRC to investigate complaints but invalidating  
9 provisions allowing the PRC to recommend specific disciplinary action); Berkeley Police  
10 Association v. City of Berkeley (1978) 76 Cal.App.3d 931 (noting that police department "has  
11 established its own procedure for reviewing citizen complaints against police officers. Such  
12 complaints are investigated by the department's Internal Affairs Division," as opposed to the  
13 public process of the PRC). Rather, the PRC exists to provide an independent public forum for  
14 the examination of policies and complaints related to the police department.

15           The BPA argues that the City of Berkeley is the "employing agency" and that since the  
16 PRC is part of the City of Berkeley, its records are confidential. This is inconsistent with the plain  
17 language of the statutes and would render the words department and agency meaningless. To do  
18 so would violate the principle of statutory construction that it is important to "give effect and  
19 significance to every word and phrase." Copley 39 Cal.4th at 1284. If the legislature wanted to  
20 refer to a city or county in statute, it would have used the words city or county or "local  
21 governmental entity,"<sup>1</sup> not department or agency. The BPA position is also inconsistent with  
22 Copley, where the Court, in discussing the function of the County Civil Service Commission  
23 found that the Commission "in hearing disciplinary appeals, *is functioning as part of a*  
24 *department or agency* that employs peace officers." Copley at 1290 (emphasis added). The Court  
25 referred to the Commission "a department of the County," and did not refer to a city or county as  
26 an agency or department itself. Copley at 1288.

27  
28  
<sup>1</sup> See e.g. Health and Safety Code § 11489 ("for purposes of this section, 'local governmental entity' means any city, county, or city and county in this state.")

1                   **B. Copley Addressed Confidentiality of Appeals from Internal Disciplinary Actions**  
2                   **and Does Not Apply to the Independent PRC Process.**

3                   The BPA contends that the recent Supreme Court decision in Copley, mandates closed  
4 records and hearings by the PRC. In doing do, Petitioner exaggerates the Court’s holding and  
5 ignores the decision’s limited scope.

6                   The Court in Copley addressed the question of whether records of an administrative  
7 appeal to a County Civil Service Commission (“CCSC”) of an internal departmental disciplinary  
8 decision were confidential. An administrative appeal of a disciplinary decision is a right afforded  
9 to peace officers under Government Code section 3304(d). Local government can choose the  
10 mechanism for providing such an appeal and it can either be done internally or outside the  
11 Department. The court reasoned that an officer’s ability to exercise his or her statutory right to an  
12 appeal and confidentiality of records relating to that appeal should not depend on the jurisdiction  
13 where the officer was employed, and that jurisdictions decision to make the administrative appeal  
14 process open. Copley at 1292-93. The court therefore concluded the CCSC was – for this  
15 purpose - functioning as part of the “employing agency.” Copley at 1290

16                  The PRC presents a wholly different case. Unlike the CCSC, the PRC is not an integral  
17 part of the Police Department’s own disciplinary process. In fact, the PRC cannot make  
18 disciplinary decisions or recommendations. Brown v. City of Berkeley, *supra*. Its functions are  
19 external and independent of the Department’s internal affairs process. The PRC does not receive  
20 complaints by members of the public that are filed at the Police Department, rather, to initiate an  
21 investigation, individuals must file complaints directly with the PRC. PRC staff then conduct  
22 independent investigations of the officers conduct, without relying on or reviewing internal affairs  
23 records or receiving assistance from internal affairs investigators.<sup>2</sup>

24  
25  
26                  <sup>2</sup>Petitioner cites Davis v. City of San Diego as an example of an police review commission record that was deemed  
27 confidential under 832.7. (2003) 106 Cal.App.4th 893. In Davis, however, the Review Board was reviewing internal  
28 Police Department documents: “The Department’s internal affairs investigation report, the report of the Department’s  
shooting review board, and the Department’s homicide report.” *Id.* at 896-897. The Board in Davis also did not  
conduct an outside investigation.

1 Most significantly, the PRC does not provide an exclusive avenue for an officer to  
2 exercise his or her statutory rights. In Copley, the court repeatedly noted the because the CCSC  
3 “has been designated to provide the appeal that the officer’s employer is required by law to  
4 provide in connection with taking punitive action,” the CCSC was in essence functioning as part  
5 of “the employing agency.” Copley, 39 Cal.App.4th at 1287-88; See also at 1290 (“the  
6 Commission, in hearing disciplinary appeals, is functioning as part of the department or agency  
7 that employs peace officers.”); at 1291 (“because the Commission has been designated to hear  
8 disciplinary appeals, its records qualify under section 832.7); at 1292 (“if the officer worked in a  
9 jurisdiction where administrative appeals are heard within the law enforcement agency, then the  
10 records of that appeal would be protected.); at 1295 (“Nor does Copley even attempt to explain  
11 why the considerations...apply differently depending on whether a *disciplinary* matter is handled  
12 inside or outside the law enforcement agency.) (emphasis added). The Court was concerned that  
13 allowing open CCSC records would force officers to sacrifice their statutory rights to  
14 confidentiality with their statutory right to an administrative appeal, creating a “Hobson’s  
15 choice.” Copley at 1296.

16 Public access to PRC records does not require officers to surrender any of their statutory  
17 rights to process in contesting departmental disciplinary charges against them. The function of the  
18 CCSC in Copley is simply not analogous to the PRC. Further, police officers do not have the  
19 same privacy interest in PRC records as they do with internal affairs records or records of the  
20 CCSC. Records from internal affairs or the CCSC would provide evidence as to whether an  
21 officer was disciplined or otherwise sanctioned for misconduct. PRC investigations result in  
22 findings, but those findings do not reveal whether an officer was censured, suspended, or suffered  
23 any other consequence as a result. PRC records reflect investigations and findings by citizen-  
24 commissioners as to events that may have transpired between a member of the public and a police  
25 officer. They do not address an officer’s disciplinary history or implicate the same privacy  
26 interests an officer may have in the records of his or her “employing agency.”

27 Petitioner argues that the Court in Copley noted that the legislature in enacting 832.7  
28 decided that confidentiality concerns outweigh the value of public access to information about

1 police misconduct. The Copley Court found that to be true with regard to internal complaints and  
2 appeals of findings in such complaints; however Court did not address, and the legislature did not  
3 make such a determination with regard to independent external investigations by agencies that do  
4 not employ peace officers.

5 **V. CONCLUSION**

6 In 1973, the City of Berkeley decided that there is a strong public interest in public  
7 examination of complaints about police conduct. For over thirty years, the PRC has provided that  
8 function. Petitioner's assertion that Copley requires this court to close down this longstanding  
9 public process is incorrect. For the foregoing reasons, the amicus ACLU of Northern California  
10 respectfully urges the court to deny Petitioner's motion for summary judgment.

11 Respectfully submitted,

12  
13 Date: October 31, 2006

14 By:   
Mark Schlosberg  
Staff Attorney

15  
16  
17 Alan Schlosser  
Legal Director

18  
19 Attorneys for Amicus Curiae  
20  
21  
22  
23  
24  
25  
26  
27  
28

