



presents

2023 Public Sector Conference

Ethical Issues in Public Sector Investigations

Friday, April 28, 2023
4:00 p.m. – 5:15 p.m.

Speakers:

Latika Malkani

Timothy L. Davis

Vida Thomas

Conference Reference Materials

Points of view or opinions expressed in these pages are those of the speaker(s) and/or author(s). They have not been adopted or endorsed by the California Lawyers Association and do not constitute the official position or policy of the California Lawyers Association. Nothing contained herein is intended to address any specific legal inquiry, nor is it a substitute for independent legal research to original sources or obtaining separate legal advice regarding specific legal situations.

© 2023 California Lawyers Association
All Rights Reserved

The California Lawyers Association is an approved State Bar of California MCLE provider.



Ethical Issues in Public Sector Investigations

Tim Davis

Burke, Williams & Sorensen

Latika Malkani

Siegel LeWitter Malkani

Vida Thomas

Oppenheimer Investigations Group

Christina Ro-Connolly (Moderator)

Oppenheimer Investigations Group

Investigating High Level Public Officials/Employees



Investigating High Level Public Officials/Employees

- Celebrities/influencers
- Governors
- Other Elected Officials
- Athletes
- But maybe more...



Investigating High Level Public Officials/Employees

Unique considerations



California Public Records Act

Essick v. County of Sonoma (July 2022)

Investigative report of complaint against elected Sheriff is subject to disclosure under CPRA allowing newspaper to gain access to the full report. Sheriff is not protected by exceptions that apply to employees and/or police officers.

(Note: However, under *Waters v. City of Petaluma* investigative report was not subject to disclosure in litigation due to attorney/client privilege. Query what the result would have been if Sonoma County claimed privilege.)

Confidentiality

Critically important to explain early in the process to all persons involved the limited nature of confidentiality of the investigation report when elected officials and high ranking employees are involved

Witness statements and interview transcripts are more likely than not subject to disclosure, subject to redaction of names and other identifying information.



California Legislature's Policy

Certain documents will be released in cases where the panel determines that facts related to sexual harassment claims have been substantiated against a member or a high-level legislative employee, and the house has imposed discipline or has determined that the allegations are well-founded based on the independent panel's findings.

The documents to be released will be the claim filed and the letter provided to the subject of the investigation, which will include a summary of the panel's factual findings. All documents will redact the personally identifying information of the accuser and witnesses, for privacy reasons.

Investigations in the Public Eye – Impacts on Investigations

- Impacts on reports – what is written that may become public?
- Anonymity – will it hold?
- Detail – at a certain level of detail, anonymity is a fiction

Take Away:

At a certain level – assume will become public and:

- ✓ Consider shorter executive summary type reports
- ✓ Consider aggregating information to maintain confidentiality
- ✓ This is about the impact before putting something in a report

Investigations in the Public Eye – Claims of Defamation

Defamation lawsuits are increasingly used against employers enforcing their rules and as silencing tactics to keep targets and witnesses from speaking out.

Under U.S. law there are first amendment and public policy exemptions protecting institutions and individuals from liability for defamation.

On Oct. 1, 2021, a federal appeals court ruled in favor of **Pamela Lopez**, a lobbyist who was sued for defamation after speaking out about being sexually assaulted by former California lawmaker Matt Dababneh. The appellate court found that Lopez was protected by Fair Reporting privilege, which says individuals can't be sued for defamation if they are simply reporting on what was already said in specific contexts, such as reports to a legislative committee.

Investigations in the Public Eye – Public’s Misconceptions

Publicity about investigations can lead to misconceptions:

- An investigation should uncover and take account of something that occurred outside of work (sexual/social relationships, social media searches, prior criminal acts, etc.) AKA: “Why aren’t you doing oppositional research?”
- An allegation shouldn’t be substantiated unless it is “proved” beyond a reasonable doubt.
- The meaning of due process.
- Shouldn’t the investigator consider the parties’ overall “character”?

The image features several overlapping geometric shapes in teal, olive green, and yellow, primarily located in the top-right and bottom-left corners. The central text is in a bold, black, sans-serif font.

Right to Representation/Information Requests

Right to Representation: Union-Represented Employees

Background: “Weingarten” Rights in the Private Sector

In the private sector, Section 7 of the NLRA guarantees the right of employees to act in concert for mutual aid and protection.

Union-represented employees have the right to have their representative present during an investigatory interview that the employee reasonably believes could lead to discipline.

NLRB v. J. Weingarten Inc., 420 U.S. 251 (1975).

Right to Representation: Union-Represented Public Employees (cont.)

Background: California Recognized Right in 1974, Before Weingarten

Recognized employee organizations have the right to represent their members in their employment relations with public agencies. Cal. Gov. Code, § 3503.

“[A] public employee's statutory right to effective union representation (Gov. Code, § 3500 et seq.) includes a right to have a union representative accompany him to a meeting with his employer when the employee reasonably anticipates that such meeting may involve union activities and when the employee reasonably fears that adverse action may result from such a meeting because of union-related conduct.” *Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382, 384.

California Right to Representation As Recognized By PERB

A union has the right to represent an employee it exclusively represents in an investigatory interview, and the employee has a corresponding right to union representation.

Contra Costa Community College District (2019) PERB Decision No. 2652

Capistrano Unified School District (2015) PERB Decision No. 2440

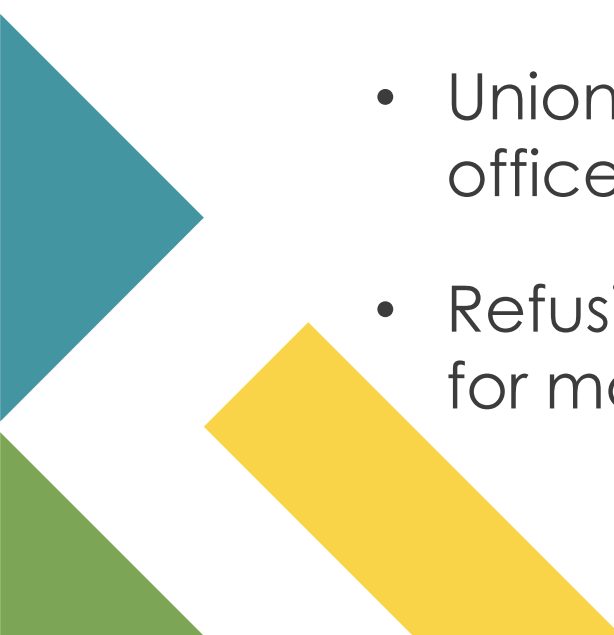
Sonoma County Superior Court (2015) PERB Decision No. 2409-C

“[U]nion and employee rights under California’s public sector collective bargaining laws go well beyond the employee rights identified in *Weingarten*.”


Contra Costa Community College District (2019) PERB Decision No. 2652

County of San Joaquin (Sheriff’s Department) (2018) PERB Decision No. 2619-M.

What Is Required by Union Right to Representation?

- Employee must request representation. But only needs to ask once.
 - Employer does not have to offer representation. But some Union contracts require Union be notified before unit employee is interviewed.
 - Union representative may be a union steward, business agent, officer, fellow employee, or union attorney.
 - Refusing employee's request or retaliating against employee for making request is an unfair practice.
- 

***Weingarten*: Which of these is an “investigatory interview”?**

- A manager, representative of management, or supervisor is seeking to question an employee.
 - The questioning is part of an investigation into the employee’s performance or work conduct.
 - Meetings in which an employee is questioned as part of an investigation of another employee’s conduct or performance.
- 

Rights of Representation under FFBOR/PBOR

Triggered differently for police and firefighters under Public Safety Officers Procedural Bill of Rights Act and Firefighters Procedural Bill of Rights Act

If questions can lead to punitive action defined as:

- Dismissal, Demotion, Suspension, Reduction in Salary, Transfer for Purposes of Punishment or written of reprimand
- Excludes Counseling, Instructing, Informal Verbal Admonishments and Routine or Unplanned Contact by Supervisor

Union Information Requests:

An exclusive representative is entitled to all information that is necessary and relevant to discharge its representational duties.

*Contra Costa Community College District (2019) PERB
Decision No. 2652*

*Sacramento City Unified School District (2018) PERB
Decision No. 2597*

Union Information Requests:

Information pertaining to matters within the scope of representation is “so intrinsic to the core of the employer-employee relationship that it is considered presumptively relevant and must be disclosed unless the employer can establish that the information is plainly irrelevant or can provide adequate reasons why it cannot furnish the information.”

Petaluma City Elementary School District/Joint Union High School District (2016) PERB Decision No. 2485

Union Information Requests:

“[A] employer violates union and employee representational rights when it fails to provide sufficient information regarding alleged wrongdoing to enable a union representative to represent an employee in a meaningful manner during an investigatory interview. This is necessarily a fact-specific inquiry.”

Contra Costa Community College District (2019) PERB Decision No. 2652, at pp. 30.

Union Information Requests:

A union is presumptively entitled to information that is necessary and relevant to the union in exercising its right to represent bargaining unit employees regarding mandatory subjects of bargaining, including but not limited to discipline, retirement benefits, workplace safety, and hostile work environment issues.

Union Information Requests:

Balancing Test: Does Confidentiality/ Privacy Outweigh the Union's Need for Information?

- No Blanket Rule Exempting Disclosure of Complainant Or Witness Statements
- Employer's Burden to Prove
- Employer Must Meet and Confer in Good Faith to Accommodate Competing Interests
- Consider Redactions or Limited Use

Union Duty of Fair Representation

Grievant's Right to Co-Workers' Statements?

Local 307 Mailhandlers Union, 339 NLRB 93 (2003), after employing a balancing test, NLRB held that the union did not have to turn over co-worker witness statements.

The background features several overlapping geometric shapes in teal, yellow, and green. A large teal shape is at the top left, a yellow shape is at the top right, and a green shape is at the top center. A yellow shape is at the bottom left, and a teal shape is at the bottom right. The shapes are arranged in a way that they appear to be part of a larger, abstract design.

Attorney-Client Privilege Issues In Public Sector Investigations

Purpose of the Attorney-Client Privilege in Investigations

- Uncover all the facts without fear of exposure of private information (such as medical information or sensitive personal information.)
- Encourages complainants and witnesses to speak up and provide full information without fear of a loss of privacy or control of their narrative.
- Better allows for a positive post-investigative work environment that is free from retaliation.

The employer has duties to all its employees – the complainant, respondent and witnesses – to fairness and to protect confidential and private information.

See Attorneys Conducting Impartial Workplace Investigations: Reclaiming the Independent Lawyer Role, Harris & Oppenheimer, California Labor & Employment Law Review, September 2022.

Pitfalls of the Attorney-Client Privilege in Investigations

- Attorney-client privileged investigations are inherently structured to benefit employers. See *Wellpoint Health Networks, Inc., v. Superior Court*, 59 Cal.App.4th 110 (1997) (attorney-client privilege and work product doctrine apply to attorney workplace investigations).
- “Repeat player bias” and financial dependency may encourage implicit or other bias.
- Employers may weaponize attorney-client-privileged investigations against the complainant including by selecting the investigator, influencing the scope and form of the investigation, and deciding whether or not to waive privilege.

View from the Plaintiff’s Bench: What Can Be Done to Encourage Impartiality and Level the Playing Field Within the Existing Framework?

See Attorney Workplace Investigations: Neither Impartial Nor Independent, Friedman & Abrams, California Labor & Employment Law Review, March 2023.

Attorney Investigators

While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer

Rules of Professional Conduct, Rule 2-100



Attorneys as Complainants/Respondents/Witnesses

Attorneys As Complainants/Respondents/Witnesses

Interviewing Attorneys

When does the privilege not apply?

- Communications with in-house attorneys when acting in the capacity as Department Heads or employees of the public agency
- Communications with the attorney when no legal advice is being given such as when receiving a complaint from an employee
- Many unresolved and complex issues are presented when the attorney is actually the complainant

Role of limited waivers?

- Governing body is the holder of the attorney-client and must be consulted

The background features several overlapping geometric shapes in teal, yellow, and green. A large teal shape is at the top center, overlapping a yellow shape to its right and a green shape below it. Another yellow shape is at the bottom left, overlapping a teal shape to its right and a green shape below it. A teal shape is also at the bottom left, overlapping the yellow shape to its right and the green shape below it.

**Members of the Board of Supervisors or City Council
As Potential Witnesses**