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March 29, 2006

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Dear Mayor Slay:

Pursuant to your request, following is a legal opinion regarding Board Bill (Floor Substitute) #69. This letter addresses only those issues that objectively would be of significant legal concern if the bill were to become law.

State law, at section 590.653 of the Missouri statutes, provides that a city, including St. Louis, may establish a civilian review board. Yet this law, at subsection 590.653.2, is clear as to the limits of what such a City-established civilian review board has the "power" to do: it may "receive" and "investigate" certain types of complaints by members of the public, "make findings and recommend disciplinary action" upon those complaints, and "submit" those findings and recommendations to the "chief law enforcement official."

These statutorily enumerated activities are the total extent of an independent civilian review board's legal authority. See *Brooks v. Pool-Leffler*, 636 S.W.2d 113, 119 (Mo. App. E.D. 1982) (holding that administrative agencies have no more legal authority than what is granted to them by statute). As explained in the *Brooks* case, implication of a power is not proper "simply because that power would facilitate the accomplishment of an end", rather a power may only be implied if it "necessarily follows from the language of the statute". *Id.* And, the language of subsection 590.653.2 must be read in light of Mo. Rev. Stat. Chapter 84 and any other pertinent federal or state statutes or case law.

<sup>1</sup> In *Brooks*, the court extensively analyzed the statutory authority of the Missouri Commission on Human Rights, which, in various statutory sections, was conferred the authority not only to "investigate" but also, expressly, additionally, to hold hearings, compel the production of documents and issue subpoenas.

Board Bill #69 exceeds the parameters of section 590.653.2 in several significant ways. For example, the bill would give an independent civilian review board the authority to issue subpoenas (section four, subsection 7), view closed records (section five, subsection 4), hold hearings (section four, subsection 1 & section five subsection 10), and otherwise compel testimony (section five, subsections 5 & 10) and the production of documents (section four, subsection 3; section five subsection 10), as well as place limitations on the Police Board's own internal investigations and discipline of officers (section five, subsection 4).<sup>5</sup> And, it would require the cooperation of the "subject officers" with the civilian review board as a condition of the officers' employment (section six, subsection 1).

Not only are the foregoing activities well beyond the scope of section 590.653, but, moreover, the exercise of such powers by an independent civilian review board also would be illegal for other important reasons.

First, such broad activities of an independent civilian review board would intrude upon the exclusive duties, powers and jurisdiction of the Police Board as conferred by Chapter 84 of the Missouri statutes. As you know, Chapter 84 creates the St. Louis Board of Police Commissioners, a state agency, and establishes the Police Board as the employer of police officers in St. Louis. It provides the Board with authority over matters such as the appointment, employment, disciplining and dismissal of officers, and provides at section 84.120 that officers may only be terminated for cause and only after a hearing which is within the "exclusive jurisdiction" of the Police Board.

Section 84.010 expressly provides that no City ordinance "shall, in any manner, conflict or interfere with the powers or the exercise of powers of the board[] of police commissioners" nor shall the City "in any manner impede, obstruct, hinder or interfere with the board . . . or any officer." The provisions of Chapter 84 mean that the City does not, and cannot, operate or, interfere with the operations of, the police department.

Second, and somewhat related, conditioning the employment of officers upon cooperation with a wholly independent review board, which independent board would compel officers to testify and the like, would violate the due process rights of the officers. There is a long line of well-established case law establishing the due process rights of public employees.<sup>6</sup> The Police Board has the legal duty to ensure that this process is

<sup>5</sup> Conducting police policy review (section one) and compiling general data and researching policies (section four, subsection 13) also are outside the scope of the enabling statute.

<sup>6</sup> See, e.g., *Garity v. New Jersey*, 385 U.S. 493 (1967) (holding that a public employee cannot be compelled, under penalty of termination, to give a statement that would incriminate him); *Board of Regents v. Roth*, 408 U.S. 564, 569-72 (1972) and *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532 (1985) (both cases establishing pre-termination procedural due process rights of public employees), and see also *Mexcer v. City of Cedar Rapids*, 308 F.3d 840 (8<sup>th</sup> Cir. 2002) (also addressing public employees' right to procedural due process); *Brown v. City of North Kansas City*, 779 S.W.2d 596,

provided. It cannot merely abdicate its responsibilities as a public employer by turning them over to a third party over which it has no control. Recently, the Missouri appellate court held that the Police Board cannot even delegate the holding of a termination hearing to its own hearing officer, without the presence of a quorum of Police Board members, if an officer objects. *McGill v. St. Louis Board of Police Commissioners*, 178 S.W.2d 719 (Mo. App. E.D. 2005). There is no legal basis at all for turning over activities such as holding hearings on officer conduct to an independent third party.

Finally, the Police Board similarly cannot abdicate its responsibility for maintaining confidential records. Because the bill sets up the civilian review board as a completely independent, outside entity, the Police Board could not voluntarily provide it with any otherwise legally protected, confidential personnel-related documents or other confidential information. This is because providing such information would be no different legally than disclosing it to any other third-party. While some types of records may be held as closed by the Police Board, there also are plenty of records that must be kept confidential under various laws, and the Police Board could not carry out its legal duty to maintain that confidentiality once it released the information to a third-party beyond its control and reproach.

Finally, section ten of the bill purports that it would not become effective unless the Police Board adopted a resolution embracing it. This contingency does not "cure" the otherwise fatal defects of the bill. At its essence, the bill would have the Police Board voluntarily abdicate its statutory powers, authorities and responsibilities and turn them over to a wholly independent civilian review board. The *delegation* of functions to an internally created CRB is one thing, because delegation includes the retaining of ultimate control over the exercise of those functions- such as the functions of holding hearings, issuing subpoenas, compelling testimony, maintaining confidential information and otherwise ensuring due process. However, the various troublesome provisions of this bill, if embraced by the Police Board, would involve an abdication of its responsibility for these functions, and that it cannot legally do. That is, under the content of this bill, once the Police Board would adopt a resolution entitling the provisions of the ordinance, it would be losing all control over the aforementioned activities and the manner in which they are carried out. Thus, the bill would not become "legal" simply by having the Police Board "agree" to it.

Sincerely,

  
Patricia A. Hageman  
City Counselor

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600 (Mo. App. W.D. 1969) (holding that, pursuant to *Gandy* and subsequent U.S. Supreme Court cases, only when a public employer has "adequately advised a public employee that nothing he says and no evidence obtained from his statements may be used against him in a criminal prosecution" may the employer properly dismiss that employee for refusing to answer questions about the employee's performance).