MEMORANDUM OF LAW

DATE: January 18, 1990

TO: Bob Burgreen, Chief of Police, San Diego Police Department

FROM: City Attorney

SUBJECT: Cost Recovery of Production Costs of Video Tapes

This memorandum is in response to a recent proposal to initiate a cost recovery program whereby The City of San Diego could recover the cost of producing various video productions in the Video Graphics unit of the Police Department.

FACTUAL BACKGROUND

The San Diego Police Department currently maintains a specialized unit which is capable of producing commercial quality video tapes. The tapes which are produced serve a variety of purposes both within the police department and within the community.

The Video Graphics unit currently produces the "Crime Stoppers" reenactment videos routinely broadcast over local television stations. The unit also produces various public service announcements to inform and educate the general public.

Educational video tapes are a core element in the process of training new police recruits as well as the in-service training of tenured officers. Many of the training tapes currently used by the Department were produced in the Video Graphics unit.

Over the years it has become increasingly apparent that many of the tapes being produced by the Video Graphics unit are of unusually high quality, and frequently requested by other law enforcement agencies. Having identified this market and recognizing the great expense involved in producing these tapes (approximately $1,500 per minute of running time), a recommendation was made to commercially market this product.

The initial proposal to commercially market the tapes produced by the Video Graphics unit was in the form of an Employee Suggestion and submitted by Officer George Head. This proposal envisioned a contractual relationship with a national distributor whereby the police department would sell the tapes to the distributor and then collect a twenty-five percent (25%) royalty from the gross receipts generated by the distributor's efforts. The objective of the proposal was to make a profit from the production of these tapes.

Officer Head's initial proposal was evaluated by this office in April of 1986. Because the emphasis of the proposal was to make a profit from the sale of the video tapes produced by the unit, the proposal was rejected by this office as legally deficient. A copy of that memorandum is attached for reference, however, the essence of the evaluation can be found in the conclusion wherein it states:

> The City of San Diego may not for profit sell a training film made by the Police Department. Since the training film is a public record, the Police Department would have to provide a copy to anyone requesting it. Moreover, the copy provided may be for a price not to exceed costs.

Recently, a derivative of the original proposal was submitted for review, again as an employee suggestion by Officer Head. The instant proposal approaches the issue from the more reasonable perspective of "cost recovery" rather than from the perspective of making a profit.

ISSUES

While cost recovery is a popular concept, a determination of whether The City of San Diego may initiate a cost recovery program for recovering the cost of producing video tapes, requires an analysis of the following legal issues:

1. Are video tapes produced by the Police Department public records under the California Public Records Act and if so do any of the exemptions under the act apply?
2. May The City of San Diego contract with a private distributor for the distribution of video tapes which are exempt from public disclosure under the act?
3. Is it proper to distinguish between the information contained in a public record and the medium containing the information, such that providing the same information in an alternate medium would constitute compliance with the act?
4. What are the limitations on recovering the cost of providing nonexempt public records?

ANALYSIS

1. Are Video Tapes Produced by the Police Department Public Records Under the California Public Records Act?

The California Public Records Act, as codified in California Government Code section 6250 et seq., defines a public record as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any

state or local agency regardless of physical form or characteristics." Government Code section 6252(d).

By virtue of the definition under the Act, a video tape constitutes a "writing" in that it is a "means of recording upon any form of communication or representation . . . ." Government Code section 6252(e).

The courts have recognized that the mere custody of a writing by a public agency does not make it a public record. Braun v. City of Taft, 154 Cal. App. 3d 332(1984); see also, Runyon v. Board of Prison Terms and Paroles, 26 Cal. App. 2d 183 (1938). However, the state Assembly has stated:

> This definition ╒of public recordσ is intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record keeping instrument as it is developed. Only purely personal information unrelated to 'the conduct of the public's business' could be considered exempt from this definition, i.e., the shopping list phoned from home, the letter to a public officer from a friend which is totally void of reference to governmental activities. Assembly Committee on Statewide Information Policy California Public Records Act of 1968. 1 Appendix to Journal of Assembly 7, Reg. Sess. (1970).

San Gabriel Tribune v. Superior Court, 143 Cal. App. 3d 762, 774 (1983).

The training of law enforcement officers is obviously a "governmental process" and wholly related to "the conduct of the public's business." Video tapes produced for the sole purpose of training these offices would clearly be included within the scope of the Act; they are by definition and legislative intent, public records.

The training of law enforcement officers can be categorized into various subjects. One area of particular importance is officer safety. Many of the high demand video tapes produced by the San Diego Police Department cover tactical training in the area of officer safety.

The Act, in section 6254(f) of the Government Code recognizes the potential danger which could be created by publicly disclosing certain information, notwithstanding its classification as a public record. This section exempts from disclosure, "records of security procedures of . . . any state or

local police agency." The statutory language does not provide any guidance as to what constitutes "security procedures." In resolving such ambiguities, it is permissible to look to the federal Freedom of Information Act (5 U.S.C. section 552(b)(7)) for guidance. South Coast Newspapers, Inc v. City of Oceanside, 160 Cal. App. 3d 261, 267 (1984). The federal act contains an exemption from public disclosure of records compiled for law enforcement purposes, the disclosure of which would "endanger the life or physical safety of law enforcement personnel."

Allowing members of the public unrestricted access to training materials, including video tapes covering the subject of officer safety, could obviously "endanger the life or physical safety of law enforcement personnel" by severely undermining the effectiveness of a tactical action or response. This position is further supported by the court of appeal in Northern California Police Practices Project v. Craig, 90 Cal. App. 3d 116 (1979).

An additional exemption from public disclosure of a public record can be found in Government Code section 6255. Under this section public disclosure can be avoided if "on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." The same arguments used to invoke exemption under section 6254(f) could be applied here.

In relation to the instant proposal, all video tapes produced for the purpose of training police officers would be considered public records. Those video tapes depicting "security procedures," i.e., officer safety tactics and techniques, arguably would be exempt from public disclosure under Government Code section 6254(f), or section 6255. Regardless of which exemption applies, the video tapes could be distributed to other law enforcement agencies without having to make them available for public inspection.

2. May The City of San Diego Contract with a Private Distributor for the Distribution of Video Tapes Which are Exempt from Public Disclosure Under the Act?

Under Government Code section 6254.5, "whenever a state or local agency discloses a public record which is otherwise exempt from ╒public disclosure╓, to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in Sections 6254, 6254.7, or other similar provisions of law." (Emphasis added.)

Assuming arguendo that some of the video tapes produced by the Police Department are exempt from public disclosure, allowing a private film distribution company access to the tapes for the

purpose of distribution would compromise the statutory exemption, and mandate public disclosure of the otherwise exempt record. Even if ultimate distribution were limited to law enforcement agencies, the use of a private distribution firm activates the waiver provisions of section 6254.5.

Theoretically, creating or using an existing nonprofit corporation for the purpose of distributing training tapes could circumvent the undesirable effects of section 6254.5. However, little would be gained because of the applicable limitations regarding cost recovery.

3. Is it Proper to Distinguish Between the Information Contained in a Public Record and the Medium Containing the Information, such that Providing the Same Information in an Alternate Medium would Constitute Compliance with the Act?

There is statutory authority, under limited provisions, for distinguishing the medium containing a public record from the contents of that record. The act recognizes a distinction between the data stored in a computer database and the software program used to manage that database.

Pursuant to Government Code section 6254.9, the data or information contained in a computer database constitutes a public record, but the computer software program used to manage the database is not a public record.

By analogy, one might be tempted to distinguish a video tape (as a medium) from the information contained in the tape. In this regard, the creative talent in the presentation of the information would be distinguished from the information presented. Carrying the analogy further, for each video tape produced, a transcript of the contents could be prepared (as a practical matter this would already be accomplished because the video tapes are normally developed from a written script). The transcript would then contain the same information as the video tape, but in a different medium.

Whereas the statutes specifically recognize the distinction between computer stored data and computer software, there are no similar provisions for distinguishing information stored on video tapes from transcripts of those tapes; thus the analogy appears to be legally flawed.

For reasons previously discussed, training tapes produced by the Police Department are public records. Maintaining transcripts of these video tapes does not change the status of the tapes. The transcripts would be an alternate record of the information contained in the tapes, and would also be characterized as public records, subject to public disclosure.

By the mandatory language of Government Code section 6256, once a public record is 'identifiable' "an exact copy shall be provided unless impractible to do so." (Emphasis added.) This section contains an exception only for information stored in computers and states, "Computer data shall be provided in a form determined by the agency." Providing a transcript of a video tape in response to a request for a copy of the tape would be a violation of section 6256, as it is a relatively simple and minor task to duplicate tapes.

4. What are the Limitations on Recovering the Cost of Providing Nonexempt Public Records?

Regarding the recovery of costs generated by compliance with the Act, Government Code section 6257 states:

> Except with respect to public records exempt by express provisions of law from disclosure, each state or local agency, upon any request
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> for a copy of records, which reasonably describes an identifiable record, or information produced therefrom, shall make the records promptly available to any person, upon payment of fees covering direct costs of duplication, or a statutory fee, if applicable. Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt by law. (Emphasis added.)

The City of San Diego has enacted its own Administrative Regulation to ensure compliance with City Charter sections 215 and 216 pertaining to the accessibility and publicity of City records. Administrative Regulation No. 95.20 states in pertinent part, "Generally, prices for routine publications and document copies should include printing costs plus prevailing overhead and should exclude costs of authorship."

As applied to the instant proposal, Administrative Regulation No. 95.20 excludes recovery of the cost of producing (authorship) a video tape, and in conformity with state law permits recovery only of the cost of duplication.

ALTERNATIVES

The current state of the law pertaining to public records compels the inescapable conclusion that training video tapes produced by the Police Department are public records. However, there are two possible alternatives for removing these productions from the scope of the Public Records Act.

The first alternative is to amend the statutory provisions in a manner that would exclude specified intellectual property from the definition of "public records." The ground work for this concept was initiated in a 1988 amendment to the Act which added section 6254.9 to the Government Code.

The 1988 amendment to the California Public Records Act apparently recognized the commercial value of computer software programs as intellectual property. Pursuant to the amendment, computer software, including "computer mapping systems, computer programs, and computer graphics systems," is not considered a public record, even if developed or "authored" by a state or local agency. The agencies can "sell, lease, or license the software for commercial or noncommercial use." Government Code section 6254.9.

Government Code section 6254.9, in subsection (a) could be amended to read as follows, "Intellectual property Computer software developed by a state or local agency is not itself a public record under this chapter. The agency may sell, lease, or license the property software for commercial or noncommercial use." Subsection (b) would then have to be amended to provide an appropriate definition of intellectual property.

By expanding the narrow language of Government Code section 6254.9 to include other types of intellectual property developed or produced by local agencies, it could then become possible to sell video tapes produced by the Police Department. Making a transcript of the tape available upon request would satisfy the requirements of the act. As the restrictions on cost recovery would not be applicable to the video tape, the cost of production could be figured into the sale, lease or license agreement.

As a drawback to this alternative, it should be understood that the enterprise of producing and selling motion pictures for profit is not a necessary governmental act in connection with the operation of the Police Department. In this regard, it has been stated:

> A municipal corporation is invested with full power to do everything necessarily incident to a proper discharge of its public functions but no right to do more can be implied, and in the absence of express legislative sanction, it has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals. (McQuillan's ┌sicσ Municipal Corporations (rev. 2d ed.), vol. 1 Section 375; additional

citations omitted.)
Ravettino v. City of San Diego, 70 Cal. App. 2d 37, 44 (1945).

Therefore, even if Government Code section 6254.9 can be amended to include other types of intellectual property, the video productions could not be sold, leased or licensed on a profit basis.

The second alternative is to form a nonprofit public benefit corporation (or use one already in existence) to produce high quality audio-visual training materials for use in the training of city employees.

This corporation would be organized under the Nonprofit Public Benefit Corporation Law as codified in the California Corporations Code, section 5111 et seq. Notwithstanding its status as a nonprofit benefit corporation, this type of corporation is not statutorily precluded from operating on a cost recovery or profit basis, as long as it is not organized or operated for the private gain of any person, but rather is organized for public purposes. Legislative Committee Comments to Corporations Code, section 5110.

Arguably, a nonprofit public benefit corporation formed for the stated purpose may not be sufficiently detached from the City of San Diego (or City funds) to totally avoid the implications of the Ralph M. Brown Act (Government Code section 54950 et seq.) or the Public Records Act. Meetings of the board of directors may be subject to the Brown Act depending on the manner in which the corporation is organized. (See e.g., 61 Op. Cal. Att'y Gen. 220 (1978) and (1980) Op. S.D. City Att'y ┌MOL 6/19/80 at 191-193σ).

Similarly, the financial records and other records pertaining to the operation of the corporation may be subject to Public Records Act. However, a strong argument could be made which distinguishes the business of running the corporation (a public matter) from the marketable items produced by the corporation.

The product of this corporation would be training materials, including video tapes. Presumably, this product could in turn be copyright protected and sold to, rented to or licensed for use by the Police Department or other applicable City Departments. Although nothing prohibits a state or local agency from copyrighting its materials (see National Conference of Bar Examiners v. Multistate, Etc., 495 F. Supp 34, 35 (N.D. Illinois 1980) ┌aff'd 692 F.2d 478 (7th Cir. 1982), cert. den. 464 U.S. 814 (1983)σ), such copyright protection could not be used to circumvent the Public Records Act, and would only protect against the unauthorized duplication of the record once disclosed as required under the Act.

The nonprofit corporation would own the copyright to the training materials which it produces. Requests for copies of these materials from any agency, local or otherwise, would have to be processed by the corporation. City departments using these materials could not make unauthorized copies for distribution to other agencies without violating the copyright. The corporation would be free to choose the recipients and determine the contractual terms for distribution of its products.

CONCLUSION

Video tapes and other training materials created by the Police Department or any other City department are public records and as such would have to be made available to any person upon demand, unless they are statutorily exempt from public disclosure. Those materials which cover officer safety tactics would arguably be exempt from public disclosure due to the threat of endangering officers' physical safety. Use of a private distribution company to sell or lease copies of these materials to other agencies would constitute a waiver of the statutory exemption.

Use of a private distribution company or a nonprofit public benefit corporation for the distribution of training materials produced by a City department would yield little benefit because recovering the cost of making the materials available is limited to the cost of duplication and does not include the cost of original production.

Eliminating the binding impact of the Public Records Act as it pertains to training materials created by a City department will have to be accomplished by way of legislative amendment. Until that time, use of the nonprofit public benefit corporation law and the copyright law for the production of training materials should permit the recovery of, at least, production costs.

It should be recognized that the formation of a nonprofit public benefit corporation can be a lengthy and expensive process, the cost of which might not be offset by the purpose. Once the corporation is formed, the services of outside counsel may be required to represent the corporation in its dealings with The City of San Diego and to handle copyright issues.

As a note of caution, this memorandum does not begin to address the myriad of legal issues which may arise pertaining to copyrights, or the formation and operation of a nonprofit public benefit corporation. These concepts are presented merely as alternatives to which there appear to be no legal impediments.

Finally, it should be recognized that a court could find the

formation of a nonprofit public benefit corporation, organized with the City as its sole member and operated with city funds, notwithstanding the stated purpose of producing audio-visual training materials, is organized for the sole purpose of circumventing the Public Records Act. Upon such a finding, the City could be subjected to the sanctions available in the Act for wrongfully withholding public records.

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