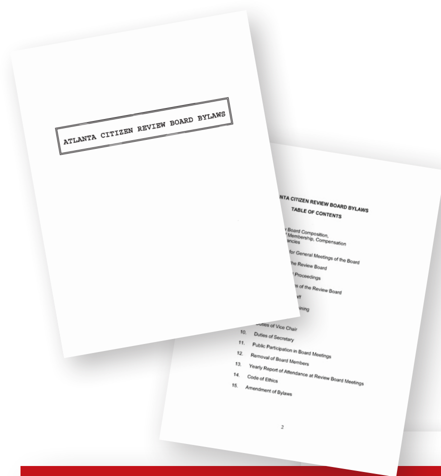

Supporting an Effective & Fair Citizen Review Board

A Report by

The Law Office of the Southern Center for Human Rights

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Introduction

The Southern Center for Human Rights is a non-profit public interest law firm dedicated to civil and human rights of people involved in the criminal justice system in the South.

We submit this "Southern Center for Human Rights Report Supporting an Effective and Fair Atlanta Citizen Review Board" in an effort to review the history of Atlanta's citizen oversight process with an eye toward ensuring that the currently constituted Atlanta Citizen Review Board can effectively fulfill its mission while ensuring the rights of accused officers. This Report includes a snapshot of other cities' programs and discusses at length the various concerns raised about the existing Citizen Review Board legislation while offering up suggestions for improvement. We conclude that there are adequate safeguards in place to ensure the rights of accused officers, and that timely and complete information is an absolute necessity for the Atlanta Citizen Review Board to accomplish the goals of City Council and ensure that citizen oversight is a reality and not a hollow promise.

Atlanta's Troubled History of Ineffective Citizen Police Review

Any assessment of the current Citizen Review Board should be done against the backdrop of the troubled history of independent police review bodies in Atlanta.

In 1984, Mayor Andrew Young attempted to create a Civilian Review Board by Ordinance 84-0-0799[1] Ordinance 84-0-0799, which was submitted by Council members Myrtle Davis and John Lewis, failed to gain the support of the majority of the council.[2] Nevertheless, Mayor Young forged ahead with his plan to create a Civilian Review Board in 1987 by Executive Order.

The Board created by Executive Order of Mayor Andrew Young was often viewed as ineffective in investigating allegations of police abuse. The Board had limited powers, lacking an investigative staff and access to information. It was comprised of 27 members serving one year terms.[3] But, not long after its inception, mayors stopped filling the positions once the terms were expired. Although a few members continued to serve in the absence of new appointees[4], the board had a number of unfilled vacancies.

In 1996, after the tragic shooting death of Jerry Jackson, an unarmed man, by an Atlanta police officer, Mayor Campbell sought to create a civilian review board. Not even a decade after Mayor Young created a similar board, Mayor Campbell was unaware of its very existence.[5] He was not aware of any framework for independent investigation of the police.[6] Similarly, while many of the Board members claimed to be reviewing complaints, several of the remaining members of the board were unaware of the chairperson or the other members of the Board.[7]

Unfortunately, the 1996 iteration of the Board was little better than its predecessor. Administrative Order 96-1, "An Administrative Order to Continue the Civilian Review Board," allotted for review of cases that involved allegations of excessive force, serious bodily injury or death resulting the from the action of an officer in the Atlanta Police Department.[8] The Order stipulated:

- A complainant must file a complaint of allegations of excessive force, serious bodily injury or death;
- The complaint must be against an Atlanta Police or Department of Corrections officer;
- Once the investigation is complete the chief or commissioner must render a final decision;
- If there is no existing litigation for the complaint, the Civilian Review Board may review the case. If there is litigation, the Board cannot review the case; and
- Cases could not be reviewed prior to December 1, 1995[9]

The Board, however, was roundly criticized because it did not receive initial complaints of brutality from the public (the complaints were first vetted through OPS, the internal affairs division of the Atlanta police force), had minimal staff, did not have subpoena power, did not meet in public, and did not make its findings or recommendations available to the public.[10] A Human Rights Watch Report revealed that Atlanta had the weakest external review mechanism of any major city in the United States.[11]

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1 Civilian Review Board Overview, U.S. State News. December 6, 2006. (page unavailable online).
2 Id.
3 Charmagne Helton, *Civilian police oversight board still operating, its members say,* The Atlanta Journal-Constitution. January 5, 1996, at 4F.
4 Id.
5 R. Robin McDonald, *Police chief to be open with board; She says she's not afraid of reviews,* The Atlanta Journal-Constitution. February 8, 1996., at 6B.
6 Charmagne Helton, *Probe by civilian board is in doubt,* The Atlanta Journal-Constitution. January 4, 1996, at 2C
7 Id.
8 *Civilian Review Board Overview,* U.S. State News. December 6, 2006. (page unavailable online).
9 Id.
10 Collins, Allyson. Shielded from justice: police brutality and accountability in the United States. Human Rights Watch 1998. (p. 126).
11 Id. at 123. The other cities covered by the report were Boston, Chicago, Detroit, Indianapolis, Los Angeles, Minneapolis, New Orleans, New York, Philadelphia, Portland, Providence, San Francisco, and Washington, D.C.

The restructured Civilian Review Board fell into many of the same patterns as the Board of the mid-1980s. As of mid-1997, just a year after the implementation of the new Board, the restructured Board had only taken on two complaints.[12] An article in 2007, reported that the Board had not met since 2002.[13] Many citizens and law-makers alike were unaware of the Board's existence.

Once again, a tragic event triggered a closer look at the role and power of the Board. This time it was the shooting of an elderly woman, Kathryn Johnston, in her home during a raid pursuant to a no-knock warrant to search the house. Determined to create a more powerful entity with the ability to provide more meaningful oversight, the *Citizen* Review Board was created through legislative, rather than executive, action. The Atlanta City Council unanimously passed and Mayor Shirley Franklin signed into law Ordinance 07-O-0141 to provide for "the establishment of a citizen review board ("Board"); to consider grievances of citizens who have complaints against any member of the police and/or corrections departments ("departments"); to provide for hearings before the board for police and/or corrections officers; to provide for recommendations for dispositions of the board; and for other purposes."[14] The law is based on the investigatory model of oversight agencies. It gives the Board the ability to request a subpoena if approved by a City Council committee[15] and allows the Board to hold hearings on complaints in order to make recommendations to the chief of police and/or the Mayor.

A survey of police review practices in the fifteen largest United States cities, revealed that independence and subpoena power are commonly cited as two keys to successful review boards.[16] In this regard, the current Board is an improvement to its predecessors.

Yet, several obstacles to the Board's effectiveness continue. The Board has no access to documents and testimony that are the subject of pending OPS investigations, even where there is no criminal investigation and otherwise public files are not revealed when they are submitted also in a criminal investigation. Also, despite the increased power, efforts to utilize the powers given by the ordinance have been thwarted by the refusal of the police to respond to requests and substantial delay in having subpoenas issued. The Board requested records in the 2006 shooting death of Ms. Johnston and also in the December 2008 shooting death of Pierre George. The Board met extreme resistance to its request, and it was not until June 15, 2009, and in response to significant pressure from constituents and concerned Atlanta residents, that the Committee on Council issued the subpoena for the records. The Board expects to receive those records on July 6, 2009.[17]

Atlanta has come a long way by enacting a stronger, if still imperfect, Citizen Review process. Nevertheless, the Citizen Review Board's effectiveness has been limited in practice because it has not received necessary information in a timely manner. The Police Department's compliance with the ordinance must be full, timely and complete. If compliance remains unsatisfactory, the City Council and Mayor should by ordinance grant additional direct subpoena and other powers to ensure that the Board can carry out its mission.

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12 Id. at 128.

13 David Pendered, *Atlanta to hold hearing on citizen review boards,* The Atlanta Journal-Constitution. February 20, 2007.

14 Ordinance 07-O-0141

15 The Board must first request a subpoena from the Committee on Council. It must garner approval from the committee before a subpoena is issued.

16 Chicago's review board reports to the mayor rather than the police superintendant. This provides autonomy for the board. See Libby Sander, *Chicago Revamps Investigation of Police Abuse, but Privacy Fight Continues* Chicago Reporter, July 20, 2007 at 1. Critics of Houston's review board cite lack of subpoena power as one major source of ineffectiveness. See Dale Lezon, *Group's HPD oversight in doubt/Committee needs subpoena power if it is to be effective, activists say. Houston Chronicle, Dec. 23, 2001 at A33.*

17 "Council committee backs review board with subpoenas of records in fatal police shootings." The Atlanta Journal-Constitution. June 15, 2009 available at http://www.ajc.com/metro/content/metro/atlanta/stories/2009/06/15/atlanta_police_council_review.html.

Ensuring Effective Investigatory Powers and Respect for an Accused's Rights Before the Citizen Review Board

We have reviewed some of the proposals for limiting or expanding the Atlanta Citizen Review Board's (ACRB) powers with an eye toward ensuring that the Board can fulfill its mission effectively and in a timely manner, while respecting the rights of accused officers and acting within permissible legislative authority. The comments below outline our research based on the issues raised to date, but must be adjusted as new proposals are presented:

I. In the event that a subpoena is unreasonable or oppressive, existing procedures already protect police officers and they are able to contest subpoenas through existing legal avenues.

Regardless of whether the ACRB is empowered to issue subpoenas directly or whether it must continue to request the issuance of subpoenas through the Committee on Council, subpoenas are always subject to close scrutiny by the courts through motions to quash or in contempt actions to enforce subpoenas.

To the extent there is concern about potential misuse of the subpoena power, either by the ACRB directly or through its power to request subpoenas through the Committee on Council, it should be noted that the ultimate power to enforce the subpoena lies with the Municipal Court of Atlanta, which has the jurisdiction to "[compel the presence of witnesses or all parties necessary to a proper disposal of each case by issuance of summonses, subpoenas, warrants, orders, and all other process in cases within its jurisdiction arising under the laws of the State of Georgia or this Charter or ordinances of the city with full power to enforce the same." Georgia law is clear that trial courts have wide discretion to quash unreasonable or oppressive subpoenas. *Bazemore v. State,* 535 S.E.2d 830 (Ga.App. 2000).

The Municipal Court will enforce subpoenas in accordance with the legal standard set forth for evaluating their enforceability: "The general standards that determine the enforceability of an administrative subpoena are well established. Courts will enforce a subpoena if (1) the subpoena is within the statutory authority of the [issuing entity]; (2) the information sought is reasonably relevant to the inquiry; and (3) the demand is not unreasonably broad or burdensome." *Inspector General of U.S. Dept. of Agriculture v. Griffin,* 972 F.Supp 676, 677 (M.D.Ga. 1997) (quoting *United States v. Westinghouse Elec. Corp.,* 788 F.2d 164, 166 (3d Cir. 1986)). Once these standards have been met, "unless the party opposing enforcement can make a sufficient showing that summary enforcement would abuse the court's process, the Court will summarily enforce an administrative subpoena." *Id.* Some instances in which a court will quash a subpoena include, but are not limited to, those cases involving Fifth Amendment violations, overly broad investigatory power, and harassment. See *Begner v. State Ethics Comm'n,* 552 S.E.2d 431 (Ga.App. 2001) (discussing a defendant's right to validly assert his Fifth Amendment privilege against self-incrimination because "no order can require someone to testify in a way that could be incriminating"); *EEOC v. First Ala. Bank of Birmingham,* 440 F.Supp. 1381 (N.D.Ala. 1977) (rejecting the application to enforce an administrative subpoena because it was issued only as a vehicle to harass the Bank's attorney); *FTC v. Turner,* 609 F.2d 743 (5th Cir. 1980) (holding that the F.T.C.'s investigatory powers did not extend far enough to justify enforcing its subpoena).

Moreover, the Ordinance specifically states in Section 2-2211(k) that subpoenaed corrections or police personnel who are "designated the subject of a related criminal investigation by a local law enforcement agency may elect not to appear until the conclusion of that investigation." This specific provision already allows officers who are the subject of a pending criminal investigation to avoid appearing at all before the ACRB until the criminal investigation has ended. Aside from this specifically delineated basis for refusing to comply with a subpoena issued by the Committee on Council, an officer could, as outlined above, move to quash the subpoena by arguing that the demand for an appearance or for certain information is unreasonable or oppressive. In sum, there are adequate protections in place for officers who are subpoenaed, and the courts will serve as a backstop for any unreasonable requests by the ACRB. Therefore, there should be no special concern regarding the ability of the ACRB to issue its own subpoenas, or any particular alarm generated by subpoenas issued at the ACRB's request.

II. Officers are adequately insulated from self-incrimination by the protections of Garrity; therefore, there is no Fifth Amendment concern presented.

The United States Supreme Court made clear in *Garrity v. State of New Jersey*, 385 U.S. 493 (1967), that where police officers being investigated are given a choice either to incriminate themselves or be subject to discipline (up to and including the possibility of dismissal) and subsequently make incriminating statements, those statements are not voluntary but coerced and therefore inadmissible in future criminal proceedings.

> The warning currently in place to be administered to City employees interviewed by the ACRB states as follows:
>
> "You are entitled to all of the rights and privileges guaranteed by the laws and the Constitution of the State of Georgia and the Constitution of the United States, including the right not to be compelled to incriminate yourself. If you refuse to answer questions specifically related to your duties, the performance of your official duties, your fitness for your position, and specific issues related to knowledge and information you have obtained during the course of your employ with the City of Atlanta, you may be directed to answer. If you continue to refuse to answer, you may be subject to departmental charges for insubordination, which may serve as the basis for disciplinary action up to and including dismissal. If you are compelled to answer and do, neither your statements nor any information or evidence which is gained by reason of such statements can be used against you in any subsequent criminal proceeding, except in cases of perjury."

As in *Garrity,* officers interviewed by the ACRB are given a choice either to incriminate themselves or face disciplinary charges up to and including dismissal. Therefore, any subsequent statements made in the context of an ACRB interview will never be admissible in the context of a criminal investigation, and officers interviewed by the ACRB will not be in any danger of unwittingly incriminating themselves.

Aside from the protections provided by *Garrity,* the ability of officers subpoenaed by the ACRB to exercise their Fifth Amendment privilege in this civil context does not constitute a blanket basis for refusal to participate in CRB interviews. The question whether officers may exercise their Fifth Amendment privilege in response to questioning by the ACRB relates to the judgment whether there is an actual possibility of harm or future self-incrimination resulting from any statements provided. Whether there is a danger of incrimination resulting from an official's answers is a judgment not for individual officers to make, but instead for the courts to decide. See *Hoffman v. United States,* 341 U.S. 479, 486-87 (1951) ("[T]his protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself – his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if 'it clearly appears to the court that he is mistaken.'" (citations omitted)). Therefore, officers should know that they will be protected from self-incrimination by the well-established principles set forth in *Garrity,* but also that the Fifth Amendment does not provide a basis for a complete refusal to appear in response to an ACRB request.

III. Releasing documents to the ACRB will not erode or eliminate the built in protections against disclosure under the Open Records Act.

Under the Georgia Open Records Act (ORA), O.C.G.A. § 50-18-70 et seq., the general public has a right to access and inspect certain records. Section 50-18-72, however, specifically exempts certain records from public disclosure, including, but not limited to:

- those specifically required by the federal government to be kept confidential [§ 50-18-72(a)(1)];
- records "compiled for law enforcement or prosecution purposes to the extent that production of such records would disclose the identity of a confidential source, disclose confidential investigative or prosecution material which would endanger the life or physical safety of any person or persons, or disclose the existence of a confidential surveillance or investigation" [§ 50-18-72(a)(3)]; and
- "[r]ecords of law enforcement, prosecution, or regulatory agencies in any pending investigation or prosecution of criminal or unlawful activity, other than initial police arrest reports and initial incident reports; provided, however, that an investigation or prosecution shall no longer be deemed to be pending when all direct litigation involving said investigation and prosecution has become final or otherwise terminated" [§ 50-18-72(a)(4)].

Other exemptions are clarified in the case law. For instance, in *Brown v. Minter,* 254 S.E.2d 326 (Ga. 1979), the Georgia Supreme Court relied on a balancing test, weighing the public interest against those of the police department's to restrict the disclosure of certain police records. Prior to this case, the Georgia Supreme Court discussed this balancing test and the importance of openness with regard to police records, explaining "public records prepared and maintained in a concluded investigation of alleged or actual criminal activity should be available for public inspection." *Houston v. Rutledge,* 229 S.E.2d 624, 627 (Ga. 1976); *Harris v. Cox Enters., Inc.,* 348 S.E.2d 448 (Ga. 1986).

Some have raised concerns that submitting documents to the ACRB will eliminate these exemptions. Those concerns are without basis in fact or law. It is clear that the ACRB can receive documents exempt under the ORA without any subsequent obligation to produce them pursuant to a future ORA request by a member of the public. Section 50-18-70 specifically provides that records "received or maintained by a private person or entity on behalf of a public office or agency *which are not otherwise subject to protection from disclosure"* are "subject to disclosure *to the same extent* that such records would be subject to disclosure if received or maintained by such agency, public agency, or public office" (emphasis added). The Act avoids making the public or exempt nature of records dependent on whether they are transferred from one entity or agency to another. See § 50-18-70. In addition, Sec. 2-2212(a) in the Citizen Review Board Ordinance makes it unlawful for the ACRB to release to the public any document or information unless such is deemed as a public record under the ORA. That Ordinance further provides that the ACRB "shall not make public any confidential police document, or information derived from any such confidential police document."

On May 4, 2009, the City Attorney posed to the Attorney General the following question: "Based on [O.C.G.A. § 50-18-72(a)(4)], when the ACRB concludes its investigation, may the public then obtain records from the ACRB that said Board previously acquired from the APD even though the APD investigation or prosecution has not yet been completed?" To the extent the investigation is still pending, and if the records fell within one of the exemptions to the ORA, they would not be subject to disclosure. This is true, regardless of whether they are in the hands of the APD, the ACRB, or both. The Georgia Court of Appeals discussed in *Hackworth v. Bd. Of Educ.*, 447 S.E.2d 78 (Ga.App. 1994), that the determination whether documents are public records is based on the operations in which the records were generated. Thus, since a pending investigation is not a public operation, any records generated during such would not be public within the meaning of the ORA.

As for ACRB's access to certain documents held by other City agencies, although it does not appear to be at issue, it should be noted that the ACRB's access reaches beyond the ORA given that the Act relates only to "public disclosure." Because the ACRB is not part of the "general public," its access to records need not be limited to those records subject to disclosure under the ORA. Members of the ACRB have taken an Oath of Office, through which they have sworn to uphold the laws of Atlanta, Georgia and the United States as well as the Ethics Code of the City of Atlanta. Thus, their obligations to the City and to confidentiality are far beyond those of the public, as is apparent in the Ordinance, Section 2-2212(b) ("The findings of the board as they may relate to conclusions drawn from interviews, study, and review of documents, shall remain confidential until the board officially releases such findings").

IV. The Citizens Review Board can better and more quickly investigate allegations of police abuse if it were granted direct subpoena powers through revision of the existing city ordinance.

While the Committee on Council currently approves and can issue subpoenas for the Citizen Review Board upon request, there is no reason why the Board cannot have direct subpoena power. While some have contended that a grant of subpoena power would be unconstitutional, we believe that such powers are permissible and would give the Board the independence the public expects.

The power to issue subpoenas is one that has been and is often conferred on similar review boards throughout the country. See *Dibb v. County of San Diego,* 884 P.2d 1003, 1009-14 (Cal. 1994); see also Petterson, *Police Accountability and Civilian Oversight of Policing: An American Perspective,* in Complaints Against the Police: The Trend to External Review (Goldsmith, edit. 1991), at pp. 259, 287-289 (11 of 21 civilian review boards in large cities possess power to issue subpoenas).

Moreover, the power to issue subpoenas is reasonably necessary to the full accomplishment of the ACRB's objectives as set forth in the Ordinance. Under Section 2-2211(e), it is provided that in order to accomplish the other goals listed therein, the board must "have *full access* to relevant police department and corrections personnel for interview and to relevant documents," including but not limited to OPS files and other police paperwork (emphasis added). Enabling the ACRB to issue its own subpoenas would ensure that it can efficiently and effectively obtain all documents and interviews necessary for it to fulfill its mission. See, e.g., *City of Newark v. Benjamin,* 364 A.2d 563, 571-572 (N.J.Super.Ch.1976) ("Without the power to subpoena witnesses, hearings before a [civilian review board] would be inadequate" and ineffective).

There is nothing in Georgia law prohibiting the power of subpoena from being delegated by the City Council to a board whose members and functions remain in the public domain. Contrary to the City Attorney's suggestion at the Committee on Public Safety Work Session on May 29, 2009, there is no requirement that the entity to which the subpoena power is conferred be composed of elected officials. In *Rogers v. Medical Assn. of Ga.,* 259 S.E.2d 85, 87 (Ga. 1979), the Georgia Supreme Court held that "[t]he General Assembly may [delegate such powers] . . . [b]ut [that] it cannot delegate [such powers] to a *private* organization." The line of permissibility drawn by the Supreme Court regarding delegation is not between elected and non-elected officials, but rather public and private entities or organizations. The Citizen Review Board is not a private entity. It is created by ordinance and considered a public agency.

The Georgia Supreme Court's opinion in *Atlanta Journal v. Hill,* 359 S.E.2d 913 (Ga. 1987), is helpful in illustrating the difference between entities to whom such delegation is permissible under the law and those to whom it is not. In *Hill*, the Supreme Court held that the City Council could not delegate to the Administrative Review Panel certain powers, including the power to issue subpoenas, because the Panel was deemed to be "purely private [and] advisory." *Id.* at 914-15. One of the primary reasons that the Panel was held to be private in *Hill* was because the Executive Order creating the Panel specifically provided that Panel meetings were limited to Panel members and others whose presence had been specifically requested. The Court pointed out that any body empowered to take official action would be subject to Georgia law mandating that such meetings be open to the public. Unlike the Panel, the ACRB was created not by Executive Order, but by City Ordinance. Also unlike the Panel, ACRB meetings and hearings are open to the public under Section 2-2211(l) ("All

hearings shall be open to the public, except when, in the opinion of the board, executive sessions are required***")****; see also Cent. Atlanta Progress, Inc. v. Baker,*** 629 S.E.2d 840 (Ga.App. 2006) (records of private organizations are subject to the ORA if they involve public funds or resources and/or public officials); *Jersawitz v. Fortson,* 446 S.E.2d 206 (Ga.App. 1994) (holding that committee charged with evaluating proposals submitted to municipal agency and then making a recommendation to that agency, consisting in part of agency staff and other City of Atlanta employees, was considered an "agency or authority of a municipality" subject to Georgia's Open Meetings Act); *Clayton County Hosp. Auth. v. Webb*, 430 S.E.2d 89 (Ga.App. 1993) (private corporations are regarded as public for purposes of the ORA if they function under the direction and control of a government entity).

In *Hill*, the Court specifically characterized the Panel as a "group of private citizens, not under any oath and not accountable to anyone." In contrast, when members of the ACRB "assume office," under Section 2-1851, they must first execute and file with the municipal clerk an Oath of Office swearing to "be governed by what is my conviction for the public good," "support the Constitution and laws of the United States, of the State of Georgia and the City of Atlanta," and "uphold and support the Ethics Code of the City of Atlanta." Section 2-2203 of the Ordinance contemplates that the board members are public officers, stating that no member of the board may "hold *any other* public office" (emphasis added). Because the ACRB is considered a public entity, the Ordinance also provides for additional staff support from "the office of the mayor [and] the city attorney."

It is clear from the ordinance creating the ACRB that the board is composed of persons fulfilling public duties and is not a private organization as was the Medical Association of Georgia in *Rogers* or the Administrative Review Panel in *Hill*. Because there is no provision of Georgia law prohibiting that the subpoena power be given to an organization like the ACRB and because the ability of the ACRB to issue its own subpoenas will enable the ACRB to fulfill its objectives to the best of its ability, we recommend that the City Council delegate this power to the ACRB.

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