

8-14-12 G. Moore
Public Comment



OFFICE OF THE CITY ATTORNEY
Long Beach, California

ROBERT E. SHANNON
City Attorney

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Chief Assistant City Attorney

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August 2, 2012

Dezire Lumachi, Publisher
Long Beach Post, Inc.
5318 E. Second Street # 568
Long Beach, California 90803

RE: Demand for Retraction

Dear Ms. Lumachi:

This Office demands the LB Post retract libelous statements printed on August 1, 2012, in the article titled "Has LBPD's Camera-Smashing Exposed the City to More Lawsuits?" written by Gregory Moore. Three of the statements in the article are untrue and defamatory. Moreover, the substance and timing of the article suggest Moore's false statements were printed maliciously to injure City officials and employees in their occupation.

In accordance with California Civil Code section 48(a), the City demands you retract and correct the following libelous statements:

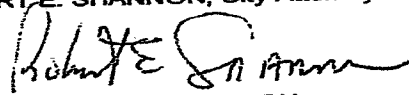
- "The matter may be made worse for the City by the fact that Deputy City Attorney Kendra Carney was present during the June 19 raid."
- "The LBPD's willingness to engage in the practice with a deputy city attorney present might be read as officers' belief that the City Attorney's Office regards such actions as legal."
- "Carney . . . declined to comment for this article."

Should you fail to immediately publish the requested retraction, and cease and desist from printing the above referenced false and malicious statements the City Attorney's Office will take appropriate legal action.

Best regards,

Very truly yours,

ROBERT E. SHANNON, City Attorney

By: 
ROBERT E. SHANNON
City Attorney

RES:jp
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cc: ✓ Gregory Moore, Long Beach Post

- Dominic Fitzhugh
- Aimee C. Lottner
- Montr H. Machin
- J. Charles Purkin
- C. Geoffrey Alfred
- Gary J. Anderson
- Richard F. Anthony
- Amy R. Burton
- Kendra L. Carney
- Christina L. Cusack
- Charles M. Gale
- Barbara J. McTigue
- Barry M. Meyers
- Cristyl Meyers
- Howard D. Russell
- Tijani L. Shin
- Linda Truong
- Theodore B. Zinger



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August 7, 2012

Robert Shannon, City Attorney
Office of the City Attorney
City of Long Beach
333 West Ocean Boulevard
Eleventh Floor
Long Beach, CA 90802-4664

Re: Letter to Long Beach Post dated August 2, 2012

Dear Mr. Shannon,

I write regarding your letter to Deziré Lumachi, publisher of the Long Beach Post ("LB Post"), dated August 2, 2012, in which you take issue with an article by Gregory Moore published by the LB Post on August 1, 2012, regarding a police raid of a medical marijuana dispensary, entitled "Has LBPD's Camera-Smashing Exposed the City to More Lawsuits?"

In your letter, you assert that three statements in the article are "libelous" and "suntuous or defamatory," demand that the LB Post retract them, and threaten to take legal action if it fails to do so. The statements you identify all fall in a paragraph, which reads:

The matter may be made worse for the City by the fact that Deputy City Attorney Kendra Carney was present during the June 19 raid. . . . [T]he L.B.P.D.'s willingness to engage in the practice with a deputy city attorney present might be read as officers' belief that the City Attorney's Office regards such actions as legal. Carney and City Attorney Robert Shannon declined to comment for this article.

As an initial matter, it is unclear from your letter which facts you regard as untrue or defamatory — that Ms. Carney was present during the raid? That this fact might make matters worse for the City? That having a Deputy City Attorney present during the raid might lead police officers to believe that the City Attorney's office endorsed their actions? Or that Ms. Carney declined to comment? Regardless of which facts you claim are defamatory, none of these would give rise to an action for libel.

Both the article in question and the statements you point out address the role of a public official, Ms. Carney, in possibly unlawful actions by the Long Beach Police Department, which is unquestionably a matter of public concern. As the Supreme Court has recognized, "The constitutional guarantees [of freedom of speech and the press] require ... a federal rule that

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prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'— that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); accord *Brown v. Kelly Broadcasting Co.*, 48 Cal.3d 711, 721-22 (1989). The California Supreme Court explained the rationale for this protection more than twenty-five years ago:

The public possesses an independent interest in the qualifications and performance of its public officials. To effectuate this interest, the public relies upon the press as its agent to gather and disseminate this information.

The Constitution specifically selected the press ... to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.

... the press is the most important check on governmental activity. Informed public opinion is "the most potent of all restraints upon governmental wrongdoing or mismanagement."

However, it is often impossible for an individual to obtain information about misconduct in government unless the press provides it. Thus, it is fundamental that criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized.

For these reasons, respondents as public officials must sometimes bear scathing and even false attacks subject only to those narrowly circumscribed exceptions embodied in the concept of actual malice. The public's interest in reports of official misconduct, even if they are factually erroneous and damaging, outweighs the reputational interest of any individual.

McCoy v. Hearst Corp., 42 Cal.3d 835, 859-60 (1986) (citations omitted, emphasis in original)

In *McCoy*, the Court applied *New York Times*' "actual malice" standard to a libel claim by two police inspectors and a prosecutor against a newspaper publisher based on a story that claimed they had falsely convicted an innocent man of murder by obtaining false testimony from the prosecution's key witness. *See id.* at 840-41. There is no question that, like the prosecutor in *McCoy*, Ms. Carney is a public official and whether she was at raid during which the police may have violated the law is a matter of public concern; thus any party alleging libel would have to show "actual malice" under *New York Times*.



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In drafting the article, Mr. Moore had three witnesses who identified Ms. Carney as one of the individuals present during the raid. Even if these three later decide to recant and Mr. Moore was not at the raid, Mr. Moore's reliance on the three witnesses is sufficient to establish that he acted with negligence.

...made worse for the City" by Ms. Carney's statements. The statements of public officials "belief that the City... neither is a provably... Amendment clearly... false." *Seelig v. Infidelity*, 2009 WL 20000 (9th Cir. 2009) (quoting *Seelig v. Infidelity*, 2009 WL 20000 (9th Cir. 2009)).
...speculation about the future...
...speculations about whether the...
...legal issues will be...
... *See, e.g., Rodriguez v. Panayiotou*, 314 P.2d 979, 986 (9th Cir. 2002); *Coastal Abstract Services, Inc. v. First American Title Ins. Co.*, 179 P.2d 925, 931 (9th Cir. 1956).

...Mr. Moore's statement that Ms. Carney declined to comment was based on a number of calls he made to your office. In the first call, he asked to speak to Carney and was transferred to her, but when he said he was calling about the June 19 raid, she said that she was not the person to comment but would pass along a message to the appropriate person. Mr. Moore did not receive any further calls, and so called Ms. Carney and left a voicemail for her at least one more time, then called the main number and explained to a receptionist that he was calling about the June 19 raid. The receptionist placed him on hold and then returned, saying City Attorney Shannon said the office had no comment on the matter. Based on this, Moore's statement that "Carney and City Attorney Robert Shannon declined to comment for this article" cannot reasonably be construed as false at all, much less as intentionally so.

For these reasons, any libel action you might bring would not only be baseless, but also would expose your office to liability under California's anti-SLAPP statute, CCP § 425.16, for discouraging the LB Post and Mr. Moore from exercising their First Amendment rights in reporting on public officials for their conduct in matters of public concern.

I would hope this is not your only concern, however. As an elected official and an attorney, you have both the responsibility to uphold the Constitution's protections for freedom of speech and the press, and the knowledge necessary to do so. Frivolous threats to litigate defamation claims against small, local press organizations do not comport with your obligation to abide by the law, as well as enforce it.

Sincerely,

Peter Bibring
Senior Staff Attorney

