EXHIBIT 6

RESPONSE OF LAW DEPARTMENT TO QUESTIONS
ABOUT POLICE COLLECTIVE BARGAINING AGREEMENT

At the June 11 public hearing on the OPS Ordinance, members of the legal community offered a series of observations and questions on a range of topics related to the Ordinance and the City's collective bargaining agreement with the Fraternal Order of Police. This document answers the main questions and clarifies some of the apparent misunderstanding regarding specific provisions in the collective bargaining agreement.

Why does the Ordinance state that investigations must be conducted in a manner consistent with the collective bargaining agreement?

Subsection 040(g) of the Ordinance requires that the independent agency "conduct investigations in a manner consistent with . . . collective bargaining agreements . . .". This provision simply states existing law. In 1984 the Illinois General Assembly enacted the Illinois Public Labor Relations Act, 5 ILCS 315. Section 7 of this Act imposes on public employers the duty to bargain over "wages, hours and other terms and conditions of employment", a formula that has long been recognized as including virtually every matter related to employee discipline, including procedural and substantive rights of employees, appeal mechanisms, legal representation, etc. Section 10(a)(4) makes it illegal for a public employer to implement unilateral (i.e., without bargaining) changes in matters subject to a bargaining obligation. Finally, Section 15(b) of the Act specifically provides that any collective bargaining agreement "*shall supersede any contrary statutes, charters, ordinances, rules or regulations relating to wages, hours and conditions of employment and employment relations adopted by the public employer or its agents*". Thus for more than two decades the City (and every other public employer in Illinois) has been precluded from enacting ordinances that conflict with collective bargaining agreements.[1] It was precisely because of our awareness of these statutory requirements that this Ordinance was drafted to maximize the effectiveness of the new agency without running afoul of any provision in the FOP labor agreement.

Does the Bill of Rights in the labor agreement give an unfair advantage to officers accused of misconduct?

§6.1(E) of the collective bargaining agreement provides that "Immediately

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[1] Private sector employers have been subject to this limitation since 1935. *Katz v. National Labor Relations Board*, 369 U.S. 736 (1962).

prior to the interrogation of an officer under investigation, he shall be informed of the nature of the complaint and the names of all complainants". Questions were asked whether this entitles the accused officer to read the statements of the complainant(s) and witness(es) prior to giving his own statement. The answer is "no"; the accused officer is presented only with a very general description (one or two sentences) of the allegations and is not permitted to view any witness statements before giving his statement.

Misunderstanding of this provision aside, it should be pointed out that labor negotiations do not occur in a vacuum. The procedural safeguards afforded Chicago police officers in the FOP labor agreement echo the protections the General Assembly has previously seen fit to provide to police officers across the state. The Uniform Peace Officers Disciplinary Act, 50 ILCS 725 ("UPODA"), creates safeguards which parallel, and in some instances exceed, those provided to CPD officers under the collective bargaining agreement. Thus §3.2 of the UPODA provides as follows:

> No officer shall be subjected to interrogation without first being informed in writing of the nature of the investigation. If an administrative proceeding is instituted, the officer shall be informed beforehand of the names of all complainants. The information shall be sufficient as to reasonably apprise the officer of the nature of the investigation.

What restrictions does the labor agreement impose on anonymous complaints?

§6.1(D) of the FOP labor agreement provides that no anonymous complaint shall be made the subject of a CR investigation unless the allegation is criminal in nature, or regards residency or medical roll abuse. There are two points to be made. First, over the years the City has actually *expanded* its ability to investigate anonymous complaints through collective bargaining and interest arbitration. The initial FOP labor agreements from the early 1980's prohibited investigation of all anonymous complaints that weren't criminal in nature. The exceptions for residency and medical roll abuse were added as the result of a 1993 interest arbitration proceeding between the City and the FOP. During those negotiations the City had sought virtually unrestricted ability to investigate them. The Interest Arbitrator, George Roumell, conducted extensive hearings and issued his Award, granting us the medical roll and residency exceptions but denying our proposal to go beyond those exceptions. In his Award, Arbitrator Roumell held that the function of this provision "is

to prevent harassment of officers by persons who are not prepared to step forward and identify themselves as complainants". He further held that acting on anonymous complaints "generally speaking, is the antithesis of the democratic way of life, by denying one the right to confront his accuser".

The second point is rooted in State statutes. In 2003 the General Assembly enacted an amendment to the UPODA mandating that "*anyone filing a complaint against a sworn peace officer must have the complaint supported by a sworn affidavit*" (50 ILCS 725/3.8). Thus under state law, complainants must not only identify themselves, they must present their complaint under oath, subject to perjury. The City testified against this legislation, expressing our fear that such a requirement would intimidate citizens and discourage them from coming forward with complaints made in good faith. When the legislation nevertheless passed by an overwhelming majority, we told the FOP that we would refuse to comply, relying on certain technical legal objections, but we offered to sit down and bargain over the subject of providing reasonable, balanced protections to officers confronted with false allegations of misconduct. The FOP sued us in Circuit Court and we prevailed on our technical legal arguments.[2] In response the FOP did two things: it went back to Springfield to amend the Illinois Public Labor Relations Act to overcome our legal arguments about the affidavit requirement and, more importantly, it agreed to sit down with us and negotiate a set of contract provisions balancing the interest of officers not to be subjected to harassing, vindictive complaints while serving our interest in maintaining our ability to investigate any allegation of misconduct where there is some reasonable likelihood it might possess merit, even if the complainant does not execute an affidavit. These detailed provisions are found in Appendix L of the FOP labor agreement. These provisions actually provide the Department with *broader* authority to investigate complaints made without an affidavit than we would possess under the four corners of the UPODA.

Does the collective bargaining agreement unreasonably limit the ability to consider past complaints?

§8.4 of the FOP collective bargaining agreement provides that information "contained in any unfounded, exonerated, or otherwise not sustained file, shall not be used against the officer in any future proceedings". Citing unspecified "rules of evidence", some witnesses at the June 11 hearing suggested that the Department should be able to take such information into account. Assuming that this comment is in reference to examining previous

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[2] *Doe v. City of Chicago*, 04 CH 110.

"not sustained"[3] complaints to ascertain the existence of a pattern of misconduct requiring further investigation, we are in agreement and the labor agreement was specifically amended in 2002 to provide us with that right. In negotiations for the 1999-2003 contract with the FOP, we proposed that the Department be permitted to utilize "not sustained" complaints for this very purpose, among others. When the FOP membership rejected the proposed contract, we proceeded to interest arbitration. As in 1993, we presented extensive evidence and witnesses in support of our position. In 2002 Arbitrator Steven Briggs granted us the right to utilize "not sustained" findings alleging excessive force and criminal conduct for purposes of determining credibility and notice. He specifically held that the Department has the right to use such findings to identify patterns of suspected misconduct. Thus the second paragraph of §8.4 was amended to provide: "*Information contained in files alleging excessive force or criminal conduct which are not sustained may be used in future disciplinary proceedings to determine credibility and notice*". He further granted us our proposal to be able to use such findings for seven years, as opposed to the five years otherwise applicable.[4]

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[3] In Department parlance, a finding of "unfounded" means that the alleged behavior did not occur. A finding of "exonerated" means that the alleged behavior occurred, but the accused officer's conduct was proper under the circumstances. A finding of "not sustained" means that the facts neither prove nor disprove the allegation. The subsequent discussion is restricted to the use of "not sustained" complaints, as no one has succeeded in articulating an argument explaining how a finding of "unfounded" or "exonerated" could ever be used against someone. Although note that several years ago we succeeded in amending Section 6.1D to grant the Superintendent the authority to act on complaints more than five years old and to re-open closed cases after five years. We negotiated for this right in response to the General Assembly's enactment of a five year "statute of limitations" on police investigations of officer misconduct. See: 65 ILCS 5/10-1-18; 18.2.

[4] It is not clear just which "rules of evidence" the witnesses believe are applicable. If they are referring to the concept that *modus operandi* evidence should be considered, that is precisely what we obtained in the 2002 interest arbitration. But as every lawyer knows, there are countervailing legal rules governing use of prior cases in which an individual was not found guilty of a crime or misconduct. A "not sustained" finding is, in many respects, analogous to an arrest record. Certainly a pattern of arrests may be indicative of something, but our legal system properly limits consideration of such records, as demonstrated by their inadmissibility in court and the prohibition in the Illinois Human

Does the FOP contract require destruction of files?

§8.4 of the FOP contract has a sentence requiring destruction of discipline investigation files after five years (increased to 7 years for files alleging excessive force or criminal conduct). But this requirement is subject to multiple exceptions, one of which is that it does not apply in instances where "the investigation relates to a matter which has been subject to either civil or criminal litigation . . .". Since the early 1990s the entire disciplinary apparatus of the Police Department has been the subject of litigation in the federal courts. In response to discovery requests and court orders, the Department long ago ceased the physical destruction of these records. The records thus remain, although the manner in which they may be used is subject to certain limitations as discussed above.

If you wish to discuss these matters further, please call Chief Labor Negotiator David Johnson at 744-0673 or Corporation Counsel Mara Georges at 744-0220.

Rights Act barring employers from making employment decisions based on an arrest record. 775 ILCS 5/2-103.