



Northern  
California

July 24, 2019

San Francisco Police Commission  
Police Headquarters  
1245 3rd Street  
San Francisco, CA 94158

**Re: SB 1421 Working Group – ACLU Comments on Draft Protocol**

Dear Police Commission:

On behalf of the American Civil Liberties Union of Northern California (“ACLU”), we submit this letter outlining our concerns with the Protocols for Release of SB 1421 Documents (“Protocol”).

**Legislative Findings of SB 1421**

Any protocol for implementation of SB 1421 should keep its legislative findings in mind. For decades, the law kept secret police departments’ investigations into its officers’ uses of deadly force. It also prevented the public from learning when police officers were found by their own departments to have committed dishonest acts or sexual assault. This changed in 2018 when the California Legislature enacted SB 1421, which made certain law enforcement records accessible to the public through the California Public Records Act (“PRA”), Cal. Gov’t Code § 6250 *et seq.* (West 2019). In adopting SB 1421, the Legislature recognized that:

Peace officers help to provide one of our state’s most fundamental government services. To empower peace officers to fulfill their mission, the people of California vest them with extraordinary authority — the powers to detain, search, arrest, and use deadly force. Our society depends on peace officers’ faithful exercise of that authority. Misuse of that authority can lead to grave constitutional violations, harms to liberty and the inherent sanctity of human life, as well as significant public unrest.

The public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force. Concealing crucial public safety matters such as officer violations of civilians’ rights, or inquiries into deadly use of force incidents, undercuts the public’s faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety.

S.B. 1421 § 1, 2018 Leg., (Cal. 2018) (enacted). After police unions mounted an unsuccessful legal challenge to prevent disclosure, *Walnut Creek Police Officers’ Ass’n v. City of Walnut Creek*, 33 Cal. App. 5th 940 (2019), the public now has access to these records.

There is significant public interest in these records. With this change in the law, effective January 1, 2019, members of the public, including those who have been directly impacted by police uses of deadly force, media organizations, and police accountability organizations have filed requests under the California Public Records Act seeking information on incidents and officers whose records are now disclosable under the law. As with the burden imposed by any Public Records Act request, we acknowledge that production of these records has created additional work for the City.<sup>1</sup>

### **Suggestions to Increase Transparency and Facilitate Disclosure of Records**

The California Public Records Act authorizes local jurisdictions to adopt policies that allow for more efficient access to public records than specifically required under the Act. Cal. Gov't Code § 6253(e) (West 2019). We have several suggestions to increase transparency, facilitate disclosure of records, and help agencies minimize duplication of efforts.

**First, post your responses on a City website.** The PRA allows an agency to comply with its requirements under the Act by posting records on a website and directing individuals to that site. Cal. Gov't Code § 6253(f) (West 2019). The Oakland Police Department, for example, has long posted a copy of its public records production online. *See Open Public Records*, City of Oakland, <https://oaklandca.nextrequest.com>. Online publication of these records is **the most efficient way** to maximize the public's access to this important information and satisfy the San Francisco law enforcement departments' obligations under the California Public Records Act. It also demonstrates a robust commitment to transparency in policing.

**Second, going forward, disclose records proactively.** We suggest adopting a policy of redacting and posting records related to dishonesty and sexual assault when a finding becomes sustained. We suggest redacting and posting the investigative file for shootings and serious uses of force when doing so would no longer interfere with a criminal investigation.

**Third, use an index.** Creating an index of all incidents subject to disclosure under SB 1421 demonstrates a commitment to transparency and helps the public understand why production might take longer than anticipated. It can also be a way to assist the requester in narrowing a request. An index from the City of Antioch, attached as Exhibit A, may be used as a template. It includes the date, case number, location, injuries, type of force used, and officers involved. Another example from the City of Richmond, attached as Exhibit B, includes similar identifying information, as well as a summary of incidents of officer-involved shootings and uses of force and whether there are audio and video records.<sup>2</sup>

---

<sup>1</sup> The Legislature has, however, called this burden "fundamental and necessary" to a democratic society. Cal. Gov't Code § 6250 (West 2019). And the people endorsed it when they added Article I, Section 3(b) to the California Constitution in 2004. Cal. Const. art. I, § 3(b).

<sup>2</sup> These indices are included with the permission of the respective City Attorneys' offices.

**Fourth, include the basis upon which a redaction is made.** For any records subject to redaction, the ACLU recommends providing the basis upon which the agency is asserting a redaction. This will further a commitment to transparency and ensure the public is aware of the grounds upon which any redaction is made. This will also aid the public in asserting any contrary arguments regarding the material redacted. Attached as Exhibit C is an example from the Oakland Police Department website that cites to the statutory section applicable to each redaction.

**Fifth, for investigative records, err on the side of disclosure.** Prior to the enactment of SB 1421, existing law protected only personnel files and “records generated as part of an internal investigation of an officer” (or information obtained from those specific records) but not “records of factual information about an incident (which generally must be disclosed).” *Long Beach Police Officers’ Ass’n v. City of Long Beach*, 59 Cal. 4th 59, 72 (2014). So, for example, the confidentiality provisions never applied to a report that an agency itself commissioned— independent of any investigation of civilian complaints—to investigate an officer-involved shooting or potential misconduct. *Pasadena Police Officers’ Ass’n v. Super. Ct.*, 240 Cal. App. 4th 268, 274 (2015) (rejecting police union’s attempt to prevent disclosure of city-commissioned report on shooting).

Although agencies would previously have had the discretion to withhold many of these records under other provisions of the PRA protecting records of investigation, *see* Cal. Gov’t Code § 6254(f) (West 2019), they also had the discretion in many cases to release them, regardless of what the officers involved wished. *See Berkeley Police Ass’n v. City of Berkeley*, 76 Cal. App. 3d 931, 941 (1977) (explaining that § 6254 exemptions “are permissive, not mandatory; they permit nondisclosure but do not prohibit disclosure” even over officer objections); Cal. Gov’t Code §§ 6253(e), 6253.3 (West 2019); *see also Am. Civil Liberties Union Found. v. Deukmejian*, 32 Cal. 3d 440, 458 (1982) (Bird, C.J., concurring and dissenting) (“Even where the Public Records Act permits nondisclosure, it does not *require* withholding the requested information.”). Therefore, when assessing disclosure of investigative records into police uses of force, it is important to remember that the law never prohibits disclosure. Agencies operate well within the law and the spirit of SB 1421 when erring on the side of disclosure in releasing these records.

**Sixth, waive any fees for production or duplication of records.** We encourage the Commission and all public agencies to waive any fees for production or duplication of records related to a police killing, including redaction of electronic records. As we have seen, some of these costs can be quite prohibitive.<sup>3</sup> We strongly believe that cost should not be an obstacle to

---

<sup>3</sup> For example, the City of Burlingame demanded \$3,258.40 to cover the cost of redacting audio and video records. Lisa Fernandez, *Burlingame Charging More than \$3,000 to Fulfill Public Records Request over Fired Officer*, FOX KTVU (Jan. 27, 2019 2:33 P.M.), <http://www.ktvu.com/news/burlingame-charging-more-than-3-000-to-fulfill->

the public’s understanding of a shooting or to the family of a loved one killed by the police getting answers as to how their loved one died.

### **Comments on the Draft Protocol**

While the PRA authorizes local jurisdictions to adopt policies that allow for more efficient access to public records, the Commission may not adopt guidelines that run counter to the plain meaning and legislative intent of SB 1421. The ACLU identifies the following issues, concerns, and suggestions:

#### **I. Sustained Findings – p. 2-3**

The ACLU agrees with definition of “sustained” in subsection (a) as this is taken directly from the statute. Cal. Penal Code § 832.8 (b) (West 2019) (“‘Sustained’ means a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to Sections 3304 and 3304.5 of the Government Code, that the actions of the peace officer or custodial officer were found to violate law or department policy.”).

Some of the examples included in the protocol are incorrect and others warrant clarification. The protocol states in examples (b)-(g):

*b) There is no sustained finding if the officer resigns or retires any time before the officer has received an administrative appeal or the time to seek an administrative appeal has passed without the officer invoking the right to an appeal.*

*c) There is no sustained finding[] if the officer resigns or retires before discipline [is] imposed either by the Commission or the Chief.*

---

public-records-request-over-fired-officer. The City of Anaheim planned to charge a deposit of \$3,000 to a mother seeking records related to her son’s death. Lisa Fernandez, *California City Charging \$3,000 Deposit to Mother Seeking Records After Son Killed by Police*, FOX KTVU (Feb. 11, 2019 7:16 A.M.), <http://www.ktvu.com/news/california-city-charging-3-000-deposit-to-mother-seeking-records-after-son-killed-by-police>. The Los Angeles Sheriff’s Department likewise charged \$1,655 to redact audio from shooting investigations. Annie Gilbertson, *California Cops Are Withholding Public Records Despite New Law Saying They Can’t*, LAist (June 30, 2019 5:00 A.M.), [https://laist.com/2019/06/30/california\\_police\\_agencies\\_withhold\\_public\\_records\\_transparency\\_law.php](https://laist.com/2019/06/30/california_police_agencies_withhold_public_records_transparency_law.php). The issue of whether the PRA permits a public agency to shift the cost of redacting electronic records to the requester is currently pending before the California Supreme Court in *National Lawyers Guild v. City of Hayward*, 27 Cal. App. 5th 937 (2018), *as modified on denial of reh’g* (Oct. 26, 2018), *rev. granted*, 431 P.3d 1151 (2018). While pending, the appellate court decision has no precedential or binding effect. Cal. R. Ct. 8.1115(e)(1).

- d) *The findings are not sustained if the officer files a timely appeal [of] the Chief's decision to the Commission.*
- e) *The findings are not sustained if the officer files a timely appeal to an Administrative Law Judge.*
- f) *The findings are sustained if the officer files a writ in court and challenges the Commission or Administrative Law Judge's findings.*
- g) *A determination of the Department of Public Accountability to sustain a complaint of police officer misconduct is not a sustained finding for the purposes of Cal. Penal Code § 832.7(b)(1)(A)(B)(C).*

Example (b) would be a sustained finding, with any records subject to disclosure. A sustained finding means a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, following an investigation and *opportunity* for an administrative appeal pursuant to sections 3304 and 3304.5 of the Government Code. “This section does not provide for an automatic administrative appeal, but merely requires that an *opportunity* for such an appeal be provided.” *Crupi v. City of Los Angeles*, 219 Cal. App. 3d 1111, 1120 (1990) (internal citations omitted). Section 3304 merely affords “the peace officer a chance to establish a formal record of the circumstances surrounding his termination and [an opportunity to] try to convince his employer to reverse its decision.” *Riveros v. City of Los Angeles*, 41 Cal. App. 4th 1342, 1359 (1996).

Thus (b) would be a final determination by the investigating agency. So long as the officer was provided an opportunity to appeal the final decision, whether he or she retires or resigns before the appeal is taken or the time to appeal has passed is irrelevant. To find otherwise would allow an officer to run the clock on their appeal or resign prior to taking an appeal and essentially reverse a sustained finding. There is no support for this interpretation, either in the statute or common sense. *See Ernsting v. United Stages*, 206 Cal. 733, 736 (1929) (finding a judgment becomes final once one has exhausted their opportunities to appeal or failed to appeal in a timely manner as prescribed by law); Romualdo P. Eclavea et al., *40A California Jurisprudence 3d: Judgments* § 5 (Bancroft Whitney 2019).

This view is consistent with PRA disclosures from other jurisdictions. For example, in 2014, an Emeryville officer resigned after investigators found he had improper interactions with sex workers and was dishonest when questioned about those interactions. Thomas Peele, Sukey Lewis & Alex Emslie, *Emeryville Cop Resigned After Probe Found He Lied About Interactions with Sex Workers*, KQED (Feb. 28, 2019), <https://www.kqed.org/news/11729928/emeryville-cop-resigned-after-probe-found-he-lied-about-interactions-with-sex-workers>. This resulted in sustained findings, and relevant records were disclosed pursuant to SB 1421's amendments to the PRA.

In the example contained in subsection (c), where the officer resigns or retires before discipline is imposed, such a finding would still be sustained if the opportunity to appeal was available. Again, whether the officer invokes this right prior to retiring or resigning is irrelevant to whether a finding is sustained. Records released from the Fairfield Police Department reveal that the department recommended suspension and termination of Officer Joseph Griego after sustaining findings against him. Officer Griego ultimately resigned prior to discipline. Megan Cassidy, *Multiple Fairfield Police Officers Disciplined for Sexual Advances, Records Show*, S.F. Chronicle (Jan. 31, 2019 5:22 P.M.), <https://www.sfchronicle.com/crime/article/Multiple-Fairfield-police-officers-disciplined-13578919.php>. The Fairfield Police Department also released records of sustained findings of sexual assault against Officer Darryl Webb even though he resigned prior to discipline. *Id.*

As for subsections (d) and (e), they are technically correct, but it should be clarified that the determination is not “sustained” during the pendency of the appeal only. See *Archdale v. Am. Int’l Specialty Lines Ins. Co.*, 154 Cal. App. 4th 449, 479 (2007) (explaining a judgment is generally not considered “final” while an appeal is pending). If the finding is upheld by the Commission or an Administrative Law Judge, it would be sustained. If the finding is overturned by the Commission or Administrative Law Judge, it would not be a sustained finding. In both examples, there is a final determination by the agency and an opportunity to appeal.

The example included in subsection (f) is correctly noted to be a sustained finding. The opportunity to appeal only includes an administrative appeal and does not include a judicial appeal to file a writ to a superior court. A finding is sustained and final if affirmed by the Commission or Administrative Law Judge, regardless of whether a writ is taken. See *In re Gauld*, 122 Cal. 18, 19 (1898) (explaining that one cannot issue a writ challenging a judgment until it is final). To find otherwise would permit an officer to endlessly delay release of his or her records, potentially for years, by filing continuous writs. Such a notion was explicitly rejected by the Legislature when it limited the opportunity to appeal to an “administrative appeal.”

As for subsection (g), the Department of Police Accountability (“DPA”) is an independent investigative body vested with the authority to sustain a finding of officer misconduct. California Penal Code Section 832.7(b)(1)(C) includes “[a]ny record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency.” The DPA is an oversight agency authorized to investigate “all complaints regarding police use of force, misconduct or allegations that a member of the Police Department has not properly performed a duty.” S.F., Cal., Charter § 4.136(d) (2019). The DPA is further authorized to sustain such complaints. *Id.* A finding is “sustained” by the DPA if “[t]he evidence provided proves that the complainant’s allegations were factual and showed improper conduct based upon Department standards.” Paul Henderson, *Annual Report 2017*, San Francisco Department of Police Accountability 6 (2019),

[https://sfgov.org/dpa/sites/default/files/DPA\\_2017.pdf](https://sfgov.org/dpa/sites/default/files/DPA_2017.pdf). We defer to the DPA regarding its own administrative appeal procedures. However, after an opportunity to take advantage of such procedures has been afforded, like the examples of a Departmental finding above, a DPA finding would be disclosable. As currently written, however, subsection (g) appears to remove the DPA’s authority to sustain complaints of officer misconduct. Such an interpretation cannot stand and is contrary to the DPA’s statutory authority.

## **II. SB 1421 Records Include On and Off Duty Conduct – p. 3**

SB 1421 records may include on and off duty conduct of police officers. For dishonest conduct and sexual assault, SB 1421 authorizes the release of records only where the conduct has been found to have violated agency policy, resulting in a sustained finding of misconduct. If the officer’s agency found the officer has committed sexual assault or engaged in dishonest conduct directly relating to the reporting, investigation, or prosecution of a crime or of investigation of misconduct by another officer, those records are subject to release (and rightly the subject of public interest) whether the conduct at issue occurred while the officer was actually on or off duty.

Police officers typically carry their police powers twenty-four hours a day in their jurisdiction, whether they are on the job or not. Officers involved in shootings and uses of force, whether on or off duty, are required to report the incident to their supervisors, and an investigation is conducted. S.F., Cal., Police Department General Order 5.01(VI)(G)(4) at 13-14 (2016), <https://www.sanfranciscopolice.org/sites/default/files/2018-11/DGO%205.01.pdf>. Therefore, records relating to uses of force governed by SB 1421 apply to conduct on and off duty.

## **III. Officer’s Discharge of a Firearm at a Person – p. 3**

SB 1421 provides for the disclosure of records relating to the report, investigation, or findings of “[a]n incident involving the discharge of a firearm at a person by a peace officer or custodial officer.” Cal. Penal Code § 832.7(b)(1)(A)(i) (West 2019). This language is straightforward. It does not matter whether the firearm was deliberately, recklessly, negligently, or accidentally fired. Thus, the ACLU objects to the language “either deliberately or negligently” being included in the Protocol, as this adds language not in the statute and omits other possibilities, such as accidental discharge.

The San Francisco Police Department’s policy provides: “Except for firearm discharges at an approved range or during lawful recreational activity, an officer who discharges a firearm, *either on or off duty*, shall report the discharge as required under DGO 8.11, Investigation of Officer Involved Shootings and Discharges. This includes an intentional or unintentional discharge, either within or outside the City and County of San Francisco.” S.F., Cal., Police

Department General Order 5.01(VI)(G)(4)(a) at 13 (2016) (emphasis added), <https://www.sanfranciscopolice.org/sites/default/files/2018-11/DGO%205.01.pdf>. If the Department has records relating to an investigation into an officer's discharge of a firearm at a person, such records would fall within the scope of SB 1421 and be subject to disclosure.

Additionally, the three examples in the Protocol described as scenarios outside the scope of the statute would arguably fall *within* the statute, depending on the context:

- a) *An officer's negligent discharge of a firearm while off duty that causes injury to him/herself.*
- b) *An officer's negligent discharge of a firearm while off duty that causes property damage, but no other people are present.*
- c) *An officer discharging a firearm at an animal.*

Devoid of context, these examples are not helpful. In the first, an officer's discharge of a firearm could have been at another person but also caused injury to herself. The second example seems to contemplate no discharge at a person, but in the third, an officer could discharge a firearm at an animal and a person could be close by. In all of these cases, what matters is whether the officer discharges a firearm at a person. Cal. Penal Code § 832.7(b)(1)(A)(i) (West 2019). If the officer discharges a firearm at a person, other factors such as who is injured, who is nearby, where the incident occurred, or whether the discharge was deliberate or negligent are irrelevant. In certain situations, there will likely be a case-by-case evaluation of whether an officer discharged a firearm *at a person*. But including examples that arguably fall within the definition of records subject to disclosure is unnecessary. Finally, because these are investigative records that were never afforded the confidentiality protections given to police personnel records, agencies should err on the side of disclosure. *See Am. Civil Liberties Union Found. v. Deukmejian*, 32 Cal. 3d 440, 458 (1982) (Bird, C.J., concurring and dissenting) (“Even where the Public Records Act permits nondisclosure, it does not *require* withholding the requested information.”).

#### **IV. Working Group Concerns: Suicides, Shots Fired in the Air, and Victims of Violence**

At the SB 1421 Working Group meeting on July 10, 2019, there was discussion about whether records relating to officer suicides would be subject to disclosure under this section. The ACLU takes no position on this point but believes the clear legislative purpose of SB 1421 was to shed light on officer misconduct and serious uses of force against members of the public, and not on officer suicides.

The Police Officers' Association also raised a question as to whether an officer discharging his gun in the air would fall within this section. As a practical matter, the discharge of firearms as a warning is generally prohibited. S.F., Cal., Police Department General Order

5.02(I)(C)(4) at 2 (2011), <https://www.sanfranciscopolice.org/sites/default/files/2018-11/DGO5.02%20Use%20of%20Firearms.pdf>. Willfully discharging a firearm in a grossly negligent manner that could result in injury or death is also a crime and punishable by imprisonment. *See* Cal. Penal Code § 246.3(a) (West 2019). People can be injured, sometimes fatally, when bullets discharged into the air hurl back toward the ground. It is therefore unlikely that a reasonably well-trained officer complying with the use of force protocol would ever do this. If investigative records related to this conduct existed, however, then the government should err on the side of disclosure, especially if people were nearby. *See Am. Civil Liberties Union Found. v. Deukmejian*, 32 Cal. 3d 440, 458 (1982) (Bird, C.J., concurring and dissenting) (“Even where the Public Records Act permits nondisclosure, it does not *require* withholding the requested information.”).

A third example at the meeting involved incidents in which a police officer is the victim of a domestic incident or otherwise discharges a firearm or uses force in self-defense. It is important to recognize that even uses of force in self-defense often raise serious questions about propriety of the use of force, the proportionality of the response, and the fairness of an investigation into the incident. For example, in the recent off-duty fatal shooting of an intellectually disabled man, serious questions about the reasonableness of the response in self-defense have been raised. Richard Winton & Hannah Fry, *Costco Shooting: Prosecutors Deciding Whether LAPD Officer Should Be Charged*, L.A. Times (June 28, 2019 4:44 P.M.), <https://www.latimes.com/local/lanow/la-me-costco-shooting-riverside-county-da-lapd-officer-kenneth-french-20190628-story.html>. It is the ACLU’s position that in these situations, any records relating to the investigation into an officer’s discharge of a firearm or use of force would be subject to disclosure under the clear language of SB 1421. It would also seem, however, that any officer who acted in self-defense would welcome the disclosure of underlying records to exonerate themselves of wrongdoing.

#### **V. Use of Force – p. 3-4: Great Bodily Injury**

SB 1421 also encompasses disclosure of records relating to the report, investigation, or findings of “[a]n incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury.” Cal. Penal Code § 832.7(b)(1)(A)(ii) (West 2019). The type of force used, however, is broader than that described in the Protocol and can include not only physical controls but also force involving chemical agents, impact weapons, extended range impact weapons, vehicle interventions, K-9 bites, and firearms. S.F., Cal., Police Department General Order 5.01(VII)(A) at 15 (2016), <https://www.sanfranciscopolice.org/sites/default/files/2018-11/DGO%205.01.pdf>; *see also* *People v. Mendias*, 17 Cal. App. 4th 195, 205-06 (1993) (gunshot wounds); *People v. Frazier*, 173 Cal. App. 4th 613, 618-19 (2009) (dog bite); *People v. Muniz*, 213 Cal. App. 3d 1508, 1520

(1989) (black eye); *People v. Escobar*, 3 Cal. 4th 740, 749-50 (1992) (vaginal soreness, abrasions, and a painful neck from a rape).

Because “great bodily injury” and “serious bodily injury” are the same as a matter of law, *see People v. Wade*, 204 Cal. App. 4th 1142, 1149 (2012) (“[S]erious bodily injury’ . . . is ‘essentially equivalent’ to ‘great bodily injury.’”); *People v. Hawkins*, 15 Cal. App. 4th 1373, 1375 (1993) (“The terms ‘serious bodily injury’ and ‘great bodily injury’ have substantially the same meaning.”), any definition in this subsection should include “[a] serious impairment of physical condition, including but not limited to loss of consciousness, concussion, bone fracture, protracted loss or impairment of function of any bodily member or organ, a wound requiring extensive suturing, and serious disfigurement.” S.F., Cal., Police Department General Order 5.01(II)(G) at 3 (2016), <https://www.sanfranciscopolice.org/sites/default/files/2018-11/DGO%205.01.pdf>.

Subsection (a) of this section provides:

*There must be a finding of a causal connection between the use of force and the great bodily injury of a person. This will require a review of the case file or transcripts.*

The ACLU notes that in many cases, a review of the case file or transcript will not be necessary to determine whether use of force caused great bodily injury or death. This is because police officers are required to notify their supervisors “immediately or as soon as practical of any reportable use of force.” S.F., Cal., Police Department General Order 5.01(VII)(A)(1) at 15 (2016), <https://www.sanfranciscopolice.org/sites/default/files/2018-11/DGO%205.01.pdf>. A supervisor will then evaluate the use of force in all reportable incidents. *Id.* Incidents involving use of force resulting in great bodily injury or death should therefore be easily identifiable.

We also note that although it is true that the use of force must cause the great bodily injury, the Protocol should also mention that incidents involving more than one officer can also still implicate all officers involved if an officer “personally applied force to the victim, and such force was sufficient to produce grievous bodily harm either alone *or in concert with others.*” *People v. Modiri*, 39 Cal. 4th 481, 497 (2006) (emphasis added).

Additionally, as of January 1, 2017, all California law enforcement agencies are mandated to collect data on officer-involved shootings and officer-involved use of force incidents resulting in serious bodily injury or death. *See* Cal. Gov’t Code § 12525.2(a)-(b) (West 2019). “Serious bodily injury” is defined as “bodily injury that involves a substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ.” *Id.* § 12525.2(d) (mirroring the definition of great bodily injury). A report of data must be submitted to the California Department of Justice annually. *See id.* § 12525.2(a). Beginning with incidents occurring on or after January 1, 2016,

each law enforcement office should therefore be able to easily identify any records responsive to a “use of force” request resulting in great bodily injury or death. There should not be a need to reevaluate the evidence if such records are compiled annually.

#### **VI. Sexual Assault – p. 4**

The Protocol’s definition of “sexual assault” and “member of the public” are taken directly from the statute. “[S]exual assault’ means the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or other official favor, *or* under the color of authority.” Cal. Penal Code § 832.7(b)(1)(B)(ii) (West 2019) (emphasis added). The ACLU objects to subsections (c) through (f) of the Protocol, which state:

*c) This category may include off-duty conduct provided that the officer uses the “color of authority” while engaging in the “sexual assault.” Examples include, the officer is off-duty but identifies as an officer and engages in conduct that meets the definition of “sexual assault.”*

*d) If the off-duty officer out of uniform engages in “sexual assault” and does not use the “color of authority” the conduct falls outside the scope of the statute.*

*e) If the off-duty officer engages in simple solicitation, the conduct falls outside the scope of the statute.*

*f) If the officer is accused of “sexual assault” but is disciplined for conduct unbecoming an officer then you must look to the information presented during the discipline process and determine whether the conduct for sexual assault is sustained. If the sustained finding arises from another policy violation, i.e. CLETS violation, then the conduct does not fall under “sexual assault.” If the sustained finding of misconduct arises from CLETS violations then review the case to determine whether the conduct falls within the “dishonesty” category.*

Subsections (c) and (d) suggest that “sexual assault” involving off-duty conduct requires an officer to act under “color of authority.” Not so. Penal Code section 832.7(b)(1)(B)(ii) defines “sexual assault” as the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or other official favor, *or* under the color of authority” (emphasis added). “[T]he plain and ordinary meaning of the word ‘or,’ when used in a statute, is to designate separate disjunctive categories. The word ‘or’ suggests alternatives.” *In re E.A.*, 24 Cal. App. 5th 648, 661 (2018) (internal citations omitted). In this way, “the function of the word ‘or’ is to mark an alternative such as ‘either this or that.’” *Id.*; see also *Anderson v. Davidson*, 32 Cal. App. 5th 136, 145 (2019) (analyzing a

statute listing three grounds on which the DMV may refuse to issue or renew a driver’s license, separated by commas and the word “or,” as listing three distinct categories).

Properly read, section 832.7(b)(1)(B)(ii) provides several alternative ways that an officer can commit a sexual assault or attempted sexual assault, each of which provides an independent basis for disclosure. Thus, a sustained misconduct finding must be disclosed if it concerns the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, or offer of leniency or other official favor, even if it not under color of authority. So, for example, if an officer rapes someone off duty and an internal investigation sustains a finding against him, the fact that he did not act under color of authority is of no moment. The sustained finding of sexual assault would still be disclosable under SB 1421.

Furthermore, the statute clarifies that “the propositioning for or commission of *any sexual act while on duty* is considered a sexual assault.” Cal. Penal Code § 832.7(b)(1)(B)(ii) (West 2019) (emphasis added). This has two consequences. First, the Legislature’s use of “on duty” demonstrates that the Legislature was aware of the distinction between on-duty and off-duty conduct and could have distinguished between the two in the definition of sexual assault. It did not do so, suggesting that for an on-duty officer, any sexual act qualifies as a sexual assault, while an off-duty officer’s sexual assault must meet one of the conditions listed in § 832.7(b)(1)(B)(ii). Second, this application of the definition of “sexual assault” to all on-duty conduct necessarily implies that there are sexual acts committed off duty that would still constitute “sexual assault.”

Sexual misconduct by officers is of strong public interest, and even sexual misconduct that is directly related to the officer’s work and official integrity may occur off-duty. For example, in 2016, police officers from the Oakland Police Department were investigated for sexually assaulting Celeste Guap, including for conduct that occurred off duty. David DeBolt & Matthew Artz, *Oakland Police Scandal Spreads: Woman Claims Sex with Dozens of Officers*, East Bay Times (June 11, 2016 10:09 P.M.), <https://www.eastbaytimes.com/2016/06/11/oakland-police-scandal-spreads-woman-claims-sex-with-dozens-of-officers/>.

To the extent there are concerns that the statute could result in disclosure of ordinary off-duty sexual activity or “simple solicitation,” as subdivision (e) suggests, such activity would likely not violate agency policy and would not be the subject of a sustained finding. But the ACLU objects to subsection (e), which categorically says that an off-duty officer’s “simple solicitation” would not be subject to disclosure. If an investigation revealed that an officer’s off-duty solicitation or other conduct amounted to a sustained finding of sexual assault, this would be covered by the statute. If there was no sustained finding of sexual assault, there would be no records to disclose. This may require agencies to delve into the facts behind the charges, but public interest in this information is paramount and critical to protecting our communities.

Some recent examples illustrate the significant public interest in off-duty police officers' sexual misconduct. For example, a Los Angeles police officer allegedly commenced a sexual relationship with someone he met during a routine traffic stop, who accused him of forcible sexual assault. Ben Poston & Maya Lau, *Previously Secret LAPD Discipline Records Reveal Lying, Sexual Misconduct by Officers*, L.A. Times (Mar. 12, 2019 12:55 P.M.), <https://www.latimes.com/local/lanow/la-me-lapd-discipline-records-20190312-story.html>. In another incident, a Burlingame cop obtained the phone number of a woman arrested for drunk driving and went to her house the following day, ostensibly to offer to trade sex for help with the charges against her. Thomas Peele, Sukey Lewis & Alex Emslie, *New Law Shows Bay Area Police Officer Fired for Offering to Help a Woman Charged with Drunken Driving in Exchange for Sex*, Mercury News (Jan. 7, 2019 12:01 P.M.), <https://www.mercurynews.com/2019/01/07/police-records-law-burlingame-cop-fired-for-asking-woman-to-trade-sex-for-help-with-charges/>.

While the ACLU does not disagree with subsection (f), a clearer way to frame this would be:

Only sustained findings of sexual assault must be disclosed. If an officer is accused of sexual assault, but no sustained finding of sexual assault is made, then the records need not be disclosed. If an officer is accused of sexual assault but the only findings that were sustained are for conduct unbecoming of an officer, then review the case to determine whether the conduct falls within the “dishonesty” category that would subject it to disclosure.

## **VII. Dishonesty – p. 4-5**

The Protocol states:

*a) Dishonesty means the officer had the intent to deceive or defraud or knowingly concealed facts or evidence and acted under circumstances where the officer should have known that s/he was concealing facts or evidence.*

- i. Mere neglect of duty is not enough. Review the evidence . . . and determine whether the conduct was sustained for dishonesty.*
- ii. An officer failing to include facts in an incident report does not necessarily mean the officer was dishonest. If the officer failed to include facts in order to hide or conceal evidence, then the conduct is dishonest.*

*b) If the dishonesty is not directly related to the “reporting, investigation or prosecution of a crime . . . ,” then the conduct is not disclosable under this category. If the dishonesty is directly related to the officer falsifying time records for overtime, then the conduct falls outside the scope of disclosable information.*

“Dishonesty” as used in SB 1421 is to include, but not be limited to, “any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.” Cal. Penal Code § 832.7(b)(1)(C) (West 2019). A finding of dishonesty is only disclosable if it is *sustained*. Although the Commission claims it does not have a box to check for “dishonesty,” presumably there have been similar findings made (such as lack of truthfulness or conduct amounting to moral turpitude) if an allegation is sustained. Therefore, there should be no general need to review and reevaluate the evidence outside of the administrative investigation.

As for subsection (b) regarding an officer falsifying time records for overtime, such records would be disclosable only if they amount to a false statement or filing of a false report that relates to the reporting, investigation, and/or prosecution of a crime. For example, if falsifying time records related to a specific case the officer was investigating, it would be disclosable. In keeping with the legislative intent behind SB 1421, if the sustained finding of dishonesty involves one that necessarily bears on the officer’s ability to do their job, the public has a right to know of the incident and corresponding investigation.

#### **VIII. Redactions –p. 5**

Section 3 of page 6 of the Protocol mandates redaction of the following:

- a) *Redact background medical information*
- b) *Redact medical records*
- c) *Redact 5150 information*
- d) *Redact signatures*
- e) *Redact autopsy photos*
- f) *Redact CLETS or CORI information*
- g) *Do not redact criminal history information concerning complainant or witnesses that was known to the officer that was not derived from CLETS or CORI.*

#### **A. Confidential Medical, Financial or Other Information**

Under SB 1421, an agency shall redact records to “protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct and serious use of force by peace officers and custodial officers.” Cal. Penal Code § 832.7(b)(5)(C) (West 2019). The Commission has given the authority to make this determination to the Chief or his or her designee or the DPA Director or his or her designee.

The first problem with these automatic redactions is that they are contrary to the statute’s balancing test, set forth in Penal Code Section 832.7(b)(5)(C). By including specified categories

of records automatically subject to redaction, the Commission has eliminated the statutory required balancing test.

Although the general provisions of the PRA are inapplicable to SB 1421, it is likely that courts interpreting this balancing test would look to case law analyzing similar balancing tests in the PRA context. Under the PRA, “[p]ersonnel, medical, or similar files” are exempt from disclosure when their disclosure “would constitute an unwarranted invasion of personal privacy[.]” Cal. Gov’t Code § 6254(c) (West 2019). This section has been interpreted to require a balancing test on a case-by-case basis, weighing “the public’s interest in disclosure against the privacy right that the exemption is designed to protect.” *L.A. Unified Sch. Dist. v. Super. Ct.*, 228 Cal. App. 4th 222, 239 (2014). This requires careful consideration of the extent and gravity of the privacy interests at stake in light of the public interest in disclosure, making it difficult to designate bright lines around certain categories of information. *See Teamsters Local 856 v. Priceless, LLC*, 112 Cal. App. 4th 1500, 1519 (2003). Particularly in the context of police officers’ conduct, the public interest in disclosure is “significant” and “particularly great.” *Long Beach Police Officers Ass’n v. City of Long Beach*, 59 Cal. 4th 59, 74 (2014).

Although section 6255 of the Government Code does not directly apply to documents subject to disclosure under SB 1421, an analysis of section 6255 cases may be helpful as well. Section 6255 permits withholding of records when “on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” Cal. Gov’t Code § 6255(a) (West 2019). “This ‘provision contemplates a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality.’” *Am. Civil Liberties Union Found. v. Super. Ct.*, 3 Cal. 5th 1032, 1043 (2017) (citing *Michaelis, Montanari & Johnson v. Super. Ct.*, 38 Cal. 4th 1065, 1071 (2006)). Factors to weigh include privacy, public safety, public scrutiny of government process to ensure fundamental fairness and accountability, and the expense and inconvenience involved in separating exempt from nonexempt material. *Id.*; *see Bertoli v. City of Sebastopol*, 233 Cal. App. 4th 353, 377 (2015); *Michaelis*, 38 Cal. 4th at 1072-73. Vague or speculative safety concerns about possible disclosure of materials cannot clearly outweigh the public interest in access to such records. *See Michaelis*, 38 Cal. 4th at 1070.

For certain information, such as background medical information or medical records, there will likely be information that may be redacted to preserve confidentiality, after a balancing of the specific interests at stake. With respect to 5150 information, however, we observe that if officers responding to a call are aware of a suspect or victim’s prior 5150 (e.g. an involuntary psychiatric hold), such information is relevant to whether the officer properly approached the individual, properly deescalated the situation, and reasonably responded to someone in a mental health crisis. This information can serve to inform the public and lead to greater oversight and

reform. In such circumstances, the public interest would clearly outweigh the unwarranted invasion of privacy at issue, as the public has a strong interest in knowing how officers are trained and respond to individuals experiencing a mental health crisis or individuals of whom the officers are aware have had prior mental health incidents.

## **B. Autopsy Photos**

We disagree that autopsy photos must categorically be redacted. As explained below, California Code of Civil Procedure Section 129 does not apply to records disclosable pursuant to SB 1421. *See* Cal. Civ. Proc. Code § 129(a) (West 2019) (“Notwithstanding any other law, a copy, reproduction, or facsimile of any kind of a photograph, negative, or print, including instant photographs and video recordings, of the body, or any portion of the body, of a deceased person, taken by or for the coroner at the scene of death or in the course of a post mortem examination or autopsy, shall not be made or disseminated except” under limited circumstances).

### **i. Notwithstanding Any Other Law**

The Legislative Counsel’s digest explains that SB 1421 itself is intended to “define the scope of disclosable records.” S.B. 1421 Legislative Counsel Digest ¶ 2, 2018 Leg., (Cal. 2018) (enacted). “The Legislative Counsel’s digest constitutes the official summary of the legal effect of the bill and is relied upon by the Legislature throughout the legislative process, and thus is recognized as a primary indication of legislative intent.” *Mt. Hawley Ins. Co. v. Lopez*, 215 Cal. App. 4th 1385, 1401 (2013) (quotations omitted). It should therefore be “entitled to great weight.” *Id.*

Penal Code § 832.7(b)(1) provides: “*Notwithstanding* subdivision (a), subdivision (f) of Section 6254 of the Government Code, *or any other law*, the following peace officer or custodial officer personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act.” Cal. Penal Code § 832.7(b)(1) (West 2019) (emphasis added). The inclusion of the phrase “notwithstanding . . . any other law” “declares the legislative intent to override all contrary law.” *Klajic v. Castaic Lake Water Agency*, 121 Cal. App. 4th 5, 13 (2004); *see also In re Marriage of Cutler*, 79 Cal. App. 4th 460, 475 (2000) (“The phrase ‘notwithstanding any other provision of law’ is a very comprehensive phrase. This phrase signals a broad application *overriding all other code sections* unless it is specifically modified by use of a term applying it only to a particular code section or phrase.”) (emphasis added).

“In construing a statute, [courts] presume the Legislature has knowledge of all prior laws and enacts and amends statutes in light of those laws. Further, in interpreting a statute, ‘effect must be given to every word or phrase so that no part is useless or devoid of meaning.’” *In re Marriage of Cutler*, 79 Cal. App. 4th at 475 (internal citations omitted); *see also McLaughlin v.*

*State Bd. of Educ.*, 75 Cal. App. 4th 196, 212 (1999) (“[T]he Legislature [is] deemed to be aware of laws in effect at the time they enact new laws and are conclusively presumed to have enacted the new laws in light of existing laws having direct bearing upon them.”). Accordingly, “a later enacted statute which includes the comprehensive phrase ‘notwithstanding any other provision of law,’ . . . prevails over” earlier enacted statutes. *In re Marriage of Cutler*, 79 Cal. App. 4th at 475. The requirement that records be disclosed “[n]otwithstanding . . . any other law,” added to section 832.7, effective January 1, 2019, thus overrides any previously enacted, contrary exemption.

ii. **CCP § 129**

Even if Section 129 did apply, it would lead to an absurd result. Section 129 excludes from dissemination any photo, negative or print, including video recordings, “of the body, or any portion of the body, of a deceased person, taken by or for the coroner at the scene of death or in the course of a post mortem examination or autopsy,” except in limited circumstances. Cal. Civ. Proc. Code § 129(a) (West 2019). This definition would include crime scene photos, if taken for the coroner. But crime scene photos and video evidence are included in the “records” subject to disclosure under SB 1421. *See* Cal. Penal Code § 832.7(b)(2) (West 2019) (including photographic, audio, and video evidence as well as “all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident”).

Of course, in certain situations, redaction of some autopsy photos may be warranted “where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information.” Cal. Penal Code § 832.7(b)(6) (West 2019); Cal. Penal Code § 832.7(b)(5)(C) (West 2019). We are mindful of the importance of preventing an unwarranted invasion of privacy and respecting the privacy of impacted family members. *See Catsouras v. Dep’t of Cal. High. Patrol*, 181 Cal. App. 4th 856, 874 (2010) (distinguishing incidents in which the disclosure of photos is for legitimate matters of public interest from those of “pure morbidity and sensationalism without legitimate public interest or law enforcement purpose”). The wishes of the surviving family members of the deceased are therefore an important consideration in the course of conducting such a balancing test. *See Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 166-67 (2004).

However, an important principle of open government is that these determinations are made by balancing the interests on a case-by-case determination. A blanket rule that all medical information, 5150 information, or autopsy photos be automatically shielded from public view in the absence of an individualized determination is in clear violation of the plain meaning and legislative intent of SB 1421.

**IX. Threat Assessment – p. 6**

SB 1421 provides for redaction of records “[w]here there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer, custodial officer, or another person.” Cal. Penal Code § 832.7(b)(5)(D) (West 2019). The Protocol suggests notifying an officer by letter that there may be disclosure of records concerning them and advising the officer that they can notify the Commission if there is a specific, articulable reason that they believe disclosure of such records would pose a significant danger to their physical safety or the physical safety of another person.

While the ACLU does not believe SB 1421 requires notification of disclosure to an officer or provides the officer with an opportunity to object to disclosure of his or her records, we understand that there must be a mechanism for implementing Penal Code § 832.7(b)(5)(D).

We would object to this provision being used in any way to delay disclosure. The Commission must not give factual deference to an officer’s mere assertion of a threat and must fully and impartially analyze the competing interests at play, mindful of the high standard that must be met in order to prohibit disclosure. Prohibiting disclosure of records when an officer merely objects to their release would thwart the legislative intent regarding the public’s right to know about serious police misconduct.

**X. Cases Involving Multiple Categories – p. 7**

It is unclear what this section is citing to or referring to. Without understanding the meaning of this provision or its intent, we are not able to form an opinion as to whether it serves its intended purpose.

**XI. Discretionary Redaction – p. 7**

This should be section D. We object to the blanket redaction of “gruesome” photos instead of conducting a balancing test that considers the specific interests at stake in each case and is mindful of the wishes of impacted family members, as discussed *supra*. See Cal. Penal Code § 832.7(b)(5)(C) (West 2019). The meaning of “gruesome” and “exposed body parts” is also impermissibly vague and subjective. An exposed body part, for example, could include a hand, arm, or leg.

**XII. Duty to Assist Requester – p. 8**

While the duty to assist the requester is important, it is far broader than suggested in the Protocol. This duty includes not only changing the date in a request as a result of a typo but also the duty to assist a requester “in formulating reasonable requests, because of the City’s superior knowledge about the contents of its records.” *Cnty. Youth Athletic Ctr. v. City of Nat’l City*, 220

Cal. App. 4th 1385, 1417 (2013); *see also Am. Civil Liberties Union of N. Cal. v. Super. Ct.*, 202 Cal. App. 4th 55, 85 n.16 (2011) (explaining the duty to interpret a FOIA request broadly, as a professional employee of the agency is far more familiar with the general subject area than a requester and may identify desired documents despite not being specifically named in the request). Because the agency is far more familiar with the documents under its control than a requester who is unable to precisely identify the documents sought, the agency must “construe the request reasonably, in light of its clear purposes.” *Cnty. Youth Athletic Ctr.*, 220 Cal. App. 4th at 1425 (“The focus should be on the criteria in the request and the description of the information, as reasonably construed, and the search should be broad enough to account for the problem that the requester may not know what documents or information of interest an agency possesses.”).

### **XIII. Priority of Release – p. 8-9**

The motive of the requester and purpose for which the requested records are to be used are not relevant when responding to a PRA request. *See Caldecott v. Super. Ct.*, 243 Cal. App. 4th 212, 219 (2015); Cal. Gov’t Code § 6257.5 (West 2019). However, the ACLU understands that some priority is helpful. We are concerned that the current Protocol does not mention prioritizing family members who have been directly impacted by police killings of their loved ones. We believe these family members should be given priority.<sup>4</sup> We also support prioritization of any criminal defendant who is in custody and seeks 1421 records.

An alternative suggestion for this section would be to prioritize requests based on date received, and within that, based on those individuals currently in custody or awaiting trial, then to impacted families, then to organizations or other individuals seeking information. As indicated *supra*, the most effective way to implement SB 1421 would be to automatically disclose records subject to disclosure on a public database. This would enable the Commission, Police Department, and DPA to direct requesters to a public database to obtain records that have already previously been disclosed, thus lessening the work and duplication of efforts by the agency.

### **XIV. Delayed Production of Records – p. 9**

With respect to the last full paragraph on page 9, beginning with “Upon invoking this,” there is language missing from section 832.7(b)(1)(7)(A)(ii), specifically, that “the Department must provide the information when the specific basis for withholding is resolved, **the**

---

<sup>4</sup> As mentioned at the outset, we believe any agency should waive any fees for production or duplication of records related to a police killing. Families should not have to pay thousands of dollars for information about how their loved ones were killed.

**investigation or proceeding is no longer active**, and in no case later than 18 months following the use of force **incident**, whichever occurs sooner” (additions in **bold**).

**XV. Other Restrictions on Disclosure – p. 10: Attorney-Client Privilege**

The ACLU objects to the inclusion of number (1) in this section, “*that the Department not release records that are protected by the attorney-client privilege.*” While documents in the Department’s possession that are disclosable under SB 1421 should generally not be subject to attorney-client privilege, SB 1421 does not make attorney-client privilege an independent ground for withholding documents, and for good reason: to do so would allow any department to make its internal investigations confidential, thus sidestepping the law, simply by having a lawyer conduct them and claiming privilege.

Another section of the PRA, Government Code section 6254(k), does contain an exemption to disclosure if “prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.” This operates to make the attorney-client privilege applicable to some public records. *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 370 (1993). But SB 1421 displaced all exemptions under the PRA, including those contained within section 6254 of the Government Code. *See* Cal. Penal Code § 832.7(b)(1) (West 2019) (“*Notwithstanding* subdivision (a), subdivision (f) of Section 6254 of the Government Code, *or any other law*, the following peace officer or custodial officer personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act.”) (emphasis added). Applying the analysis discussed *supra* with respect to the term “notwithstanding any other law,” the PRA exemption for records subject to the attorney-client privilege is inapplicable to section 832.7.

The Legislature took care to include in SB 1421 a specific grant of authority to withhold information that is protected under federal law, which confirms that it did *not* intend to allow withholding of materials protected by other state laws. *See* Cal. Penal Code § 832.7(b)(5)(C) (West 2019) (mandating redaction of “information of which disclosure is specifically prohibited by federal law”).

In contrast, as stated above, the PRA generally allows the government to withhold “[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, *provisions of the Evidence Code relating to privilege.*” Cal. Gov’t Code § 6254(k) (West 2019) (emphasis added). This differing treatment confirms that SB 1421 does not allow the government to withhold documents exempt under § 6254(f) of the PRA for two reasons. First, when the Legislature includes an exception in one statute, its “failure to include [that same] exception within [a related] statutory scheme is significant, because the Legislature knows how to craft such an exception when it wishes to do so.” *Bernard v. Foley*, 39 Cal. 4th 794, 811 (2006). Second, if SB 1421 allowed withholding under PRA

exemptions, there would have been no need for it to authorize redaction to accommodate federal law because section 6254(k) would already have allowed withholding of this same information.

Moreover, because the records subject to disclosure under SB 1421 are quite narrow and identified by statute, it is unclear what records would be covered by the attorney-client privilege. Photographs, autopsy reports, and departmental sustained findings are not materials subject to the privilege. It is also unclear what privilege is sought to be protected, as there is no client to whom an attorney is transmitting information. We have strong concerns that an agency might seek to circumvent SB 1421 by hiring an attorney to conduct internal investigations of its police officers and then claiming everything is privileged. To do so would shield information about serious police misconduct, officer-involved shootings, and other serious uses of force from the public. This is a context in which the Legislature did not envision application of the attorney-client privilege and in fact it is specifically *excluded* by its terms.

In sum, the attorney-client privilege cannot prohibit disclosure of records now subject to mandatory disclosure. The only basis upon which to redact would be if specific information falls within one of the enumerated bases of redaction in the statute. *See* Cal. Penal Code § 832.7(b)(5)-(6) (West 2019).

#### **XVI. Department Coordination – p. 10-11**

Although the Department and DPA may certainly coordinate the release of records to the extent practical and efficient, it is concerning that the two would be coordinating their efforts in what to disclose. The DPA is an independent investigating agency and conducts impartial investigations into officer misconduct. S.F., Cal., Charter § 4.136(d) (2019). It should not require the Department’s approval regarding anything contained within their investigations.

#### **XVII. Notice – p. 11**

In this context, the ACLU does not believe notice to an involved officer is necessary under SB 1421 when releasing records. A sustained finding with an opportunity for appeal, or a police killing or use of force and conclusion of an investigation, provides the requisite notice to officers. For similar reasons, there is no basis to notify the Mayor’s Office, District Attorney’s Office, Commission/SFPD/DPA, or SFPD Brady Unit when releasing responsive records. Not only is this type of notice not in the statute, but no other agency or department in California is notifying analogous individuals or entities upon release of records.

If notice is provided, however, it should certainly include impacted families whose loved ones have been shot or killed by police. We are concerned that they are not at the top of any list for notifications of release of records. *See Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 166-67 (2004). Finally, the most effective way of providing notice is to create a public database by which anyone can access these records.

**XVIII. Appeal Process – p. 11**

The ACLU agrees that a requester should be informed of their right to appeal the Commission/Department/DPA's decision regarding the scope of released records or of no responsive records. We would simply ask that this procedure be spelled out more clearly in such a letter, including the specific steps one can take to file an appeal.

**XIX. Miscellaneous**

The tracking forms mentioned at the bottom of page 11 are not attached.

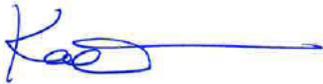
**XX. Procedures for Penal Code 832.7/ SB 1421 Requests (separate handout)**

In addition to the steps identified, the ACLU suggests incorporating the timeline by which the agencies must respond to a PRA request. Specifically, each agency shall respond to a request within 10 days of receipt with information as to whether the request seeks disclosable records within the possession of the agency. Cal. Gov't Code § 6253(c) (West 2019). In unusual circumstances, an agency may extend the date by which they are to respond but in no event past 14 days. *See id.* Once the agency determines it possesses public records responsive to a request, it must estimate the date and time such records will be made available. *Id.* An agency may produce records on a rolling basis in response to a voluminous request.

The ACLU recommends that each agency automatically disclose these now public records and automatically update its disclosures as new records become available. Each record would then be uploaded onto the public portal or domain once it has been released. Doing so is the most efficient and effective way to satisfy the City's obligations under the California Public Records Act.

Thank you for allowing us the opportunity to submit these comments. Please do not hesitate to contact us with any questions or concerns.

Regards,



Kathleen Guneratne  
Senior Staff Attorney  
(415) 293-6312  
[kguneratne@aclunc.org](mailto:kguneratne@aclunc.org)



AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION

Northern  
California

A handwritten signature in blue ink that reads "amy gilbert".

Amy Gilbert  
Staff Attorney  
(415) 293-6394  
[agilbert@aclunc.org](mailto:agilbert@aclunc.org)

# Exhibit A

## Antioch Police PRA Request: SB 1421 Records (RELEASED 4/22/19)

DATE	CASE	CLASS	LOCATION	INJURIES SUSTAINED	FORCE USED	OFFICER(S) INVOLVED
<b>2011 = 1</b>						
24-Oct	11-9020	APD-OIS	LEMONTREE CT	GUN SHOT WOUND	FIREARM	VANDERPOOL, MOREFIELD, BEDGOOD, MARTIN, WALTERS
<b>2014 = 2</b>						
9-Jun	14-5594	APD-OIS	1608 SYCAMORE DR	GUN SHOT WOUND	FIREARM	COLLEY
28-Jul	14-7258	APD-OIS	4157 FOLSOM DR	GUN SHOT WOUND	FIREARM	WARD
<b>2015 = 0</b>						
<b>2016 = 3</b>						
5-Feb	16-1320	APD-LEIFI	E. 6 <sup>TH</sup> ST (DEAD END)	MECHANICAL OBSTRUCTION	CAROTID RESTRAINT	MORTIMER, MORAGA
4-May	16-4844	APD-OIS	E.LELAND/LOVERIDGE	GUN SHOT WOUND (OFC.)	FIREARM	T.SMITH, DUGGAR
28-Jun	16-7006	APD-OIS	913 W. 8 <sup>TH</sup> ST	GUN SHOT WOUND	FIREARM	KINT
<b>2017 = 4</b>						
16-Mar	17-2789	APD-OIS	WAWONA CT	BULLET FRAGMENTATION	FIREARM	MEALS
16-Jun	17-6461	APD-OIS	2308 MANZANITA WY	GUN SHOT WOUND	FIREARM	MORTIMER
3-Jul	17-7065	APD-OIS	1801 HILLCREST AVE	GUN SHOT WOUND	FIREARM	KINT
30-Aug	17-9276	APD-OIS	515 E.18TH ST	NONE	FIREARM	HARRIS
<b>2018 = 1</b>						
8-Feb	18-1393	APD-OIS	4649 GOLF COURSE RD	GUN SHOT WOUNDS	FIREARM	HOFFMAN
<b>Internal Affairs = 1</b>						
DATE	CASE	CLASS	LOCATION	RESULT	MISCONDUCT TYPE	OFFICER(S) INVOLVED
23-Feb	IA 17-688	INTERNAL	300 L ST	SUSTAINED FINDINGS	DISHONEST	S.CASTILLO

Item v.: Summary: The subject officer was investigated for multiple allegations of misconduct. This resulted in sustained findings, including dishonesty. As a result, the subject officer was terminated from employment but resigned from his position prior to the arbitration hearing.

# Exhibit B

**Use of Force/Officer Involved Shootings  
Closed Cases for the Past 5 Years (2014-2018)**

Case Number	Date	Location	Officer(s)	Summary	Injury	Type Force	AVR or Video	Audio
UOF17-058, 17-8795	7/7/2017	5225 Central Ave	Palma	GBI: Arrest of felony subject with extraditable felony warrant resulted in the utilization of a canine to locate & subdue the subject. Subject was hospitalized for injuries from canine bites for more than 72 hours.	GBI	Canine	AVR	Yes
OPA2017-015; 17-3067	3/7/2017	Carlson Ave & Butte St	Peixoto	OIS: Officers responded to a vehicle burglary. Suspect drove at officer and officer fired at the suspect. Suspect fled the scene and the vehicle was later found in Emeryville, unoccupied and no evidence that the suspect had been struck by the gunfire.	No Injury	Firearm	Yes	Yes
IA15-008: 15-4706	3/21/2015	540 38th Street	Lopez	OIS: Officer and armed gang member exchanged gunfire and subject was struck twice.	Gunshot	Firearm	Video AVR	Yes
IA15-042; 15-900	1/15/2015	2000 Blk of Nevin Ave	Reina	OIS: Suspect reached for a gun and Officer fired his weapon, striking the subject twice.	Gunshot	Firearm	No	Yes
IA14-025; 14-16162	10/30/2014	3288 Pierce St	Garcia	OIS: Driver of vehicle attempted to strike an officer with the vehicle. Another officer fired his weapon at the suspect, striking the driver once.	Gunshot	Firearm	Video	Yes
IA14-024, 14-13481	9/14/2014	3322 Cutting Blvd	Jensen	OIS: During physical confrontation, subject attempted to take the Officer's firearm. While being attacked and in self-defense officer fired his weapon striking subject three times.	Death	Firearm	Video	Yes
IA14-043, 14-11651	8/11/2014	120 MacDonald Ave	Branch, Zeidan	OIS: Driver of vehicle attempted to strike an officer with the vehicle. Two other officers fired their weapons numerous times at driver. Driver fled the scene and was later arrested. Suspect was not struck by the gunfire.	No Injury	Firearm	Video	Yes

# Exhibit C

**OAKLAND POLICE DEPARTMENT  
INTERNAL AFFAIRS DIVISION  
REPORT OF INTERNAL INVESTIGATION  
FILE NO. 15-0771**

**COMPLAINANT:**

Oakland Police Department

**ABSTRACT OF ALLEGATION:**

It is alleged officers engaged in improper conduct with a prostitute.

(b)(3), (b)(4)

It is alleged officers had sex in a public place.

(b)(3), (b)(4)

It is alleged officers were aware of misconduct and failed to report it.

**APPLICABLE RULE(S):**

MOR 314.03-2 General Conduct

MOR 314.42-1 Obedience to Laws – Felony

(b)(3), (b)(4)

(b)(3), (b)(4)

MOR 314.48-1 Reporting Violations of Laws, Ordinances, Rules, or Orders

**DISCOVERY OF ADDITIONAL RULE(S)  
VIOLATION(S):**

(b)(3), (b)(4)

(b)(3), (b)(4)

It is alleged an officer was untruthful.

MOR 398.80-1 Truthfulness

*NOTE: All definitions, concepts, facts, conclusions and recommendations contained herein are strictly administrative in nature without force of law and have no bearing on any legal body with competent authority. Summary statements have been written to reflect the individual's recollection of the incident. No portions contained therein have been supplemented by the Internal Affairs Division.*

**SUBJECT OF COMPLAINT:**

Officer Terryl Smith, 9238

Officer James Ta'ai, 9240

Ofc A, (b)(3), (b)(4)

Officer Warit Uttapa, 9254

Ofc B, (b)(3), (b)(4)

Ofc C, (b)(3), (b)(4)

Ofc D, (b)(3), (b)(4)

Ofc E, (b)(3), (b)(4)

Ofc F, (b)(3), (b)(4)

Officer Luis Roman, 9251

Ofc G, (b)(3), (b)(4)

Ofc H, (b)(3), (b)(4)

Ofc I, (b)(3), (b)(4)

Ofc J, (b)(3), (b)(4)

Sergeant Leroy Johnson, 7806

Ofc K, (b)(3), (b)(4)

Ofc L, (b)(3), (b)(4)

**DATE/TIME OF INCIDENT:**

25 Sep 15 / 2245hrs

**LOCATION OF INCIDENT:**

455 7<sup>th</sup> Street

**DATE COMPLAINT RECEIVED:**

25 Sep 15

**ASSIGNED INVESTIGATOR(S):**

Lieutenant Alan Yu (Primary)

Sergeant Mildred Oliver

Sergeant Nicholas Calonge

Sergeant Jason Skrdlant

# Table of Contents

<b>BACKGROUND</b> .....	<b>5</b>
<b>COMPLAINANT STATEMENTS</b> .....	<b>6</b>
<b>Compl, (b)(5)(B)</b> .....	<b>6</b>
<b>SUBJECT STATEMENTS</b> .....	<b>26</b>
Officer Terryl "TJ" Smith .....	26
Officer James Ta'ai .....	39
<b>Ofc A, (b)(3), (b)(4)</b> .....	46
Officer Warit Uttapa .....	55
Sergeant Leroy Johnson .....	69
<b>Ofc B, (b)(3), (b)(4)</b> .....	75
<b>Ofc C, (b)(3), (b)(4)</b> .....	86
<b>Ofc D, (b)(3), (b)(4)</b> .....	110
<b>Ofc E, (b)(3), (b)(4)</b> .....	118
<b>Ofc F, (b)(3), (b)(4)</b> .....	126
Officer Luis Roman .....	133
<b>Ofc G, (b)(3), (b)(4)</b> .....	146
<b>Ofc H, (b)(3), (b)(4)</b> .....	152
<b>Ofc I, (b)(3), (b)(4)</b> .....	160
<b>Ofc J, (b)(3), (b)(4)</b> .....	165
<b>Ofc K, (b)(3), (b)(4)</b> .....	171
<b>Ofc L, (b)(3), (b)(4)</b> .....	174
<b>INVESTIGATION AND OTHER RELEVANT INFORMATION</b> .....	<b>177</b>
Physical Canvass .....	177
Social Media Canvass/Evaluation .....	178
Press Coverage and Media Analysis .....	181
<b>(b)(3), (b)(4)</b> Phone Evidence .....	184
<b>Compl, (b)(3), (b)(4)</b> Phone Evidence .....	185
Facebook Friends list Audit .....	186
Facebook photos/comments Audit .....	186
Facebook Warrant Data (July 11, 2016) .....	187
Instagram Warrant Data (July 7, 2016) .....	188
<b>(b)(3), (b)(4)</b> .....	188
<b>(b)(3), (b)(4)</b> .....	188
<b>(b)(3), (b)(4)</b> .....	191
<b>(b)(3), (b)(4)</b> .....	193
<b>CREDIBILITY ASSESSMENTS</b> .....	<b>194</b>
<b>TRAINING AND POLICY RECOMMENDATIONS</b> .....	<b>199</b>

<b>RECOMMENDED FINDINGS.....</b>	<b>201</b>
As to Officer Terryl Smith: .....	201
As to Officer James Ta'ai:.....	202
<b>Ofc A, (b)(3), (b)(4) :</b> .....	203
As to Officer Warit Uttapa: .....	204
As to Sergeant Leroy Johnson:.....	205
<b>Ofc B, (b)(3), (b)(4) :</b> .....	206
<b>Ofc C, (b)(3), (b)(4) :</b> .....	207
<b>Ofc D, (b)(3), (b)(4) :</b> .....	208
<b>Ofc E, (b)(3), (b)(4) :</b> .....	209
<b>Ofc F, (b)(3), (b)(4) :</b> .....	210
As to Officer Luis Roman: .....	211
<b>Ofc G, (b)(3), (b)(4) :</b> .....	212
<b>Ofc H, (b)(3), (b)(4) :</b> .....	213
<b>Ofc I, (b)(3), (b)(4) :</b> .....	214
<b>Ofc J, (b)(3), (b)(4) :</b> .....	215
<b>Ofc K, (b)(3), (b)(4) :</b> .....	216
<b>Ofc L, (b)(3), (b)(4) :</b> .....	217
<b>Appendix A - Witness Interviews .....</b>	<b>219</b>
Unavailable / Refused Witnesses .....	245
<b>Appendix B - List of Evidence .....</b>	<b>248</b>
<b>Appendix C - (b)(3), (b)(4), (b)(5) Suicide Note .....</b>	<b>251</b>
(C)	

## BACKGROUND

On 25 Sep 15, the Oakland Police Department (OPD) discovered that Officer (b)(3), (b)(4), (b)(5)(C) took his own life at his residence in Oakland and a Criminal Investigation was subsequently initiated. During the course of the criminal investigation, Homicide Investigators recovered a suicide note. The suicide note appeared to have been written by (b)(3), (b)(4) who also left the passcode to his personal iPhone.

In the note, (b)(3), (b)(4) claimed that (b)(5)(B) was the "catalyst" of his suicide. (b)(3), (b)(4), (b)(5)(C)

(b)(3), (b)(4), (b)(5)(C) stated that Compl advised OPD Sergeant Leroy Johnson that she had been sexually involved with many OPD officers while underage. (b)(3), (b)(4), (b)(5)(C)

The Criminal Investigation Division (CID) discovered the names of current and former OPD officers in (b)(3), (b)(4) cell phone that linked them to (b)(5)(B). As a result, Lieutenant Roland Holmgren (Homicide Commander) contacted the Internal Affairs Division (IAD) Commander (Captain Donna Hoppenhauer) to advise they had discovered potential misconduct. This internal investigation was initiated following the notification.