



Northern
California

August 18, 2019

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

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

Dear Police Commission,

Thank you again for the opportunity to participate in the SB 1421 Working Group regarding the San Francisco Police Commission’s Draft Protocols for SB 1421 Implementation (“Protocol”). After the working group meeting on August 5, 2019, the ACLU of Northern California (“ACLU”) submits the following supplemental comments to the Protocol.

We hereby move to incorporate all previous comments, suggestions and big picture ideas as discussed in our July 24, 2019 letter to the Commission. We think these are important policy proposals that warrant the Commission’s attention. In addition, we have a few recommendations regarding the updated Protocol circulated at the Working Group’s August 5, 2019 meeting.

I. Sustained Findings

We suggest re-phrasing subsection b) in C. 1. – “Sustained Findings” on p. 3. Currently, subsection b) reads:

b) There is no sustained finding if the officer resigns or retires any time before the Commission or the Chief makes a final determination that the allegations are sustained. If the Commission continues its investigation despite the officer’s retirement or resignation, the charges are sustained once the Commission has made its final determination and the officer has been afforded the opportunity to appeal.

As written, this section is confusing with multiple mentions of “sustained” and it is unclear whether all findings by the Commission are sustained. We therefore recommended rephrasing this subsection to read:

b) There is no sustained finding if the officer resigns or retires any time before the Commission or the Chief makes a final determination. If the Commission continues its investigation despite the officer’s retirement or resignation, the charges will be sustained once the Commission has made its final determination sustaining a finding and the officer has been afforded the opportunity to appeal.

II. Examples

We again recommend deleting reference to all examples in the Protocol, as the examples tend to confuse, rather than clarify the statute. Specifically, delete the three examples contained in section 3 – “Officer’s Discharge at a Person” on p. 3:

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

The plain language of the statute is clear that records of an officer’s discharge of a firearm at a person are subject to disclosure under SB 1421. There is no need for clarifying language or examples. There is also no distinction in the statute as to an officer’s mental state. Situations may require a case-by-case determination of whether the officer discharged a firearm *at a person*. However, these examples do not provide any clarity and create more questions than answers. For instance, an officer’s discharge of a firearm that causes injury to him or herself could likewise be a discharge of a firearm *at a person* if another person was present. Additionally, subsection d), which was newly added to the Protocol, is contrary to the plain language of the statute. An officer’s discharge of a firearm at a person, whether accidental or not, falls within the scope of the statute and is subject to disclosure.

Delete the example in subsection b) in section 4 – “Use of Force Records” on p. 3:

- b) *Use of force causing death or great bodily injury against a family member or neighbor falls within the statute.*

The inclusion of this example is unnecessary given that any use of force by a police officer resulting in death or great bodily injury is disclosable. By specifically including a neighbor or family member, the Protocol might suggest that others are excluded, such as a friend or coworker. This is not necessary given the plain and unambiguous language of the statute.

Delete the last sentence in subsection a) of section 5 – “Sexual Assault” on p. 4:

- a) *“Member of the public” means any person not employed by the officer’s employing agency and includes any participant in a cadet, explorer, or other youth program affiliated with the agency. **This statute’s definition therefore may cover the officer’s family members.***

The statutory definition is clear, and no examples are necessary to qualify “member of the public.” Additionally, by including the second sentence, subsection a) could be interpreted as excluding other individuals, such as a neighbor or friend.

Delete the example contained in subsection c) of section 5 – “Sexual Assault” on p. 4:

- c) *If the off-duty officer engages in simple solicitation without identifying as an officer or otherwise invoking “color of authority”, the conduct falls outside the scope of the statute.*

This not only confuses the issue but is not true. The statutory definition of sexual assault is clear. Sexual 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 color of authority. If an off-duty officer engages in simple solicitation, it may qualify as sexual assault if the officer uses means of force, threat, coercion, extortion, offer of leniency or other official favor, or under color of authority. We defer to the arguments in our July 24, 2019 letter regarding the interpretation of this section, but as written, subsection c) is incorrect as it creates a new interpretation of “sexual assault” that is not supported by the statute.

III. Dishonesty

We understand that San Francisco does not have a box to check for a sustained finding of dishonesty and therefore it may be necessary to look to the underlying facts of each case to determine whether an officer has a sustained finding of dishonesty. The examples provided in subsection a) of section 6 – “Dishonesty” on p. 5, however, should be more inclusive. Currently, this subsection provides:

- i. *Mere neglect of duty is not enough. Review the evidence supporting the sustained finding 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.*

As written, these are misleading. Neglect of duty can amount to dishonest conduct if an officer is aware of the duty and fails to act. An officer who failed to fully investigate a report when he or she had a duty to do so, as all reasonably trained officers are trained to do, could also be dishonest. Additionally, an officer who fails to include facts in an incident report after being told to do so, or after having been previously been warned about the need to do so, could be dishonest. Conduct unbecoming of an officer can be dishonest conduct. “The California Supreme Court construed the phrase ‘conduct unbecoming’ a city police officer to refer only to conduct which indicates a lack of fitness to perform the functions of a police officer.” *Nicolini v. Cty. of Tuolumne*, 190 Cal. App. 3d 619, 631 (1987). This can include failing to include facts in a report or neglect of duty when such conduct demonstrates a lack of fitness to perform the functions of a police officer and would undermine the public’s trust in the officer.

Although we do not think examples are warranted, given that the statute already lists some examples, if the Commission deems them necessary we recommend deleting the current examples, and instead replacing them with the following language:

- i. Review the evidence supporting the sustained finding and determine whether the conduct was sustained for dishonesty.
- ii. Sustained findings of dishonesty directly related to the reporting, investigation or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another investigation of misconduct by another peace officer or custodial officer must be disclosed.
- iii. Dishonesty can include, but is not limited to, sustained findings of perjury, false statements, filing false reports, destruction, falsifying, concealing of evidence, or conduct demonstrating the officer acted in an untruthful manner that demonstrates a lack of fitness to perform the functions of a police officer.

IV. Other

A. Medical Records

We request the Commission clarify in subsection a) of section A – “Required Redactions – General” on p. 6 that medical records are redacted *pursuant to federal law*, i.e. the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 C.F.R. § 160 *et seq.*¹

B. Impacted Families

We are surprised that families impacted by police violence are not mentioned at all in your protocol. Impacted families have established personal privacy interests that could be infringed by unwarranted disclosure of records of their loved ones. *See Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 162 (2004). We therefore request they be notified upon the release of records of their loved ones and be afforded priority when requesting records. We believe their views on the public interest in disclosure of certain records, such as autopsy photographs, should be taken into consideration.

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

¹ As a caveat, we note that it is not obvious that HIPAA applies to all situations where the public entity is in possession of medical records, since the entity is not the medical provider. 1421 clearly provides for redaction of information whose disclosure is prohibited by federal law; whether federal law prohibits disclosure of all medical records may need to be decided on a case by case basis.



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Northern
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Regards,

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