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WILLIAM SCOTT  
CHIEF OF POLICE

August 19, 2019

SB 1421 Working Group  
San Francisco Police Commission  
1245 Third Street, Sixth Floor  
San Francisco, CA 94158

**Re: Language Suggestions**

Dear Members of the SB 1421 Working Group:

At the last Working Group meeting, Commissioners Elias and Mazzucco invited members to provide language for consideration in the next SB 1421 protocols draft. Below, please find the Police Department's suggestions.

**I. DISCLOSABLE RECORDS: USES OF FORCE**

As noted in our previous correspondence, the Police Department disagrees that all off-duty uses of force are disclosable under Penal Code section 832.7(b)(1)(ii).<sup>1</sup> In short, while peace officers may exercise their powers throughout the state, they do not always act as peace officers and, to the contrary, may act as private citizens.<sup>2</sup> The Police Department believes that the correct construction of section 832.7(b)(1)(ii) is that it reaches only those incidents where a peace officer is either (1) on duty; or (2) off-duty but acting as a peace officer. To that end, the Department suggests the following language or modifications:<sup>3</sup>

- (I)(C)(4)(b) *Use of force causing death or great bodily injury against a family member or neighbor falls within the statute, where the peace officer places themselves in on-duty status.*
- *Add: (I)(C)(4)(d) Off-duty conduct resulting in great bodily injury committed where the peace officer acts in a private capacity is not subject to disclosure.*

**II. DISCLOSABLE RECORDS: SEXUAL ASSAULT**

We also believe the nuance of what constitutes a "peace officer" as it relates to off-duty conduct applies to the sexual assault definition. Penal Code section 832.7 is silent on whether sexual assault cases are limited to on-duty incidents. However, Penal Code section 832.7(B)(i) renders

<sup>1</sup> Police Department Brief at 4-5, Jul. 24, 2019.

<sup>2</sup> *Id.*

<sup>3</sup> Additions italicized.

non-confidential: "Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a *peace officer . . . engaged in sexual involving a member of the public.*"<sup>4</sup>

As with uses of force, this begs the question as to whether the section applies to off-duty conduct because those employed as peace officers do not always act in their capacity as peace officers. Given that peace officers do and can act as a private citizens, the Police Department does not believe that section 832.7(B)(i) applies to off-duty conduct where a peace officer does not place themselves in an on-duty status or otherwise invokes their authority. Therefore, the Police Department suggests the following language change:

- (I)(C)(5)(b) This category may include off-duty conduct provided that the officer uses force, threat, coercion, extortion, offer of leniency of other official favor, or the "color of authority" while engaging in the "sexual assault," *and where the peace officer places themselves in on-duty status or otherwise invokes their position.*

### III. ANONYMITY

Some of the discussion regarding anonymity has raised the question of whether a witness who provides their name or other personal information can remain anonymous. The Police Department disagrees that a witness who provides identifying information is by definition not anonymous.

There is certainly a reasonable expectation from many witnesses, informants, and complainants that their information shall remain confidential—despite their sharing it with law enforcement. If the Police Department cannot assure that witnesses' information will remain confidential where desired, the Police Department expects this will cause reticence from the public to provide witness statements or other valuable law enforcement information. Not only could this create a chilling effect on criminal investigations, it could have the same on administrative investigations. Therefore, the Police Department suggests that the Commission make it clear that witnesses who express a desire to remain anonymous shall be considered so.

Additionally, the Police Department believes that the Commission should rule all public witness statements made prior to the implementation of SB 1421 anonymous. Prior to the law change nearly all peace officer personnel records were considered confidential. Thus, a presumption in confidentiality and anonymity existed: any witness who provided a statement as part of an administrative investigation had a constructive belief that their identity would remain anonymous, because the law provided confidentiality.

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<sup>4</sup> Emphasis added.

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- (II)(A)(2)(a) Analyze whether the complainant or witness is anonymous. *Any witness who has expressed a desire to remain anonymous shall be deemed anonymous. . . .*
- (II)(A)(2)(a)(vi) *All witness statements given in administrative investigations shall be considered anonymous unless the witness waived anonymity by word or conduct.*

#### IV. NOTICE

The proposed protocol mandates notice from the Commission and applicable departments to various entities upon releasing responsive records. The Police Department further requests that the Commission require a ten (10) day notice period prior to release so that the Police Department can effectively conduct a threat assessment regarding said release. Therefore, the Police Department suggests the following language be added:

- VI. Notice [¶] *Notification shall be given at least ten working days prior to release.*

Sincerely,

  
WILLIAM SCOTT  
Chief of Police