



SACRAMENTO  
SAN FRANCISCO

Monique Alonso  
monique@majlabor.com  
direct: 415.266.1816

July 24, 2019

**VIA E-MAIL AND U.S. MAIL**  
*sfpd.commission@sfgov.org*

Police Commission Office  
San Francisco Police Headquarters  
1245 3rd Street  
San Francisco, California 94158

**Re: Comments of the San Francisco Police Officers Association (“SFPOA”) regarding the San Francisco Police Commission’s Proposed “Protocols for Release SB 1421 Documents”**

Dear Commissioners:

Thank you for the opportunity to provide written comments to the Commission’s draft “Protocols for Release of SB 1421 Documents” (the “Protocols”). Our specific recommendations and comments, where applicable, are set forth below. Where the SFPOA has no objections or comments, we omit any discussion. As a threshold matter, the SFPOA submits that the statute, including its definitions, speaks for itself and efforts at this stage to isolate what is not covered by any given provision are premature. Further, directions to file and document reviewers to probe beyond, for example, what constitutes a “sustained finding” under Penal Code § 832.7(B) and (C), as suggested in the Protocols will prolong an already daunting task, and moreover, poses the threat of second-guessing that interferes with proper disclosure.

The introductory paragraph should read as follows to more accurately reflect the statute (suggested changes in bold):

“Penal Code section 832.7 has long made most peace officer personnel records confidential and exempt from disclosure under the California Public Records Act (“CPRA”). Amendments to this section, which became effective January 1, 2019, now **permit** disclosure of certain peace officer personnel records in response to requests under the CPRA, **subject to certain limitations**. These protocols provides guidance for the types of records and redactions that apply.”

**Section I.B.2:** The reference should be to “personnel records.”

**MESSING ADAM &  
JASMINE LLP**

235 MONTGOMERY ST. 415.266.1800 MAIN  
SUITE 828 415.266.1128 FAX  
SAN FRANCISCO, CA  
94104

**MAJLABOR.COM**

San Francisco Police Commission

Re: Comments of the San Francisco Police Officers Association (“SFPOA”) regarding the San Francisco Police Commission’s Proposed “Protocols for Release SB 1421 Documents”

July 24, 2019

Page 2

### **Section I.C.1: Sustained Findings.**

Penal Code § 832.7(b) provides that: “‘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.”

The ACLU and the Public Defender have argued that merely affording the officer an “*opportunity* for an administrative appeal” (emphasis added) is sufficient before mandating release of records. This interpretation ignores the entirety of this provision, however, which calls for a “*final* determination.” Allowing only for an “opportunity to appeal” but releasing the records before completion of the appeals process nullifies the requirement that there be a *final* determination. Statutory interpretation law requires that all parts be given meaning. *DuBois v. Workers' Comp. Appeals Bd.*, 5 Cal. 4th 382, 388 (1993) (holding that “significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear”) (citations and quotations omitted). It makes no logical sense that there be a threshold requirement of a sustained finding before release of previously confidential records where the fact that such a finding might be overturned on appeal is ignored.

The SFPC’s examples (d)-(f) are appropriate but do not go far enough; if any appeal is filed, the words of the statute establish that there must be a “final determination” before any records are released. A finding on appeal is not final on its face. As to (b), (c) and (g), the SFPOA has no objections.

### **Section I.C.2. Off –Duty Conduct.**

The proposed Protocols assert without citation: “This statute covers off-duty conduct.” This blanket statement is not supported by the statute and should not be imported here. Under Penal Code § 832.7(b)(1)(A)(B)(C), certain categories of “personnel records” are now discloseable. “Personnel records” are defined, among other things, to include: “Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, *and pertaining to the manner in which he or she performed his or her duties.*” Penal Code § 832.8(5) (emphasis added). Explicit in this definition is that the subject officer was performing his or her professional duties when the “event or transaction” giving rise to the complaint or investigation took place, thus limiting production to on duty conduct.

San Francisco Police Commission

Re: Comments of the San Francisco Police Officers Association (“SFPOA”) regarding the San Francisco Police Commission’s Proposed “Protocols for Release SB 1421 Documents”

July 24, 2019

Page 3

**Section I.C.3. Officer’s Discharge at a Person.**

The SFPC draft protocol (1) adds the phrase “deliberately or negligently” into the definition, and (2) provides three examples concluding that disclosure does not apply. The SFPOA recommends that there be no elaboration of the statutory language in the final Protocols

**Section I.C.5. Sexual Assault.**

The SFPOA recommends relying on the language of the statute which makes it clear that disclosure of a sustained finding of sexual assault will be limited to “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.) On its face, this language encompasses the examples proposed by the Commission without the need for elaboration.

**Section I.C.6. Dishonesty.**

This provision requires a sustained finding of dishonesty, as defined in the statute. Where a sustained finding is required as a prerequisite to disclosure, the Protocols need not introduce the question of intent, or the question of whether an officer “should have known” s/he was being dishonest. Similarly, the statute is clear that the dishonesty must have been in connection with “the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer.” It is therefore unnecessary affirmatively to supply examples of where disclosure would not apply.

**Section II.A.4. Threat assessment.**

Delete the following: “Under no circumstances shall the threat assessment halt the Commission or Departments’ work with respect to gathering, reviewing, and production of records. However,”

No production should occur until a threat assessment is completed.

**Section II.C. Cases involving multiple categories.**

Delete this section as unnecessary and duplicative.

**Section II.C. [sic] Discretionary redaction.**

Subparagraph (1): unclear what is being directed here.

San Francisco Police Commission

Re: Comments of the San Francisco Police Officers Association ("SFPOA") regarding the San Francisco Police Commission's Proposed "Protocols for Release SB 1421 Documents"

July 24, 2019

Page 4

Subparagraph (2): because this provision applies to discretionary redaction, is this subparagraph meant to be policy across the Commission and the Departments?

**Section VII. Notice.**

Notice should be given to the involved officer and his or her association representative on the following timeline:

- Initial courtesy notice to affected officer(s) via an officer's City email address within 3 business days of the Commission or Department becoming aware that the officer is the subject of a request;
- 5 days emailed notice to impacted officer(s) and his/her association representative of the records the Commission or either Department intends to release and date of release before release of written records. The Second Notice should set forth: the documents being produced, the date of actual production (which should be set to allow for a review and objection period by the officer(s)), the time and place they may be reviewed by the officer(s) and his/her association representative, and a statement that any objection must be filed prior to the specified production date; and
- Minimum of 5 days prior to release provide a reasonable opportunity for officer to review, with no loss of compensation and right to have legal or union representative present.

We look forward to discussing these comments at the next meeting of the Working Group and are available should you have any further questions before that time.

Very truly yours,

MESSING ADAM & JASMINE LLP



Monique Alonso *MB*

MA:krb

cc: Tony Montoya, President, SFPOA  
Gregg McLean Adam, Esq.

00074377-1