

Protocols for Release of SB 1421 Documents

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 require disclosure of certain peace officer personnel records in response to requests under the CPRA. These protocols provides guidance for the types of records and redactions that apply.

I. Disclosable Peace Officer Personnel Records

A. Categories of Disclosable Documents.

The following peace officer personnel records are no longer confidential and therefore are subject to disclosure under the CPRA:

1. Records relating to: the report, investigation, or findings regarding an officer's discharge of a firearm at a person (“discharge of a firearm at a person”);
2. Records relating to: the report, investigation, or findings regarding an officer's use of force that results in death or great bodily injury of a person (“use of force”);
3. Records relating to: a sustained finding that an officer engaged in sexual assault involving a member of the public (“sexual assault); and
4. Records relating to: a sustained finding that an officer was dishonest directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence (“dishonesty”).

Cal. Penal Code § 832.7 (b)(1)(A)(B)(C).

But disclosure of these records is subject to limits. These limits fall under various topics: redaction, delays in producing the records, and procedures governing their production. These rules are discussed below.

B. Types of Records.

1. **Releaseable records.** A “record” relating to the report, investigation, or findings of any of the disclosable categories are subject to release. Penal Code section 832.7 (C) lists the types of “records” that are subject to disclosure include:
 - a) all investigative reports;
 - b) photographic, audio, and video evidence;
 - c) transcripts or recordings of interviews;
 - d) autopsy reports;
 - e) 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, or whether the

- officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take; documents setting forth findings or recommended findings;
- f) Copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action.

2. Personal Records. Personal records are not subject to release without a court order. Cal. Penal Code 832.7. Cal. Penal Code section 832.8 defines "personal records" as any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following:

- a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.
- b) Medical history.
- c) Election of employee benefits.
- d) Employee advancement, appraisal, or discipline except as specifically required by Cal. Penal Code § 832.7 (b)(1)(A)(B)(C).
- e) 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 Cal. Penal Code § 832.7 (b)(1)(A)(B)(C)..
- f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.

3. Records from prior investigations. A record from a separate and prior investigation or assessment of a separate incident shall not be released unless it is independently subject to disclosure pursuant to this subdivision.

C. Important Notes for each of the categories of disclosable categories.

- 1. **Sustained Findings.** For sexual assault and dishonesty category, a sustained finding is required. No sustained finding is required for the disclosure of documents for discharge of a firearm at a person or use of force category.
 - a) "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.
 - 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 imposed either by the Commission or the Chief.
- d) The findings are not sustained if the officer files a timely appeal 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).

2. **Off-Duty Conduct.** This statute covers off-duty conduct. If the off-duty conduct falls within a disclosable category then follow all the other rules outlined herein.

3. **Officer's Discharge at a person.** This category requires the discharge of a firearm at a person. An officer discharging a firearm at a person (either deliberately or negligently) falls within the statute. The following scenarios are examples that fall outside the scope of the statute and are not subject to disclosure as a public record:

- 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.

4. **Use of Force Records.** This category pertains to records relating to the report, investigation, or findings regarding an officer's use of force that results in death or great bodily injury of a person.

- a) 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.
- b) Use of force causing death or great bodily injury against a family member or neighbor falls within the statute.
- c) Great bodily injury means significant or substantial physical injury, not minor or moderate injury. (See Penal Code, § 12022.7(f); CALCRIM No. 810.) Great bodily injury does not require permanent, prolonged, or protracted bodily damage. (See People v. Cross, 45 Cal.4th 58, 64 (2008).) The aggregation of smaller injuries, such as multiple bruises over various body parts, along with swelling, discoloration, and pain that lasts until the day after the incident can be sufficient to show a great bodily injury. (See People v. Jaramillo, 98 Cal.App.3d 830, 836 (1979).) Great bodily injury includes:

- i. black eye with bruising with or without blurred vision
- ii. kick to the head and medical professionals later determine the use of force contributed to the death
- d) These documents must be released even if there is no sustained findings.

5. **Sexual Assault.** “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 the color of authority. For purposes of this definition, the propositioning for or commission of any sexual act while on duty is considered a sexual assault.

- 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 covers the officer’s family members.
- b) This category requires a sustained finding.
- 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 of 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 of misconduct arises from another policy violation, i.e. CLETS violations, 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.

6. **Dishonesty.** This category requires dishonesty by a peace officer directly relating to the **reporting, investigation, or prosecution of a crime**, or directly relating to the **reporting of, or investigation of misconduct by, another peace officer**, including, but not limited to, any sustained finding of *perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.*

- 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 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.

- b) If the dishonesty is not directly related to the “reporting, investigation, or prosecution of a crime, or the reporting, investigation of misconduct by, another officer” 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.

II. Redactions

A. Required redactions – General

When disclosing the records identified above, the San Francisco Police Commission (“Commission”) and the Police Department and Department of Police Accountability collectively, and separately referred to as (“Departments”) must redact the following information:

1. Personal data or information, such as home address, telephone number, or identities of family members, other than the names and work-related information of peace officers;
2. Information the redaction of which is necessary to preserve the anonymity of complainants and witnesses.
 - a) Analyze whether the complainant or witness is anonymous. The exemption is about preserving that status.
 - i. If the case was heavily litigated and the identity of the complainant came out in the litigation, the complainant is probably not anonymous and there is no need to preserve anonymity.
 - ii. If a city employee is acting within the course and scope of duties then there is no reason to redact information identifying the employee. If the city employee is a witness and observed conduct, there may be a basis for redacting the information provided that the anonymity element is met. If there is a safety concern then analyze under Section II. A. 4.
 - iii. If you have private employees who were witnesses while are working within the course and scope of their duties, analyze whether it is necessary to preserve their anonymity.
 - iv. Pre-Copley Press cases. Prior to *Copley Press*, police discipline proceedings were open to the public. Post *Copley Press* the proceedings are closed. The revisions to the Cal. Penal Code section 832.7 lift the confidentiality provisions on certain documents relating to the disciplinary proceeding but did not overrule *Copley Press* holding that the Cal. Penal Code requires that disciplinary proceedings for peace officers be conducted in closed session. If the witness or complainant is anonymous then redact to the information to preserve that status. If the case was widely reported

then do not redact unless there is a safety concern. If there is a safety concern then analyze under Section II. A. 4.

- v. Do not redact from transcript proceedings the names of paid witnesses or experts.
3. Confidential medical, financial, or other information, where (1) disclosure is prohibited by federal law, or (2) the Chief or his or her designee and the DPA Director or his or her designee can demonstrate that disclosure would cause an unwarranted invasion of privacy that clearly outweighs the strong public interest that the Legislature found supports the disclosure of records about misconduct and serious use of force by peace officers.
 - a) Redact background medical information
 - b) Redact medical records
 - c) Redact 5150 information
 - d) Redact signatures
 - e) Redact autopsy photos (Cal. Civil Code § 129)
 - f) Redact CLETS or CORI information
 - g) Do not redact criminal history information concerning the complainant or witnesses that was known to the officer that was not derived from CLETS or CORI.
 4. Information as to which there is a specific, articulable, and particularized reason to believe that disclosure would pose a significant danger to the physical safety of a police officer or any person.
 - a) Threat assessment of Officer or any person.

The Commission and the Departments, where applicable, shall send a letter to the officer or any person who is at risk of significant danger to their public safety and advise them that there may be responsive records that will be released. Special Investigation Division (“SID”) shall conduct the threat assessment and will only recommend redactions to the Commission or Departments if 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 officer or another person to warrant redactions.

Under no circumstances shall the threat assessment halt the Commission or Departments’ work with respect to gathering, reviewing, and production of records. However, prior to releasing the records, the Commission and Departments’ staff shall confirm with SID whether there is cause to redact records.

B. Required redactions – investigation or incident involving multiple officers

In addition to the above redactions, if an investigation or incident involves multiple officers in the dishonesty or sexual assault category, the Commission and the

Departments must redact the following information:

1. Information about an allegation of misconduct against a particular officer under the new exceptions for sexual assault and dishonesty, unless the information relates to a sustained finding against that officer; and
2. Factual information regarding actions other officers took during an incident, or the statements of officers about an incident, relating to an allegation of sexual assault or dishonesty, unless the factual information and statements relate to a sustained finding against another officer that is subject to release under the new sexual assault and dishonesty exceptions.

Cal. Penal Code § 832.7(b)(1)(4).

C. Cases involving multiple categories

If a discipline case is filed at the Commission or Departments alleging use of force that caused death or great bodily injury or alleging charges related to an Officer-Involved Shooting at a person, records relating to the incident must be disclosed. This disclosure, subject to redactions for materials exempt from disclosure under Penal Code sec, 832.7, is required even though: the case is withdrawn by the charging party before discipline is imposed, the allegations are not sustained, the allegations are returned to the Chief's level, or litigation over the matter is dismissed by Superior Court or taken off calendar because of an officer resignation or retirement

C. Discretionary redaction

Unless otherwise required, the Commission and the Departments may but is not required to redact "information, including personal identifying information where, on the facts of the particular case, the public interest served by non-disclosure clearly outweighs the public interest served by disclosure." Cal. Penal Code § 832.7(b)(1)(6).

1. Do not redact the portions of transcripts containing evidence with regard to which the Commission or hearing officer sustained or overruled objections were sustained or overruled.
2. Redact gruesome photos or exposed body parts.

III. Production of Records

The Commission and the Departments must respond to a public records request promptly in meeting required timelines. Cal. Govt. Code § 6253(b); Admin. Code § 67.21(b). There are two types of requests – standard requests, and immediate disclosure requests – with different response deadlines.

A. Standard Requests

Unless the requester makes an immediate disclosure request, the Commission and the Departments must respond to a request to inspect or copy records within 10 calendar days. Cal. Govt. Code § 6253(c).

1. Commission and the Departments may have up to 14 additional calendar days to respond. To invoke such an extension, the Commission or the Departments must

inform the requester in writing of the extension within the initial 10-day period, setting forth the reasons for the extension and the date on which a response will be made. Cal. Govt. Code § 6253(c).

2. The types of circumstances permitting the extension are limited to the need for the Commission and the Departments to do one or more of the following:
 - a) Search for and collect the requested records from facilities separate from the office processing the request.
 - b) Search for, collect, and appropriately examine a voluminous amount of separate and distinct records included in a single request.
 - c) Consult with another department or agency that has a substantial interest in the response to the request.
 - d) As to electronic information, compile data, write programming language or a computer program, or construct a computer report to extract data.

B. Immediate Disclosure Request. The Sunshine Ordinance requires a faster response to “immediate disclosure requests” for certain types of documents. The purpose of the immediate disclosure request is to expedite the Departments’ response to a “simple, routine, or otherwise readily answerable request.” Admin. Code 67.25(a). Immediate disclosure requests must be satisfied no later than the close of business the next business day. Admin. Code § 67.25(a). For example, if a category of disclosable documents were previously redacted and produced then it would be appropriate to immediately disclose the same package to another requester the next business day. To determine whether the records sought are subject to the immediate disclosure consult with the City attorney.

C. Voluminous Requests. For requests the responses to which are time-consuming and voluminous, the Commission and the Departments should provide records on a rolling basis after notifying the requestor. The Commission and the Departments must produce records as soon as reasonably possible on an incremental or “rolling” basis, when so requested. The Commission and Departments must provide periodic updates to the requestor and an estimated date when the request will be fulfilled until such time as the request has been fulfilled.

D. Duty to Assist the Requester.

Departments have an obligation to assist the requester. If the requester request documents within a certain time-frame, Departments are required to produce only those documents. If, however, the requester incorrectly identifies the timeframe, the Departments have an obligation to assist the requester and provide the responsive records. For example, the requester asks for use of force documents from (2017-1018) for Officer X. The Departments do not have any responsive records for that time period. But, the department has disclosable documents from 2015. The Departments have an obligation to clarify with the requester whether s/he is seeking documents from 2015. If so, the Departments should provide the documents.

E. Priority of Release. To extent legally feasible, requests for release should be prioritized in the following order:

1. Records related to requests from the Public Defender or defense attorney that list the name(s) of specific officer(s)
2. Records related to requests from requestors other than Public Defender or defense attorney that list the name(s) of specific officer(s)
3. Records related to current SFPD officer(s)
4. Records related to terminated SFPD officers
5. Records related to resigned or retired SFPD officers

IV. Delayed Production of Records

The Departments may delay disclosing records relating to a use of force (either an officer-involved firearm discharge at a person, or any use of force resulting in death or great bodily injury) as follows:

A. Delayed disclosure during an active criminal investigation

Distinct rules, keyed to the date of the use of force, govern delays in production of records during an active criminal investigation:

1. Initial 60-day period during the criminal investigation of the use of force.
SFPD and DPA may delay up to 60 days following the date of the use of force, or until the DA files charges, whichever occurs sooner. But the Departments must justify this delay in writing to the requester by demonstrating how the interest in delaying disclosure clearly outweighs the public interest in disclosure. In addition, this writing must include the estimated date for disclosure of the withheld information.

Cal. Penal Code § 832.7(b)(1)(7)(A)(i).

2. Subsequent periods during the criminal investigation of the use of force.
After the 60-day delay following the date of the use of force, the Departments may continue to delay disclosure if it has reason to conclude that disclosure could interfere with a criminal investigation of (a) the officer who used force, or (b) someone other than the officer who used force.

Cal. Penal Code § 832.7(b)(1)(7)(A)(ii).

Upon invoking this post-60-day delay, and at subsequent 180-day intervals for each subsequent delay, the Departments must provide in writing to the requester, the specific basis for the Departments' determination that it has reason to believe that disclosure will interfere with the criminal investigation of the officer who used force, or of someone other than the officer who used force. In addition, this writing must include the estimated date for disclosure of the withheld information. In any event, the Department must provide the information when the specific basis for withholding is resolved, and in no case later than 18 months following the use of force whichever occurs sooner.

Cal. Penal Code § 832.7(b)(1)(7)(A)(ii).

But, where the criminal investigation is of someone other than the officer who used the

force, the Department may delay disclosure beyond the beyond the 18-month limit if extraordinary circumstances warrant continued delay due to the ongoing criminal investigation. In invoking this exception to the 18-month rule the Departments must demonstrate in writing to the requester by clear and convincing evidence that the interest in preventing prejudice to the active and ongoing criminal investigation outweighs the public interest in prompt disclosure of the records in question. At this point the Departments must release all information subject to disclosure that does not cause substantial prejudice, including any documents that have otherwise become available. Cal. Penal Code § 832.7(b)(1)(7)(iii).

B. Delayed disclosure after criminal charges have been filed

If criminal charges are filed related to the incident in which force was used, the Departments may delay disclosure of records or information until a verdict on those charges is returned at trial or, if a plea of guilty or no contest is entered, the time to withdraw the plea pursuant to Cal. Penal Code Section 1018 has expired. Cal. Penal Code § 832.7(b)(1)(7)(B).

C. Delayed disclosure during an administrative investigation.

The Departments may withhold disclosure of records or information until the Departments determine whether a policy violation occurred, but no longer than 180 days after the date of the discovery of the use of force or allegation of use of force by a person authorized to initiate the investigation, or 30 days after the close of any related criminal investigation whichever is later. Cal. Penal Code § 832.7(b)(1)(7)(C).

V. Other Restrictions on Disclosure

Notwithstanding the new disclosure requirements pertaining to peace officer personnel records:

1. The Departments must not release records that are protected by the attorney-client privilege.
2. The Departments must not release a record of a civilian complaint, or the investigation, findings, or disposition of that complaint if the department determines that the complaint is frivolous, as defined in Section 128.5 of the Code of Civil Procedure, or if the complaint is unfounded. Cal. Penal Code § 832.7(b)(1)(8).

VI. Departments Coordination

The Commission and the Departments have independent obligations to produce documents in their possession in response to PRA requests. In situations where there are concurrent investigations and SFPD, DPA, and the Commission have identified potentially responsive records to a public records request for disclosure of SB 1421

documents, the Commission and the Departments may meet and discuss coordinating the release of records for efficiency purposes. There may be additional information that either only the Commission or SFPD have knowledge, such as to whether specific allegations were “sustained.” In those cases, the Commission and the Departments must work together. To the maximum extent as possible, the Departments shall ensure redactions to public records requests are consistent among the Commission and the Departments. However, the Commission expects each Department to exercise its independent judgment for matters that require the exercise of discretion. If there is disagreement between the Departments or the Commission with respect to a legal issue, the Commission and the Departments will seek the advice of the City Attorney’s Office. But where that office advises that the decision to disclose requires an exercise of judgement each agency must exercise its own independent discretion.

VII. NOTICE

The Commission and Departments shall notify the following entities when releasing responsive records:

1. Mayor’s Office
2. District Attorney’s Office
3. Commission/SFPD/DPA
4. SFPD Brady Unit
5. Involved Officer

VIII. APPEAL PROCESS

In cases where a requestor asks to appeal the Commission or Departments’ decision regarding the scope of the released records, or the notification of no responsive records, the Commission/SFPD/DPA shall respond to the requestor in writing and include 1) the explanation for the Commission or Department’s original response, and 2) information on how the requestor can file an appeal.

The Sunshine Ordinance provides three administrative appeals processes for a requestor to challenge a Department’s denial of access to records. If the Department refuses, fails to comply, or incompletely complies with a public records request, the requestor may petition (1) the Sunshine Ordinance Task Force, (2) the Supervisor of Records (City Attorney’s Office), or (3) in certain cases, the Ethics Commission, for a determination whether the requested record should be disclosed.

IX. Legal Authority

This policy is based on changes in the law effected by Senate Bill 1421 (SB 1421), which was approved by the Governor on September 30, 2018, and which became effective on January 1, 2019. SB 1421 made substantial changes in Penal Code section 832.7 and Government Code section 6254(f).

**The attached tracking forms shall be used for each officer identified and in each incident identified as being responsive to the CPRA request.*

