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District Attorney

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San Francisco Police Commission  
SB 1421 Working Group  
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RE: *Protocols for Release of SB 1421 Documents*

Dear San Francisco Police Commission,

The San Francisco District Attorney's Office is committed to fostering greater transparency and disclosure of public records under the recently enacted Senate Bill 1421. As crafted, the language of SB 1421 provides a framework for the types of records that are now subject to disclosure. In doing so, it also creates a set of boundaries that limits the types of records that can be lawfully disclosed. The SFDA's Office is limited by these boundaries and existing legal interpretations of the language of SB 1421.

As drafted, SB 1421 defines a "sustained" finding as a final determination made by the agency that employs the officer whose misconduct is the subject of review. Under SB 1421's own definition, the SFDA's Office can only make a sustained finding concerning its own employees. As an extension of this same definition, the SFDA's Office's *Brady* list cannot be interpreted as a public record under SB 1421. As another limitation, the language of SB 1421 does not supersede the *Pitchess* evidentiary process; law enforcement personnel records obtained through the *Pitchess* process remain subject to a court protective order under SB 1421.

**I. ACCORDING TO THE LANGUAGE OF SB 1421, THE SFDA'S OFFICE CAN ONLY MAKE A SUSTAINED FINDING CONCERNING ITS OWN EMPLOYEES.**

A "sustained finding" under the terms of Penal Code Section 832.8, subdivision (b), as amended by SB 1421, means a "final determination by an investigative 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." Penal Code Section 832.8(b).

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Government Code section 3300 et seq. “sets forth a list of basic rights and protections which must be afforded all peace officers by the public agencies which employ them.” *Zazueta v. County of San Bernardino* (1995) 38 Cal.App.4<sup>th</sup> 106, 112.

Section 3304 provides procedural protections for the investigation, mainly a one-year statute of limitations (with several exceptions) for the completion of a misconduct investigation and an opportunity for an administrative appeal. Section 3304.5 requires that the administrative appeal be conducted “in conformance with the rules and procedures adopted by the local public agency.”

The inclusion of Sections 3304 and 3304.5 of the Government Code to define a “sustained” finding is a limitation of SB 1421. These sections codify the Public Safety Officers Procedural Bill of Rights Act, which is “a catalogue of the minimum rights the Legislature deems necessary to secure stable *employer-employee* relations. *Id.* (italics included). A “sustained” finding as defined by 832.8(b) is ultimately an employment decision. It is made by the officer’s employing agency. Accordingly, under SB 1421, the San Francisco District Attorney’s Office can make sustained findings as to its employees, not the actions of peace officers employed by other agencies.

## **II. ACCORDING TO THE LANGUAGE OF SB 1421, THE SFDA’S OFFICE’S *BRADY* LIST IS NOT A PUBLIC RECORD.**

Under *Brady v. Maryland*, 373 U.S. 83 (1963), prosecutors have a duty to disclose “material exculpatory evidence whether the defendant makes a specific request [citation], a general request, or none at all [citation].” *In re. Brown* (1998) 17 Cal. 4th 873, 879 [72 Cal. Rptr. 2d 698, 952 P. 2d 715]. “*Brady* material” includes any evidence favorable to the accused—evidence that goes towards negating a defendant’s guilt, that would reduce a defendant’s potential sentence, or that would go to the credibility of a witness.

The SFDA’s “*Brady* list” consists of the names of peace officers employed by other law enforcement agencies whose employing agencies have indicated that their peace officer may have unspecified *Brady* materials in his or her personnel file, i.e. *Brady* notification. The employing agency’s *Brady* notification to our office does not specify the scope or nature of the potential *Brady* materials, other than to indicate that the materials may negatively impact the individual’s credibility as a witness.

Cal. Penal Code Section 832.7, as amended by SB 1421, creates four exceptions to the confidentiality of peace officer personnel records. These four exceptions fall into one of two categories. First, there are exceptions for records of dishonesty or sexual assault, which require a “sustained finding” of the misconduct. Second, there are records related to the use of force or discharge of a firearm by an officer, which do not require such a finding.

Records related to dishonesty or sexual assault reflect the type of underlying conduct that would cause an officer’s employer to provide *Brady* notification to our office, thereby placing

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the officer's name on our *Brady* list. Section 832.7, however, requires that a "sustained finding" of on-the-job dishonesty or sexual assault has been made for disclosure. As discussed above, a "sustained" finding under the terms of Penal Code Section 832.7 and 832.8 is one made by the *officer's employing agency*. (Pen. Code sec. 832.8(b) ["sustained" finding requires, *inter alia*, the opportunity for an "administrative appeal pursuant to Section 3304 and 3304.5 of the Government Code"].)

While the SFDA's Office possesses nonspecific *Brady* notifications for the officers on our *Brady* list, the office does not possess information indicating whether any "sustained" finding has been made by the employing agency with respect to these officers. Even though the SFDA's Office has placed the name of a peace officer on the "*Brady* list," we do not know whether that individual's employing agency has made the "sustained finding" that Penal Code secs. 832.7 and 832.8 require for the exceptions to apply.

As for the second set of exceptions under section 832.7-- records related to the use of force or discharge of a firearm by an officer— neither types of conduct, on their own, qualify an officer for the office's *Brady* list.

### III. THE LANGUAGE OF SB 1421 LEAVES THE *PITCHESS* PROCESS IN PLACE.

*Pitchess v. Superior Court* (1974) 11 Cal. 3d 531 [113 Cal. Repr. 897, 522 P.2d 305] (*Pitchess*) allows a defendant to obtain discovery of law enforcement personnel records upon a sufficient showing of good cause. (Id. at pp. 537-540.) The California Legislature has codified the privileges and procedures surrounding what are known as Pitchess motions through the enactment of Pen. Code, §§ 832.7, 832.8, and Evid. Code, §§ 1043 through 1045.

A Pitchess motion must describe the type of records or information sought and include affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records (Evid. Code, § 1043, subd. (b)(2), (3)).

If the defendant establishes good cause, the court must review the records *in camera* to determine what, if any, information should be disclosed (Evid. Code, § 1045, subd. (b)). In providing for *in camera* review, the Legislature has balanced the accused's need for disclosure of relevant information with the law enforcement officer's legitimate expectation of privacy in his or her personnel records. Section 1045, subd. (e), requires the court to impose a protective order providing that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law.

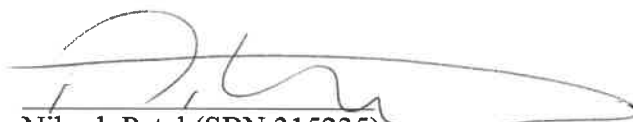
Penal Code Section 832.7 and 832.8, as amended by SB 1421, "does not supersede or affect the criminal discovery process outlined in Chapter 10 (commencing with section 1054) of

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Title 6 of Part 2, or the admissibility of personnel records obtained pursuant to 832.7(a). Penal Code Section 832.7(h). Law enforcement personnel records obtained through a *Pitchess* motion remain subject to a court enforced protective order. *Pitchess v. Superior Court (1974)* 11 Cal. 3d 531 [113 Cal. Repr. 897, 522 P.2d 305] (*Pitchess*); Pen. Code, §§ 832.7, 832.8, and Evid. Code, §§ 1043 through 1045.

Very truly yours,



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