

# **PROTOCOLS FOR RELEASE OF S.B. 1421 DOCUMENTS**

Penal Code § 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 and records maintained by any state or local agency (hereafter “peace officer records”) in response to requests under the CPRA. These protocols provide guidance for the types of records and redactions that apply.

## **I. Disclosable Peace Officer Records**

### **A. Categories of Disclosable Documents.**

The following peace officer 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)-(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. **Releasable records.** A “record” relating to the report, investigation, or findings of any of the disclosable categories is subject to release if it is in the categories described in Section IA. Penal Code § 832.7(b)(2) lists the types of “records” that are subject to disclosure:
  - 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;
- f) documents setting forth findings or recommended findings;
- g) 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. Personnel Records.** Personnel records are not subject to release without a court order, except as provided under the amendments described in these Protocols. Cal. Penal Code § 832.7. Cal. Penal Code § 832.8 defines "personnel 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).
- 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 except as specifically required by Cal. Penal Code § 832.7(b).
- 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 Cal. Penal Code § 832.7(b).

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

**1. Sustained Findings only required for sexual assault and dishonesty categories.** For the sexual assault and dishonesty categories, 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 categories.

- 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 Commission or the Chief makes a final determination. If the ~~Commission~~ **Department** continues its investigation despite the officer's retirement or resignation, the charges will be sustained if the ~~Commission~~ **Department** has made a final determination sustaining a finding and the officer has been afforded the opportunity to appeal.
  - c) The findings are not sustained if the officer files a timely appeal from the Chief's decision to the Commission, during the pendency of the appeal.
  - d) The findings are not sustained if the officer files a timely appeal to an Administrative Law Judge, during the pendency of the appeal.
  - e) The findings are sustained if the officer files a writ in court and challenges the Commission or Administrative Law Judge's findings.
  - f) A determination of the Department of Police Accountability to sustain a complaint of police officer misconduct is not a sustained finding for the purposes of Cal. Penal Code § 832.8 because the officer does not have the opportunity to pursue an appeal under Sections 3304 and 3304.5 at that stage of the process.
2. **Off-Duty Conduct.** This statute covers off-duty conduct, if the off-duty conduct relates to a report, investigation, or findings within a disclosable category of peace officer records. If so, 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. Cal. Penal Code § 832.7(b)(1)(A)(i).
  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. However, no "sustained finding" is required for this category. Cal. Penal Code § 832.7(b)(1)(A)(ii).
    - a) Great bodily injury means significant or substantial physical injury, not minor or moderate injury. (See Cal. 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 must be determined based on the specific facts of the injury, in accordance with the applicable case law.

5. **Sexual Assault.** This category pertains to any records 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 assault involving a member of the public. Cal. Penal Code § 832.7(b)(1)(B)(i).
- a) “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. Cal. Penal Code § 832.7(b)(1)(B)(ii).
  - b) “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. Cal. Penal Code § 832.7(b)(1)(B)(iii).
6. **Dishonesty.** This category pertains to any records relating to an incident in which a *sustained finding* was made by any law enforcement agency or oversight agency of 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. Cal. Penal Code § 832.7(b)(1)(C).

## **II. Redactions**

### **A. Required Redactions**

When disclosing the records identified above, the San Francisco Police Commission (“Commission”), 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. Redact signatures and personal email addresses. Cal. Penal Code § 832.7(b)(5)(A).
2. Information the redaction of which is necessary to preserve the anonymity of complainants and witnesses. Cal. Penal Code § 832.7(b)(5)(B).
  - a) Analyze whether the complainant or witness is anonymous. This limited exemption is about preserving that status. However, redactions should not be made on this basis if anonymity cannot be preserved. For example, if a complainant or witness voluntarily disclosed information to the press or in

litigation, the complainant or witness is probably not anonymous and redactions should not be made in an attempt to render the individual's official statement anonymous. Additionally, even if a complainant or witness identity is determined to be anonymous, their statements do not automatically warrant redaction.

- b) If the complainant or witness is a city employee who is acting within the course and scope of duties, do not redact information identifying the employee unless there is a separate basis for redaction. However, if the city employee is a witness who observed or provided information not within the course and scope of duties, there may be a basis for redacting the information provided that the anonymity element is met. In either scenario, if there is a safety concern then analyze under Section II.A.4.
  - c) If you have private employees who were witnesses while are working within the course and scope of their duties, analyze whether it redaction is necessary to preserve their anonymity.
  - d) *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 § 832.7 lift the confidentiality provisions on certain documents relating to the disciplinary proceeding but did not overrule *Copley Press's* 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.
  - e) Do not redact from transcript proceedings the names of paid witnesses or experts.
3. Confidential medical, financial, or other information, where (1) disclosure is specifically prohibited by federal law or 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. Cal. Penal Code § 832.7(b)(5)(C).
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. Cal. Penal Code § 832.7(b)(5)(D).
- a) The Commission and the Departments shall send a notification to the officer or retired officer whose records may be released, or to any person who is at risk of significant danger from the release, at least 10 business days prior to releasing records.

The notification will be made through Department email and interoffice mail for current officers and by US mail to the last address on file for separated officers. It will advise that responsive records may be released.

- b) Special Investigation Division (“SID”) shall conduct the threat assessment, document their findings, and recommend redactions to the Commission or Departments only if there is a specific, articulable and particularized reason to conclude that disclosure of the record would pose a significant danger to the physical safety of the officer or another person to warrant redactions. Cal. Penal Code § 832.7(b)(5)(D).

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 should confirm with SID whether there is cause to redact records.

- 5. Notwithstanding the new disclosure requirements pertaining to peace officer records, the Commission and Departments continue to observe generally applicable state-law confidentiality provisions and restrictions on release under the CPRA. These include:
  - a) The Commission and the Departments must not release records that are protected by the attorney-client privilege.
  - b) Redact 5150 information under Welfare and Institutions Code § 5328.
  - c) Redact autopsy photos under Civil Code § 129.
  - d) Redact CLETS or CORI information.

Whenever a redaction is made, the basis for such shall be documented by citing the basis as outlined in Cal. Penal Code §§ 832.7(b)(1)(4) – (8).

### **B. Redactions for investigation or incident involving multiple officers**

In addition to the above redactions, if an investigation or incident involves allegations of wrongdoing against multiple officers, the Commission and the Departments must redact alleged misconduct that is not independently disclosable, while disclosing information that is pertinent to the investigation of the disclosable conduct. For example, two officers are alleged to have committed sexual assaults against the same individual and the complaints are investigated together. One of those complaints is sustained and one is not. Information about the sustained allegation of misconduct should be released. Information about the unsustained allegation should be redacted, including the identity of the officer alleged to have committed it, except to the extent the information relates to the sustained finding against the other officer. Cal. Penal Code § 832.7(b)(1)(4).

### **C. Discretionary Redaction**

Unless otherwise required, the Commission and the Departments may but are 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)(6).

1. Do not base redactions upon whether the information was admitted into evidence during Commission or administrative hearing proceedings.
2. Gruesome photos or exposed body parts may be redacted under this provision.

#### **D. S.B. 1421 Exception from Release**

Under S.B. 1421, the Commission and 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).

### **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). Under the CPRA, 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's Office.

### **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**

Under the CPRA, Departments have an obligation to assist the requester to identify records and information that are responsive to the request, or the purpose of the request if stated. If the request appears to include an error, for example in the intended time frame for the records or in the name of an officer identified in the request, the Commission and the Departments have an obligation to assist the requester in clarifying the request and to provide the responsive records.

### **E. Priority of Release**

Generally, the following factors will be considered in prioritizing requests for release:

1. Whether the request is from the Public Defender, defense attorney or impacted family and relates to a pending criminal case, particularly if the individual awaiting trial is in custody.
2. Whether the request lists the name(s) of specific officer(s).
3. Records related to current SFPD officers may be prioritized above records relating to former SFPD officers.
4. Time request has been pending.
5. Burden of fulfilling the request.
6. Other factors supporting public interest in expedient disclosure.

## **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 Departments must provide the information when the specific basis for withholding is resolved, the investigation or proceeding is no longer active, and in no case later than 18 months following the use of force incident, 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)(A)(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 § 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. Coordination**

The Commission and the Departments have independent obligations to produce documents in their possession in response to CPRA 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 S.B. 1421 documents, the Commission and the Departments should meet and discuss coordinating the release of records for efficiency purposes.

There may be situations where only the Commission or SFPD has the information needed to determine if records should be disclosed, such as whether specific allegations were “sustained.” In those cases, the Commission and the Departments must work together. To the maximum extent 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.

## **VI. 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 requester 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 requester 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.

## **VII. Legal Authority**

This policy is based on changes in the law effected by Senate Bill 1421 (S.B. 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 § 832.7 and Government Code § 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.*