



**July 24, 2019**

## **Summary of Principal Concerns with Proposed Policy**

The Police Commission published a policy outlining proposed procedures (dated July 5, 2019) by which the San Francisco Police Commission (Commission), the San Francisco Police Department (SFPD), and the Department of Police Accountability (DPA) will process records requests under Penal Code § 832.7.

As part of the working group established by the Commission, this Office submits this memorandum to provide section-by-section commentary so that the policy will fulfill the stated goal of SB 1421: to increase transparency and facilitate police accountability. In particular, we express concern on the following issues:

1. **Definition of Sustained Finding:** The definition is unfounded and underinclusive.
2. **Threat Assessments:** The process for conducting threat assessments is confusing and vague and will cause undue delay.
3. **Definition of Dishonesty:** The definition of dishonesty is unclear and restrictive.
4. **The Department of Police Accountability Should Maintain Its Independence:** DPA should not collaborate with SFPD on the release or redaction of records.

Since the policy aims to provide clarity to the requestor and the person tasked with evaluating files for release, most of the remaining comments of this memorandum focus on three principles. First, the policy should hew closer to the statute, particularly when the statute is clear on its face. Seemingly small changes in language cleave out significant portions of disclosable records. Second, the policy should eliminate or reduce examples used to illustrate what types of records are releasable. When examples are used, the policy should clarify that they are not exhaustive. Above all, the examples should give clear, correct guidance. Third, the policy should not outline bright-line rules when the statute envisions a balancing test. Ultimately, the Commission, the Departments, and the City, should ensure that the policy governing the release of these records is not overly restrictive and counter to the spirit of the law.

## Legal Background of SB 1421

Transparency and accountability lie at the heart of Senate Bill 1421, now codified as Penal Code § 832.7. Accountability here has two important meanings: (1) accountability to the public in the form of justice for those wronged by police misconduct and (2) accountability to the public of police officers who have engaged in misconduct. The California legislature made clear when it enacted the law that the “public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force.”<sup>1</sup> Concealing this information “undercuts the public’s faith in the legitimacy of law enforcement ... and endangers public safety.”<sup>2</sup> This right to know stems mainly from the “extraordinary authority” granted to law enforcement: the “powers to detain, search, arrest, and use deadly force.”<sup>3</sup> In effect, the legislation has abrogated the notion that police misconduct records are fully privileged or protected and available only under the *Pitchess*<sup>4</sup> or *Brady*<sup>5</sup> process. Penal Code § 832.7 is neither *Pitchess* nor *Brady* but explicitly provides a right for every member of the public to access records on officer-involved shootings, use of force resulting in death or great bodily injury, sustained allegations of sexual assault, and sustained allegations of dishonesty.<sup>6</sup> That right, however, is not self-executing; justice rarely is.

The records identified by Penal Code §832.7 are available under a California Public Records Act (CPRA) request. The CPRA explains that “access to information concerning the conduct of the public’s business is a fundamental and necessary right of every person in this state.”<sup>7</sup> The records available under Penal Code § 832.7 are no different from other publicly available records. In fact, Penal Code § 832.7 brings disclosure of police officer misconduct records in line with other records of complaints and discipline

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<sup>1</sup> CAL. SENATE BILL 1421 § 1(b) (2018).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Pitchess v. Super. Ct.* (1974) 11 Cal.3d 531, 535 (holding an accused may compel discovery of police personnel records upon showing that the requested information will produce facts and a fair trial).

<sup>5</sup> *Brady v. Maryland* (1963) 373 U.S. 83, 87 (finding that the suppression of evidence favorable to the accused was a denial of due process).

<sup>6</sup> PENAL CODE § 832.7(b)(1)(A)(i)-(ii), (B)(i), & (C).

<sup>7</sup> PENAL CODE § 6250 et seq.

against public employees.<sup>8</sup> As custodians of those records, SFPD and DPA perform a ministerial function when they produce these records.

### **The Importance of full compliance with Penal Code § 832.7**

The need for transparency and accountability with law enforcement has soared in the public consciousness in the wake of highly publicized police shootings and misconduct. The past five years have seen a dramatic shift in the way the country thinks about police shootings – particularly the shooting and killing of people of color – and have inexorably altered the national conversation around race and police misconduct. Structural and institutional racism have exacerbated the tensions between law enforcement and the communities they serve.<sup>9</sup>

California is no exception to the national reckoning with police misconduct and with the overpolicing and overcharging of communities of color.<sup>10</sup> The names Stephon Clark, Mikel McIntrye, and Darrell Richards have shaken the public’s confidence in the integrity of police officers’ actions – and these are just the incidents that have garnered some of the most headlines. San Francisco is no exception either. The names Alex Nieto, Mario Woods, Amilcar Perez-Lopez, Jessica Williams, and others still conjure pain and anguish for many in San Francisco. That we have begun collectively to reckon with the complicated history of police violence and its disparate effect on communities of color<sup>11</sup> is a welcome start. It is by no means an end.<sup>12</sup>

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<sup>8</sup> See, e.g., *American Fed’n of State, County and Mun. Emp. Local 1650 v. Regents of the Univ. of Cal.* (1978) 80 Cal. App. 3d 913, 918; *Bakersfield City School Dist. v. Super. Ct.* (2004) 118 Cal.App.4th 1041.

<sup>9</sup> Aldima Mesic, et al., *The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the State Level*, 110 JOURNAL OF THE NAT’L MED. ASS’N 106, 106-16 (2018) (finding that structural racism remains a significant positive predictor of police shootings of unarmed black men).

<sup>10</sup> Ben Poston & Maya Lau, *Here Are The Stories About Police Misconduct Uncovered So Far By A New Media Partnership*, L.A. TIMES, Mar. 19, 2019, <https://www.latimes.com/local/lanow/la-me-police-files-roundup-20190319-story.html>.

<sup>11</sup> Victor E. Kappeler, *A Brief History of Slavery and the Origins of American Policing*, EASTERN KENTUCKY UNIVERSITY, <https://plsonline.eku.edu/insidelook/brief-history-slavery-and-origins-american-policing>; Ben Fountain, *Slavery and the Origins of the American Police State*, Medium (Sept. 17, 2019), <https://medium.com/s/story/slavery-and-the-origins-of-the-american-police-state-ec318f5ff05b> (history of black oppression in America is the history of police oppression in America).

<sup>12</sup> From October to December 2018, black men constituted 35 percent of use-of-force incidents while the City’s black population is just 5.3 percent; white men, by contrast, constituted 21 percent of use-of-force incidents while whites overall form 47 percent of

Increased transparency of police misconduct through full compliance with Penal Code § 832.7 will engender public trust in law enforcement and help heal its harmful effects. Here in San Francisco, racial disparities exist at every step of the criminal justice system. One 2013 study found that while black adults represent only six percent of the adult population in the City, they represented forty percent of those arrested, forty-four percent of those booked in County jail, and forty percent of those convicted.<sup>13</sup> That same study found that black adults are 7.1 times as likely as white adults to be arrested, eleven times as likely to be booked in County jail, and 10.3 times as likely to be convicted of a crime.<sup>14</sup> In 2017, the San Francisco District Attorney commissioned a study to examine sentencing disparity that echoed these findings: “differences by race and ethnicity in the extent of involvement with the criminal justice system are the result of differences in offending patterns, differences in treatment by law enforcement and other agents of the criminal justice system, disparate impacts across groups of policies and practices applied in a race-neutral manner, or some combination thereof.”<sup>15</sup> Black defendants are less likely than white defendants to have their cases dropped, dismissed, or successfully diverted.<sup>16</sup> When convicted, black defendants are more likely to receive prison sentences or longer sentences than whites.<sup>17</sup>

There is cause for concern regarding potential racial bias exhibited by SFPD officers. Separately, the need for transparent record is supported by a

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the City’s population. See Julian Mark, *Police Commission To SFPD: Why Is Use Of Force On Men Of Color So Disproportionately High?* Mission Local (Mar. 7, 2019), <https://missionlocal.org/2019/03/police-commission-to-sfpd-why-is-use-of-force-on-men-of-color-so-disproportionately-high/>. Similarly, even though police search blacks after traffic stops at a disproportionately high rate, SFPD finds contraband just 33 percent of the time while finding contraband on three-fourths of white drivers. See Timothy Williams, *San Francisco Police Disproportionately Search African-Americans*, N.Y. TIMES, July 11, 2016, <https://www.nytimes.com/2016/07/12/us/san-francisco-police-disproportionately-search-african-americans-report-says.html>.

<sup>13</sup> *San Francisco Justice Reinvestment Initiative: Racial and Ethnic Disparities Analysis for the Reentry Council* 4, THE BURNS INSTITUTE, June 2015, [https://www.burnsinstitute.org/wp-content/uploads/2015/06/SF\\_JRI\\_Full\\_Report\\_FINAL\\_7-21.pdf](https://www.burnsinstitute.org/wp-content/uploads/2015/06/SF_JRI_Full_Report_FINAL_7-21.pdf).

<sup>14</sup> *Ibid.*

<sup>15</sup> John MacDonald & Steven Raphael, *An Analysis of Racial and Ethnic Disparities in Case Dispositions and Sentencing Outcomes for Criminal Cases Presented to and Processed by the Office of the San Francisco District Attorney* 16, SAN FRANCISCO DIST. ATT’Y, December 2017, [https://sfdistrictattorney.org/sites/default/files/MacDonald\\_Raphael\\_December42017\\_FINALREPORT%20%28002%29.pdf](https://sfdistrictattorney.org/sites/default/files/MacDonald_Raphael_December42017_FINALREPORT%20%28002%29.pdf).

<sup>16</sup> *Ibid.* at 20.

<sup>17</sup> *Ibid.*

U.S. Department of Justice report noted that a series of incidents involving the SFPD raised serious questions about its “use of force practices, accountability, and oversight.”<sup>18</sup> That study highlighted a 2010 criminal investigation into a series of racist, sexist, and homophobic text messages among a group of SFPD officers.<sup>19</sup> As former Public Defender Jeff Adachi argued, it would be “naïve to believe these officers’ bigotry was reserved solely for text messages.” Echoing these comments and disagreeing with the SFPD, District Attorney George Gascón observed that “you don’t just have 14 people being racist without these being a wider problem” in the SFPD.<sup>20</sup> The history of SFPD misconduct is long, including the Henry Hotel scandal<sup>21</sup> in 2010 and “Operation Safe School”<sup>22</sup> in 2015, and a separate scandal of racist and homophobic text messages underlying the criminal probe of SFPD officer Jason Lai in 2016.<sup>23</sup> Of the 272 reforms the U.S. Department of Justice issued in 2016, the Department had completed just eleven by June 4, 2019.<sup>24</sup>

Understanding the root of our City’s disparate practices requires examining the role of misconduct by its police officers whose arresting decisions and testimony are central to the criminal process. For members of the public, this information will restore trust. For the accused, it could be the difference between a dismissal or prosecution, a conviction or acquittal. Uncovering evidence of police misconduct is exactly what the California

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<sup>18</sup> Collaborative Reform Initiative: An Assessment of the Francisco Police Department ix, U.S. DEPT. OF JUSTICE, October 2016), <https://ric-zai-inc.com/Publications/cops-w0817-pub.pdf>.

<sup>19</sup> *Id.*; see also Tamara Aparton, *Bigoted Text Messages to Affect 200+ Cases*, SAN FRANCISCO PUBLIC DEFENDER (April 26, 2016), <http://sfpublicdefender.org/news/2016/04/bigoted-text-messages-to-affect-200-cases/>.

<sup>20</sup> Julia C. Wong, *San Francisco’s Liberal Image Marred by Scandal-Prone Police Department*, THE GUARDIAN (April 4, 2016), <https://www.theguardian.com/us-news/2016/apr/04/san-francisco-police-department-scandal-racist-texts>.

<sup>21</sup> Bob Egelko, *‘Day of Shame’: Ex-SFPD Sergeant Gets Prison in Scandal*, SF GATE (Feb. 23, 2015), <https://www.sfgate.com/crime/article/Ex-SFPD-Sgt-Ian-Furminger-gets-prison-for-6096649.php> (noting that a federal judge found “substantial evidence” of racially discriminatory law enforcement).

<sup>22</sup> Vivian Ho & Bob Egelko, *Federal Judge Finds Evidence of Racial Bias by S.F. Police*, SF GATE (June 30, 2016), <https://www.sfgate.com/news/article/Federal-judge-finds-evidence-of-racial-bias-by-8335739.php>.

<sup>23</sup> Vivian Ho, *Was SFPD’s Latest Racist-Texts Scandal Hidden For Months?*, SF Gate (April 4, 2016), <https://www.sfgate.com/bayarea/article/Was-SFPD-s-latest-racist-texts-scandal-hidden-7223604.php>.

<sup>24</sup> Julian Mark, *The SFPD Has Taken More Than Two Years To Complete 11 Reforms. It Has One Year to Complete 261 More*, Mission Local (June 4, 2019), <https://missionlocal.org/2019/06/the-sfpd-has-taken-more-than-two-years-to-complete-11-reforms-it-has-one-year-to-complete-261-more/>.

legislature had in mind when it enacted Penal Code § 832.7. The law gives the public the right to access crucial information about the actions of its police force. Greater transparency around systemic misconduct is essential to repairing the relationship between the San Francisco community and local law enforcement agencies.

### **Requests from this Office**

This Office submitted requests under Penal Code § 832.7 to SFPD and DPA for all publicly available records for active officers over 7 months ago (January 2, 2019).<sup>25</sup> This office also submitted similar requests to several other agencies, including the Commission. The requests sought all available records in the four categories Penal Code § 832.7 made public: (1) incidents involving the “discharge of a firearm at a person by any police officer;” (2) incidents involving the “use of force by any police officer ... resulting in death, or in great bodily injury;” (3) sustained findings against a police officer engaged in sexual assault; and (4) sustained findings against a police officer of dishonesty.<sup>26</sup> Since its initial requests, this Office has submitted additional requests for the records of individual officers involved in ongoing criminal cases.

To date, this Office has received just nineteen records, fourteen from SFPD and five records from DPA.

### **Protocols for release of Penal Code § 832.7 documents**

SFPD and DPA released a policy detailing the protocols for releasing personnel records under Penal Code § 832.7 just this month (July 5, 2019). This section identifies specific shortcomings with the proposal and provides alternatives supported by the statute and case law. The general aim of the comments and recommendations for the policy is two-fold: (1) to hew closer to the text the Legislature provided and (2) to err in general on the side of disclosure.

The following sections correspond to the July 5, 2019 policy.

## **1. Disclosable Peace Officer Personnel Records**

### **A. Categories of disclosable documents**

The title of Section I should reflect what the Legislature intended to be disclosed: “personnel records and *records maintained by any state or local agency.*”<sup>27</sup> The title here is unclear and inaccurate. So the Commission should

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<sup>25</sup> See Attachment A.

<sup>26</sup> See Attachment A.

<sup>27</sup> PENAL CODE § 832.7(b)(1) (emphasis added).

delete the word “personnel” whenever it appears in Section I.

After listing the four types of disclosable records, this section includes a caveat clarifying that disclosure is subject to limits outlined in the policy. This Office recommends that in addition to outlining the limits to disclosure, the policy should include a general statement that the reviewer should err on the side of disclosure when a question arises as to whether records are subject to disclosure. This would comport with the general principles of transparency and accountability underlying the California Public Records Act and SB 1421.

## **B. Types of Records**

### **1. Releasable records**

Although this section is in large part derived from the statute and substantively comports with the law, it contains many errors. First, the word “are” in the first sentence should be changed to “is” for proper subject-verb agreement. Second, a plain reading of the statute suggests that the modifier “all” applies not just to investigative reports but to every listed category. Thus, the word “all” should be removed from subsection (a) and added before the preceding colon. Third, the appropriate citation is to Penal Code § 832.7(b)(2), not Penal Code § 832.7(C). Finally, subsection (e) includes two distinct categories separated by a semi-colon. For that reason, the fragment “documents setting forth findings or recommended findings;” should become subsection (f) and the current subsection (f) should become subsection (g).

### **2. Personnel records**

To begin with, the Commission should retitled this section “Personnel Records” and change all references to “personal records” to “personnel records.”

The first sentence of this section, stating “Personal records [sic] are not subject to release without a court order” is factually inaccurate in the wake of SB 1421 and is misleading in the context of this policy. Penal Code § 832.7 explicitly provides for the public inspection of certain “*peace officer or custodial personnel records* and records maintained by any state or local agency.”<sup>28</sup> The Commission should remove the first sentence of this section and replace it with:

*The portions of an officer’s personnel record that are not disclosable under Penal Code section 832.7 remain confidential and are not subject to release without a court order.*

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<sup>28</sup> PENAL CODE § 832.7(b)(1).

### **3. Records from prior investigations**

This section is clear and appears accurate.

#### **C. Important notes for each of the categories of disclosable categories**

##### **1. Sustained Findings**

Penal Code § 832.8 defines sustained finding as “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.”<sup>29</sup> Sections 3304 and 3304.5 of the Government Code require that an officer be provided an opportunity for administrative appeal in accordance with local policy whenever a punitive action or denial of promotion on grounds other than merit is undertaken.<sup>30</sup> Punitive action is defined as “any action that *may lead* to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.”<sup>31</sup> Courts have construed this to mean that an officer’s administrative appellate rights are triggered by any document that “may hinder advancement or cause other adverse consequences in the future,” including written reprimands or findings of misconduct, no matter if punishment is imposed.<sup>32</sup>

An administrative appeal under Government Code § 3304 does not require the full panoply of trial-like procedures in every instance. Its “limited purpose” is to provide an officer subject to possible punitive action an opportunity to establish a formal record of the circumstances and to try to persuade the agency to reverse its decision.<sup>33</sup> Without specific rules or regulations detailing the procedures to be provided in a particular case, the sufficiency of an administrative appeal is determined by constitutional due process standards.<sup>34</sup> Due process is flexible and calls for “such procedural

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<sup>29</sup> PENAL CODE § 832.8(b).

<sup>30</sup> GOV. CODE §§ 3304-3304.5.

<sup>31</sup> GOV. CODE § 3303 (emphasis added).

<sup>32</sup> *James v. City of Coronado* (2003) 106 Cal.App.4th 905, 909 (citing *Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1222 and *Hopson v. City of Los Angeles* (1983) 139 Cal.App.3d 347, 352-54).

<sup>33</sup> *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1806 (citing *Barnes v. Personnel Department* (1978) 87 Cal.App.3d 502, 506 and *Browning v. Block* (1985) 175 Cal.App.3d 423, 430).

<sup>34</sup> *James, supra*, 106 Cal.App.4th at 909-910; *Binkley, supra*, 16 Cal.App.4th at 1806-1807.



protections as a particular situation demands.”<sup>35</sup> It does not, for example, entitle an officer to confront and cross-examine witnesses.<sup>36</sup> Government Code § 3304 simply requires an “independent re-examination’ of an order or decision made” conducted by “someone who has not been involved in the initial determination.”<sup>37</sup>

**a) DPA can make sustained findings**

A DPA finding not timely appealed or sustained on appeal falls § 832.8. DPA is an “investigating agency.” The City Charter explicitly instructs DPA to “promptly, fairly, and impartially *investigate* all complaints regarding police use of force, misconduct or allegations that a member of the Police Department has not properly performed a duty.”<sup>38</sup> After conducting an investigation, DPA determines whether to make a written finding of officer misconduct.<sup>39</sup> Whenever a finding is made, DPA forwards it to the Chief or the Commission for a disciplinary determination.<sup>40</sup> Because a finding of misconduct by DPA, no matter how minimal, *may lead* to various disciplinary outcomes, it is punitive action under Government Code §§ 3303 and 3304.

DPA provides an internal opportunity for administrative appeal that fully comports with the requirements of Government Code § 3304.<sup>41</sup> Whenever DPA makes a misconduct finding, it provides written notice to the involved officer and an opportunity to request a review hearing within 10 days.<sup>42</sup> If the officer requests a hearing, an Investigative Hearing Officer is assigned.<sup>43</sup> This Officer is someone who is not employed by DPA and has no prior contact with the case.<sup>44</sup> The Officer determines the facts, after which the Director determines whether to sustain the allegations.<sup>45</sup> This appeal process, conducted before an impartial factfinder, provides the officer notice, an opportunity to make a record, and to persuade the finding agency to reverse its decision. Because the rules give every officer the opportunity to appeal DPA findings through a

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<sup>35</sup> *Binkley, supra*, 16 Cal.App.4th at 1807 (citing *Mathews v. Eldridge* (1976) 424 U.S. 319, 334).

<sup>36</sup> *James, supra*, 106 Cal.App.4th at 912-913.

<sup>37</sup> *Caloca v. County of San Diego* (2002) 102 Cal.App.4th 433, 443-44 (quoting *Stanton v. City of West Sacramento* (1991) 226 Cal.App.3d 1438, 1443).

<sup>38</sup> SAN FRANCISCO CITY CHARTER § 4.136(d).

<sup>39</sup> Department of Police Accountability, *Complaint Process*, <https://sfgov.org/dpa/complaint-process> (last visited July 17, 2019).

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

process that comports with Government Code § 3304, wherever an officer does not pursue appeal or a finding is sustained by the Director after a hearing is conducted, it follows that DPA's finding is sustained under Penal Code § 832.8. Thus, subsection (g) of this section misstates the law and the Commission should remove should it in its entirety.

**b) Officers who resign or retire without pursuing an appeal have been provided an opportunity for appeal**

Any officer who is provided an opportunity for appeal and chooses not to request an appeal within the timeframe provided, whatever the reason or stage of proceedings, has been provided an opportunity and the finding is sustained as a matter of law. Subsections (b) and (c) of this section state that no sustained finding occurs when an officer resigns or retires without pursuing an appeal. The policy is notably silent on the rationale for these subsections, which are not based in the statutory language. Penal Code § 832.8 requires only “an investigation and opportunity for an administrative appeal.”<sup>46</sup> There is simply no foundation for the proposition that an officer's failure to pursue an appeal amounts to deprivation of the opportunity for appeal. In fact, the opposite is true. That an appeal is waived if not timely filed applies in most legal contexts.<sup>47</sup> Without an articulable reason to depart from long-standing legal principle here, the policy should remove subsections (b) and (c) and clarify that a finding is final and sustained under the plain language of the statute where an officer does not request an appeal within the time provided.

**c) The Commission should clarify the remaining language in this section**

Finally, the Commission should rephrase subsections (d), (e), and (f) of this section to promote clarity. This Office recommends removing subsections (b) through (g) as currently drafted and replacing them with (new subsections (b) through (e)):

- b) A sustained finding can be made by DPA, SFPD, the Commission, or an Administrative Law Judge.*
- c) If the time for appeal outlined by the agency making a finding has passed*

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<sup>46</sup> PENAL CODE § 832.8(b).

<sup>47</sup> In the civil context, untimely appeals are subject to mandatory dismissal. (See CAL. RULES OF COURT, rule 8.104.) Similarly, a criminal appeal untimely filed is not excused even if due to mistake or inadvertence. (See *In re Oscar Del Campo* (1961) 55 Cal.2d 816, 817). A parallel rule applies in federal cases. (See 5 Am. Jur. 2d Appellate Review § 266.) Similarly, in the immigration context, the Board of Immigration Appeals may summarily dismiss untimely appeals. (See 8 CFR 1003.1(d)(2)(i)(G) (2018).)

*and the officer did not timely request an appeal, the agency's finding is sustained.*

- d) If the officer has made a timely request for appeal with the agency making a finding, the finding is not sustained unless the finding is upheld after completion of the appeal.*
- e) The filing of a writ does not constitute an administrative appeal under this section. If an officer files a writ in court to challenge a finding, the finding remains sustained regardless of the status or outcome of the writ.*

## **2. Off-Duty conduct**

Portions of § 832.7 apply to officers' off-duty conduct. At a threshold level, only those incidents that were deemed appropriate to investigate by the Commission or the Departments will be disclosable because only those incidents will have records to disclose. The proposed policy is unlikely to dictate what conduct gets investigated in the future and cannot dictate what conduct has already been investigated. Files generated in investigations should be disclosable no matter when the conduct occurred.

### **a) Use of firearm and use of force causing GBI**

Incidents involving the discharge of a firearm and use of force resulting in GBI apply to off-duty conduct if the Commission or the Departments investigated that conduct. The statute makes no distinction between on- and off- duty conduct for these categories.

SFPD officers are not required to keep their badge and gun on them at all times, though they may do so.<sup>48</sup> Administrative review boards can investigate shootings by off-duty officers and impose punishment for that conduct.<sup>49</sup> The records of these investigations into officers discharging their firearm at any person should be disclosed under § 832.7.

Similarly, officers who use force against a member of the public are not categorically acting as civilians.<sup>50</sup> For example, off-duty officers who engage in a fight are still able to act under color of law and use of force to end the altercation.<sup>51</sup> If an officer has to report the use of force to comply with Department General Order 5.01, or if the Commission or the Departments

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<sup>48</sup> DGO 10.02 (I)(G)(1) "OPTIONAL EQUIPMENT. Officers of all ranks while off duty may be equipped with the following: (c) Loaded handgun."

<sup>49</sup> *Wences v. City of L.A.* (2009) 177 Cal.App.4th 305, 310.

<sup>50</sup> *Mendoza v. City of L.A.* (1998) 66 Cal.App 4th 1333, 1340 (In cases in which the employee was an off-duty police officer, courts have found police departments liable for the employee's acts of violence against members of the public).

<sup>51</sup> *Choate v. Cty. of Orange* (2000) 86 Cal.App.4th 312, 318.

investigated the force for another reason, those records should be disclosed under § 832.7 if the force resulted in GBI or death.

### **b) Sexual Assault**

In § 832.7, sexual assault is specifically defined and has a more expansive definition for on-duty conduct. The more limited, specifically outlined conduct applies to off-duty conduct. The definitions are outlined in section I(C)(5) below, but the existence of the two definitions is an evidence that off-duty conduct is covered.

### **c) Dishonesty**

Finally, dishonesty is the least likely category of conduct to apply to off-duty actions. That category is limited to actions “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.”<sup>52</sup> Though these actions seem unlikely to happen while an officer is off duty, one can reasonably imagine scenarios where an off-duty officer might give a statement about another officer’s potential misconduct. This is reason enough to exclude an absolute declaration that off-duty conduct is not covered.

## **3. Officer’s Discharge at a Person**

The section above illustrates the clarity with which the text of § 832.7 deals with officers’ discharge at a person. The text does not limit its applicability to shootings done “deliberately or negligently” as the proposed policy does. The statute allows for the release of “a record relating to the report, investigation, or findings of ... [a]n incident involving the discharge of a firearm at a person by a peace officer.”<sup>53</sup>

No reading of the statute would warrant exclusion of incidents where officers may have discharged a firearm at themselves, either intentionally or not. If such an incident led to the creation of a “report, investigation, or findings” by the Commission or Departments, those files would be disclosable. The reference in the proposed policy to negligence, property, and animals is unnecessary and unnecessarily complicates the category.

## **4. Use of Force Records**

Generally, and as indicated above, instructions to reviewers should begin and end with the Penal Code text itself whenever possible. Only when the text

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<sup>52</sup> PENAL CODE § 832.7(b)(1)(C).

<sup>53</sup> PENAL CODE § 832.7(b)(A)(i).

is unclear on its face as applied to records maintained by the Commission or the Departments should the text require interpretation or explication. Section 832.7(b)(1)(A)(ii) requires release of records relating to the report, investigation, or findings of an incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury (GBI).

Subsection (a) states that there “must be a finding of a *causal connection* between the use of force and the great bodily injury of a person” (emphasis added) and overstates what the plain text requires. The text does not require a separate “finding of a causal connection” between the use of force and the injury. Rather, the text states that “the use of force ... resulted in death, or in great bodily injury.” An investigator evaluating a GBI complaint against an officer will inevitably determine whether the force resulted in GBI – such a finding is required to separate the finding from other findings such as a simple injury. That investigator need not make a separate, specific “causal connection” between the force and GBI. As a result, The Commission should rephrase subsection (a) to:

*The use of force must have resulted in death or great bodily injury. This will require a review of the case file, transcripts, or other relevant sources.*

Similarly, the Commission should remove subsection (b) as unnecessary because the text is clear on its face. But to err on the side of caution for the reviewer, the proposal could read:

*Use of force causing death or great bodily injury can occur against any person, including a partner, spouse, family member or neighbor.*

Subsection (c) implicitly recognizes that the Legislature intentionally employed the term “great bodily injury” because of “the greater body of law interpreting that term[] and existing tracking already done by law enforcement.”<sup>54</sup> Indeed, it intended for the public to have access to the greatest possible number of responsive records under the statute so that California law would no longer allow these records to be hidden from the public.<sup>55</sup> Because an established framework of GBI exists, both Departments should expand on that proposed definition to follow that well-worn framework. The preexisting Penal

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<sup>54</sup> Aug. 31, 2018, California Committee Report, 2017 CA S.B. 1421 (NS).

<sup>55</sup> *Ibid.*

Code definitions as construed by California courts give clear guidance. Thus, subsection (c) should read:

*The relevant inquiry of the term “great bodily injury” as it appears in Penal Code § 832.7 is on the injury sustained, rather than on the conduct that produced the injury or the intent of the officer whose use of force resulted in the injury. Great bodily injury is defined as “significant or substantial injury” that is “greater than minor or moderate harm.”<sup>56</sup> Indeed, great bodily injury need not be permanent, prolonged, or protracted.<sup>57</sup> For example, injuries as minimal as soft tissue and muscular damage have been held to constitute “great bodily injury,” particularly where the person injured suffers even temporary difficulty in everyday tasks.<sup>58</sup> Such a finding is warranted even without medical evidence of ongoing physical issues.<sup>59</sup> Similarly, the accumulation 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.<sup>60</sup>*

*In light of the aforementioned, the following constitute “great bodily injury”:*

- *Injuries requiring medical treatment;<sup>61</sup>*
- *Injuries involving a broken, fractured, or dislocated bone or joint;<sup>62</sup>*
- *Injuries involving bruising or swelling that persists, is particularly painful, interrupts daily activities, or renders the skin sensitive to touch;<sup>63</sup>*

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<sup>56</sup> CALCRIM No. 3160. Great Bodily Injury (PENAL CODE §§ 667.5(c)(8), 667.61(d)(6), 1192.7(c)(8), 12022.7, & 12022.8).

<sup>57</sup> *People v. Escobar* (1992) 3 Cal.4th 740, 750 (specifically rejecting that the standard for GBI requires the victim to suffer “permanent,” “prolonged” or “protracted” injury).

<sup>58</sup> *People v. Poroj* (2010) 190 Cal.App.4th 165, 167-169; *People v. Le* (2006) 137 Cal.App.4th 54, 59-60.

<sup>59</sup> *Ibid.*

<sup>60</sup> *See People v. Jamarillo* (1979) 98 Cal.App.3d 830, 836.

<sup>61</sup> *See supra* footnote 58.

<sup>62</sup> *See People v. Kent* (1979) 96 Cal.App.3d 130, 136; *People v. Elder* (2014) 227 Cal.App.4th 411, 415 fn.3.

<sup>63</sup> *See People v. Sanchez* (1982) 131 Cal.App.3d 718, 678.

- *Injuries interrupting everyday tasks, such as walking, sitting, or standing;*<sup>64</sup>
- *Injuries including lacerations or abrasions;*<sup>65</sup>
- *Injuries to the head and neck;*<sup>66</sup>
- *Injuries involving soft tissue and/or muscular damage, even if temporary;*<sup>67</sup>
- *Injuries resulting in any pregnancy complication;*<sup>68</sup>
- *Injuries involving vaginal or rectal bleeding;*<sup>69</sup> and
- *Any injury to a person’s genitals.*<sup>70</sup>

### **5. Sexual Assault**

Section I.A.C.5 of the proposed policy discussing the definition of sexual assault contains both errors in law and unnecessary examples that confuse an otherwise simple portion of § 832.7.

Subsection (d) incorrectly limits the definition of sexual assault outlined in § 832.7 only to those assaults committed off-duty under the “color of authority.” This mischaracterizes the conduct that would be disclosable under § 832.7.

The actual definition appears just above this section and outlines that sexual assault includes committing or attempting sexual acts 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.”<sup>71</sup> No distinction exists between on- and off-duty conduct and the means used to commit the assault.

The only reference to a distinction between on- and off-duty is that conduct while on- for duty has *more* restrictions, and “any sexual act while on

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<sup>64</sup> See *supra* footnote 58.

<sup>65</sup> See *Escobar, supra*, (1992) 3 Cal.4th 740, 752.

<sup>66</sup> See *People v. Corona* (1989) 213 Cal.App.3d 589 (swollen jaw, bruises to head and neck and sore ribs support finding of great bodily injury).

<sup>67</sup> See *supra* footnote 58.

<sup>68</sup> See *People v. Cross* (2008) 45 Cal.4th 58, 62-67 (upholding great bodily injury enhancement where rape resulted in pregnancy without medical complications).

<sup>69</sup> See *People v. Williams* (1981) 115 Cal.App.3d 446, 454-455; *Escobar, supra*, 3 Cal.4th 749-750.

<sup>70</sup> See *Williams, supra*, (1981) 155 Cal.App.3d at 454-455; *People v. Wolcott* (1983) 192 Cal.Rptr.748, 758 (approving citing the injury in *Williams*, a torn hymen, as an example of great bodily injury).

<sup>71</sup> PENAL CODE § 832.7(b)(1)(B)(ii) (emphasis added).

duty is considered a sexual assault.”<sup>72</sup> Subsections (c) and (d) should be eliminated as they do not accurately reflect the law.

Subsection (e) addresses the enhanced scrutiny on-duty conduct faces and, while accurate, is an unnecessary and seemingly irrelevant point without that broader context included.

The final section contains another confusing example involving CLETS violations. While a complaint of sexual assault *could* be sustained for a different reason – dishonesty, for example – a complaint could be sustained for many reasons. The example does not recognize that possibility and potentially forecloses the release of otherwise responsive records. Currently, the Departments evaluate allegations against officers using the preponderance of the evidence standard and later review of the file – for example, looking whether “conduct unbecoming” was sustained based on a sexual assault allegation – should do so as well.<sup>73</sup>

## **6. Dishonesty**

The Commission and the Departments should establish a clear definition of dishonesty based in law that facilitates the performance of their ministerial duties under § 832.7. After citing the relevant Penal Code section, Section I.C.6.a of the proposal mandates that 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.” This subsection cites no legal precedent and creates an unnecessarily high bar of proof, requiring both an intent and an act. Because a less complicated standard would ensure full and accurate compliance with the law, this definition must be abandoned. For instance, filing false reports – which the Legislature specifically declared should be an act of dishonesty – does not necessarily require an “intent to deceive.” Yet the proposed definition would graft such a standard on filing a false report. Similarly, the proffered definition of dishonesty couples an intent standard with a requirement that the officer concealed evidence when the officer “should have known” that the officer was concealing evidence. This definition is circular, confusing, and unnecessary.

Rather than pick this definition, the Commission and the Departments should look to the text and its structure for guidance. The Legislature declined

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<sup>72</sup> See *ibid.*

<sup>73</sup> See *Department General Order 2.04 (Complaints Against Police Officers)*, SAN FRANCISCO POLICE DEPT. (May 15, 2019), <https://www.sanfranciscopolice.org/sites/default/files/2019-06/sfpd-dgo-204-citizen-complaints-against-officers.pdf>.



to define dishonesty directly, opting instead for listing a set of non-exhaustive examples of what behavior or statements could constitute dishonesty such as “any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.”<sup>74</sup> That list is both revealing and instructive. The non-exhaustive list of examples covers not just speech but also conduct, suggesting a desire to cast a wide net. To start, the Legislature used the phrase “false statements” instead of the simpler term lying. It certainly could have adopted the simpler term but chose not to, likely so because lying conjures thoughts of deliberate actions. By contrast, a false statement need not explicitly be lying but any statement inherently false, no matter if an intent to deceive exists. As further proof, the phrase “filing false reports” as referenced in the previous paragraph similarly lacks an explicit intent standard. As a result, the Commission and the Departments should choose a definition of dishonesty that encompasses dishonest conduct and statements without reference to an “intent to deceive.”

To be sure, dishonesty is a difficult term to define and is anchored best in a specific context and where it encompasses, as here, both knowing and other acts. One California court recognized that “dishonesty seems to be incapable of exact definition or precise limitation because among other things of the infinite variety of circumstances which affect the relations and affairs ... [of] our society.”<sup>75</sup> Another court observed that dishonesty “denotes an absence of integrity; a disposition to cheat, deceive, or defraud; deceive and betray.”<sup>76</sup> Still another found that dishonesty may “apply to any breach of honesty or trust, as lying, deceiving, cheating, stealing, or defrauding.”<sup>77</sup> Thus, dishonesty for purposes of Penal Code § 832.7 should be defined as:

*Dishonesty should be defined as any statement or act that an officer knew or should have known based on Department training or standards (or based on a common understanding) that constituted a misrepresentation or omission as related to official duty that bears on the officer’s character for truthfulness.*

A sustained finding of dishonesty need not be stamped with the magic word dishonesty for the underlying behavior to be dishonest. To illustrate, DPA can make a sustained finding of “Neglect of Duty” for failure to turn on a body-

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<sup>74</sup> PENAL CODE § 832.7(b)(1)(C).

<sup>75</sup> *Wayne v. Bureau of Private Investigators & Adjusters, Dep’t of Prof’l & Vocational Standards* (1962) 201 Cal.App.2d 427, 436.

<sup>76</sup> *Lone Star Sec. & Video, Inc. v. Bureau of Sec. & Investigative Servs.* (2012) 209 Cal.App.4th 445, 447.

<sup>77</sup> *United States v. Brackeen* (9th Cir. 1992) 969 F.2d 827, 829-30.

worn camera, and while not labeling the sustained finding as “dishonesty,” the underlying behavior could be dishonest. Thus, a reviewer should have the power to make that finding when the facts warrant it.

## **2. Redactions**

### **A. Required redactions – in general**

#### **1. Redaction of personal information**

This section is clear and appears accurate.

#### **2. Redaction to preserve anonymity of complainants and witnesses**

Subsection (a)(i) provides that if a case were “heavily litigated” and the identity of the complainant emerged in the litigation, the complainant would “probably not [be] anonymous” and there would be no need to preserve anonymity. This policy seems to assume that the complainant in every case will be a criminal defendant or the direct victim of police misconduct or violence. There is no basis for such an assumption. Because anyone – even someone uninvolved in the investigated incident – may submit a complaint of officer misconduct, it is unclear why a reviewer would simply assume that a heavily litigated case necessarily erases the anonymity of the complainant. And it is unclear why litigation itself is associated with a lack of anonymity. A case can be heavily litigated without being widely publicized. In fact, most “heavily litigated” cases remain opaque to the public.

Because the reviewer is already instructed to analyze whether a complainant or witness is anonymous under subsection (a), subsection (a)(i) is unnecessary and should be removed. At the least, the phrase “heavily litigated” should be changed to “widely publicized.”

#### **3. Confidential medical records / Criminal History of complainants/witnesses**

Penal Code § 832.7 requires redaction where disclosure of confidential medical, financial, or other information is “*specifically* prohibited by federal law” or would cause an unwarranted invasion of personal privacy that “*clearly* outweighs” the strong public interest in records about misconduct and serious use of force by peace officers.<sup>78</sup> The Commission should amend the language of this policy section to include the word “specifically” to conform with the statute.

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<sup>78</sup> PENAL CODE § 832.7.

Because there is a strong public interest in disclosure, redactions should be confined to clear cases. Without references to specific laws, it is difficult to discern the origins of the exceptions here. If they derive from federal statute, the language should match that of the specific law to ensure conformity and the law should be referenced and cited. If they are not derived from federal law, redaction is not permitted, and the redactions should be removed. This Office requests a representation at or before the next meeting of which laws serve as the origin for these exceptions and reserves commentary on each listed exception until that representation is made.

#### **4. Officer threat assessment**

The proffered policy establishes a procedure to facilitate redactions based on police officer safety but is confusing and vague. The section begins with the text of the Code but then strays into an opaque process.

The policy first requires the Commission and the Departments to notify the officer at risk of significant danger and advise the officer that there may be responsive records that will be released. This notification is redundant since the officer would have notice when the conduct occurred, when an initial investigation occurred, when a sustained finding occurred, and as the threat assessment is conducted. Confusingly, after the officer is notified – ostensibly because the officer does not have notice but more likely so that the officer attempt to delay by filing an injunction – the Special Investigation Division (SID) “conduct[s] the threat assesment [*sic*] and will only recommend redactions ... if there is a specific, articulable and particularized reason to believe that disclosure ... would pose a significant threat.”<sup>79</sup>

Two problems loom large should SID conduct the officer threat assessment: (1) the lack of a specific timetable for conducting a threat assessment and (2) the lack of disclosing what constitutes a threat for SID. The lack of a specific timetable frustrates the purpose of a public disclosure and harms the public’s trust that SID will conduct an honest, independent threat assessment. More importantly, the policy provides no discussion on what constitutes a “specific, articulable, and particularized” reason. The legislature was notably silent on this point, providing no other guidance other than these three general terms. Consequently, the following factors should be used to assess whether a threat is specific, articulable, and particularized:

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<sup>79</sup> *Protocols for Release of SB 1421 Documents*, Section II.A.4.a., SAN FRANCISCO POLICE COMM., <https://sfgov.org/policecommission/sites/default/files/Documents/PoliceCommission/Draft%20Protocols%20for%20Release%20of%20SB%201421.pdf>.

- *In general, redactions based on this reason should be rare to comport with the underlying goal of full disclosure;*
- *Redactions cannot be based on characteristics – either known or believed – not conveying an immediate and significant danger to physical safety, i.e., gang membership;*
- *Redactions should not be based on vague claims of fear of significant danger; and*
- *The threat must be credible (to place a reasonable person in fear of danger) and imminent.*

While this Office recognizes that threat assessments serve a legitimate purpose in keeping officers safe from legitimate threats, other cities that have released similar records of police misconduct have not witnessed a backlash of retaliation against officers and their families.<sup>80</sup> No Department or organization has offered any credible reason to think that releasing records would endanger the safety of officers or other persons. Thus, that a determination by SID – a body not subject to the same sunlight police misconduct records are now subject to – serves as a gatekeeper to the public’s right to supervise the police by accessing records of misconduct is antithetical to the transparency and accountability at the heart of Penal Code § 832.7.

**B. Required redactions – investigation or incident involving multiple officers**

This section is clear and appears accurate.

**C. Cases involving multiple categories**

The meaning of this section is near incomprehensible. Its intent is only apparent based on the heading and assuming the section envisions unsustained allegations of dishonesty possibly appearing alongside officer involved shootings or use of force causing GBI.

Reading the text as intending to convey that message, it must be changed for clarity and accuracy because it inappropriately limits the types of files to “discipline cases” that “allege charges.” The language could read:

*“If a case is investigated by the Commission or Departments alleging use of force that caused death or great bodily injury or related to an officer-involved shooting at a person, records relating to the incident*

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<sup>80</sup> See Jamie Kalven, *Invisible Institute Relaunches the Citizens Police Data Project*, THE INTERCEPT (August 16, 2018), <https://theintercept.com/2018/08/16/invisible-institute-chicago-police-data/>.

*must be disclosed regardless of any final determination. Portions that may deal with matters not subject to disclosure – such as unsustained allegations of dishonesty – must be redacted.”*

#### **D. Discretionary redaction**

As outlined in this proposed policy, the statute includes a balancing test that allows for redaction of information where, “on the facts of the particular case,” the public interest is better served by non-disclosure. Such redactions are inappropriate if, rather than relying on the facts of the particular case, there is a categorical rule that requires redaction of “gruesome photos or exposed body parts.”

While such photos might often be redacted, there should not be a rule that mandates their redaction in every case. The Legislature drafted the statute knowing autopsy photos and photos from sexual assault investigations would be subject to release. The appropriate way to determine whether to redact is to follow the statute and apply the balancing test, not act as super-legislators and mandate the redaction in every case.

### **3. Production of Records**

#### **A. Standard Requests**

This section is clear and appears accurate.

#### **B. Immediate disclosure request**

This section is clear and appears accurate.

#### **C. Voluminous requests**

This section should be modified so that all records are released on a rolling basis instead of when requests are “time-consuming and voluminous” and even if requests specifically do not ask for records to be released on a rolling basis. This makes sense for two reasons. First, many members of the public who request records may not realize that the records are extensive before they submit a request and thus withholding records until all are ready is unnecessary. Second, releasing records as they become available may help the requestor determine if the records are needed at all. This could save the Commission and Departments time and expense. Moreover, the public would be better served with prompt and efficient disclosure of records.

#### **D. Duty to assist the requester**

The policy rightfully states that the Commission and the Departments have an obligation to assist the requestor to identify responsive records. In fact, the San Francisco Good Government Guide requires the Commission and the Departments to do exactly that.<sup>81</sup> The principle, however, should be expanded beyond when the requestor mistakenly identifies an incorrect timeframe as the proposed policy notes. As an example, the duty to assist should be expanded to help the requestor identify the correct category for an officer should the requestor misidentify the category for a specific officer. Additionally, if the requestor asks for all sustained findings of dishonesty but the officer instead has sustained findings of sexual assault, the Departments have an obligation to clarify this misidentification with the requestor. Thus, the language of this section should be expanded.

#### **E. Priority of release**

Because the justifications for prioritizing criminal defendants with open cases apply with even more force to defendants who are in custody awaiting trial, this Office recommends an additional prioritization within the first category for defendants who are in custody when making their request.

### **4. Delayed Production of Records**

#### **A. Delayed disclosure during an active criminal investigation**

This section is clear and appears accurate.

#### **B. Delayed disclosure after criminal charges have been filed**

This section is clear and appears accurate.

#### **C. Delayed disclosure during an administrative investigation**

This section is clear and appears accurate.

### **5. Other Restrictions on Disclosure**

Section V provides no guidance about which attorney-client relationship it envisions protecting. The addition of this extra-statutory language inserts another potential obstacle to the production of records, with no means for the requestor to follow up on the lack of production. Thus, the policy should make clear whose attorney-client privilege it refers to.

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<sup>81</sup> See *Good Government Guide: An Overview of the Laws Governing the Conduct of Public Officials* 87, San Francisco City Attorney, September 3, 2014, <https://www.sfcityattorney.org/wp-content/uploads/2015/07/GoodGovtGuide-2014-09-03.pdf>.

## **6. Departments Collaboration**

The Commission should narrow the proffered policy on releasing records. Collaboration between the Commission and the Departments should be limited only to resource-saving efforts involving redaction of identical and otherwise duplicative body-worn camera footage, audio interviews, and transcription.

Collaboration beyond this scope undermines the independent obligation the Commission and the Departments have to produce records for the public. For example, the proposed policy declares that the Commission and the Departments must work together to coordinate the release of records if there is additional information which either only the Commission of SFPD knows about, like whether specific allegations were “sustained.” It is irrelevant to disclosure whether the Commission and the Departments diverge on whether a claim is sustained. Beyond the procedures outlined in this policy, the Commission and the Departments should not be involved in determining the appropriateness of potential releases or redactions.

To the extent the Commission and the Departments must communicate to determine whether allegations were “sustained,” the Commission should adopt procedures to communicate that information when the “sustained” finding occurs. This would enable the Departments and Commission eventually to eliminate the need for coordination on the release of records and will help restore confidence in the independence of the Commission and the Departments.

## **7. Notice**

While this section is clear, its authority for inclusion is not. The Departments and the Commission are free to notify whomever they like whenever they release files, but making the notice should interfere with the release in any way.

Thus, the only change we would propose to this section is to the timing of the notification from “when releasing” to “immediately following the release.” This will ensure that the release of records is not delayed for any non-statutory reason.

## **8. Appeals Process**

The Commission and the Departments should notify the requestor of the reasons for their determination and the process for appeal in *every case in which* they withhold records or when it makes a determination that there are no responsive records. The CPRA requires an agency to justify the

nondisclosure of records in writing.<sup>82</sup> Providing this justification upfront and informing all requestors of the process for appeal will ensure compliance with the law and will reduce unnecessary back-and-forth. In addition, the Commission and Departments should provide more specific information about the appellate process, including the contact information for the various appellate agencies. For the ease of this Working Group, the guidelines for filing a complaint with each organization is provided below:

**Sunshine Ordinance Task Force:**

You may fill out a complaint form online or access a form at [sfgov.org/site/sunshine](https://sfgov.org/site/sunshine), or you may send your own letter filing a formal complaint. File the complaint with the Sunshine Ordinance Task Force, 1 Dr. Carlton B. Goodlett Pl., Room 244, San Francisco, CA 94102-4689; or you may send it by fax to (415) 554-5163 or email to [sotf@sfgov.org](mailto:sotf@sfgov.org).<sup>83</sup>

**City Attorney Supervisor of Records:**

You may file a complaint with the City Attorney Supervisor of Records by email at [Supervisor.Records@sfcityattorney.org](mailto:Supervisor.Records@sfcityattorney.org) or by mail at Attn: General Government Team, CITY ATTORNEY/SUPERVISOR OF RECORDS, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102. Provide the following information as the basis for your petition: The city department to which you made your request; the record or records you requested; the date of your request; an explanation as to why you believe the decision to withhold or redact records is unlawful; other information you consider pertinent; and your contact information and preferred means of contact.<sup>84</sup>

**Ethics Commission:**

To determine whether the Ethics Commission is the appropriate agency to direct your complaint, you may contact an investigator by calling the Ethics Commission at (415) 252-3100.<sup>85</sup>

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<sup>82</sup> GOV. CODE § 6255.

<sup>83</sup> Sunshine Ordinance Task Force, *Filing a Complaint with the Sunshine Ordinance Task Force*, <https://sfgov.org/sunshine/filing-complaint-sunshine-ordinance-task-force> (last visited July 17, 2019).

<sup>84</sup> City Attorney of San Francisco, *Sunshine Appeals*, <https://www.sfcityattorney.org/good-government/sunshine-appeals/> (last visited July 17, 2019).

<sup>85</sup> San Francisco Ethics Commission, *Filing a Complaint with the Ethics Commission*, [https://sfethics.org/wp-content/uploads/2015/04/complaint\\_form.pdf](https://sfethics.org/wp-content/uploads/2015/04/complaint_form.pdf) (last visited July 17, 2019).



## **9. Legal authority**

Several sections cite ambiguous, incorrect, or no legal authority for policy decisions explaining the scope of § 832.7. Thus, this section is inaccurate or incomplete.

### **Policies and Issues not Covered by the Proposal**

The proposed policy remains notably silent on several important points. That silence, as the saying goes, is deafening.

#### **A. Proposed changes to processing requests**

To meaningfully comply with PC § 832.7 and maximize transparency, SFPD and DPA should establish a policy that clearly explains how they will process requests. In other words, what policies and procedures govern what happens to a request for records after submission? A detailed policy would provide insight into how and when records are processed.

While SFPD and DPA are certainly free to craft a policy that governs their employees, the policy should aim at creating the most efficient release process and not a tool to delay or frustrate release of those records.

- First, SFPD and DPA should determine if responsive records exist for each officer and immediately notify the requestor of the results of that search.
- Second, SFPD and DPA should summarize the findings or the final report before producing other documents so that the requestor can decide if further record production is necessary.
- Third, SFPD and DPA should create clear guidelines for redacting sensitive information under Penal Code § 832.7 to establish consistency and to provide a clear metric for how long redaction should take.
- Fourth, SFPD and DPA should provide an estimate of how long each request will take to complete, including how long producing all records for each officer will take.<sup>86</sup>
- Finally, SFPD and DPA should produce written records first for cases that are easily identifiable on their face as responsive – i.e.,

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<sup>86</sup> As reference and perhaps guide, the San Diego County Sheriff's Department created a FAW estimating the time required to produce documents at each stage. See *California Senate Bill 1421 Peace Officers Release of Records Frequently Asked Questions*, SAN DIEGO COUNTY SHERIFF'S DEPARTMENT, <https://www.sdsheriff.net/documents/CPRA-FAQ.pdf>.

ones that have been categorized as either firearm discharge, GBI, sexual assault, or dishonesty.

Following those records, SFPD and DPA should produce written records not easily identifiable or that require some discretion, then redacted body-worn camera footage, and redacted audio-files last.

### **B. Create an online repository for records**

The fundamental aim of SB1421 is to promote trust in law enforcement through public disclosure of records involving serious police misconduct. This goal will be best achieved if this information is widely disclosed and easily accessible through an online repository. The CPRA specifically identifies maintenance of a public website as an approved method of responding to public record requests.<sup>87</sup> Rather than provide responsive documents to each requestor, an agency may comply with the law by posting the documents on a website and responding to later requests for the same information by simply directing requestors to the site. Indeed, the Martinez Police Department and the San Diego County Sheriff's Department have both adopted this system for responding to SB1421 requests.<sup>88</sup>

Not only will a public website of all disclosable records best ensure the public's access to information, but it will also reduce administrative burden and cost by reducing the need to respond to duplicative requests. Both DPA and SFPD conveyed, in their initial responses to our office, that the need to respond to multiple requests from many parties created an administrative backlog. A regularly maintained and updated online repository will minimize the time, resources, and expense by streamlining the Departments' responses to records requests while ensuring compliance with the law and enabling broad access for members of the public.

### **C. Err on the side of disclosure**

The Commission and the Departments should adopt a general policy to err on the side of disclosure in considering whether a particular record falls under Penal Code § 832.7. The legislature intended for the public to have

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<sup>87</sup> GOV. CODE § 6253(f) ("a public agency may comply with subdivision (a) by posting any public record on its Internet Web site and, in response to a request for a public record posted on the Internet Web site, directing a member of the public to the location on the Internet Web site where the public record is posted").

<sup>88</sup> *CA Legislative Information*, CITY OF MARTINEZ, [http://www.cityofmartinez.org/depts/police/resources/ca\\_legislative\\_information\\_sb\\_1421.asp](http://www.cityofmartinez.org/depts/police/resources/ca_legislative_information_sb_1421.asp); *Public Records*, SAN DIEGO COUNTY SHERIFF'S DEPARTMENT, <https://www.sdsheriff.net/publicrecords.html>.

access to the greatest possible number of responsive records under the statute so that California law would no longer allow these records to be hidden from the public.<sup>89</sup>

#### **D. Preponderance of the evidence standard**

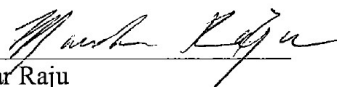
The Commission and the Departments should apply a preponderance of the evidence standard when reviewing records to determine whether those records are disclosable under § 832.7(b)(1)(A)-(C).


#### **Conclusion**

The legislative intent in enacting Penal Code § 832.7 was to give the public greater access to these records to increase transparency and accountability in policing. The legislature dubbed California the most secretive police state in the country.<sup>90</sup> It is time to end that secrecy.

This Office has every faith SFPD and DPA will fully comply with the law. Because the proffered policy remains notably silent on crucial aspects on how the records are to be released, this Office also suggests that the Police Commission consider the above recommendations when establishing these policies.

Respectfully Submitted,

  
\_\_\_\_\_  
Manohar Raju  
Public Defender

  
\_\_\_\_\_  
Matt Gonzalez  
Chief Attorney

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<sup>89</sup> See Aug. 31, 2018, California Committee Report, 2017 CA S.B. 1421 (NS).

<sup>90</sup> *Ibid.*

## **Attachment A**

# SAN FRANCISCO PUBLIC DEFENDER

JEFF ADACHI – PUBLIC DEFENDER  
MATT GONZALEZ – CHIEF ATTORNEY



January 2, 2019

San Francisco Police Department  
Attn: Legal Department  
850 Bryant Street, Room 511  
San Francisco, CA 94103

RE: California Public Records Act Request

Dear Ms. Wagner:

Under the California Public Records Act<sup>1</sup>, I ask to obtain a copy of the following, for each of the San Francisco Police Officers listed on the attached document titled "San Francisco Police Department Sworn Personnel By Name" Run Date: 05/30/18:

1. All records relating to the report, investigation, or findings of an incident involving the discharge of a firearm at a person by any police officers listed on the attached document.
2. All records relating to the report, investigation, or findings of an incident in which the use of force by any police officers listed on the attached document against a person resulted in death, or in great bodily injury.
3. All records relating to incidents in which a sustained finding was made by any law enforcement agency or oversight agency that any police officers listed on the attached document engaged in sexual assault – including the propositioning for or commission of any sexual act while on duty – involving a member of the public. These records should include those related 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. Please consider "member of the public" to be any person not employed by the officer's employing agency and including any participant in a cadet, explorer, or other youth program affiliated with the agency.

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<sup>1</sup> Government Code Section 6250 et seq.

4. All records relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by any police officers listed on the attached document 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 or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

The California legislature has codified these records as **not confidential** and available for public inspection pursuant to the California Public Records Act.<sup>2</sup> The same statute specifies that the records released shall include:

- all investigative reports;
- photographic, audio, and video evidence;
- transcripts or recordings of interviews;
- autopsy reports;
- 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; and
- 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.<sup>3</sup>

I ask for a determination on this request within 10 days of your receipt of it.

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<sup>2</sup> Penal Code Section 832.7(b)(1).

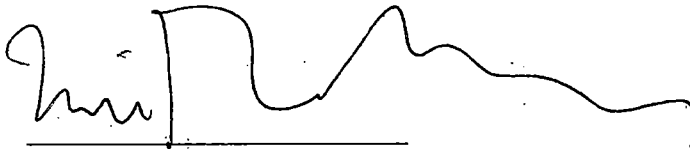
<sup>3</sup> Penal Code Section 823.7(b)(2).

If you determine that some but not all of the information is exempt from disclosure and that you intend to withhold it, I ask that you redact it for the time being and make the rest available as requested.

Please provide a signed notification citing the legal authorities on which you rely if you determine that any or all of the information is exempt and will not be disclosed.

If I can provide any clarification that will help expedite your attention to my request, please contact me. I ask that you notify me of any duplication costs before you duplicate the records so that I may decide which records I want copied.

Sincerely,

A handwritten signature in black ink, appearing to read "Matt Gonzalez", written over a horizontal line.

Matt Gonzalez  
Chief Attorney