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July 24, 2019

SB 1421 Working Group  
San Francisco Police Commission  
1245 Third Street, Sixth Floor  
San Francisco, CA 94158

**Re: Police Department Brief**

Dear Members of the SB 1421 Working Group:

Below please find the San Francisco Police Department's ("SFPD") suggestions and concerns regarding the SB 1421 protocols.

**I. A RECORD IS ONLY SUSCEPTIBLE TO RELEASE FOLLOWING AN ADMINISTRATIVE APPEAL**

Penal Code section 832.7 provides that records of cases involving sustained findings of sexual assault or dishonesty are no longer confidential. Penal Code section 832.8(b) defines the meaning of "sustained" for purposes of section 832.7:

"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 Section 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.

**A. The Statute Is Unambiguous**

When interpreting the meaning of a statute, "we must look to the statute's words and give them their usual and ordinary meaning."<sup>1</sup> "The statute's plain meaning controls . . . unless its words are ambiguous."<sup>2</sup> The plain language of the statute is susceptible to only one reasonable interpretation: a finding is only sustained following a "final determination" which must be made by the appropriate party *following* "an opportunity" for an administrative appeal.

<sup>1</sup> *DeForte v. Up-Right, Inc.*, 2 Cal. 4th 593, 601 (1992).

<sup>2</sup> *People v. Arias*, 45 Cal. 4th 169, 177 (2008).

A final determination cannot logically be made *prior* to holding an administrative appeal—where an officer seeks one—because if a matter is pending the administrative appeal process it cannot by its very nature be “final.” When something is “final” it is “concluded.”<sup>3</sup> In the litigation context a judgment is only “final” when it “terminates the litigation between the parties and leaves nothing in the nature of judicial action to be done . . . .”<sup>4</sup> Where an officer chooses to seek an appeal from a disciplinary recommendation that matter is not “concluded” as there continues to be administrative litigation between the parties.

Further illustrating the point is the Legislature’s use of the preposition “following.” In interpreting statutes, “we generally must ‘accord significance . . . to every word, phrase, and sentence in pursuance of the legislative purpose,’ and . . . ‘a construction making some words surplusage is to be avoided.’”<sup>5</sup> The Legislature could only have meant the word “following” to mean that a matter can only be sustained *after* an officer exhausted the administrative appeal process. Any other construction would render this word meaningless, for what possible meaning could “following” have if the records could be released *before* the officer had an opportunity to hear his appeal?

SFPD does not believe that “following” means subsequent to the triggering of an officer’s right to request an appeal. This interpretation effectively writes the entire phrase “following . . . an opportunity for administrative appeal” out of the statute. If the law were intended to mean that the records could be released when a “sustained” finding was made following an investigation *but before* an administrative appeal was held, the Legislature would have and could have written the statute as: “Sustained means a final determination . . . following an investigation.” We do not have the power “to rewrite the statute.”<sup>6</sup>

#### **B. Releasing Records Prior to An Administrative Appeal Would Lead to Absurd Results**

Any interpretation that a record can be sustained *prior* to an administrative appeal would lead to absurd results. “Interpretations that lead to absurd results . . . are to be avoided.”<sup>7</sup> Contriving the statute to mean that a sustained finding could occur before an administrative appeal means that an applicable record could be publicly released prior to said appeal. If an officer were to later win that appeal, then the “final determination” of the matter would be *not sustained* (or something less than sustained). Despite this, the record would have been publicly released—an act that cannot be undone—in violation of the statute’s requirement that only *sustained* matters are released.

<sup>3</sup> “Final,” Black’s Law Dictionary (11th Ed. 2019).

<sup>4</sup> *Ramon v. Aerospace Corp.*, 50 Cal. App. 4th 1233, 1237-38 (1996).

<sup>5</sup> *People v. Valencia*, 3 Cal. 5th 347, 357 (2017) (citations); also *Williams v. Superior Court*, 5 Cal. 4th 337, 357 (1993) (“An interpretation that renders statutory language a nullity is obviously to be avoided.”).

<sup>6</sup> *California Teachers Ass’n v. Governing Bd. Of Rialto Unified School Dist.*, 14 Cal. 4th 627, 633 (1997).

<sup>7</sup> *Tuolumne Jobs & Small Business Alliance v. Superior Court*, 59 Cal. 4th 1029, 1037 (2014).

This interpretation is also absurd because it frustrates the Legislature's obvious intent. "We must also consider 'the object to be achieved and the evil to be prevented by the legislation.'"<sup>8</sup> Clearly, the Legislature intended that certain classes of misconduct should no longer be confidential. However, as a procedural safeguard and recognizing the rights peace officers are owed under Government Code section 3304, the Legislature specifically defined "sustained" as a matter of law as a final determination *following* an opportunity for administrative appeal. There is no purpose in referencing the "opportunity" for an administrative appeal but for the assumption that the records would be released following the conclusion of said appeal (where the officer pursues one).

## II. THE DPA CANNOT SUSTAIN FINDINGS BY LAW

The DPA cannot "sustain" findings insofar as Penal Code section 832.8(b) is concerned because the DPA does not possess the power to make a final determination. As noted in Penal Code section 832.8(b), 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 . . ."<sup>9</sup> Under the rules of the City and County of San Francisco, DPA does not have the power to make a "final determination" because that power is vested in the Police Commission.

Under Government Code section 3304(b) "[n]o punitive action . . . shall be undertaken by any public agency against any public safety officer . . . without providing the public safety officer with an opportunity for administrative appeal." "Section 3304 'does not specify how the appeal process is to be implemented'; instead, '[t]he details of administrative appeal . . . are left to be formulated by the local agency."<sup>10</sup> This permits local agencies to craft different administrative appeal processes, wherein the power to make a final determination is vested in different parties. Some agencies place this power in arbitrators, others in city managers, still others in personnel boards.

Here, the City Charter specifically vests the power to make a final determination in the Police Commission. As noted in section A8.343 of the Charter of the City and County of San Francisco:

Members of the uniformed ranks of the fire or the police department guilty of any offense or violation of the rules and regulations of their respective departments, shall be liable to be punished . . . after trial and hearing by the commissioners of their respective departments; provided, however, that the chief of each respective department for disciplinary purposes may suspend such member for a period not to exceed 10 days. Any such member so suspended shall have the right

<sup>8</sup> *Marweich v. Superior Court*, 21 Cal. 4th 272, 276 (1999) (citations).

<sup>9</sup> Emphasis added.

<sup>10</sup> *Morgado v. City and County of San Francisco*, 13 Cal. App. 5th 1, 7 (2017) (citations).

to appeal such suspension to the fire commission or to the police commission . . . and have a trial and hearing on such suspension.

Regardless of the discipline sought, it is the Police Commission—to the exclusion of any other entity—who makes a final determination (assuming the officer exercises their appeal from Chief's level discipline).

DPA never has the power to make a *final* determination as to whether a particular matter should be sustained. Rather, DPA makes an *initial* determination and then may refer that matter to the Police Commission or the Chief of Police depending upon the severity of the disciplinary recommendation. However, this determination is truly a quasi-prosecutorial decision. The ultimate power to make a final determination lies solely with the Commission, because the DPA never sits in a position to decide the merits during an appeal.

It is anticipated that some may argue that DPA makes a final determination at the conclusion of its investigation due to section 832.8(b)'s reference to "investigatory agency's." This analysis fails to recognize the "as applicable" language. The statute, recognizing that local agencies have disparate disciplinary rules, lists a series of possible parties who could make a final determination "as applicable" under those rules. Under the rules here applicable, however, DPA never makes a final determination because the Charter provides the Police Commission with that power.

### III. OFF-DUTY "USES OF FORCE" ARE NOT SUBJECT TO RELEASE

While off-duty conduct that falls within a specified category is subject to release, a nuance in the law is not highlighted here. Under certain circumstances, an "off-duty" use of force does not qualify as a use of force "by a peace officer" and is therefore not subject to release.

Penal Code section 832.7(b)(1)(A)(ii) identifies "an incident in which the use of by a peace officer . . . against a person [resulting] in death, or in great bodily injury," is subject to release. It does not follow that every time an off-duty officer engages in a use of force that it necessarily is a "use of force by a peace officer" because officers can act in a private capacity.

It is true that peace officers can generally exercise their authority at all times anywhere within the State of California.<sup>11</sup> However, it does not follow that when a peace officer is acting in a fully private capacity that they are acting as "peace officers." For example: "Peace officers who work as private security guards pursuant to the conditions laid out in [Penal Code section 70], have the authority and protection given peace officers in their usual, public work. *Otherwise, they do not.*"<sup>12</sup> In a 1986 opinion, the Attorney General noted that peace officers may engage in off-duty employment, even in civilian clothes or in a private uniform. "[H]owever, the peace officer so

<sup>11</sup> Pen. Code § 830.1.

<sup>12</sup> *Melendez v. City of Los Angeles*, 63 Cal. App. 4th 1, 13 (1998) (citing

engaged acts only as a *private person* and not as a public officer . . . .<sup>13</sup> Thus, California law recognizes that while peace officers can exercise their authority at any time, they are not always acting as peace officers.

It follows that a force incident that occurs off-duty does not necessarily fall within the category identified in Penal Code section 832.7(b)(1)(A)(ii). Imagine an officer is off-duty at a bar. Another patron attacks the officer. The officer defends themselves by punching the patron. The punch results in great bodily injury. At no point, does the officer identify themselves as a peace officer, attempt to arrest the patron, or otherwise exercise a peace officer power. This is a use of force by a private person—not a use of force by a peace officer.

SFPD encourages the Police Commission to adopt standards that ensure that only off-duty uses of force made by a peace officer are subject to release.

#### IV. THE COMMISSION SHOULD ESTABLISH STANDARDS FOR GREAT BODILY INJURY

The Police Commission should establish some greater guidelines for what constitutes “great bodily injury” (“GBI”). As is, the standard is so broad and amorphous that nearly any use of force could be found to involve GBI. Additionally, we could end up in a situation where the Police Commission, the Police Department, and DPA frequently come to different conclusions about what constitutes GBI.

California law provides broad guidelines for what constitutes GBI. It is a “significant or substantial physical injury.”<sup>14</sup> The injury must be distinguished from “trivial or insignificant injury or moderate harm.”<sup>15</sup> GBI must be a “substantial injury beyond that inherent in the offense.”<sup>16</sup> However, beyond these broad guidelines, what constitutes GBI is largely left to the trier of fact. “Whether a victim has suffered physical harm amounting to [GBI] is not a question of law for the court but a factual inquiry to be resolved by the jury.”<sup>17</sup>

“A fine line can divide an injury from being insignificant or substantial from an injury that does not quite meet the description.”<sup>18</sup> Some examples of cases where GBI was found include: (1) contusion, swelling, severe discoloration, and the look of anguish on a child’s face couple with pain from casual touching of shoulder;<sup>19</sup> (2) a black eye, loose teeth, and bleeding about the face;<sup>20</sup> and (3) injury to eye that “was ‘completely black, blue, purple, completely swollen shut’ and ‘three to four times the size of a normal eye.’”<sup>21</sup>

<sup>13</sup> 69 Ops. Cal. Atty. Gen. 119 (Van De Kamp 1986) (*emphasis added*).

<sup>14</sup> Penal Code section 12022.7(f).

<sup>15</sup> *People v. Miller*, 18 Cal. 3d 873, 883 (1977).

<sup>16</sup> *People v. Escobar*, 3 Cal. 4th 740, 746 (1992).

<sup>17</sup> *People v. Cruz*, 45 Cal. 4th 58, 64 (2008).

<sup>18</sup> *People v. Jaramillo*, 98 Cal. App. 3d 830, 836 (1979).

<sup>19</sup> *Id.*

<sup>20</sup> *People v. James*, 133 Cal. App. 2d 478, 479 (1955).

<sup>21</sup> *People v. Hunt*, 213 Cal. App. 3d 1508, 1520 (1989).

In contrast, courts noted GBI was not found where: (1) the victim showed only "redness on her chest and back" as a result of being choked;<sup>22</sup> and (2) where the victim suffered a minor laceration ("a little stab") from a knife attack.<sup>23</sup>

We suggest that the working group and Police Commission collaborate to attempt to create additional guidelines and examples of common sorts of injuries that would constitute GBI. This would help create uniformity among the parties and avoid situations where records are released by one entity but not another.

## V. PRIORITY OF RELEASE ISSUES

SFPD suggests the Commission reconsider prioritizing records relating to requests from defense attorneys. SFPD expects to have voluminous requests for records, specifically from defense attorneys. Given SFPD's operational realities, a chronic backlog of cases is likely to occur. Should defense attorneys be given top priority, this will likely result in SFPD being unable to timely respond to non-defense attorney requests. This appears to frustrate the purpose of SB 1421 (and the Public Record Act in general), as parties who have a mechanism for obtaining recordings—defense attorneys—are being prioritized over the general public and the press—who have no such alternative.

SFPD recognizes the importance of defense attorneys being able to vigorously defend their clients and, in turn, recognizes the importance of making available records to them where appropriate. Here, however, there is already a legal mechanism in place for defense attorneys to obtain exculpatory evidence: the *Pitchess/Brady* process.<sup>24</sup> SFPD is aware that where courts determine evidence should be released, they generally only order the release of "the name, address, and phone number of any prior complainants and witnesses . . ."<sup>25</sup> It is understandable that defense attorneys want access to greater records given the law change.

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<sup>22</sup> *People v. Covino*, 100 Cal. App. 3d 660, 664 (1980).

<sup>23</sup> *People v. Martinez*, 171 Cal. App. 3d 727, 735 (1985).

<sup>24</sup> Evid. Code §§ 1043-1046.

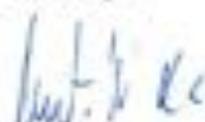
<sup>25</sup> *City of Santa Cruz v. Municipal Court*, 49 Cal. 3d 74, 84 (1989).

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SFPD suggests, however, that the Commission give priority only to defense attorney requests following the *Pitchess/Brady* process. This will allow SFPD to provide records to defense attorneys where there is focused likelihood of discovering responsive records (the categories of records subject to release under SB 1421 are narrower than under *Pitchess*). Additionally, this would focus on prioritizing records that would stand a greater likelihood of admissibility in court, as there is no guarantee that evidence obtained through a public records request will be admitted by the presiding judge. By filtering the prioritization through the *Pitchess/Brady* process, SFPD hopes to better handle its workload to the satisfaction of the greatest amount of parties.

Sincerely,

Handwritten signature in blue ink, appearing to read "Bob Moser".

**BOB MOSER**  
Assistant Chief  
Administration Bureau