

Procedure for Responding to Public Records Act Requests for Certain Peace Officer Personnel Records

As you know, Penal Code section 832.7 has long made most peace officer personnel records confidential and exempt from disclosure under the California Public Records Act ("CPRA"). Amendments to this section, which became effective January 1, 2019, now require disclosure of certain peace officer personnel records in response to requests under the CPRA. This memorandum sets forth the policy for both the San Francisco Police Department ("SFPD") and Department of Police Accountability ("DPA") on these new disclosure requirements in order to set consistency between the SFPD and DPA collectively referred herein together and separately as, "department" in releasing documents.

I. Disclosable Peace Officer Personnel Records

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

- Records relating to: the report, investigation, or findings regarding an officer's discharge of a firearm at a person;
- 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;
- Records relating to: a sustained finding that an officer engaged in sexual assault involving a member of the public; and
- 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..

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

But disclosure of these records has limits. There are rules regarding redaction, delays in producing the records, and procedures governing their production. These rules are discussed below.

II. Redactions

A. Required redactions – General

When disclosing the records identified above, the department must redact the following information:

- 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;

- Information the redaction of which is necessary to preserve the anonymity of complainants and witnesses;
- Confidential medical, financial, or other information, where (1) disclosure is prohibited by federal law, or (2) the Chief or his or her designee and the DPA Director or his or her designee can demonstrate that disclosure would cause an unwarranted invasion of privacy that clearly outweighs the strong public interest that the Legislature found supports the disclosure of records about misconduct and serious use of force by peace officers; and
- 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 any person.

Cal. Penal Code § 832.7(b)(1)(5)(A)(B)(C)(D).

In the event that SFPD and DPA have identified potentially responsive records to a public records request for disclosure of SB 1421 documents, the departments shall follow the procedures in Section VI. Departments Coordination.

B. Required redactions – investigation or incident involving multiple officers

In addition to the above redactions, if an investigation or incident involves multiple officers, the department must redact the following information:

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

Cal. Penal Code § 832.7(b)(1)(4).

C. Discretionary redaction

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

III. Delayed Production of Records

The department 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:

- 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 department 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).
- 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 department 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 department must provide in writing to the requester, the specific basis for the department's determination that it has reason to believe that disclosure will interfere with the criminal investigation of the officer who used force, or of someone other than the officer who used force. In addition, this writing must include the estimated date for disclosure of the withheld information. In any event, the department must provide the information when the specific basis for withholding is resolved, and in no case later than 18 months following the use of force whichever occurs sooner. Cal. Penal Code § 832.7(b)(1)(7)(A)(ii).

But, where the criminal investigation is of someone other than the officer who used the force, the department may delay disclosure beyond the beyond the 18-month limit if extraordinary circumstances warrant continued delay due to the ongoing criminal investigation. In invoking this exception to the 18-month rule the department 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 department must release and, when circumstances subsequently require, continue to release, all information subject to disclosure where disclosure would no longer cause substantial prejudice, including any documents that have otherwise become available. Cal. Penal Code § 832.7(b)(1)(7)(iii).

B. Delayed disclosure after criminal charges have been filed

If criminal charges are filed related to the incident in which force was used, the

department may delay disclosure of records or information until a verdict on those charges is returned at trial or, if a plea of guilty or no contest is entered, the time to withdraw the plea pursuant to Cal. Penal Code Section 1018 has expired. Cal. Penal Code § 832.7(b)(1)(7)(B).

C. Delayed disclosure during an administrative investigation.

The department may withhold disclosure of records or information until the department determines 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).

IV. Threat Assessment of the Officer Prior to Disclosure

Option 1:

Before any disclosure of documents, the department must:

- Notify the subject officer regarding the request for that officer's records; SFPD must conduct a threat assessment where there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the police officer or another person.

Option 2:

Before any disclosure of documents, the department must:

SFPD must conduct a threat assessment where there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the police officer or another person.

V. Other Restrictions on Disclosure

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

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

VI. Departments Coordination

In the event that SFPD and DPA have identified potentially responsive records to a public records request for disclosure of SB 1421 documents, the departments shall periodically meet and discuss coordinating the release of records. To the maximum extent as possible, the departments shall ensure responses to public records requests are consistent between departments. If there is disagreement between the departments with respect to a legal issue, the departments will seek the advice of the City Attorney's Office and if necessary bring the dispute before the Commission for resolution.

VII. Legal Authority

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

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

Senate Bill No. 1421

CHAPTER 988

An act to amend Sections 832.7 and 832.8 of the Penal Code, relating to peace officer records.

[Approved by Governor September 30, 2018. Filed with
Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1421, Skinner. Peace officers: release of records.

The California Public Records Act requires a state or local agency, as defined, to make public records available for inspection, subject to certain exceptions. Existing law requires any peace officer or custodial officer personnel records, as defined, and any records maintained by any state or local agency relating to complaints against peace officers and custodial officers, or any information obtained from these records, to be confidential and prohibits the disclosure of those records in any criminal or civil proceeding, except by discovery. Existing law describes exceptions to this requirement for investigations or proceedings concerning the conduct of peace officers or custodial officers, and for an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office.

This bill would require, notwithstanding any other law, certain peace officer or custodial officer personnel records and records relating to specified incidents, complaints, and investigations involving peace officers and custodial officers to be made available for public inspection pursuant to the California Public Records Act. The bill would define the scope of disclosable records. The bill would require records disclosed pursuant to this provision to be redacted only to remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace officers and custodial officers, to preserve the anonymity of complainants and witnesses, or to protect confidential medical, financial, or other information in which disclosure would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct by peace officers and custodial officers, or where there is a specific, particularized reason to believe that disclosure would pose a significant danger to the physical safety of the peace officer, custodial officer, or others. Additionally the bill would authorize redaction where, on the facts of the particular case, the public interest served by nondisclosure clearly outweighs the public interest served by disclosure. The bill would allow the delay of disclosure, as specified, for records relating to an open investigation or court proceeding, subject to certain limitations.

The California Constitution requires local agencies, for the purpose of ensuring public access to the meetings of public bodies and the writings of public officials and agencies, to comply with a statutory enactment that amends or enacts laws relating to public records or open meetings and contains findings demonstrating that the enactment furthers the constitutional requirements relating to this purpose.

This bill would make legislative findings to that effect.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) Peace officers help to provide one of our state's most fundamental government services. To empower peace officers to fulfill their mission, the people of California vest them with extraordinary authority — the powers to detain, search, arrest, and use deadly force. Our society depends on peace officers' faithful exercise of that authority. Misuse of that authority can lead to grave constitutional violations, harms to liberty and the inherent sanctity of human life, as well as significant public unrest.

(b) 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. Concealing crucial public safety matters such as officer violations of civilians' rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety.

SEC. 2. Section 832.7 of the Penal Code is amended to read:

832.7. (a) Except as provided in subdivision (b), the personnel records of peace officers and custodial officers and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office.

(b) (1) Notwithstanding subdivision (a), subdivision (f) of Section 6254 of the Government Code, or any other law, the following peace officer or custodial officer personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act (Chapter 3.5

(commencing with Section 6250) of Division 7 of Title 1 of the Government Code):

(A) A record relating to the report, investigation, or findings of any of the following:

(i) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.

(ii) 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.

(B) (i) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.

(ii) As used in this subparagraph, "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.

(iii) As used in this subparagraph, "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.

(C) Any record 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 or custodial 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 or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

(2) Records that shall be released pursuant to this subdivision 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.

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

(4) If an investigation or incident involves multiple officers, information about allegations of misconduct by, or the analysis or disposition of an investigation of, an officer shall not be released pursuant to subparagraph (B) or (C) of paragraph (1), unless it relates to a sustained finding against that officer. However, factual information about that action of an officer during an incident, or the statements of an officer about an incident, shall be released if they are relevant to a sustained finding against another officer that is subject to release pursuant to subparagraph (B) or (C) of paragraph (1).

(5) An agency shall redact a record disclosed pursuant to this section only for any of the following purposes:

(A) To remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace and custodial officers.

(B) To preserve the anonymity of complainants and witnesses.

(C) To protect confidential medical, financial, or other information of which disclosure 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 and custodial officers.

(D) Where there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer, custodial officer, or another person.

(6) Notwithstanding paragraph (5), an agency may redact a record disclosed pursuant to this section, including personal identifying information, where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information.

(7) An agency may withhold a record of an incident described in subparagraph (A) of paragraph (1) that is the subject of an active criminal or administrative investigation, in accordance with any of the following:

(A) (i) During an active criminal investigation, disclosure may be delayed for up to 60 days from the date the use of force occurred or until the district attorney determines whether to file criminal charges related to the use of force, whichever occurs sooner. If an agency delays disclosure pursuant to this clause, the agency shall provide, in writing, the specific basis for the agency's determination that the interest in delaying disclosure clearly outweighs the public interest in disclosure. This writing shall include the estimated date for disclosure of the withheld information.

(ii) After 60 days from the use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against an officer who used the force. If an agency delays disclosure pursuant to this clause, the agency shall, at 180-day intervals as necessary, provide, in writing, the specific basis for the agency's determination that disclosure could reasonably be expected to interfere with a criminal enforcement proceeding. The writing shall include the estimated date for the disclosure

of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner.

(iii) After 60 days from the use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against someone other than the officer who used the force. If an agency delays disclosure under this clause, the agency shall, at 180-day intervals, provide, in writing, the specific basis why disclosure could reasonably be expected to interfere with a criminal enforcement proceeding, and shall provide an estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner, unless extraordinary circumstances warrant continued delay due to the ongoing criminal investigation or proceeding. In that case, the agency must show by clear and convincing evidence that the interest in preventing prejudice to the active and ongoing criminal investigation or proceeding outweighs the public interest in prompt disclosure of records about use of serious force by peace officers and custodial officers. The agency shall release all information subject to disclosure that does not cause substantial prejudice, including any documents that have otherwise become available.

(iv) In an action to compel disclosure brought pursuant to Section 6258 of the Government Code, an agency may justify delay by filing an application to seal the basis for withholding, in accordance with Rule 2.550 of the California Rules of Court, or any successor rule thereto, if disclosure of the written basis itself would impact a privilege or compromise a pending investigation.

(B) If criminal charges are filed related to the incident in which force was used, the agency may delay the 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 Section 1018.

(C) During an administrative investigation into an incident described in subparagraph (A) of paragraph (1), the agency may delay the disclosure of records or information until the investigating agency determines whether the use of force violated a law or agency policy, but no longer than 180 days after the date of the employing agency's discovery of the use of force, or allegation of use of force, by a person authorized to initiate an investigation, or 30 days after the close of any criminal investigation related to the peace officer or custodial officer's use of force, whichever is later.

(8) A record of a civilian complaint, or the investigations, findings, or dispositions of that complaint, shall not be released pursuant to this section if the complaint is frivolous, as defined in Section 128.5 of the Code of Civil Procedure, or if the complaint is unfounded.

(c) Notwithstanding subdivisions (a) and (b), a department or agency shall release to the complaining party a copy of his or her own statements at the time the complaint is filed.

(d) Notwithstanding subdivisions (a) and (b), a department or agency that employs peace or custodial officers may disseminate data regarding the number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved.

(e) Notwithstanding subdivisions (a) and (b), a department or agency that employs peace or custodial officers may release factual information concerning a disciplinary investigation if the officer who is the subject of the disciplinary investigation, or the officer's agent or representative, publicly makes a statement he or she knows to be false concerning the investigation or the imposition of disciplinary action. Information may not be disclosed by the peace or custodial officer's employer unless the false statement was published by an established medium of communication, such as television, radio, or a newspaper. Disclosure of factual information by the employing agency pursuant to this subdivision is limited to facts contained in the officer's personnel file concerning the disciplinary investigation or imposition of disciplinary action that specifically refute the false statements made public by the peace or custodial officer or his or her agent or representative.

(f) (1) The department or agency shall provide written notification to the complaining party of the disposition of the complaint within 30 days of the disposition.

(2) The notification described in this subdivision shall not be conclusive or binding or admissible as evidence in any separate or subsequent action or proceeding brought before an arbitrator, court, or judge of this state or the United States.

(g) This section does not affect the discovery or disclosure of information contained in a peace or custodial officer's personnel file pursuant to Section 1043 of the Evidence Code.

(h) This section does not supersede or affect the criminal discovery process outlined in Chapter 10 (commencing with Section 1054) of Title 6 of Part 2, or the admissibility of personnel records pursuant to subdivision (a), which codifies the court decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

(i) Nothing in this chapter is intended to limit the public's right of access as provided for in *Long Beach Police Officers Association v. City of Long Beach* (2014) 59 Cal.4th 59.

SEC. 3. Section 832.8 of the Penal Code is amended to read:

832.8. As used in Section 832.7, the following words or phrases have the following meanings:

(a) "Personnel records" means any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following:

(1) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.

(2) Medical history.

(3) Election of employee benefits.

(4) Employee advancement, appraisal, or discipline.

(5) 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.

(6) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.

(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 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.

(c) "Unfounded" means that an investigation clearly establishes that the allegation is not true.

SEC. 4. The Legislature finds and declares that Section 2 of this act, which amends Section 832.7 of the Penal Code, furthers, within the meaning of paragraph (7) of subdivision (b) of Section 3 of Article I of the California Constitution, the purposes of that constitutional section as it relates to the right of public access to the meetings of local public bodies or the writings of local public officials and local agencies. Pursuant to paragraph (7) of subdivision (b) of Section 3 of Article I of the California Constitution, the Legislature makes the following findings:

The public has a strong, compelling interest in law enforcement transparency because it is essential to having a just and democratic society.

SEC. 5. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district under this act would result from a legislative mandate that is within the scope of paragraph (7) of subdivision (b) of Section 3 of Article I of the California Constitution.