

Minutes from the July 10, 2019 SB 1421 Working Group meeting

The meeting was held at the Public Safety Building, 1245 3rd Street, Room 1025, San Francisco.

Meeting called to order at 1340 hours by Commission President Hirsch:

Item #1 Roll Call:

In attendance were: Commissioner Robert Hirsch, Commissioner Thomas Mazzucco, Commissioner Cindy Elias, Assistant Chief Robert Moser, Commander Pete Walsh, Lt. Kathryn Waaland, Lt. Andy Cox, Sgt. Maura Pengel, Director Susan Merritt, Director David Stevenson, Monique Alonso for the POA, Sgt. Brian Knueker for the APOA, Sgt. Lyn Reilly for Pride Alliance, Sarah Hawkins for the DPA, Kathleen Gunerante for the ACLU, Nikesh Patel from the DA's Office (1347 hrs.), Brian Cox from the PD's Office, Sandra Fletcher representing the public, and Evan Sernoffsky representing the media. There was a quorum.

Commissioner Hirsch made opening remarks about starting the working group to develop standard protocols for the Department, Commission and the DPA to use when responding to records requests related to SB 1421/832.7. He thanked everyone for attending. There was going to be an item regarding SB 1421 on the Police Commission July 10th agenda, but it was taken off calendar until the working group has more opportunities to meet. The Commission will approve a final draft that all three agencies will use. The Commission will listen to all suggestions, but not all suggestions will be included in the final Protocols.

Commissioner Mazzucco thanked everyone for attending. The 3 agencies will follow the law. He addressed accusations from people who spoke at previous Commission meetings that the agencies were taking their time in complying with the requests. These are voluminous requests and need to be prioritized. Priority should be given to someone who is in custody. He feels it is important that officers be notified, and there is some opposition to that. There is a requirement that agencies conduct a threat assessment prior to the release of the records, and give officers an opportunity to notify the agencies of potential threats. This does not mean that records will not be released.

Commissioner Elias welcomed everyone to the meeting and acknowledged there is frustration with the timeliness of responses. The goal is for the working groups to go through the Protocols and come up with a final document that will help streamline responses for the 3 agencies.

Item #2 Introductions:

Working group members introduced themselves and what agency they represented

Item #3 Review of Sunshine Ordinance and Public Records laws as they apply to committees created by a Charter Commission:

DCA Alicia Cabrera reviewed the Sunshine and Public Records laws and noted:

- All communications, notes and any work product regarding this working group are subject to release, whether or not they were captured on personal electronic devices.
- The Good Government Guide is on the City Attorney's website and is a good resource.
- If there is a Public Records Request, members of the group will have to turn over all correspondence to comply with the request. If a working group member asserts they have turned over all their documents or if they have no records, they will have to sign a declaration under penalty of perjury that you have turned over all materials or you have no material.
- Many of the members of the working group are attorneys. They cannot assert attorney client privilege or attorney work product if their work is related to this working group.

There was no public comment.

Item #4 1421 Protocols:

Commissioner Elias started with each page and moved forward with comments for each page:

Page 1:

- Commissioner Elias mentioned that Section A and B on page 1 are directly from the statute.
- Brian Cox: grammatical error in the first paragraph. Also thought that the citation in section 1. B. 1. where it lists 832.7 (C) may be different than the actual law. Commissioner Elias pointed out that the citation is correct.
- Commissioner Hirsch mentioned the additional section on how requests are handled when they come in needs to be added so the 3 agencies' intake is the same. Commissioner Elias said that document can be reviewed after the draft Protocols.

Page 2:

- Kathleen Gunerante: Personal should be changed to Personnel
- Questions from Commissioner Elias about Section C.1. B-D (on pages 2-3). Rachael Kilshaw said b-d are a result of producing records where there were questions on these topics. B-D are a result of getting advice from the City Attorney's Office regarding the Department's and Commission's questions on the issues.
- Brian Cox asked for the rationale from the CAO behind B-D. DCA Cabrera said the CAO did not write the document and will not discuss advice in public.
- Brian Cox asked why there is a section that goes beyond the plain text of the statute. Need to find out the definition of sustained is.
- Brian Cox discussed that having an opportunity to appeal is what the statute contemplated and not contingent on the officer's employment status. Why does B go beyond what the statute says?

- Commissioner Elias said the original document that she and Commissioner Mazucco drafted only had the statute. Items B-D make it difficult because those things are not in the statute.
- Commissioner Hirsch said he asked Commission staff to draft protocols that included answers to question so the three agencies will handle the issues in the same manner. He does not want to see the 3 agencies having to ask the CAO each time there is a question.
- Commissioner Mazucco mentioned that Commission takes it advice from the CAO. He said the Protocols should address issues that come up. And officers do resign prior to the final imposing of discipline. He asked to table the issue to get advice from the CAO.

Page 3:

- Brian Cox had a question about G. and whether DPA feels once they sustain a case if they consider that a sustained finding and the records are able to be disclosed. Sarah Hawkins said the DPA has not released any records that fall into this item, but they stand behind their work, and believe if they sustain a complaint it is considered a sustained finding for this statute and disclosable. Commissioner Elias agrees with DPA. Commissioner Mazucco asked that the Commission meet with the CAO. Commissioner Mazucco asked that anyone who wants to brief the issues regarding B-G can submit it to the Commission Office by July 24, 2019 and then the group will reconvene to discuss. Commissioner Elias wants to finish the review with the group before bringing the protocols to the full Commission.
- Monique Alonso says the Protocols are helpful. The statute is not helpful for all situations. There needs to be a resource that the people working on the requests can follow.
- Kathleen Gunerante would like to brief the entire Protocols. Thinks that B-D go beyond what the actual statute states. Case law states that if an opportunity to appeal is available for the officer then the case is sustained. The ACLU has received records from other agencies where the officer had a sustained finding but the officer resigned.
- Commissioner Hirsch asked DPA a question: If the DPA sustains a case against an officer, but the officer appeals the case to the Commission, while the appeal is pending does the DPA think that is a sustained finding and would they release the records in that case? Or would they have to wait for the decision from the Commission or the appellate process? Sarah Hawkins said the DPA does consider that sustained and would release the records.
- Commissioner Hirsch has an issue with whether the DPA is the final determination. Commissioner Hirsch asked what happens after the release of records and the Commission reverses the DPA's decision. Brian Cox says the complaint would no longer be sustained. Commissioner Hirsch pointed out that in those cases the material would already have been released.
- Commissioner Elias asked ACLU about the legislative intent regarding the definition of sustained finding. Kathleen Gunerante said the way the statute reads that the DPA would be the final determination.

- Section 2 – Off-Duty Conduct. AC Moser has some issues about off-duty conduct but they may be answered in the following sections, use of force and great bodily injury. If an officer uses force they are placing themselves on duty. It should be use of force in the performance of the officer’s duties.
- Monique Alonso had concerns about off-duty conduct. Some of the statute states “in the performance of their duties” which indicates on-duty conduct. The mention of personnel records means it refers to on-duty conduct. Commissioner Mazzucco asked if the statute would cover if the officer was acting in official capacity while off duty. Commissioner Elias said personnel records can include off-duty conduct.
- Commander Walsh has concerns for officers who are victims of domestic violence or sexual assault and uses force that cause great bodily injury to defend themselves, why would that be disclosable just because the person is an officer. Commissioner Elias mentioned those records could use the exemption to withhold the records because the release does not serve the public interest.
- Kathleen Gunerante said the statute has different sections about personnel and investigative records. Some conduct can occur and be included in investigative and personnel records.
- Commander Elias asks that the briefs include thoughts on off-duty conduct.
- Section 3 Officer’s Discharge at a person. AC Moser asked about on duty suicides and asked if that is covered in this protocol.
- Kathleen Gunerante quoted the statute and said it does not mean suicide because it states “at a person by an officer,” meaning more than one person was involved. Also if you discharge a firearm at a person but strike an animal that would have to be disclosed. Also if an officer discharges a firearm at a person but injures themselves that would have to be disclosed.
- Brian Cox asks why the Protocol did not follow the plain text of the statute – specifically why is “negligently and deliberately” added.
- Commissioners Mazzucco and Elias said suicide can be added as not disclosable.
- Brian Cox asked what it means to have other people present. He asked why the protocols could not use the plain text.
- Monique Alonso said that cleaning a firearm is not a use of force.
- Commissioner Mazzucco said the questions about suicide and off-duty discharges were addressed because of the various scenarios that the Department has seen. Commissioner Mazzucco asked that the issues of suicide and off-duty discharges be included in the briefings.
- Commissioner Mazzucco asked that BSU submit information on noticing officers that records will be released.
- Commissioner Elias stopped the discussion on the protocols and asked that members of the working group submit briefs/letters/memos on the entire document including the intake procedures and submit to the Commission Office in 2 weeks. Then the group will reconvene.

Public Comment:

Question from member of the public: asked if this item will be taken off the Commission calendar for tonight. Commissioner Mazzucco answered that the item will not be on calendar.

Question from member of the public: asked if records will be released while the protocols are being worked on. Commissioner Hirsch said they will be released using the current protocols are finalized. Follow-up question: will requests for people who are in custody be prioritized. Commissioner Elias advised when making a request for an in custody client to make note of that on the request. DPA said they will make an attempt to prioritize requests from people who are in custody.

AC Moser asked that the Department be allowed to explain the process.

Amy Gilbert from ACLU asked about getting an index from the agencies that lists the cases that are being worked on. Commissioner Elias asked that Amy submit an example of the index.

Items #5 and 6 were taken off calendar.

Item #7 Discussion of Production:

Commander Walsh described the process of producing records pursuant to 1421

- There is no 1421 unit
- Legal handles all requests, including 1421, Pitches motions, body camera requests, civil discovery requests, DPA requests, inter-agency requests, other public records requests that do not fall within 1421
- 117,489 requests that need to be researched for the 1421 requests. The Public Defender accounts for over 19,000. This is where prioritization is important. When the PD asks for all officers as of a certain day and attaches the roster with no priority, then the staff works on them in alphabetical order
- There is not data base for great bodily injury and there is no dishonesty code in the Department
- Great bodily injury takes time to locate the record. The Department needs to read each Use of Force report to determine if the report falls within the statute
- Asked for cooperation from the requestors regarding prioritizing and coordinating within the same office
- Have limited staffing and resources
- The Department sends out response letters to keep the requestor updated
- To redact a body worn camera it takes 3-4 times to redact the actual amount of time of the video
- Goal is to place all the released records on the website

Sarah Hawkins described the DPA's process for producing records pursuant to 1421

- Many of the same issues of the Department
- Not trying to stall, trying to get the redactions correct
- Records not stored in anticipation of release
- Everything is hand written and in boxes
- Only 1 person working on these records
- It would be good to have one

Rachael Kilshaw described the Commission's process for producing records pursuant to 1421

- Similar issues to the Department and the DPA
- 4 people in the office setting up the data base systems, spent over 200 hours

Public Comment:

No public comment

Item #8 Items for follow-up discussion regarding SB 1421:

Commissioner Elias asked for briefs by July 24, 2019, and send in dates that are unavailable to meet after July 24th.

Item #9 Adjournment:

Adjourned at 1513 hours.