

## Protocols for Release of SB 1421 and SB 16 Documents

California 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”). Senate Bill 1421 (“SB 1421”) amendments to this section, which became effective January 1, 2019, require disclosure of certain peace officer personnel records in response to CPRA requests. Senate Bill 16 (SB 16), which became effective January 1, 2022, further amended Cal. Penal Code § 832.7 to broaden the categories of disclosable documents. These protocols provide guidance for the types of records and redactions that apply.

### I. Disclosable Peace Officer Personnel Records

#### A. Categories of Disclosable Documents.

The following peace officer personnel records are not confidential and therefore are subject to disclosure under the CPRA. Records relating to:

1. the report, investigation, or findings regarding an officer's discharge of a firearm at a person (“**discharge of a firearm at a person**”);
2. the report, investigation, or findings involving an officer's use of force against a person that results in death or great bodily injury of a person (“**use of force**”);

A sustained finding:

3. involving a complaint that alleges unreasonable or excessive force (“**unreasonable/excessive force**”);
4. an officer failed to intervene against another officer using force that is clearly unreasonable or excess (“**failure to intervene**”);
5. an officer engaged in sexual assault involving a member of the public (“**sexual assault**”);
6. involving dishonesty by an 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 officer, including, but not limited to, any false statements, filing false reports, destruction, falsifying, or concealing of evidence or perjury (“**dishonesty**”);
7. an officer engaged in conduct that includes but is not limited to: verbal statements, writings, online posts, recordings, and gestures, involving prejudice or discrimination against a person on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status (“**discrimination**”); and
8. an officer made an unlawful arrest or conducted an unlawful search (“**unlawful arrest or search**”).

Cal. Penal Code § 832.7 (b)(1)(A)-(E). Disclosure of these records, however, may be subject to certain limitations. These limitations fall under various topics: redaction, delays in producing the records, and procedures governing their production. These limitations are discussed below.

## **B. Types of Records.**

1. **Releasable records.** Under Cal. Penal Code § 832.7(b)(3), the following materials are included within the definition of “record” and must be released if they fall within one of the categories listed above in Section 1A:
  - a) all investigative reports;
  - b) photographic, audio, and video evidence;
  - c) transcripts or recordings of interviews;
  - d) autopsy reports;
  - e) all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take;
  - f) documents setting forth findings or recommended findings; and
  - g) copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action.
  
2. **Personnel Records.** Personnel records are not subject to release without a court order, except as described in these protocols. Cal. Penal Code § 832.7. Cal. Penal Code § 832.8 defines “personnel records” as any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following:
  - a) personal data, including marital status, family members, educational and employment history, home addresses, or similar information;
  - b) medical history;
  - c) election of employee benefits;
  - d) employee advancement, appraisal, or discipline;
  - e) complaints, or investigations of complaints, concerning an event or transaction in which they participated, or which they perceived, and pertaining to the manner in which they performed their duties; and
  - f) any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.

3. **Records from prior investigations.** A record from a separate and prior investigation or assessment of a separate incident shall not be released unless it is independently subject to disclosure pursuant to Cal. Penal Code § 832.7(b)(4).

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

1. **Sustained Findings.** A sustained findings is required to release records relating to unreasonable/excessive force, failure to intervene, sexual assault, dishonesty, discrimination, and unlawful arrest/search categories. However, no sustained finding is required for those categories if the officer resigns or retires. (see *below* C.2). A sustained finding is not required to release records involving discharge of a firearm at a person category, use of force category.
  - a) “Sustained” means a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to Cal. Govt. Code §§ 3304 and 3304.5 that the actions of the peace officer or custodial officer were found to violate law or Department policy. Cal. Penal Code § 832.8.
  - b) The findings are not sustained if the officer files a timely appeal to an Administrative Law Judge.
  - c) The findings are sustained if the officer files a writ in court and challenges the Commission or Administrative Law Judge’s findings.
  - d) A determination of the Department of Police Accountability (“DPA”) to sustain a complaint of police officer misconduct is not a sustained finding for the purposes of Cal. Penal Code §§ 832.7 and 832.8 because the officer does not have the opportunity to pursue an appeal under Cal. Govt. Code §§ 3304 and 3304.5 at that stage of the process.

**2. Officer Retires or Resigns.**

If an officer retires or resigns before the Police Department or the Commission concludes its investigation into the alleged incident, a sustained finding is no longer needed, and the records shall be immediately released. Cal. Penal Code § 832.7(b)(3).

3. **Off-Duty Conduct.** Off-duty conduct may be subject to disclosure, if the off-duty conduct relates to a report, investigation, or findings within a disclosable category of peace officer records. If so, then follow all the other rules outlined herein.
4. **Officer’s Discharge at a person.** This category requires the discharge of a firearm at a person. Cal. Penal Code § 832.7(b)(1)(A)(i).
5. **Use of Force Records.** This category pertains to records relating to the report, investigation, or findings involving an officer’s use of force against a person that results in death or great bodily injury.

- a) “Great bodily injury” means significant or substantial physical injury, not minor or moderate injury. (See Cal. Penal Code, § 12022.7(f); CALCRIM No. 810.) Great bodily injury does not require permanent, prolonged, or protracted bodily damage. (See People v. Cross, 45 Cal.4th 58, 64 (2008).) The aggregation of smaller injuries, such as multiple bruises over various body parts, along with swelling, discoloration, and pain that lasts until the day after the incident can be sufficient to show a great bodily injury. (See People v. Jaramillo, 98 Cal.App.3d 830, 836 (1979).) Great bodily injury must be determined based on the specific facts of the injury, in accordance with the applicable case law.
- b) This category does not require a sustained finding.

6. **Sexual Assault.** This category pertains to any records relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer engaged in sexual assault involving a member of the public. Cal. Penal Code § 832.7(b)(1)(B)(i).

- a) “Sexual assault” means the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or other official favor, or under the color of authority. For purposes of this definition, the propositioning for or commission of any sexual act while on duty is considered a sexual assault. Cal. Penal Code § 832.7(b)(1)(B)(ii).
- b) “Member of the public” means any person not employed by the officer's employing agency and includes any participant in a cadet, explorer, or other youth program affiliated with the agency. Cal. Penal Code § 832.7(b)(1)(B)(iii).

## II. **Redactions**

### **A. Required redactions – General**

When disclosing the records identified above, the San Francisco Police Commission (“Commission”), Police Department, and DPA (collectively, and separately referred to as “Departments”) must redact the following information:

1. Personal data or information, such as home address, telephone number, or identities of family members, other than the names and work-related information of peace officers. Signatures and personal email addresses should be redacted. Cal. Penal Code § 832.7(b)(6)(A).
2. Information which is necessary to preserve the anonymity of whistleblowers, complainants, victims, and witnesses (collectively referred to as “witness”). Cal. Penal Code § 832.7(b)(6)(B).

b) a) Analyze whether the redaction is necessary to preserve anonymity. The

- exemption is about preserving that status of anonymity as opposed to redacting the name of the witness whose name is publicly known. For example, if the witness voluntarily disclosed information to the media or in litigation, redacting their name is probably not necessary to preserve their anonymity. Additionally, even if redaction of a person's name is necessary to preserve their anonymity, the person's statements do not need to be redacted unless the identity of the person can be inferred or deduced from the content of their statements. If the witness is a city employee who is acting within the course and scope of duties, do not redact information identifying the employee unless there is a separate basis for making the redaction. However, if the city employee is a witness who observed or provided information not within the course and scope of their duties, there may be a basis for redacting the information provided that the anonymity element is met. In either scenario, if there is a safety concern then analyze under Section II.A.4.
- c) If you have private employees who were witnesses while working within the course and scope of their duties, analyze whether redactions are necessary to preserve their anonymity.
  - d) While police discipline proceedings are closed to the public (*See Copley Press, Inc. vs. Superior* (2006) 39 Cal. 4th 1272, certain documents relating to these closed disciplinary proceedings are not confidential pursuant to Cal. Penal Code 832.7. If the witness is anonymous, then redact the necessary information to preserve the status of anonymity. If the case was widely reported in the media, then do not redact unless there is a safety concern. If there is a safety concern, then analyze under Section II.A.4.
  - e) Do not redact the names of paid witnesses or experts from transcript proceedings.
3. Confidential medical, financial, or other information of which disclosure is specifically prohibited by federal or state law or would cause an unwarranted invasion of privacy that clearly outweighs the strong public interest in records about possible misconduct and use of force by peace officers. Cal. Penal Code § 832.7(b)(6)(C).
  4. Information as to which there is a specific, articulable, and particularized reason to believe that disclosure would pose a significant danger to the physical safety of a police officer or any person. Cal. Penal Code § 832.7(b)(6)(D).
    - a) To start the threat assessment, the Commission and Police Department shall send a notification to the officer or retired officer whose records may be released, or to any person who is at risk of significant danger from the release, at least 10 business days prior to releasing records.

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

- b) The Police Department's Special Investigation Division ("SID") shall conduct the threat assessment, document their findings, and recommend redactions to the Commission or Departments only if there is a specific, articulable, and particularized reason to conclude that disclosure of the record(s) would pose a significant danger to the physical safety of the officer or another person. Cal. Penal Code § 832.7(b)(6)(D).
  - c) DPA shall coordinate with the Police Department.
  - d) Under no circumstances shall the threat assessment stop the Commission or Departments work with respect to gathering, reviewing, and producing of records. However, prior to releasing the records, the Commission and Departments' staff should confirm with SID whether there is cause to redact records.
5. Information that implicates state-law confidentiality provisions and restrictions on release under the CPRA. Notwithstanding the disclosure requirements pertaining to peace officer records, the Commission and Departments should continue to observe generally applicable state-law confidentiality provisions and restrictions on release under the CPRA and redact records as necessary to protect confidential information protected under those provisions. These include but are not limited to:
- a) Materials protected by the attorney-client privilege, except for factual information provided by the Commission or Departments.
  - b) Confidentiality provisions related to WIC §§ 5328; 5150.
  - c) Autopsy photos that fall under Civil Code § 129.
  - d) Restrictions on the release of criminal history that falls under CLETS or CORI statutes (Cal. Penal §§ 13100;11105).

Whenever a redaction is made, the basis for the redaction shall be documented by citing the basis as outlined in Cal. Penal Code §832.7.

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

In addition to the above redactions, if an investigation or incident involves allegations of wrongdoing against multiple officers for the following categories: sexual assault, dishonesty, discrimination, and unlawful arrest/search, the Commission and the Departments must redact alleged misconduct unless it relates to a sustained finding regarding that officer that is itself subject to disclosure. For example, two officers are alleged to have committed sexual assaults against the same individual and the complaints are investigated

together. One of these complaints is sustained and one is not. Information about the sustained allegation of misconduct should be released. Information about the un-sustained allegation should be redacted from any of the records that will be released, including the identity of the officer alleged to have committed it, except to the extent the information relates to the sustained finding against the other officer. Cal. Penal Code § 832.7(b)(1)(5).

### **C. Discretionary redaction**

Unless otherwise required, the Commission and the Departments may, but are not required to, redact “information, including personal identifying information where, on the facts of the particular case, the public interest served by non-disclosure clearly outweighs the public interest served by disclosure.” Cal. Penal Code § 832.7(b)(7).

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

### **D. SB 1421 Exception from Release**

The Commission and the Departments must not release a record of a civilian complaint, or the investigation, findings, or disposition of that complaint if the the Commission or Departments determine 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)(9).

## **III. Production of Records**

The Commission and the Departments must respond to a public records request promptly and within the prescribed timelines. Cal. Govt. Code § 6253(b); Admin. Code § 67.21(b). Under the CPRA, there are two types of requests - standard requests, and immediate disclosure requests - with different response deadlines.

### **A. Standard Requests**

Unless the requester makes an immediate disclosure request, the Commission and the Departments must respond to a request to inspect or copy records within 10 calendar days. Cal. Govt. Code § 6253(c).

1. The Commission and the Departments may have up to 14 additional calendar days to respond. To invoke such an extension, the Commission or the Departments must inform the requester in writing of the extension within the initial 10-day period, setting forth the reasons for the extension and the date on which a response will be made. Cal. Govt. Code § 6253(c).
2. The types of circumstances permitting the extension are limited to the need for the Commission and the Departments to do one or more of the following:
  - a) search for and collect the requested records from facilities separate from the office processing the request;

- b) search for, collect, and appropriately examine a voluminous amount of separate and distinct records included in a single request;
- c) consult with another department or agency that has a substantial interest in the response to the request; or
- d) as to electronic information, compile data, write programming language or a computer program, or construct a computer report to extract data.

#### **B. Immediate Disclosure Request.**

The Sunshine Ordinance requires a faster response to “immediate disclosure requests” for certain types of documents. The purpose of the immediate disclosure request is to expedite the Departments’ response to a “simple, routine, or otherwise readily answerable request.” Admin. Code 67.25(a). Immediate disclosure requests must be satisfied no later than the close of business the next business day. Admin. Code § 67.25(a). For example, if a category of disclosable documents were previously redacted and produced then it would be appropriate to immediately disclose the same package to another requester the next business day. To determine whether the records sought are subject to the immediate disclosure consult with the City Attorney’s Office.

#### **C. Voluminous Requests.**

For requests the responses to which are time-consuming and voluminous, the Commission and the Departments should provide records on a rolling basis after notifying the requestor. The Commission and the Departments must produce records as soon as reasonably possible on an incremental or “rolling” basis, when so requested. Until the request is fulfilled, the Commission and Departments must provide periodic updates to the requestor and an estimated date when the request will be fulfilled.

#### **D. Duty to Assist the Requester.**

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

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

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

1. Requests from the Public Defender’s Office, defense attorney or impacted family that relate to a pending criminal case, particularly if the individual awaiting trial is

- in custody.
2. Whether the request lists the name(s) of specific officer(s).
  3. Records related to current SFPD officers may be prioritized above records relating to former SFPD officers.
  4. Amount of time the request has been pending.
  5. Burden of fulfilling the request.
  6. Other factors supporting public interest in expedient disclosure.

#### **IV. Delayed Production of Records**

The Departments may delay disclosing records relating to a use of force (either an officer-involved firearm discharge at a person, or any use of force resulting in death or great bodily injury) as follows:

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

Distinct rules, keyed to the date of the use of force, govern delays in production of records during an active criminal investigation:

1. Initial 60-day period during the criminal investigation of the misconduct or use of force. The Departments may delay up to 60 days following the date of misconduct or the use of force, or until the DA files charges, whichever occurs sooner. But the Departments must justify this delay in writing to the requester by demonstrating how the interest in delaying disclosure clearly outweighs the public interest in disclosure. In addition, this written justification must include the estimated date for disclosure of the withheld information. Cal. Penal Code § 832.7(b)(8)(A)(i).
2. Subsequent periods during the criminal investigation of the misconduct or use of force. After the 60-day delay following the date of the misconduct or use of force, the Departments may continue to delay disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal investigation of (a) the officer who engaged in misconduct or used force, or (b) someone other than the officer who used force. Cal. Penal Code § 832.7(b)(8)(A)(ii).

Upon invoking this post-60-day delay, and at subsequent 180-day intervals for each subsequent delay, the Departments must provide in writing to the requester, the specific basis for the Departments' determination that it has reason to believe that disclosure will interfere with the criminal investigation of the officer who engaged in misconduct or used force, or of someone other than the officer who used force. In addition, this writing must include the estimated date for disclosure of the withheld information. In any event, the Departments must provide the information when the specific basis for withholding is resolved, the investigation or proceeding is no longer active, and in no case later than 18 months following the use of force incident, whichever occurs sooner. Cal. Penal Code § 832.7(b)(8)(A)(ii).

But, where the criminal investigation is of someone other than the officer who used the force, the Department may delay disclosure beyond the beyond the 18-month limit if extraordinary circumstances warrant continued delay due to the ongoing criminal investigation. In invoking this exception to the 18-month rule the Departments must demonstrate in writing to the requester by clear and convincing evidence that the interest in preventing prejudice to the active and ongoing criminal investigation outweighs the public interest in prompt disclosure of the records in question. At this point the Departments must release all information subject to disclosure that does not cause substantial prejudice, including any documents that have otherwise become available. Cal. Penal Code § 832.7(b)(8)(iii).

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

If criminal charges are filed related to the incident in which misconduct occurred or force was used, the Departments may delay disclosure of records or information until a verdict on those charges is returned at trial or, if a plea of guilty or no contest is entered, the time to withdraw the plea pursuant to Cal. Penal Code § 1018 has expired. Cal. Penal Code § 832.7(b)(8)(B).

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

The Departments may withhold disclosure of records or information until the Departments determine whether a policy violation occurred, but no longer than 180 days after the date of the discovery of the misconduct or use of force or allegation of the misconduct or 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)(8)(C).

Except to the extent temporary withholding for a longer period is permitted under section IV of this policy, records subject to disclosure shall be provided at the earliest possible time and no later than 45 days from the date of a request for their disclosure. Cal. Penal Code § 832.7(b)(11).

**V. Department Coordination**

The Commission and the Departments have independent obligations to produce documents in their possession in response to CPRA requests. In situations where there are concurrent investigations and the Departments and the Commission have identified potentially responsive records to a public records request for disclosure of SB 1421 documents, the Commission and the Departments may meet and discuss coordinating the release of records for efficiency purposes.

There may be situations where only the Commission or Police Department has the information needed to determine if records should be disclosed, such as whether specific allegations were “sustained.” In those cases, the Commission and the Departments must work together. To the maximum extent possible, the Departments shall ensure redactions to public records requests are consistent amongst each other. However, the Commission expects each Department to exercise its independent judgment for matters that require the exercise of discretion.

If there is disagreement between the Departments or the Commission with respect to a legal issue, the Commission and the Departments will seek the advice of the City Attorney's Office. But where the City Attorney's Office advises that the decision to disclose requires an exercise of judgement, each agency must exercise its own independent discretion.

## **VI. Appeal Process**

In cases where a requestor asks to appeal the Commission or Departments decision regarding the scope of the released records, or the notification of no responsive records, the Commission and Departments shall respond to the requestor in writing and include 1) the explanation for the Commission or Department's original response, and 2) information on how the requestor can file an appeal.

The Sunshine Ordinance provides three administrative appeals processes for a requester to challenge a Department's denial of access to records. If the Department refuses, fails to comply, or incompletely complies with a public records request, the requester may petition (1) the Sunshine Ordinance Task Force, (2) the Supervisor of Records (City Attorney's Office), or (3) in certain cases, the Ethics Commission, for a determination whether the requested record should be disclosed.

## **VII. Legal Authority**

This policy is based on changes in the law effected by SB 1421 and SB 16SB 1421 and SB 16 made substantial changes in Cal. Penal Code §832.7 and Government Code §6254(f).

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