

When cessation of BWC recording is allowed (or mandated), among the police departments of Berkeley, BART, Hayward, Oakland, San Jose, and San Francisco.

All except BPD	When the event giving rise to the activation has concluded (or officer has left the scene).
BPD, HAY	For privacy concerns, generally (privacy concerns outweigh any legitimate law enforcement interest in recording). (BPD 425.8)
	<i>Specific privacy concerns:</i>
SF, HAY, OAK, BPD	-- interviewing sexual assault or child abuse victims (In BPD 425.8(b), discretion to record. In HAY, discretion to deactivate. In SF & OAK, do not activate.)
HAY, OAK, SF	-- hospital/patient confidentiality
BPD	-- conversation bt. person in custody and their attorney, religious advisor, or physician
SJ, BPD	-- conversation bt. officer and person in privileged relationship (spouse, attorney, police peer counselor, labor rep, minister, e.g.)
OAK, SJ, BPD	On a perimeter: and unlikely to have an encounter with a suspect (OAK, SJ)); or direct participation complete and not actively part of investigation (BPD).
SF, HAY, OAK, SJ, BPD	Discussing tactical and/or law enforcement information with other law enforcement personnel. Sometimes modified by "when away from civilian" or when info is "sensitive."
SF, OAK, BPD	When engaging with confidential informant or undercover operative. (BPD 425.8(c) and SF "shall not activate.")
SF, BPD	Where recording would inhibit information gathering efforts from witnesses or community members (SF); When recording would interfere with ability to conduct investigation (BPD).
SF, OAK	On the order of a higher ranking officer.
HAY, BPD	In presence of explosive device. (BPD 425.12)
SJ	Use reasonable judgment in determining when to deactivate.
OAK	At termination of a pursuit and in compliance with other applicable policies.

*Language regarding cessation of BWC recording from BART, Hayward, Oakland, San Francisco, and San Jose Police Department policies.*

**BART Policy 451**

**451.6 AXON CAMERA OPERATING PROCEDURES**

- (b) Once the AXON camera is activated pursuant to Section 451.5 of this policy, it shall remain on until the event giving rise to the activation has reached a conclusion and/or the officer leaves the scene of the event, whichever occurs first. Officers shall record further interaction with suspects, including searching, processing, transporting, and booking. Any exceptions will be documented in the police report and reported to a supervisor. When the officer reasonably believes the event giving rise to the activation is over, he/she may deactivate the AXON camera from the recording mode. If the event giving rise to the activation resumes following the officer's termination of the AXON camera recording the officer shall reactivate their AXON camera.

**HAYWARD Policy 425**

**425.7 REQUIRED ACTIVATION**

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Members shall remain sensitive to the dignity of all individuals being recorded and exercise sound discretion to respect privacy by discontinuing recording whenever it reasonably appears to the member that such privacy may outweigh any legitimate law enforcement interest in recording. Requests by members of the public to stop recording shall be considered using this same criterion. Recording shall resume when privacy is no longer at issue unless the circumstances no longer fit the criteria for recording.

Other than at the conclusion of the contact or investigation, personnel may deactivate in places where there is a reasonable expectation of privacy or in circumstances where the audio recorder or camera may prevent them from obtaining information in relation to an investigation. Instances where personnel may deactivate include, but are not limited to:

- (a) During interviews involving sexual assault victims,
- (b) In the presence of an explosive device,
- (c) Inside hospital emergency rooms and other medical facilities,
- (d) In tactical planning situations;
- (e) While in a police facility.

**OAKLAND Dept. General Order I-15.1**

**II. PDRD [Portable Digital Recording Device] ACTIVATION AND DE-ACTIVATION**

**D. De-activation of the PDRD**

1. Members shall not de-activate their PDRD, when it was activated as required by this policy, until one of the following occurs:
  - a. Their involvement in the citizen contact, arrest or detention has concluded or becomes a hospital guard (see part II, C, 4 above);
  - b. They receive an order from a higher ranking member;
  - c. They are discussing administrative, tactical or law enforcement sensitive information away from the citizen;
  - d. They are at a location where they are not likely to have interaction or a chance encounter with the suspect (e.g. outer perimeter post, traffic control post, etc.);
  - e. The searches requiring activation as enumerated in Part II, A have concluded and the member believes they will have no further interaction with the person;
  - f. They reasonably believe the recording at a hospital may compromise patient confidentiality;
  - g. A pursuit has been terminated and the member performs the required actions, as specified in DGO J-4, or notifies Communications they are in-service; or
  - h. They are interviewing an informant for the purpose of gathering intelligence. At the conclusion of the interview, the PDRD shall be re-activated until no longer required by policy.
  - i. They are meeting with an undercover officer. At the conclusion of the meeting, the PDRD shall be re-activated until no longer required by policy.

After a member de-activates their PDRD, it is their responsibility to ensure they re-activate their PDRD should the circumstances require it.

**E. Discretionary Activation and De-Activation**

Members, when not prohibited from or required to activate their PDRD, may use their own discretion when deciding to activate and de-activate the PDRD.

**SAN FRANCISCO DGO 10.11**

**E. Terminations of Recordings.**

Once the BWC has been activated, members shall continue using the BWC until their involvement in the event has concluded to ensure the integrity of the recording, unless the contact moves into an area restricted by this policy. Members shall deactivate the BWC in the following circumstances:

1. When discussing sensitive tactical or law enforcement information away from the citizen
2. After receiving an order from a higher ranking member
3. When recording at a hospital would compromise patient confidentiality

4. When gathering information from witnesses or community members, and the officer has a reasonable and articulable concern that a BWC would inhibit information gathering efforts

In cases when a member deactivates a BWC, the member shall document the reason(s) for deactivation as outlined in Section III, G, Documentation.

## **SAN JOSE Police Dept. Body Worn Camera Policy**

### **6. When to Deactivate**

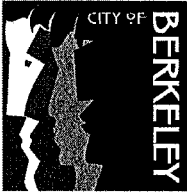
Body-worn camera recordings shall not be intentionally terminated until the conclusion of the encounter, except for tactical or safety reasons, or the encounter no longer holds evidentiary or investigative value.

Anytime the recording is terminated prior to the end of the encounter, the reason(s) should be documented both on the body-worn camera recording before deactivation and in the subsequent police report. If no police report is filed for the recorded encounter, then the reason(s) for the early termination should be recorded on the citation, CAD event or Street Check.

Officers will use reasonable judgment in determining when to deactivate the body-worn camera, such as when the purpose for activation is no longer present. (Example: An officer is assigned to an outer perimeter position for an extended period of time and has no verbal or visual contact with involved parties.) (Example: Officers have secured a prisoner and are completing paperwork outside the presence of the prisoner, unless the prisoner is combative, agitated or otherwise uncooperative.)

Keeping in mind that static situations may change rapidly, officers need to recognize it may be necessary to re-activate their body-worn camera unexpectedly. (Example: Officers are assigned to an outer perimeter position with their cameras turned off, and a suspect exits the residence to surrender or run from police.)

Officers shall deactivate the body-worn camera when engaged in conversations with individuals with whom the officer is in a privileged relationship (e.g. spouse, attorney, police peer counselor, labor representative, minister, etc.) Officers will verbally indicate why the body-worn camera is being deactivated and will reactivate the body-worn camera at the conclusion of the private conversation if the need for recording the police encounter or investigation still exists.



Police Review Commission (PRC)

February 27, 2019

To: Farimah Brown, City Attorney  
From: Katherine J. Lee, Police Review Commission Officer  
Re: Inquiry from PRC Regarding Documents and other Records Held by BPD that the PRC is Entitled to Obtain

The Police Review Commission, in performing its oversight of the Berkeley Police Department as described in its enabling Ordinance (Ord. No. 4644-N.S.), often needs access to information from the BPD. The PRC is frequently frustrated, however, when the BPD is unresponsive to requests for documents and other records that are necessary to its work. This lack of responsiveness and, in some cases, the denial of requests for documents from the BPD, or, occasionally, from your office, have resulted in a lack of clarity over what the PRC may obtain from the BPD in fulfilling its mandated oversight function.

Therefore, the Commission unanimously voted at its February 13, 2019 meeting to ask that you identify all BPD documents and other records the PRC is entitled to receive, by ordinance, statute, or otherwise. A non-exclusive list of such documents and records would include, for example:

1. Internal documents and memoranda relating to the formulation of General Orders and Lexipol policies.
2. Data and internal documentation relating to police equity and racial discrepancies in police stops and arrests.
3. Data and internal documentation relating to the BPD response to the CPE report of May 2018 and to the PRC report and recommendations in "To Achieve Fairness and Impartiality" from November 2017.
4. Source documents and other information supporting statements contained in After-Action reports.
5. Internal documentation and data used to develop the department's biennial budget proposal, the mid-biennial update, and any other requested adjustments to the budget; by line item and fund.
- 6.

We are aware that General Order R-23 ("Release of Public Records and Information") addresses what certain types of police records may be disclosed to the public and to the PRC. However, the PRC, unlike the general public, is tasked with oversight of BPD policies and procedures, and there is little concrete guidance as to what we can expect access to in the performance of that unique function.

Please note that the impetus for this request is not the newly disclosable records under SB 1421, nor is the Commission asking what the BPD must disclose to the PRC in the course of the PRC's investigation of complaints against individual members of the police department.

Thank you in advance for clarification of these issues, the satisfactory resolution of which is critical to the performance of the PRC mandate.

DRAFT

Memo to Katherine Lee, PRC Officer

February 18, 2015

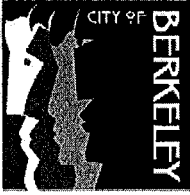
Page 3 Re: Disclosure of Berkeley Police Department Internal Affairs' records to the PRC

For the same reasons cited above, the Chief cannot disclose to the PRC whether he has imposed discipline based on sustained findings of wrongdoing by the PRC, as those records are confidential personnel records under Section 832.7.

cc: Christine Daniel, City Manager  
Dee Williams-Ridley, Deputy City Manager  
Mark Numainville, City Clerk  
Opn. Index II.E.1; II.G.8.a.







## **Police Review Commission**

### **Standing Rules**

**(As of February 14, 2019)**

#### ***A. PURPOSE***

These Standing Rules are established by the Police Review Commission to ensure transparency and efficiency of our operations.

#### ***B. AMENDMENTS AND REVISIONS***

Amendments and revisions to these Standing Rules shall be adopted by a majority vote of the Police Review Commission, except that the Commission may not adopt rules that conflict with the enabling Ordinance, Commissioners' Manual, or Regulations for Handling Complaints Against Members of the Police Department.

#### ***C. AGENDA ITEMS – REGULAR MEETINGS***

1. Individual commissioners shall submit agenda items to the commission secretary by 12:00 noon one week before the meeting date. (This will almost always be a Wednesday.)
2. A commissioner may place only one item on the agenda per meeting, and may not add items to the agenda unless prior agenda items from that commissioner have been cleared. "Cleared" means that the Commission has either completed its consideration of the item, or agreed to move forward with the item by, for instance, forming a subcommittee or considering the issue as a whole commission, in which case the item belongs to the Commission, not the individual commissioner.

#### ***D. COMMUNICATIONS***

Individual commissioners shall submit communications to be included in the agenda packet to the commission secretary by 12:00 noon one week before the meeting date to ensure inclusion in the packet. Communications received after this deadline and before 3:00 p.m. on the meeting day will be distributed in hard copy at the meeting, and may also be distributed to commissioners via email. If communications are received after 3:00 p.m. on the meeting day, the commission secretary will make every effort, but cannot guarantee, to have hard copies available at the meeting.

#### ***E. MEETING PROCEDURES***

1. items shall be introduced by the commission member or staff member who proposed the item. The Chair shall then allow an initial period for discussion by recognizing commissioners in rotation to ensure that each commissioner has the opportunity to speak before a commissioner is allowed to speak again.

Commissioners are allowed a maximum of two minutes to speak each time they are given the floor.

2. After a motion on the item is made and seconded, the Chair will recognize the maker of the motion, and then the seconder, to speak. After that, the Chair will recognize commissioners in rotation, giving each commissioner the opportunity to speak before a commissioner is allowed to speak again. Commissioners are allowed a maximum of one minute to speak each time they are given the floor, and must confine their remarks to the merits of the motion. The Chair may give the maker of the motion an additional minute to speak before putting the matter to a vote.
3. A pending motion may be modified by a "friendly amendment"; that is, by a proposed amendment that is accepted by the maker and seconder of the motion.
4. Action on a motion may be by either voice or general consent. In either case, the Chair shall ask the commission secretary to repeat the motion before the action.
5. Guest speakers who are not on the agenda may address the commission only by general consent, or upon a formal motion.
6. None of these procedural rules shall supersede the procedures set forth in Robert's Rules of Order.

#### *F. PUBLIC COMMENT*

1. The Chair, subject to the consent of the commission, may determine the time limit for each speaker and the total number of speakers.
2. Before an agenda item is heard, the Chair or Vice-Chair may poll members of the public present to determine if a significant number of them wish to speak on a particular agenda item. If so, the Chair or Vice-Chair may move that public comment on that item can be heard just before the item.

#### *G. POLICY COMPLAINTS AND REVIEWS*

1. An inquiry into a policy, when initiated by a civilian filing a policy complaint form, is a "policy complaint."
  - a) The procedures for handling a policy complaint are set forth in Section II.A.4.b. of the Regulations for Handling Complaints Against Members of the Police Department.
  - b) Additionally, a public comment period shall be agendaized immediately preceding consideration of the policy complaint, limited to comments on that complaint. Policy complainants will be allowed to speak for five minutes. Other members of the public will be allowed up to three minutes; the time allotted is subject to the discretion of the Chair, who will consider the number of persons wishing to speak. Commissioners may ask policy complainants brief questions. The BPD will be given an opportunity to respond to the commission.
2. A commission-initiated policy review may commence upon a majority vote of the commissioners.

- a) Commissioners shall then determine how to proceed. Possible actions include, but are not limited to: considering the issue as whole commission, assigning a commissioner to research the issue, asking staff to investigate or research, or establishing a subcommittee. If a subcommittee is created it will seek BPD involvement in its policy review and, upon completing its review, will present its conclusions and recommendations to the full commission.
- b) The full commission may recommend to the BPD, City Manager, or City Council that the BPD adopt a new policy, revise an existing policy, or take no action.

#### *H. REGULAR MEETINGS*

Regular meetings shall be held on the second and fourth Wednesday of the month, except in the months of August, November, and December. The commission shall not meet in August, and shall meet only on one Wednesday of the month in November and December. Exceptions shall be made when a meeting day falls on a religious holiday.

Regular meetings shall commence at 7:00 p.m., and shall be held at the South Berkeley Senior Center and other locations as may be determined by the commission.

#### *I. ELECTIONS*

1. Annual elections for PRC Chair and Vice-Chair will be agendized for the second regular meeting in January and, whenever possible, this item will be agendized as the final item under New Business.
2. The election of the Chair will precede the election of the Vice-Chair, and the following nomination and election process will be followed for each office:
  - a) The presiding Chair declares the nomination process open.
  - b) A commissioner nominates another commissioner or him/herself. A commissioner must be present in order to be nominated.
  - c) The nomination is seconded (the nomination fails if there is no second)
  - d) The presiding Chair declares the nomination process closed, when there are no further nominations.
  - e) Each nominee is allowed two (2) minutes to express their reason for seeking the position. A nominee may decline this opportunity.
  - f) Commissioners pose questions to each candidate.
  - g) The presiding Chair calls for a roll vote and then announces the winner, except in the following circumstances:
    - i. If there is only one nominee for a position, the presiding Chair may seek or move a vote by acclamation.
    - ii. If a tie occurs among nominees, the presiding Chair will conduct a second round of voting, including any additional nominations.

- iii. If a clear winner is still not identified after a second round of voting, the presiding Chair will conduct a coin toss to break the tie and determine a winner. The PRC Secretary will assign "heads" and "tails."
3. The PRC Secretary will record the maker and the second of the nomination motion as well as the total votes and results per office.
4. The outgoing Chair and Vice-Chair will be given the opportunity to make 2-minute departing statements after the election process takes place. The newly-elected Chair and Vice-Chair will assume their positions at the end of the meeting.

*J. APPOINTMENT OF MEMBERS OF THE PUBLIC TO SUBCOMMITTEES*

1. In accordance with the PRC Ordinance, the Chair may appoint members of the public to subcommittees in which they have expressed an interest, subject to approval of the commission. Members of the public seeking to serve on a subcommittee must: a) be residents of the City of Berkeley; and b) present themselves at a commission meeting before or at the time of the appointment and speak on the public record on intent to serve and what they will bring to the subcommittee work and deliberations.
2. Members of the public appointed to subcommittees shall enjoy the same voting rights and privileges on the subcommittee, as that of PRC commissioners appointed to the subcommittee, except that public members may not be selected to be the subcommittee Chair.
3. Commission members must constitute a majority of the membership of any subcommittee, but a subcommittee may convene and conduct business even if commissioners are not a majority of subcommittee members present
4. The term of appointment for members of the public appointed to subcommittees shall not exceed the life of the subcommittee. If a subcommittee must be reauthorized, any members of the public serving on the subcommittee must be reappointed by the Chair, subject to the approval of the commission.
5. A public member of a subcommittee who is absent from two consecutive subcommittee meetings is automatically removed from the subcommittee, but may be reinstated by the Chair if good cause for the absences is shown.
6. The Chair, subject to the approval of the commission, may remove a member of the public from a subcommittee for good cause. Examples of good cause are: failure to work cooperatively with subcommittee members; unruly or disruptive behavior at meetings; or failure to participate in the work of the subcommittee.
7. All actions by the Chair to appoint, reappoint, or remove a member of a public to or from a subcommittee shall occur at a commission meeting.

***K. MUTUAL AID AGREEMENTS***

The commission shall constitute a mutual aid subcommittee no later than the first meeting in February of each year to review the pacts between the BPD and other law enforcement entities.

***L. SUBCOMMITTEE NOTES***

Each PRC subcommittee must produce written notes of what occurred at each subcommittee meeting. These notes must be forwarded to the PRC Officer, who will post the notes to the PRC's website

***M. ANNUAL REPORT***

The commission secretary shall endeavor to present the annual report for the commission's approval no later than June 1 of each year. The Foreword shall be written by the commissioner who served as Chair in the year of the report.

***N. FAMILIARITY WITH BERKELEY POLICE DEPARTMENT***

Within the first 6 months of their appointment, newly-appointed commissioners shall endeavor to:

- 1) complete a ride-along with a sworn police officer, and
- 2) meet with Chief of Police and his/her command staff.

***O. KNOWLEDGE OF APPLICABLE LAWS AND RULES***

Commissioners should be generally knowledgeable of the Police Review Commission's enabling Ordinance (Ordinance No. 4644-N.S.; B.M.C. Chapter 3.32), the Regulations for Handling Complaints Against Members of the Police Department, and these Standing Rules. They should also bring copies of these documents to all commission meetings.



# BERKELEY POLICE DEPARTMENT

DATE ISSUED: November 2, 2009

GENERAL ORDER R-23

SUBJECT: RELEASE OF PUBLIC RECORDS AND INFORMATION

## PURPOSE

- 1 - The purpose of this Order is to establish the policy for release of public records to the public.

## POLICY

- 2 - It shall be the policy of the Berkeley Police Department to release copies of public records, unless release would endanger a private person or law enforcement personnel, harm a law enforcement investigation, constitute an unwarranted invasion of privacy, or is prohibited by law.

## DEFINITIONS

- 3 - Public Record: any writing or archival record containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.
- 4 - Member of the Public: any person, except a member, agent, officer, or employee of a federal, state, or local agency acting within the scope of his or her membership, agency, office, or employment.
  - (a) Notwithstanding the definition of "member of the public," an elected member or officer of any state or local agency is entitled to access public records of that agency on the same basis as any other person.
- 5 - Person: any natural person, corporation, partnership, limited liability company, firm, or association.
- 6 - Custodian of Records: The Support Services Division Captain, or his/her designee, shall serve as Custodian of Records for written incident and investigative reports. For all other records maintained by this department, the Administrative Division Captain, or his/her designee, shall serve as Custodian of Records.

## PROCEDURES

- 7 - The Custodian of Records shall be the person responsible for release of public records. No record shall be released to the public without his/her approval.
  - (a) Release of information by the Public Information Officer, in accordance with General Order P-29, shall adhere to the standards set forth in this Order.
- 8 - A request for a public record shall be received in any form, including an oral request.

## BERKELEY POLICE DEPARTMENT

DATE ISSUED: November 2, 2009

GENERAL ORDER R-23

- (a) Any question or concern regarding the nature or propriety of a public record request shall be forward to the Custodian of Records for review and determination.
- 9 - The Support Services Division Service Bureau will be primarily responsible for receiving public record requests and disseminating records authorized for release.
- 10 - The following reports, documents or information shall not be released unless specifically authorized by law or Court Order:
- (a) The name or address of a juvenile arrested, detained, or who is a suspect in a police investigation, or any information which might lead to his/her identification;
  - (b) Vehicle collision reports involving death or personal injury, except to "persons with a proper interest therein" (Vehicle Code §20012);
  - (c) Incidents or investigations involving child neglect or abuse, either physical or emotional (Penal Code §§11167 and 11167.5);
  - (d) Incidents or investigations regarding violent or abusive conduct reported by a health care provider (PC §11163.2(b));
  - (e) The name and address of a victim of a sex crime, domestic violence, child abuse, stalking, or a hate crime, if confidentiality is requested by the victim, or if a minor, his/her parent or guardian (Government Code §6254(f)(2));
  - (f) Reports of suspected abuse of an elder or dependent adult (Welfare and Institutions Code §15633);
  - (g) Reports or information received from other agencies; and,
  - (h) Any other report or other information not listed above, the release of which is prohibited by Federal or State law.
- 11 - The Department has discretion to withhold release of a police report, document or information contained therein, when its release would:
- (a) Endanger the safety of a witness or other person involved in an investigation;
  - (b) Endanger the safety of law enforcement personnel;
  - (c) Impede the successful completion of an investigation;
  - (d) Reveal confidential investigative techniques or procedures;



## BERKELEY POLICE DEPARTMENT

DATE ISSUED: November 2, 2009

GENERAL ORDER R-23

- (e) Reveal the identity of confidential informants or sources of information, including names, statements, and locations;
  - (f) Reveal information constituting an unwarranted invasion of privacy;
  - (g) Reveal the name and address of any person detained pursuant to WIC §5150, where disclosure would constitute an unwarranted invasion of privacy;
  - (h) Reveal information maintained in confidential or law enforcement sensitive databases or information management systems (e.g., NCIC, CLETS, DMV files, etc.); or,
  - (i) Reveal a person's criminal history information.
- 12 - The following public information shall be released subsequent to administrative review of the Custodian of Records, unless release would endanger the safety of a person involved in an investigation, or endanger the successful completion of the investigation or a related investigation:
- (a) Arrest information for arrests made within six (6) months of the date of the public information request (GC §6254(f)(1)):
    - (1) The arrestee's name, occupation, date of birth, and physical description, including gender, height, weight, and color of eyes and hair;
    - (2) The date, time and location of arrest, and the date and time of booking;
    - (3) The factual circumstances surrounding the arrest, the amount of bail set, the location where the individual is currently being held, or the time and manner of release; and,
    - (4) All charges the individual is being held upon, including any outstanding warrants from other jurisdictions, and parole or probation holds.
  - (b) Complaints and requests for assistance made within six (6) months of the date of the public information request (GC §6254(f)(2)):
    - (1) The time, substance, and location of all complaints or requests for assistance received by this department, and time and nature of response thereto, including, to the extent the information is recorded, the time, date and location of occurrence, and the time and date of the report.

## BERKELEY POLICE DEPARTMENT

DATE ISSUED: November 2, 2009

GENERAL ORDER R-23

- (2) The victim's name, age and address, unless his/her name and address are not be disclosed pursuant to paragraph 10(e) of this Order.
  - (3) Factual circumstances surrounding the crime or incident, and a general description of any injuries, property or weapons involved.
  - (c) Information **required to be released to misdemeanor or felony crime** victims, their agents, and insurers (GC §6254(f)):
    - (1) Names and addresses of persons involved in the incident;
    - (2) Names and addresses of witnesses (other than confidential informants) to the incident;
    - (3) The description of any property involved;
    - (4) The date, time and location of the incident;
    - (5) Statements of parties involved in the incident;
    - (6) Statements of witnesses (other than confidential informants); and,
    - (7) All diagrams.
  - (d) Release of a complete copy, without redaction, of an identity theft (PC §530.5) police report to the victim of said offense (PC §530.6(a)).
- 13 - Appeals relating to a denied request for the release of public records shall be forwarded to the Custodian of Records for review and disposition.
- 14 - Supervisory and command personnel may release verbatim excerpts from the General Orders, Training and Information Bulletins, or written policy directives of their particular command, and may quote statutory law which effects this Department and its conduct of public business.
- 15 - Subsequent to the approval of the Chief of Police, the Public Information Officer, his/her designee, and command personnel may respond to criticism of their particular command, of the activities of members of their command, or of the department, except when the criticism has resulted in an Internal Affairs investigation of alleged misconduct.
- 16 - Guideline Matrix. A guideline matrix for public record release is attached to this Order, and is provided to facilitate clarity and efficiency regarding the evaluation and satisfaction of public record requests.

**BERKELEY POLICE DEPARTMENT**

**DATE ISSUED: November 2, 2009**

**GENERAL ORDER R-23**

References: Evidence Code §§1040 – 1042  
Government Code §§6251 – 6265 and 13960  
Penal Code §§530.5, 530.6(a), 841.5, 964, 11075, 11076, 11105,  
11163.2(b), 11167, 11167.5 and 13300 et seq.  
Welfare and Institutions Code §§5328 and 15633  
Vehicle Code §§16005 and 20012  
TNG v. Superior Court (4 C.3d 767 (1971))  
City of Berkeley Administrative Regulations  
General Order P-29  
Support Services Division Manual



**GUIDELINES FOR RELEASE OF REPORTS AND INFORMATION THEREIN**

General Policy Statement Regarding Release Of Police Reports To The Public and the Police Review Commission (PRC):

It shall be the general policy of the Police Department to release a copy of a police report to any member of the public or the PRC, unless the release of the report, or a part of the report, or the information in the report would: (1) endanger a person; (2) endanger the successful completion of the investigation or a related investigation; (3) constitute an unwarranted invasion of privacy as defined in this Policy; or, (4) is prohibited by law.

A release of a police report to a City department, such as the City Attorney's office, the Office of Transportation, or the City Manager's office, is not a release to the public and is not governed by this Policy.

<b>NAMES AND ARRESTEE INFORMATION</b>		
<b>Subject</b>	<b>Release</b>	<b>Further Direction</b>
Adult arrestee's name, occupation, physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held on, including any outstanding warrants from other jurisdictions and parole or probation holds.	Yes, release of this information is required by law, unless the release would: (1) endanger a person's safety; or, (2) endanger the successful completion of the investigation or a related investigation. [Government Code §6254(f)(1)]	No Release Reason

**GENERAL ORDER R-23 (ATTACHMENT)**

**ISSUED: NOVEMBER 16, 2009**

**GUIDELINES FOR RELEASE OF REPORTS AND INFORMATION THEREIN**

<b>NAMES AND ARRESTEE INFORMATION (continued)</b>		
<b>Subject</b>	<b>Release</b>	<b>Further Direction</b>
Adult suspect name (e.g., when suspect not arrested)	No to general public, but yes to the general public, if the adult suspect's name was already released to the public through the PRC process.  Release is also authorized to assist in specific public safety effort, such as locating the suspect.	For PRC to investigate, when relevant to a PRC investigation, the PRC shall get the name of an adult suspect, if ALL of the following conditions apply: (1) the release will not endanger a person's safety; (2) the release will not endanger the successful completion of the investigation or a related investigation; and, (3) the release will not result in the release of highly personal information of a very sensitive nature such as sex crimes information, suicide, or mental health information.  With respect to this third category, if the only person affected is the requesting party, and the person has filed a complaint with the PRC, then this information can be released to the PRC.
Juvenile arrestee name and Juvenile suspect name	No. The entire report cannot be released without a Court Order, except that the juvenile's name and address information may be released to the victim, or his/her representative, after the criminal case against the juvenile suspect/arrestee is final in Juvenile Court, but only if the victim is seeking damages in civil court.	Prior to release to victim, confirm status of case is no longer active in Juvenile Court.
		Unwarranted invasion of privacy.
		Release prohibited (except in limited circumstance noted) by Alameda County Court Order, dated 4/7/1995; Welfare & Institutions Code §§ 601 and 602; [TNG v. Sup. Ct.]

**GUIDELINES FOR RELEASE OF REPORTS AND INFORMATION THEREIN**

NAMES AND ARRESTEE INFORMATION (continued)			
Subject	Release	No Release Reason	Further Direction
Adult and juvenile victim name.	<p>No, if there is an active criminal case pending or a criminal case is likely to be filed, the name of the victim should not be released. [Penal Code §964]</p> <p>If no criminal case is pending or likely to be filed, then:</p> <p>Yes, release of a victim's name is required by law, unless the release of the adult victim's name would: (1) endanger a person's safety; (2) endanger the successful completion of the investigation or a related investigation; or (3) the victim of one of the crimes listed in GC §6254(f)(2) (e.g., sex crimes, domestic violence, stalking or hate crime) has been asked and has requested or, if a juvenile victim, his or her parent or guardian has requested, that his or her name be kept confidential. [GC §6254(f)(2).]</p>	<p>PC §964 sets forth certain restrictions on the release of a victim's name if a criminal case is pending.</p>	

GUIDELINES FOR RELEASE OF REPORTS AND INFORMATION THEREIN

NAMES AND ARRESTEE INFORMATION (continued)			
Subject	Release	No Release Reason	Further Direction
<p>Adult or juvenile witness or "other party" name; an "other party" is a person who is not an arrestee, suspect, or witness.</p>	<p>No, if there is an active criminal case pending or a criminal case is likely to be filed, the name of the witness (or other party) should not be released. [PC §964]</p> <p>If no criminal case is pending or likely to be filed, then, for an adult witness name:</p> <p>Yes, unless release of the adult witness name would: (1) endanger a person's safety; (2) endanger the successful completion of the investigation or a related release of highly personal information of a very sensitive nature such as sex crimes information, suicide, or mental health information.</p> <p>Note: The name of a juvenile witness will not be disclosed to the general public, unless it has already been disclosed through the PRC process. The name of a juvenile witness will only be disclosed to the PRC, if the parent or guardian consents to the disclosure.</p>	<p>Protection of witness and potential witnesses; PC §964 sets forth certain restrictions on the release of a witnesses' name if a criminal case is pending</p>	<p>If the PRC requests the name of a witness, the name can only be disclosed if: (1) there is no active criminal case pending or a criminal case is likely to be filed; (2) the release of the name would not endanger a person's safety; and, (3) the release of the name would not endanger the successful completion of the investigation or a related investigation. In addition, if the witness is a juvenile, the parent or guardian must consent to the disclosure to the PRC.</p>



GUIDELINES FOR RELEASE OF REPORTS AND INFORMATION THEREIN

PHONE NUMBERS			
Subject	Release	No Release Reason	Further Direction
Phone number of person whose name IS released under this Policy	No, to general public, but yes to the general public, if the phone number was already released to the public through the PRC process.	Unwarranted invasion of privacy.	For PRC to investigate, PRC shall get the phone number of any adult person whose name is released to the PRC. However, if the person whose name is released is a juvenile, the phone number will not be released to the PRC without the consent of the juvenile's parent or guardian.
Phone number of any person whose name is NOT released under this Policy	No.	Unwarranted invasion of privacy.	

ADDRESS INFORMATION			
Subject	Release	No Release Reason	Further Direction
Adult arrestee address. Adult suspect address Adult/juvenile victim address. Adult/juvenile witness address. Adult/juvenile "other party" address.	No, if the name is not released under this Policy and/or applicable law.  In cases in which the name is released: No, to general public, but yes to the general public; if the person's address was already released to the public through the PRC process.	Unwarranted invasion of privacy	For PRC to investigate, when relevant to a PRC investigation, PRC shall get the address of an adult arrestee, or adult suspect, or any victim, witness, or other party, but only if ALL of the following conditions apply: (1) the PRC obtained the name from BPD under this Policy; (2) the person has no working telephone number; (3) the release will not endanger a person's safety; (4) the release will not endanger the successful completion of the investigation or a related investigation; [cont.]

**GENERAL ORDER R-23 (ATTACHMENT)**

**ISSUED: NOVEMBER 16, 2009**

**GUIDELINES FOR RELEASE OF REPORTS AND INFORMATION THEREIN**

<b>ADDRESS INFORMATION (continued)</b>		
<b>Subject</b>	<b>Release</b>	<b>No Release Reason</b>
	<b>Further Direction</b>	
		and, (5) the release will not result in the release of highly personal information of a very sensitive nature such as sex crimes information, suicide, or mental health information.  In the case of a juvenile victim, juvenile witness, or juvenile other party, in addition to the above conditions, the address shall not be released to the PRC without consent of the juvenile's parent or guardian.  Juvenile arrestee and juvenile suspect addresses are not releasable to the PRC. See below.
Juvenile arrestee address and Juvenile suspect address.	No. The entire report cannot be released without a Court Order, except that name and address information may be released to the victim or his or her representative after the criminal case against the juvenile suspect/arrestee is final in Juvenile Court, but only if the victim is seeking damages in civil court.	Release prohibited (except in limited circumstance noted) by Alameda County Court Order dated 4/7/1995; WIC §§601, 602. [TNG v. Superior Court]
		Prior to release to victim confirm status of case is no longer active in Juvenile Court.

Except for headers, highlighted text is new.

GUIDELINES FOR RELEASE OF REPORTS AND INFORMATION THEREIN

OTHER PERSONAL INFORMATION			
Subject	Release	No Release Reason	Further Direction
Date of birth of <u>non-arrestee</u> . (Date of birth of arrestee is required by law to be released. See above)	No.	Unwarranted invasion of privacy and potential identity theft.	As an alternative, release victim, witness, or suspect's age.
CDL, Social Security #, Bank Account #.	No.	Unwarranted invasion of privacy and potential identity theft.	
Vehicle license plate numbers.	No.	Unwarranted invasion of privacy.	
Medical treatment records.	No, unless a person is requesting his or her own medical records, or the person whose medical records are being requested has signed an authorization for the release of the medical records to the requesting party.	Civil Code §56, et seq. provides that medical records are to be kept confidential: WIC §5328 provides that WIC §5150 records (such as the Berkeley Mental Health staff person's report re a WIC §5150) are confidential.  Note: An officer's report re a WIC §5150 call is not a medical treatment record; it is a police report.  Information provided by a medical treater noted in a police report is not a medical treatment record, but it should be deleted as an unwarranted invasion of privacy if it is highly sensitive information such as information involving sex crimes, suicide, or mental health.	Medical records can be given to the PRC if the person whose medical records are being requested has signed an authorization for the release of the medical records to the PRC.  Alternatively, a person can obtain his or her own medical records held by BPD, if any, directly from BPD, and then give them to the PRC.

GUIDELINES FOR RELEASE OF REPORTS AND INFORMATION THEREIN

MUG SHOTS		
Subject	Release	Further Direction
PFN photos taken by BPD (mug shots.)	Yes, unless release would: (1) endanger a person's safety; or, (2) endanger the successful completion of the investigation or a related investigation.	Obtain Detective Bureau approval for release in all criminal cases.
PFN photos taken by another agency.	No, unless release is made for a public safety purpose.	Obtain approval from Office of the Chief.

THE POLICE REPORT NARRATIVE, STATEMENTS, DIAGRAMS, PHOTOS, AND COMMUNICATION TAPE		
Subject	Release	Further Direction
<p>Oral (paraphrased) and written statements from victims, witnesses, and suspects.</p> <p>Investigative narrative.</p> <p>Diagrams.</p> <p>Evidence list.</p>	<p>Yes, unless release would: (1) endanger a person's safety; (2) endanger the successful completion of the investigation or a related investigation; or, (3) result in the release of highly personal information of a very sensitive nature such as sex crimes information, suicide, or mental health information.</p> <p>With respect to this third category, if the only person affected is the requesting party, and the person has filed a complaint with the PRC, then this information can be released to the PRC.</p>	

GUIDELINES FOR RELEASE OF REPORTS AND INFORMATION THEREIN

THE POLICE REPORT NARRATIVE, STATEMENTS, DIAGRAMS, PHOTOS, AND COMMUNICATION TAPE (cont.)	
Subject	Release
Evidence photographs.	<p>Yes, unless release would: (1) endanger a person's safety; (2) endanger the successful completion of the investigation or a related investigation; or, (3) result the release of highly personal information of a very sensitive nature such as the condition of person's body or a corpse.</p> <p>With respect to this third category, if the only person affected is the requesting party, and the person has filed a complaint with the PRC, then this information can be released to the PRC.</p>
Communications center audio tapes	<p>Yes, unless release is prohibited under PC §964 (pending criminal case), or release results in an unwarranted invasion of a citizen's privacy.</p> <p>No, as to continuing police radio communications in lengthy incidents occurring more than one hour after the incident first started.</p>
	No Release Reason
	Further Direction
	<p>For PRC to investigate, PRC shall get the tapes. However, if witness or victim information is not releasable to the PRC under this Policy or by law (e.g., PC §964), then that information must be deleted. Also, if the tape contains highly personal information of a very sensitive nature such as a victim screaming as she is violently assaulted or killed, such segments shall be deleted before release to the PRC, unless the only person affected is the requesting party, and the person has filed a complaint with the PRC.</p>

GUIDELINES FOR RELEASE OF REPORTS AND INFORMATION THEREIN

THE POLICE REPORT NARRATIVE, STATEMENTS, DIAGRAMS, PHOTOS, AND COMMUNICATION TAPE (cont.)		
Subject	Release	No Release Reason Further Direction
Investigative techniques: Trackers, undercover, surveillance locations, 'Johns'/decoy, tactics, interview tactics.	No.	Evidence Code §§1040-1042
Confidential informant's name or identifying information.	No.	EC §§1040-1042  If the report uses "x" to refer to the confidential informant, release is permitted as no identifying information is included.
Complete, unredacted police report in ID theft (PC530.5) cases.	Yes, to victim only (PC §530.6(a)).	

CRIMINAL HISTORY INFORMATION		
Subject	Release	No Release Reason Further Direction
PFN Number.	No.	Unwarranted invasion of privacy.
Criminal history: Actual RAP sheet or actual RMS print-out for an individual.	No. However, local criminal history information contained in the RMS print out must be released to the subject of that information, if requested by the subject. [PC §13330(b)(11)]	PC §§11075, 11076, 11105 and 13300.  Okay to release serious felony conviction information only to Housing Authority managing Section 8 program.
Limited criminal history: Fact of prior crime or similar arrests relevant to the investigation, or relevant to the arrest charge, such as felon with a gun.	Yes. Although this information may be contained within a Rap sheet, it can be disclosed as a relevant part of a single police report, which in itself is not a Rap sheet. It can also be disseminated to the public generally for the purpose of assisting in the apprehension of a wanted person. [PC §13305]	

GUIDELINES FOR RELEASE OF REPORTS AND INFORMATION THEREIN

CRIMINAL HISTORY INFORMATION (continued)			
Subject	Release	No Release Reason	Further Direction
Information taken out of CLETS.	No.	CLETS "Policies, Practices & Procedures" provides that CLETS information (which includes DMV) is confidential and for OFFICIAL USE ONLY.	
Probation or parole hold on an arrestee.	Yes. Release of this information is required by law, unless the release of the probation or parole hold on the arrestee would: (1) endanger a person's safety; or, (2) endanger the successful completion of the investigation or a related investigation. [GC §6254(f)(1)]		
Probation or parole status when it is related to the investigation or arrest charge.	Yes, unless release of the arrest charge or investigation would: (1) endanger a person's safety; or, (2) endanger the successful completion of the investigation or a related investigation.		
Probation or parole, general status when there is no "hold" and it is not related to the investigation or arrest charge, and it is not being disclosed for a public safety purpose.	No.	PC §§11075, 11076, 11105 and 13300.	

GUIDELINES FOR RELEASE OF REPORTS AND INFORMATION THEREIN

OPEN AND CLOSED INVESTIGATIONS, HOMICIDE REPORTS			
Subject	Release	No Release Reason	Further Direction
Open, Suspended, and Closed investigations.	Yes, unless release would: (1) endanger a person's safety; (2) endanger the successful completion of the investigation or a related investigation; or, (3) result the release of highly personal information of a very sensitive nature such as sex crimes information, suicide, or mental health information.  With respect to this third category, if the only person affected is the requesting party, and the person has filed a complaint with the PRC, then this information can be released to the PRC.		Obtain approval from effected Detective Bureau unit prior to release, if a criminal prosecution is still possible.  For homicide reports, obtain approval from Homicide Unit and Custodian of Records prior to release.

SPECIAL POLICE REPORTS			
Subject	Release	No Release Reason	Further Direction
Juvenile arrest or juvenile suspect reports.	No. The entire report cannot be released without a Court Order, except that the name and address information may be released to the victim or his or her representative after the criminal case against the juvenile suspect/arrestee is final in Juvenile Court, but only if the victim is seeking damages in civil court.	Release prohibited (except in limited circumstance noted) by Alameda County Court Order dated 4/7/1995; WIC §§601 and 602. [TNG v. Superior Court]	Prior to release to victim confirm status of case is no longer active in Juvenile Court.
Child abuse reports.	No.	PC §§11167 and 11167.5.	
Elder abuse reports.	No.	WIC §15633 prohibits release.	
Vehicle collision reports.	No, except to persons authorized in VC §20012.	VC §20012 limits the release of collision reports to certain interested parties.	



GUIDELINES FOR RELEASE OF REPORTS AND INFORMATION THEREIN

SPECIAL POLICE REPORTS (continued)		
Subject	Release	No Release Reason
Reports from other agencies.	No.	Policy decision.
		Further Direction

REQUESTS BY UNINVOLVED PARTIES, VICTIMS, AND SPECIAL REQUESTS		
Subject	Release	No Release Reason
Can an uninvolved party obtain a police report?	<p>Uninvolved parties will have access to the same information as involved parties, except in the following three situations:</p> <p>(1) in compliance with Alameda County Superior Court Juvenile Court Order dated 4/7/95 (release certain information to victim only in juvenile cases in certain circumstances, except if it will endanger a person or investigation);</p> <p>(2) in accordance with GC §6254(f) (may withhold from an uninvolved party certain information releaseable to a victim of a misdemeanor or felony crime); and,</p> <p>(3) pursuant to VC §§16005 and 20012 (release to involved parties only re: collision reports.)</p> <p>A release of information to a crime victim, involved party, or their representative, under these three circumstances does not modify otherwise applicable rules regarding release to others.</p>	Policy decision.
		Further Direction

GUIDELINES FOR RELEASE OF REPORTS AND INFORMATION THEREIN

REQUESTS BY UNINVOLVED PARTIES, VICTIMS, AND SPECIAL REQUESTS (continued)		
Subject	Release	No Release Reason
Can a victim of a misdemeanor or felony (but not an infraction), or their agent or insurance company, obtain a police report?	<p>In part. Release of the following information to the victim (or their agent or insurer) is required under Government Code section 6254(f), except where: the release is prohibited by law (e.g., certain juvenile cases (see above)); is witness information in pending criminal cases; the release would endanger a person's safety; or, impede the successful completion of the investigation or a related investigation:</p> <ol style="list-style-type: none"> <li>(1) names and addresses of persons involved in the incident;</li> <li>(2) names and addresses of witnesses (other than confidential informants) to the incident;</li> <li>(3) description of any property involved;</li> <li>(4) date, time and location of the incident;</li> <li>(5) statements of parties involved in the incident;</li> <li>(6) statements of witnesses (other than confidential informants); and,</li> <li>(7) all diagrams.</li> </ol>	Further Direction

GUIDELINES FOR RELEASE OF REPORTS AND INFORMATION THEREIN

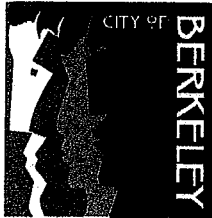
REQUESTS BY UNINVOLVED PARTIES, VICTIMS, AND SPECIAL REQUESTS (continued)			
Subject	Release	No Release Reason	Further Direction
Categorical requests, such as all reports pertaining to a certain address, all reports regarding a certain type of incident, or all reports related to a particular individual.	Yes, unless: (1) the release will impact citizen privacy issues; (2) the potential assembly of information will reveal criminal history; or, (3) if gathering the information will create an undue burden on staff.  Yes, when release will enhance public safety (e.g., in a neighborhood effort to abate a nuisance such as drug dealing at a certain property where the reports are needed for a civil lawsuit.)		Custodian of Records to decide.

SEARCH WARRANTS			
Subject	Release	No Release Reason	Further Direction
Search Warrants and Returns.	Yes, unless sealed.	If sealed by Court.	
Search Warrant applications or affidavits, and any police reports attached to application.	Yes, but delete all identifying information pertaining to a victim or a witness in the application, affidavit, or a police report attached to the application.	PC §964 prohibits the release of a witness or victim's identifying information in a Search Warrant application or a police report attached to the application.	

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Office of the City Attorney

Date: May 31, 2016  
To: Katherine J. Lee, PRC Officer  
From: Zach Cowan, City Attorney  
By: Kristy van Herick, Acting Assistant City Attorney *KVH 5/31/16*  
Re: Disclosure of Use of Force Reports and Summaries to the Police Review Commission

### **Background**

Under Berkeley Police Department General Order U-2 (Use of Force), a supervisor must complete a Use of Force Report under certain specified circumstances. Those circumstances include reporting to the Chief where: (1) Use of any force results in injury or death to a person; (2) Non-lethal weapons (OC/baton) or less-than-lethal munitions are used on a person; or (3) An officer discharges a firearm intentionally or unintentionally on duty (other than during training), or off-duty while acting in the capacity of a police officer.

A completed report includes the nature of the incident, officers involved, type of force used, who was injured (e.g. citizen, officer), nature of injuries (including whether medical treatment was required), summary of actions of the officer or officers involved, supervisor's comments, division commander's recommendation, and a finding whether the force used was within policy or referred for administrative action/investigation by Internal Affairs Bureau. Per General Order U-2, all Use of Force Reports are held in file for five (5) years and then purged, unless needed for additional administrative action.

The Police Review Commission ("PRC") is interested in reviewing these reports. The PRC has acknowledged that confidentiality laws may prohibit the disclosure of names of officers identified on the reports (as well as other identifying information related to the incident). The PRC has requested an opinion from the City Attorney on whether the PRC could obtain from the BPD Use of Force Reports, with non-disclosable information redacted. Alternatively, the PRC would like to know if there are any legal impediments to the release of a report that synthesizes or summarizes information from a group of Use of Force Reports.

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### Issues

1. Can the PRC obtain redacted Use of Force Reports?
2. Can the PRC obtain a report that synthesizes or summarizes information from a group of Use of Force Reports?

### Conclusion

1. No. Regardless of whether the names and other identifying information from the reports are redacted, these reports fall with the definition of "personnel records," and are therefore confidential under Penal Code Sections 832.7 and 832.8.
2. Yes, so long as the report is in a form which does not directly or indirectly identify the individuals involved.

### Discussion

#### *Individual reports*

Peace officer personnel records are confidential pursuant to the California Penal Code. Penal Code section 832.7 (a), provides, in part, that "[p]eace officer or custodial officer personnel records 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."

If Use of Force Reports are considered part of a "personnel record", then they will be confidential under Section 832.7. Section 832.8 defines "personnel record" as follows:

"As used in Section 832.7, "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:

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

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The California Supreme Court has determined that "peace officer personnel records include only the types of information enumerated in section 832.8." (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 293.) However, the location in which a peace officer's record is stored (i.e., in the official personnel file or some other location) does not necessarily dictate whether or not it is a personnel record. "We consider it unlikely the Legislature intended to render documents confidential based on their location, rather than their content. ... Similarly, we do not believe that the Legislature intended that a public agency be able to shield information from public disclosure simply by placing it in a file that contains the type of information specified in section 832.8." (*Id.* at p. 291.) Therefore, to determine whether a record is part of confidential "personnel record" of a peace officer, one must consider the content of the document and determine whether it falls within one of the categories set forth in Section 832.8.

Consistent with Sections 832.7 and 832.8, Berkeley Police Department General Order P-26 identifies all Internal Affairs Bureau (IAB) files as confidential and limits access to these records to "the employee, the Chief of Police, authorized administrative staff, the employee's Division Commander, the City Attorney, Internal Affairs Bureau personnel, the Human Resources Director and the City Manager and others as required by law." One category of police misconduct investigated by the IAB, as referenced in BPD General Order P-26, is "**improper** use of force", which includes "all allegations concerning the improper use of force that goes beyond reasonable or lawful limits of physical power that may be used upon a person including: (i) Improper use or display of a firearm, (ii) Improper use of any object, (iii) Improper use of hands or feet."

A Use of Force Report is referred for administrative action/investigation to Internal Affairs if there is a determination that the force used may be outside of department policy. In such situations, the Use of Force Report would be part of the complaint used to initiate the internal investigation, and thus would fall within the "personnel record" definition at Section 832.8(e), as a record of a "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."

Looking next at Use of Force Reports that do not fall under Section 832.8(e) because they do not result in a complaint or an investigation into a possible "improper" use of force, the question is whether those reports nevertheless fall within some other provision of Section 832.8. Penal Code Section 832.8 (d) and (f) deem confidential personnel records document related to "[e]mployee advancement, appraisal, or discipline," and "[a]ny other information the disclosure of which would constitute an unwarranted invasion of personal privacy."

In the recent case of *Pasadena Police Officers Association v. Superior Court* (2015) 240 Cal.App.4th 268, the Court examined to what extent a report on an officer-involved shooting was not deemed confidential and therefore subject to disclosure under the Public Records Act. The report involved a high profile shooting death of an unarmed teen, and was prepared by an independent consultant, the Office of Independent

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Review Group (OIR), which included a broad examination of police department policy as well as the use of force. The court examined the various aspects of the use of force investigation, and while finding portions subject to disclosure, the administrative portion of the investigation was determined to constitute or relate to employee performance "appraisal", and thus to be confidential personnel information.

Specifically, the court noted:

"The protection for personnel records under section 6254, subdivision (k) [of the Public Records Act] applies to any information obtained from an officer's personnel records. (*CPOST, supra*, 42 Cal.4th at p. 289, 64 Cal.Rptr.3d 661, 165 P.3d 462.) Accordingly, portions of the Report culled from personnel information or officers' statements made in the course of the PPD's administrative investigation of the McDade shooting are protected by the *Pitchess* statutes. However, other portions of the Report, including the CID investigation, which do not constitute or relate to employee appraisal, are not."

(*Id.* at p. 290.) The Court further noted that the administrative review of use of force is the process that may result in a recommendation for discipline, and thus the records of that process are confidential. "Only the PPD's administrative review results in a disciplinary recommendation to the Chief. And, only records related to that process enjoy protection under the *Pitchess* statutes." (*Id.* at p. 292.)

A Use of Force Report is used to conduct a review of an officer's performance, and determine whether it complies with Department policy. The form solicits performance-related comments from the supervisor, recommendations from the Division Commander and findings from the Chief. As such, whether the conduct ultimately leads to an administrative action or investigation, it constitutes or relates to employee appraisal. Under *Pasadena Police Officers Assoc.*, a Use of Force Report falls within the definition of a personnel record and can only be released by judge under the process at Evidence Code Sections 1043-1047 (*Pitchess* statutes).

#### *Use of Force Summaries*

On the issue of reviewing a summary of the use of force reports, the key question is whether the information could be identifiable enough to be linked to any individual officer's personnel record. Put another way, could one "reverse engineer" the data in the summary to identify individual officers or incidents. If not, a summary can be released to the PRC.

Generally, disclosure of complaints about use of force in summary form is allowed under Penal Code Section 832.7, so long as the information is not disclosed in a form that would identify a specific officer.

"Notwithstanding subdivision (a), a department or agency that employs peace or custodial officers may disseminate data regarding the number, type, or



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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." (Penal Code § 832.7(c).)

A recently enacted law impacts how a broad set of data points on use of force is shared with the state and what level of information the Department of Justice (DOJ) will make publicly available. Effective January 1, 2016, AB 71 (Government Code section 12525.2) took effect expanding the obligations on law enforcement agencies to collect and report to the DOJ on use of force incidents.

Pursuant to Government Code Section 12525.2, subdivisions (a) and (b):

"(a) Beginning January 1, 2017, each law enforcement agency shall annually furnish to the Department of Justice, in a manner defined and prescribed by the Attorney General, a report of all instances when a peace officer employed by that agency is involved in any of the following:

- (1) An incident involving the shooting of a civilian by a peace officer.
- (2) An incident involving the shooting of a peace officer by a civilian.
- (3) An incident in which the use of force by a peace officer against a civilian results in serious bodily injury or death.
- (4) An incident in which use of force by a civilian against a peace officer results in serious bodily injury or death.

(b) For each incident reported under subdivision (a), the information reported to the Department of Justice shall include, but not be limited to, all of the following:

- (1) The gender, race, and age of each individual who was shot, injured, or killed.
- (2) The date, time, and location of the incident.
- (3) Whether the civilian was armed, and, if so, the type of weapon.
- (4) The type of force used against the officer, the civilian, or both, including the types of weapons used.
- (5) The number of officers involved in the incident.
- (6) The number of civilians involved in the incident.
- (7) A brief description regarding the circumstances surrounding the incident, which may include the nature of injuries to officers and civilians and perceptions on behavior or mental disorders."

Section 12525.2 has a fairly expansive definition of "serious bodily injury" subject to the new data collection requirements. "For purposes of this section, "serious bodily injury" means a bodily injury that involves a substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ." (Govt Code § 12525.2(d).) The "instructions for Reporting Use of Force Incidents" prepared by the DOJ indicates a fairly broad interpretation of this definition:

"'Serious bodily injury' is more severe than mere physical injury. Per California Criminal Law Jury Instruction 925, physical injuries that are considered serious may include (but are not limited to) loss of consciousness, wounds requiring

May 31, 2016

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extensive suturing, bone fractures or concussions. In the majority of cases, such an injury will require a visit to a hospital or advanced medical care facility, either as an outpatient or by being admitted into the facility (routine medical clearances would not be included).

Serious bodily injury should not, however, mean that one must seek or require medical treatment at a hospital (e.g., a person experiences a loss of consciousness or because the injury is such that it is not immediately apparent that hospital care is necessary). Under those or similar circumstances, agencies must still report the use of force incident upon discovering that it resulted in serious bodily injury.”

The DOJ has developed use of force incident data elements<sup>1</sup> to be reported pursuant to the new law. Starting January of 2016, all law enforcement agencies had to begin internally tracking use of force incident data elements as outlined by the DOJ. Beginning in 2017, law enforcement agencies must begin submitting the expansive data set to the DOJ. Up to the point that the data is reported to the DOJ, it remains confidential. However, the data will then be “summarized” and published by the DOJ for public review.

Specifically, Government Code Section 12525.2, subdivision c specifies:

“Each year, the Department of Justice shall include a summary of information contained in the reports received pursuant to subdivision (a) in its annual crime report issued by the department pursuant to Section 13010 of the Penal Code. This information shall be classified according to the reporting law enforcement jurisdiction. In cases involving a peace officer who is injured or killed, the report shall list the officer’s employing jurisdiction and the jurisdiction where the injury or death occurred, if they are not the same. **This subdivision does not authorize the release to the public of the badge number or other unique identifying information of the peace officer involved.**”

While Section 12525.2(c) states that the DOJ is not authorized to release the badge number or “other unique identifying information” of involved peace officers, it will nevertheless be providing a “summary of information” created from the detailed set of data reported by local agencies on a public website. What is meant by a “summary of information” it is not yet clear. For example, the DOJ has not specified whether it will impose additional limitations or criteria on the data to ensure that the information in published summaries cannot be “reverse engineered” to reference back to specific officers.

The DOJ confirmed that it “will be working over the first half of 2016 to develop, refine and test a web-based data collection system, which will allow LEAs to enter and submit use of force data to the DOJ. The system will allow for the ability to track incidents

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<sup>1</sup> The Use of Force Incident Reporting Information Bulletin released by the DOJ can be found here: [https://oag.ca.gov/sites/all/files/agweb/pdfs/law\\_enforcement/dle-15-05-ib-instructions.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/law_enforcement/dle-15-05-ib-instructions.pdf)

Memo to Katherine Lee, PRC Officer

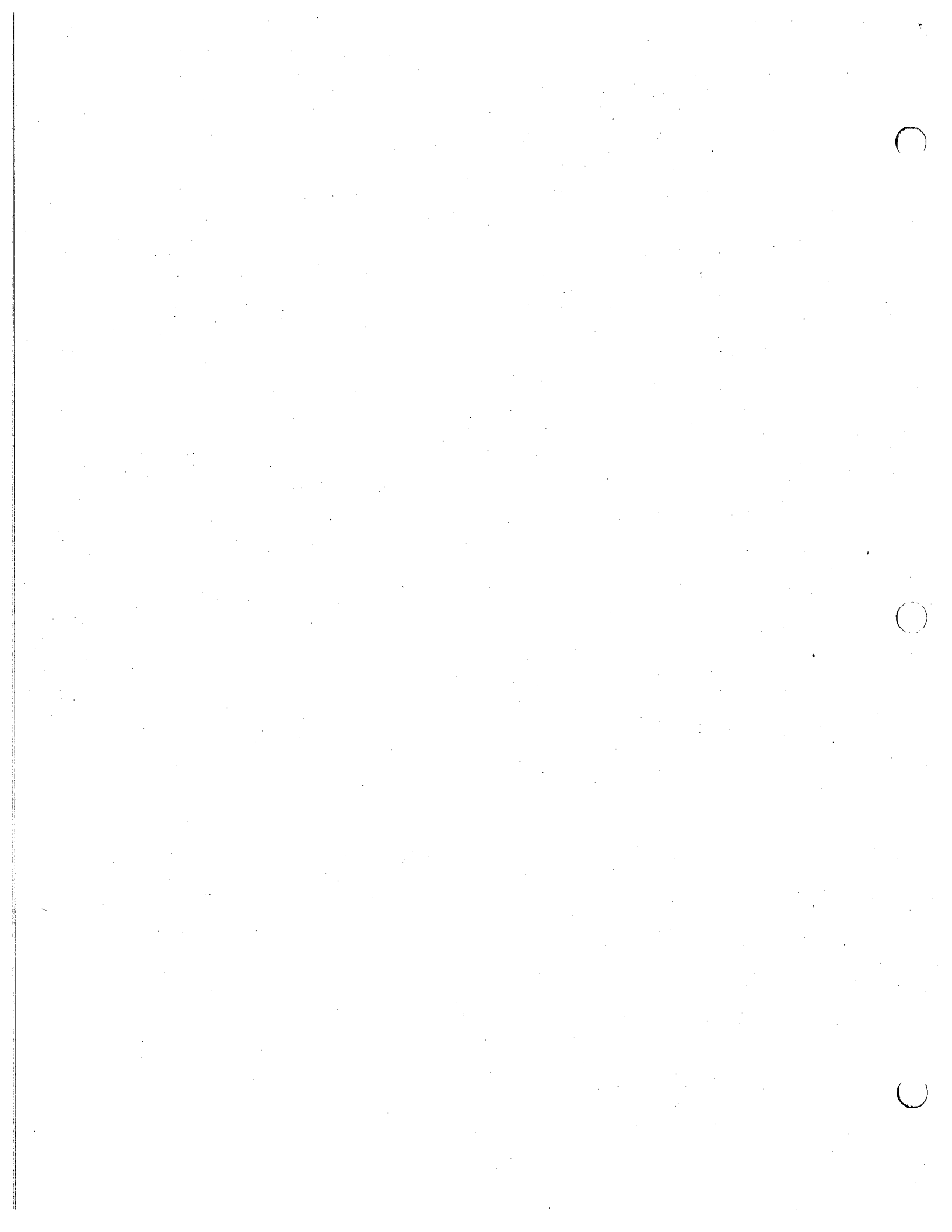
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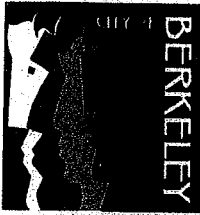
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locally, as well as providing for review and quality control of the data before submitting it to the DOJ." California Department of Justice Information Bulletin DLE-2015-05, 12/29/2015.) It is anticipated that further guidance will be released by the DOJ regarding the level of data which will be publicly accessible.

Based on the existing disclosure language in Penal Code Section 832.7(c) and newly adopted Government Code 12525.2(c), BPD may release to the PRC both a summary of complaints filed on use of force, and may release a summary of the data that is released to the DOJ. The summary should be in a form that cannot be used to determine the officer(s) involved. The BPD could prepare its own summary, or wait until the DOJ releases its summary.

cc: Dee Williams-Ridley, City Manager  
Mark Numainville, City Clerk  
Opn. Index II.1.2; II.G.8.a.





Office of the City Attorney

Date: May 11, 2016

To: Katherine J. Lee, PRC Officer

From: Zach Cowan, City Attorney  
By: Kristy van Herick, Acting Assistant City Attorney *KVH*

Re: Opinion Regarding Whether Information on Police Academy Attendance Is Part Of An Officer's Confidential Personnel Record; interpretation of Commission on Peace Officer Standards and Training v. Superior Court

### **Background**

A member of the public has requested information regarding the dates of training and the names of the specific academies attended by five Berkeley Police Department officers. He provided the *Commission on Peace Officer Standards and Training v. Superior Court* case for the proposition that the City, in response to a Public Records Act request, should disclose information on when and where individual officers attended police academy.

### **Issue**

Does the case *Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4<sup>th</sup> 278, support the position that academy training records are not confidential and instead are subject to disclosure in response to a Public Records Act request?

### **Conclusion**

No. Records held by the City of Berkeley on its peace officers' police academy training constitute "educational and employment history" within the definition of a personnel record in Penal Code Section 832.8, and are therefore not subject to disclosure under the Public Records Act.

**Discussion**

Peace officer personnel records are confidential pursuant to the California Penal Code. Penal Code section 832.7(a), provides, in part, that "Peace officer or custodial officer personnel records 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."

Penal Code Section 832.8 sets forth the definition of records that are considered "personnel records" and thus confidential under 832.7.

"As used in Section 832.7, "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:

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

The California Public Records Act requires disclosure of records in response to a request unless an exception applies. One such exemption involves "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, the provisions of the Evidence Code relating to privilege." (Gov. Code, § 6254, subd. (k).) The Evidence Code, at sections 1043 through 1045, sets forth a confidential process for seeking peace officer personnel records, commonly referred to as the "*Pitches* process", involving a Court Order and *in camera* review of the records.

The California Supreme Court case, *Commission on Peace Officer Standards and Training (CPOST) v. Superior Court* (2007) 42 Cal.4th 278, considers whether the California Public Records Act (Gov. Code, § 6250 et seq.) requires the Commission on Peace Officer Standards and Training to disclose the names, employing departments, and hiring and termination dates of California peace officers included in the Commission's database. (*Id.* at p. 284.) In *CPOST*, a Los Angeles Times reporter requested, through a Public Records Act request, that the Commission release

information in its database pertaining to all new peace officer appointments dating from 1991 through 2001.<sup>1</sup> (*Id.* at p. 286.) The Times was trying to track attrition rates and movement between police departments.

In initially denying the request, the Commission relied upon Penal Code sections 832.7 and 832.8, asserting that the requested information was obtained from peace officer personnel records and accordingly was privileged and exempt from disclosure. The Times challenged the Commission. (*Ibid.*) The California Supreme Court explored whether the information sought from the Commission was the type that fell within the Penal Code definition of "personnel record".

Unlike the current matter under consideration, the request by the Times did not involve disclosure of academy records or other educational records and did not involve a request to a police department. While the Court ultimately determined that the information sought by the Los Angeles Times did not constitute personnel records, the court majority also confirmed that records that constitute personal data, such as "employment and education *history*", are exempt from disclosure.<sup>2</sup>

According to the Court majority:

*"Subdivision (a) of section 832.8 refers to "Personal data, including marital status, family members, educational and employment history, home addresses, or similar information." Each of the items listed, including "employment history," is presented as an example of "personal data." The items enumerated in subdivision (a) do not constitute information that arises out of an officer's employment. Rather, they are the types of personal information that commonly are supplied by an employee to his or her employer, either during the application process or upon employment.<sup>4</sup>*

*Information relating to the officer's current position, on the other hand, is addressed in other subdivisions of section 832.8: "(c) Election of employee benefits. [¶] (d) Employee advancement, appraisal, or discipline. [¶] (e) 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." If we were to interpret*

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<sup>1</sup> State law requires law enforcement agencies in California to disclose certain information to the Commission about its officers. "Whenever a peace officer of a participating department is newly appointed, promoted ... or ... terminates," the department is required to report that event to the Commission. (Cal. Code Regs. tit. 11, § 1003.) ..."

<sup>2</sup> Interestingly, the three dissenting Justices found that some or all of the released information should have been considered part of the confidential personnel records. Justice Kennard found that employing agency and dates of hire and termination should be considered protected personnel records as well, and Justices Chin and Baxter thought all of the information requested should be considered confidential.

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*"employment history" to include information concerning the officer's current position, the phrase "employment history" in subdivision (a) would encompass all of the information listed in subdivision (d)—"[e]mployee advancement, appraisal, or discipline"—rendering subdivision (d) unnecessary and redundant."*

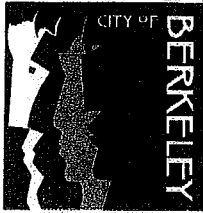
(*Id.* at pp. 294-295 [emphasis added].)

An individual can engage in academy training in various ways. Some officers transfer from other law enforcement agencies as lateral hires, having attended academy through their prior employers. Officers can also enroll directly in a POST-certified police academy and apply for employment post-academy. In both of these situations, the only record of academy attendance and training would be in their "educational and employment history". Others are hired by the City of Berkeley into the position of "Police Officer Recruit". Police Officer Recruit, as noted in the applicable Job Classification, is an "an entry level, temporary civil service classification without peace officer powers, rights or privileges, within the Police Department, used for classification of new recruits during their attendance at a P.O.S.T. Certified Basic Recruit Academy." As a temporary non-sworn recruit, only if they pass the academy program are they eligible to seek the position of Police Officer. Under the process, academy attendance would be part of their educational history.

Under all of these scenarios, the records regarding academy attendance constitute "educational and employment history". The *CPOST* case supports the position that this information is confidential and not subject to release by way of a Public Records Act request.

cc: Dee Williams-Ridley, City Manager  
Mark Numainville, City Clerk  
Opn. Index: II.G.1; II.I.2






Office of the City Attorney

Date: February 18, 2015

To: Katherine J. Lee, PRC Officer

From: Zach Cowan, City Attorney

By: Sarah Reynoso, Assistant City Attorney 

Re: Request for Opinion Regarding Disclosure of Berkeley Police Department Internal Affairs' records to the PRC

### **Background**

At its January 14, 2015 meeting, the PRC requested an opinion from the City Attorney on whether the PRC could obtain from the BPD Internal Affairs Bureau ("IAB") Division its records regarding prior complaints against the subject officer. The PRC believes that having access to the subject officers IAB complaints and findings may provide relevant information for a PRC Board of Inquiry ("BOI") hearing a complaint against that subject officer. The PRC does not currently have access to the IAB complaint investigation files.

You also asked whether the Police Chief could disclose to the PRC whether he had imposed discipline based on a PRC BOI sustained finding of wrong doing.

### **Issues**

1. Can the PRC obtain access to subject officers IA complaint investigation file records as part of the PRC's complaint investigation process?
2. Can BPD disclose to the PRC whether discipline has been imposed as a result of a PRC BOI sustained finding of wrong doing?

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### **Conclusion**

1. No. These records are confidential personnel records under Penal Code Section 832.7.
2. No. This information is also confidential personnel records under Penal Code Section 832.7.

### **Discussion**

IAB is responsible for investigating BPD internal personnel complaints and citizen complaints filed directly with IAB. IAB also conducts parallel investigations of all citizen complaints filed directly with the PRC. BPD established IAB to comply with Penal Code Section 832.5, which requires law enforcement agencies to establish a process to investigate complaints against public safety officers.

Pursuant to Penal Code Section 832.7, IAB's complaint investigation records are confidential. Section 832.7 (a), provides, in part, that "Peace officer or custodial officer personnel records 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."

Consistent with Section 832.7, BPD General Order P-26 identifies all IAB files as confidential and limits access to these records to "the employee, the Chief of Police, authorized administrative staff, the employee's Division Commander, the City Attorney, Internal Affairs Bureau personnel, the Human Resources Director and the City Manager and others as required by law." BPD G.O. P-26 *Retention of Records* – 56. Thus, the only city employees who have access to IAB records are those that have some role in the disciplinary process of a police officer or the attorneys that represent the City in legal actions

In *Brown v. City of Berkeley* (1976) 37 Cal.App.3d 223, the Court invalidated a provision in the PRC ordinance which purported to give the PRC authority to make disciplinary recommendations of police officers. The Court held that this section of the PRC ordinance conflicted with City of Berkeley Charter Section 28, which vests in the City Manager sole authority over the discipline of all city employees. *Id.* at 233. Thus, while the PRC Ordinance grants the PRC the authority to investigate complaints against police officers, the PRC has no power or authority to discipline or recommend disciplinary action of a police officer. IAB complaint records cannot be disclosed to the PRC because it has no authority to recommend discipline.