



September 17, 2019

Mayor Robert Garcia
Councilmember Jeannine Pearce
Councilmember Suzie A. Price
Councilmember Daryl Supernaw
Councilmember Stacy Mungo
Councilmember Dee Andrews
Councilmember Roberto Uranga
Councilmember Al Austin
Councilmember Rex Richardson

Via e-mail to cityclerk@longbeach.gov, mayor@longbeach.gov

Re: September 17, 2019 Council Meeting – Item #21

Dear Mayor and Councilmembers,

We write regarding the approval of the 2019-2022 Memorandum of Understanding (“MOU”) with the Long Beach Police Officers Association, in support of and in solidarity with the September 13, 2019 letter submitted to you by Black Lives Matter LBC and allied Long Beach residents and community organizations.

Section IX of the MOU, as currently drafted, undermines the intent of Senate Bill 1421 to safeguard the public’s right to know about police use of force and misconduct, provides an unwarranted opportunity for officers to obstruct and delay disclosure through litigation, and likely violates the Public Records Act.

Section IX addresses requests for public records made disclosable pursuant to Senate Bill 1421. SB 1421 ensures the public’s right to know about investigations and discipline related to police shootings and other serious uses of force, as well as sustained findings of dishonesty and sexual assault by police officers, by providing those records are public and shall be disclosed, subject to only limited exceptions set forth in the bill. Section IX provides that, when the Long Beach Police Department receives a request for records disclosable pursuant to SB 1421, at the same time it notifies the requestor whether any responsive records exist, as required by the Public Records Act, Govt. Code section 6253(c), it will:

- Notify any actively employed officer whose records are requested that the department has received a request for records for which it has responsive documents;
- Provide information about the identity of the requestor and nature for the request;

- “[P]rovide the involved [officer] with an opportunity to review the redacted records at least five calendar days prior to public release;” and
- Allow the officer to retain a copy of the records subject to public release.

This provision, and in particular the City’s agreement to delay release of documents by five days once redacted copies have been prepared in order to allow involved officers to review the documents, undermines SB 1421 and the public’s right of access in several ways.

First, the provision violates the intent of SB 1421 to provide prompt access to records. Long Beach Police Department has, so far, not been cooperative with requests for records pursuant to SB 1421. The ACLU of Southern California requested a broad set of records on January 1, 2019, but nearly nine months later has yet to receive a single page in response. The City has also taken the unique position that it need not turn over public records related to an officer who is a witness in a pending criminal case, an interpretation utterly at odds with both the language and intent of SB 1421. And just days before SB 1421 took effect, the City destroyed 23 years worth of relevant police records that would have become disclosable.¹

Indeed, the City of Long Beach has an unfortunate history of facilitating obstruction of public records access by its police officers. Most notably, in *Long Beach Peace Officers Association v. City of Long Beach*, 59 Cal.4th 59 (2014), the City notified officers that they had been subject to a request by a Los Angeles Times reporter for the names of LBPD officers who fatally shot Douglas Zerby on his back porch while he held only the nozzle to a garden hose. The notice allowed the LBPOA to file an action seeking to prevent disclosure of names, which the City did not oppose and indeed supported, filing briefs supporting the LBPOA’s arguments against disclosure as the case progressed to the California Supreme Court.² The Supreme Court ultimately rejected the arguments for secrecy mounted by LBPOA and the City and held that the names of officers involved in the shooting must be disclosed.

Importantly, the proposed Section IX of the MOU is not necessary to allow peace officers access to their own records. Under Government Code section 3306.5, police agencies must allow officers to examine their own personnel files and materials “used to determine that officer’s qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.” Govt. Code section 3306.5(a). Officers certainly will have had access to any files related to sustained findings of dishonesty and sexual assault during the administrative proceeding resulting in the finding and should be very familiar with their contents. Because documents related to serious uses of force may be withheld from public disclosure during a pending administrative investigation up to 180 days, or longer if there is a parallel criminal investigation, officers should in nearly all case have access to the files either during any administrative proceeding arising out of it or following the investigation.

¹ Megan Barnes, *Long Beach destroys years of internal police records before transparency law goes into effect, says it is unrelated*, Long Beach Press-Telegram (Dec. 28, 2018), at <https://www.presstelegram.com/2018/12/28/long-beach-quietly-destroys-years-of-internal-police-records-before-transparency-law-goes-into-effect-says-it-is-unrelated/>.

² For the City briefs in the Supreme Court, see Stanford Supreme Court of California Resources, *Long Beach Peace Officers Assn. v. City of Long Beach*, at <https://scocal.stanford.edu/opinion/long-beach-police-officers-assn-v-city-long-beach-34314>.

Certainly, the proposed Section IX is much broader than the requirement to simply allow officers access to their own files. Indeed, it seems designed to abet obstruction and delay of transparency by the LBPOA. Giving the involved officer notice of the request and five days to review the redacted documents prior to disclosure provides sufficient time to allow the officer to file suit to prevent release.

The requirement of a five-day delay in production of records likely violates the Public Records Act. Government Code section 6253 sets forth narrow grounds under which agencies are permitted to delay production beyond the 10 day statutory period, which do not include allowing an employee time to review the proposed production and file litigation, and that section expressly provides that “[n]othing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records.” *Id.* sec. 6253(b).

The City of Long Beach currently stands out of compliance with California’s public records law. Rather than provide officers with a one-sided opportunity to impose even further delay, the City should attempt to address compliance with SB 1421 holistically, by requiring that documents be preserved and proactively posted once they become disclosable under its provisions. The model ordinances attached to this letter would help the City meet its legal obligations by providing for such proactive disclosure. We urge the City Council to adopt these ordinances and help safeguard, rather than hinder, the public’s right to know.

Sincerely,



Peter Bibring
Director of Police Practices
ACLU of Southern California

MODEL ORDINANCE FOR PROACTIVE PUBLICATION OF SB 1421 RECORDS

Section 1. Findings

The People of [City/County] find and declare:

(a) The people of [City/County] have vested its law enforcement officers with extraordinary authority, including the powers to detain, search, arrest, and use deadly force. The misuse of that authority not only harms individual targets of officer misconduct, but also the public's trust in the ability of law enforcement to contribute to community safety.

(b) The public has a fundamental right to know what happened when an officer kills or seriously injures someone, sexually assaults someone, or otherwise engages in serious misconduct. The public has a legal right to access records relating to such incidents, described in Cal. Penal Code § 832.7(b). These records are crucial for the public to understand how officers interact with the communities they police and how law enforcement agencies respond to the most serious allegations of misconduct.

(c) There is significant public interest in these records. Members of the public, including those directly impacted by police use of force, media organizations, and police accountability organizations, have filed requests under the California Public Records Act seeking such records. Some of the requests are duplicative. While fulfilling requests in a complete and timely manner is both mandated by law and of utmost importance, doing so poses costs to the [City/County]. Moreover, while individual requestors may work to make all or some of the requested records available to the general public, [City/County] cannot solely rely on them to facilitate public access or to satisfy its legal obligation to respond to every request.

(d) The California Public Records Act authorizes local jurisdictions to adopt policies that allow for faster or more efficient access to public records than specifically required under the Act. It also allows an agency to comply with its requirements under the Act by posting records on a website and directing individuals to that site.

(e) Proactive online publication of records that must be disclosed to the public pursuant to Cal. Penal Code § 832.7(b) is the most efficient way to maximize the public's access to important information and to satisfy the [City/County's] obligations under the California Public Records Act. A policy of proactive publication also reflects [City's/County's] commitment to transparency in policing and the crucial role that information access plays in keeping law enforcement agencies accountable to the public they serve.

Section 2. Purpose

The purpose of this [Article/Chapter] is to create a process by which records designated as public under the California Public Records Act and California Penal Code Section 832.7(b) are routinely published online so that the public may gain access to them in the most immediate and efficient manner. Publication shall include records related to incidents occurring both before and after January 1, 2019.

Section 3. Definitions

For the purposes of this [Article/Chapter] the following definitions shall apply:

(a) "Agency" means an agency operating within [City/County] that employs peace officers and is subject to the provisions of the California Public Records Act, Cal. Gov. Code Sec. 6250, et seq.

(b) "Peace officer" has the same meaning as in paragraph (1) of subdivision (g) of Section 12525.5 of the California Government Code.

(c) "Public records" has the same meaning as in California Government Code Section 12525.5(b).

(d) "Personnel record" means any file maintained under a peace officer's name by his or her employing agency as defined by California Penal Code Section 832.8(a).

(e) "Serious use of force" means any incident involving the discharge of a firearm at a person or an incident in which the use of force resulted in great bodily injury, as defined by California Penal Code Section 832.7(b)(1)(A).

(f) "Sexual assault" means the commission or attempted initiation of a sexual act as defined by California Penal Code Section 832.7(b)(1)(B).

(g) "Official dishonesty" means a finding of dishonesty relating to the reporting, investigation, or prosecution of a crime, as defined by California Penal Code Section 832.7(b)(1)(C).

(h) "Sustained" means a final determination by an investigating agency as defined by California Penal Code Section 832.8(b).

Section 4. Publication of Public Records

(a) An agency shall publish on its website all public records relating to the report, investigation, or findings of any the following involving a peace officer or custodial officer employed by that agency:

- (1) An incident involving a serious use of force;
- (2) A sustained finding that an officer committed sexual assault; or
- (3) A sustained finding that a peace officer committed official dishonesty.

(b) Agencies shall publish public records pursuant to the following timelines:

(1) All public records that relate to an incident occurring after [EFFECTIVE DATE OF ORDINANCE], shall be published on the official website of the agency within thirty (30) days of creation, unless withheld or delayed as specified in this section. If a record is withheld or delayed as specified in this section, it shall be published when the time for withholding or delay expires, or when it is disclosed, whichever is sooner. For purposes of this provision, a public record is created when the following occurs:

(A) If the record relates to a serious use of force, the record is created at the time that it is prepared, owned, used or retained by the local agency.

(B) If the record relates to a sustained finding of sexual assault or dishonesty:

(i) A public record that is also a personnel record is created when the incident that renders Cal. Penal Code Section 832.7(b)(B)-(C) applicable is sustained and the time to appeal has expired or the officer has separated from the agency and thereby waived any further appeal.

(ii) A public record that is not a personnel record is created at the time that it is first prepared, owned, used or retained by the local agency.

(2) All public records that relate to an incident that occurred prior to [EFFECTIVE DATE OF ORDINANCE] shall be published on the official website of the agency within thirty (30) days after it is identified as a public record responsive to a request made under the California Public Records Act. An agency may also search for and locate public records in its possession that have not been requested pursuant to the Public Records Act for publication.

(c) The public records shall be organized on the agency's website to display the following information for each incident:

- (1) The date of the incident;
- (2) The name of the officer(s) involved in the incident;
- (3) If the incident is a use of force disclosable under California Penal Code Section 832.7(b)(1)(A), the name of the subject(s) of the use of force;
- (4) If the incident relates to sexual assault or official dishonesty disclosable under California Penal Code Section 832.7(b)(1)(B)-(C), the department policy violated;
- (5) If an agency is claiming a basis for withholding any records or portion of any record pursuant to an applicable exemption specified in California Penal Code Section 832.7(b)(7), the above information and the grounds for withholding; and
- (6) Any additional information about the incident the agency chooses to publish.

(d) At the time of publication on the agency's website, the public records should reflect all redactions required pursuant to California Penal Code Section 832.7(b)(5).

(e) An agency may not withhold or delay production of any record relating to serious uses of force, official dishonesty, or sexual assault on the basis of any statutory grounds for withholding records in response to a California Public Records Act Request other than those specified in California Penal Code Section 832.7(b)(7).

(f) An agency may not delay production of records relating to a serious use of force pursuant to any provision of California Penal Code Section 832.7(b)(7) beyond 60 days after the use of force, unless it publishes a particularized statement of reasons why the interest in delaying disclosure clearly outweighs the public interest in disclosure for that specific incident.

(g) Nothing in this [Article/Chapter] shall preclude an agency from providing greater access to public records, nor preclude an agency from waiving any applicable exemptions to the records disclosed under this ordinance or any other records in the agency's possession.

SAMPLE MOTION TO REVISE RETENTION SCHEDULE

MOTION

[DATE]

The people of [City/County] have vested its law enforcement officers with extraordinary authority, including the powers to detain, search, arrest, and use deadly force. The misuse of that authority not only harms individual targets of officer misconduct, but also the public's trust in the ability of law enforcement to contribute to community safety. Law enforcement shootings, sexual misconduct, and dishonesty understandably have been subjects of widespread public concern.

For decades, the law kept secret records of law enforcement departments' investigations into their officers' uses of deadly force, and records of investigations in which officers were found by their own departments to have violated the public's trust in the most egregious ways, including by committing sexual assaults against members of the public or lying in law enforcement reports or on the stand when an individual's freedom hung in the balance. This changed in 2018, when the California Legislature enacted SB 1421 (Skinner), which made records of such investigations accessible to the public through the California Public Records Act, Gov. Code § 6250 et seq. The public now has a legal right to access records, described in Cal. Penal Code § 832.7(b), which are crucial to understanding how officers have interacted with the communities they police and how law enforcement agencies have responded to the most serious allegations of misconduct.

Such records contain information used by policymakers and administrators to make decisions and develop policies regarding public safety on behalf of [City/County]. Retention of these records guarantees the public's right to know and demonstrates [City's/County's] commitment to the crucial role that transparency plays in keeping law enforcement agencies accountable to the public it serves. The records thus have historical and archival value because they contain information of continuing and enduring value to the [City/County], provide valuable research data, and document the history and development of the [City/County] and its departments.

I, THEREFORE, MOVE that the [Council/Board of Supervisors] approve the revised [City/County] Records Retention Schedule and the Records Retention Schedule for the [Police Department/Sheriff] to retain the records identified as available for public inspection in Cal. Penal Code § 832.7(b), and to adopt a resolution directing [City/County] Departments/agencies, including the [Police Department/Sheriff], to use these Records Retention Schedules.

MODEL REVISION TO RECORDS RETENTION SCHEDULE
 CITY/COUNTY OF []

RECORD NO.	RECORD TITLE	DEPARTMENT(S)	RETENTION PERIOD	RECORD TYPE
###-###	Officer-involved shooting files	Police/Sheriff; Office of the Inspector General; Civilian Oversight Commission; District Attorney	PE (Permanent)	H (Historical)
###-###	Officer use of force reports, investigation files, case packages, and related documentation	Police/Sheriff; Office of the Inspector General; Civilian Oversight Commission; District Attorney	PE (Permanent): Cal. Gov't Code § 832.7(b) records 5 years: all others	H (Historical)
###-###	Complaint & complaint investigation files (complaints, investigation reports, findings, related records)	Police/Sheriff; Office of the Inspector General; Civilian Oversight Commission	PE (Permanent): Cal. Gov't Code § 832.7(b) records 5 years: all others	H (Historical): Cal. Gov't Code § 832.7(b) records C (Confidential): all others
###-###	Internal affairs investigation case files; discipline reports	Police/Sheriff; Office of the Inspector General; Civilian Oversight Commission	PE (Permanent): Cal. Gov't Code § 832.7(b) records 5 years: all others	H (Historical): Cal. Gov't Code § 832.7(b) records C (Confidential): all others
###-###	Pitchess motions - requests and files	Police/Sheriff; Office of the Inspector General	PE (Permanent): Cal. Gov't Code § 832.7(b) records 5 years: all others	H (Historical): Cal. Gov't Code § 832.7(b) records C (Confidential): all others
###-###	Workpapers and audio tapes for audits & investigations	Office of the Inspector General; Civilian Oversight Commission	PE (Permanent): Cal. Gov't Code § 832.7(b) records 5 years: all others	H (Historical)