

## Police Transparency in California: A Legal Compendium

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### Introduction

Two bills passed the California Legislature in 2018 that significantly broadened the public's right of access to information about state and local police officers. One, Senate Bill 1421, substantially increased the public's right to get records about police misconduct and serious uses of force. The second, Assembly Bill 748, similarly opened up public access to video and audio recordings relating to police uses of force and other critical incidents. Both bills went into effect in 2019.

The following guide explains in some detail each of these laws, along with relevant court rulings, and also explains what records the public has a right to see. **Section I** is about police misconduct and use-of-force files, and **Section II** is about video and audio recordings, such as dash cam and body cam footage.

The public can access these records under the California Public Records Act. For the basics on how the CPRA works, refer to [FAC's primer](#). As for timing: under the CPRA, the government is generally required to respond to a request for records within 10 days. The time for responding can be extended by the agency for an additional 14 days (for a total of 24 days).

### I. Files About Police Misconduct and Other Critical Incidents

In 2018 the California Legislature enacted [SB 1421](#) which amended [Penal Code section 832.7\(b\)](#) ("Section 832.7(b)"). The Legislature enacted SB 1421 to greatly expand public access to records concerning police uses of force and serious misconduct. As the Legislature explained:

"The public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force. Concealing crucial public safety matters such as officer violations of civilians' rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety." [S.B. 1421](#), §1(b).

The law went into effect on January 1, 2019, and makes the records about the following types of conduct by state and local law enforcement officers (referred to in the law as "**peace officers or custodial officers**") available under the California Public Records Act ("CPRA"):

- 1) **officer-involved shootings** (Section 832.7(b)(1)(A)(i));
- 2) uses of force resulting in **great bodily injury** or death (Section 832.7(b)(1)(A)(ii)),
- 3) **sustained findings** that an officer committed **sexual assault** as defined in Section 832.7(b)(1)(B); and
- 4) **sustained findings** that an officer committed **dishonesty** as described in Section 832.7(b)(1)(C).

## A. Definitions

Each of the boldfaced terms above has a special meaning in the law, and those definitions are important for determining what is, and what is not, a public record. These terms have the following meanings:

### 1. Peace officers and custodial officers (“officers”)

Section 832.7(b) covers records related to the above-listed four categories of incidents involving “peace officers or custodial officers.” Peace officers include police officers, officers of sheriff’s departments, California Highway Patrol officers, officers of specialized policing agencies such as those for ports, and many other types of law enforcement personnel. Penal Code sections [830 to 830.15](#) detail numerous categories of “peace officers.” Peace officers also include correctional officers, e.g., prison guards for state prisons, and other employees of the California Department of Corrections and Rehabilitation such as parole and probation officers. Custodial officers are employees of city or county law enforcement agencies that maintain custody of prisoners in local detention facilities. Penal Code sections [831 and 831.5](#) explain the types of individuals who are custodial officers.

For simplicity, peace officers and custodial officers are referred to as “officers” below.

### 2. Officer-involved shootings

An agency must disclose records relating to **any incident in which an officer discharged a firearm at a person**. Records relating to such incidents must be disclosed even if nobody was hit or injured. See Section 832.7(b)(1)(A)(i). A shooting incident does not have to be investigated by an agency for the records to be released. Similarly, the agency does not need to have made any findings that an officer violated policy or any law for records to be released. Rather, any record relating to **the report**, or investigation, or findings concerning the incident must be released. See Section 832.7(b)(1)(A).

### 3. Use of force resulting in death or great bodily injury

An agency must disclose records relating to any incident in which an officer’s use of force resulted in death, or in “great bodily injury.” See Section 832.7(b)(1)(A)(ii). The term “great bodily injury” is defined in California law as “a significant or substantial physical injury.” See, e.g., Pen. Code, § [12022.7\(f\)](#).

The term “great bodily injury” has been interpreted broadly by the California courts. See *People v. Washington*, 210 Cal.App.4th 1042, 1047-1048 (2012) (“some physical pain or damage, such as lacerations, bruises, or abrasions” constitutes great bodily injury); *People v. Jung*, 71 Cal.App.4th 1036, 1042 (1999) (same); *People v. Wallace*, 14 Cal.App.4th 651, 665-666 (1993) (cuts and burns from being flex-tied, burning sensation from an insecticide-like substance were great bodily injury); *People v. Bustos*, 23 Cal.App.4th 1747, 1755 (1994) (multiple abrasions, lacerations, and contusions were great bodily injury); *People v. Corona*, 213 Cal.App.3d 589 (1989) (a swollen jaw, bruises to head and neck and sore ribs were “great bodily injury”); *People v. Sanchez*, 131 Cal.App.3d 718 (1982) (multiple abrasions and lacerations to victim’s back and bruising of eye and cheek were “great bodily injury”) disapproved on other grounds in *People v. Escobar*, 3 Cal.4th 740, 751, fn. 5 (1992); *People v. Jaramillo*, 98 Cal.App.3d 830, 836-837 (1979) (multiple contusions, swelling and discoloration of the body, and extensive bruises were “great bodily injury” was great bodily injury).

A different term, “serious bodily injury,” is defined somewhat more narrowly in California law, and can be interpreted as requiring more severe injuries than “great bodily injury.” However, in drafting SB 1421 the Legislature specifically rejected use of the term “serious bodily injury” and instead chose to use the term “great bodily injury.” See [SB 1421 Senate Floor Analysis dated August 31, 2018](#) at page 2. Furthermore, at least two trial courts have rejected agency attempts to use the more narrow definition of “serious bodily injury” when responding to requests for records under Section 832.7(b). See *Richmond Police Officers’ Association v. City of Richmond*, Case No. MSN19-0169 (Contra Costa Sup. Ct. July 31, 2020); *The Sacramento Bee, et al., v. Sacramento Co. Sheriff’s Dept.*, No. 34-2019-80003062 (Sacramento Sup. Ct., Nov. 8, 2019). These courts have held that “great bodily injury” under Section 832.7(b) must be interpreted broadly and consistently with the broad interpretations under *People v. Washington*, and the cases listed above.

Therefore, in responding to requests for records under Section 832.7(b), agencies should interpret “great bodily injury” broadly, and in line with the broad scope of “great bodily injury” applied by the California courts.

As with shooting incidents, a use of force resulting in great bodily injury does *not* have to be investigated by an agency for the records to be released. Similarly, the agency does *not* need to have made any findings that an officer violated policy or any law for records to be released. Rather any record relating to *the report*, or investigation, or findings concerning the incident must be released. See Section 832.7(b)(1)(A).

#### **4. Sustained findings of sexual assault**

Under Section 832.7(b), an agency must release any records relating to an incident in which a “sustained finding” was made that an officer engaged in sexual assault involving a member of the public. See Section 832.7(b)(1)(B).

A “sustained finding” means a final determination by the agency, hearing officer, or other applicable investigating agency, following an investigation and opportunity for an administrative appeal, that the actions of the officer violated law or department policy. See Penal Code § [832.8\(b\)](#). As at least one trial court has held that once a sustained finding has been made, an agency must disclose the records *even if* the agency later decides to drop the sustained finding, or enters into a settlement agreement with the officer to drop the sustained finding. See *Richmond Police Officers’ Association v. City of Richmond*, Case No. MSN19-0169 (Contra Costa Sup. Ct. July 31, 2020). In other words, an agency cannot make an agreement with an officer that would hide a sustained finding from disclosure.

“Sexual assault” is broadly defined under Section 832.7(b) as including instances when a police officer propositions a member of the public or engages in a sexual act with a member of the public while on duty:

“sexual assault” means the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or other official favor, or under the color of authority. For purposes of this definition, the propositioning for or commission of any sexual act while on duty is considered a sexual assault.

See Section 832.7(b)(1)(B)(ii). As one trial court summarized, the statute defines sexual assault as including “[1] Nonconsensual sexual acts or propositions, whether committed on or off the job; and [2] Sexual acts or propositions committed on the job, whether or not consensual (or claimed to be consensual).” *Richmond Police Officers’ Association v. City of Richmond*, Case No. MSN19-0169 (Contra Costa Sup. Ct. July 31, 2020).

## **5. Sustained findings of dishonesty**

Finally, Section 832.7(b) requires disclosure of records relating to an incident in which a sustained finding was made of dishonesty by an officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

Thus, the law covers at least two types of incidents: (a) incidents in which an officer engaged in dishonesty related to reporting, investigation, or prosecution of a crime committed by anyone; and (b) incidents in which an officer engaged in dishonesty related to reporting of, or investigation of misconduct by, another officer. As with sexual assault, in order for the records to become disclosable, there must be a sustained finding that the officer committed dishonesty falling into one of these categories.

### **B. Scope of records that must be released in response to a request under Section 832.7(b)**

Section 832.7(b) requires disclosure of a broad array of records. As explained above, it requires the disclosure of any records relating to the report, or investigation, or findings for any officer involved shooting, or any use of force resulting in great bodily injury or death. Similarly, it requires the disclosure of any record related to an incident resulting in a sustained finding of sexual assault or dishonesty.

Section 832.7(b) further explains that the records which must be released include “all investigative reports; photographic, audio, and video evidence; transcripts or recordings of interviews; autopsy reports; all materials compiled and presented for review to” anyone who determines whether the officer’s action was consistent with law or policy or determines whether to file charges against the officer; and records related to “what discipline to impose or corrective action to take; documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident.” See Section 832.7(b)(2).

It does not matter which agency initially created the records—if an agency has in its possession records subject to disclosure under Section 832.7, it must disclose them even if it did not initially create them and/or the records pertain to officers from a different agency. See *Becerra v. Superior Court*, 44 Cal. App. 5th 897, 920 (2020).

### **C. Incidents that occurred and records created before January 1, 2019**

SB 1421 applies irrespective of when the incident occurred or the records were created. Thus, an agency must release records under Section 832.7(b) even if the records were created, or the incident occurred, prior to January 1, 2019, when the amendments to Section 832.7(b) came

into effect. See *Walnut Creek Police Officers' Ass'n v. City of Walnut Creek*, 33 Cal. App. 5th 940, 941 (2019).

**D. Requester costs for recordings, including edited or redacted body cam or dash cam video**

Just as with other categories of other records disclosable under the CPRA, the government may charge only for the direct costs of duplicating records or the direct costs of providing the records in electronic form. Of particular importance, the California Supreme Court held that agencies may not charge a requester for the agency's costs of redacting the records at issue (particularly responsive audio and video records). See *Nat'l Lawyers Guild v. City of Hayward*, 9 Cal. 5th 488, 506-507 (2020). Rather, the agency may only charge for the direct costs of duplicating records or the direct costs of providing the records in electronic form. Therefore, a requester should be able to obtain these records (including any existing audio or video recordings) for a minimal cost.

**II. Recordings of Police Shootings and Use-of-Force Incidents**

AB 748 amended the CPRA to require the disclosure of audio and video records of "critical incidents." The amendment, to add Government Code Section 6254(f)(4) ("Section 6254(f)(4)"), allows the public and press to access a significantly broader range of recordings than was previously available.

Although most commonly thought of as providing for the release of police "body cam" or "dash cam" videos, Section 6254(f)(4) is not limited to such videos but instead applies to any "video or audio recording that relates to a critical incident." Thus, records such as bystander videos that end up in the possession of the government should be subject to Section 6254(f)(4)'s disclosure requirements.

**A. Records that Can Be Obtained Under Section 6254(f)(4)**

Except in the relatively narrow circumstances described below, Section 6254(f)(4) requires agencies to disclose audio and video records of "critical incidents." A "critical incident" is: (i) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer; or (ii) An incident in which the use of force by a peace officer or custodial officer against a person resulted in death or in great bodily injury.

In other words, Section 6254(f)(4) provides for release of video and audio recordings of the same types of officer-involved shooting and use of force incidents for which records must be released under Penal Code section 832.7(b). As under Section 832.7(b), agencies should interpret the term "great bodily injury" broadly, and consistently with the broad manner in which California courts have interpreted the term.

Section 6254(f)(4) allows an agency to withhold audio and video recordings of critical incidents in the following limited circumstances.

**B. Withholding based on active investigation**

An agency may withhold a recording for 45 days or longer from the date agency "knew or reasonably should have known about the incident" *only if* releasing the recording would substantially interfere with an active criminal or administrative investigation. However, the

longer the agency withholds the recording, the higher the burden on the agency to justify delaying disclosure. Thus, an agency may only withhold a recording for up to 45 days, *if*, based on the facts and circumstances depicted in the recording, disclosure would substantially interfere with an active investigation, such as by endangering the safety of a witness or a confidential source. The agency must provide a written explanation to the requester of the specific basis for the agency's determination that disclosure would substantially interfere with the investigation, and must also provide the estimated date of disclosure. To withhold a recording for longer than 45 days, the agency faces a more substantial burden, and must provide a new written notice every 30 days. See Sections 6254(f)(4)(A)(i) and (ii).

### **C. Redaction or withholding based on privacy expectation**

An agency may redact or withhold a recording if the agency demonstrates, on the facts of the particular case, that the public interest in withholding the recording clearly outweighs the public interest in disclosure *because* the release of the recording would violate the reasonable expectation of privacy of someone depicted in the recording. Sections 6254(f)(4)(B). There are a number of limitations for invoking this exception.

First, the agency must provide a written explanation to the requester of the specific expectation of privacy at issue and the public interest served by withholding the recording.

Second, whenever possible, the agency is required to redact the recording "including blurring or distorting images or audio, to obscure those specific portions of the recording" to protect the privacy interest at stake. The agency may only withhold the recording entirely if the agency demonstrates that a privacy interest cannot adequately be protected through redaction. Furthermore, when redacting a recording, the agency is not permitted to interfere with the viewer's ability to fully, completely, and accurately comprehend the events captured in the recording and cannot not otherwise edit or alter the recording.

Even when a recording is entirely withheld because of a privacy interest, the person whose privacy is being protected (or their surviving family) can still obtain a copy of the recording (except where it would substantially interfere with an active criminal or administrative investigation, in which case the provisions above concerning active investigations apply). See Section 6254(f)(4)(B)(ii).

As noted above, agencies may *not* charge for its own costs in redacting the records at issue. See *Nat'l Lawyers Guild v. City of Hayward*, 9 Cal. 5th 488, 506-507 (2020).

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