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VIA ELECTRONIC MAIL

San Bernardino County Counsel's Office
385 N. Arrowhead Avenue
San Bernardino, CA 92415-0120
tom.bunton@cc.sbcounty.gov

Re: Public Records Request #22-3694

Dear Tom Bunton:

The First Amendment Coalition ("FAC") is a nonprofit public interest organization dedicated to advancing free speech, open and accountable government, and public participation in civic affairs. I am writing on behalf of FAC to address your agency's response to a public records request by journalist Joey Scott.

On October 27, 2022, Mr. Scott asked the San Bernardino County Sheriff's Department ("SBCSD") to disclose:

All recordings, video and audio, pursuant to California Government Code section 6254(f)(4) [now section 7923.625].

- Incidents involving the discharge of a firearm at a person or custodial officer;
- Incidents in which the use of force by a peace officer or custodial officer against a person resulted in death or great bodily injury

The incident occurred on September 27th, involving the death of two people Anthony Graziano and Savannah Graziano.

SBCSD last responded on June 23, 2023, stating:

Please be advised that the records you have requested are part of an active investigation. At this time, the Department is in the process of gathering and reviewing material related to this incident. We will provide an update on or before July 26, 2023.

As of December 8, 2023, SBCSD has not provided an update nor disclosed any of the requested information.

The California Public Records Act (“CPRA”) requires disclosure of public records on request unless they fall within narrowly defined exceptions. Cal. Const. Art. I, § 3(b); Govt. Code § 7922.530. The recordings requested by Mr. Scott are public records. Govt. Code § 7920.530.

Under A.B. 748 and S.B. 1421, SBCSD’s response is insufficient to justify the continued delay of disclosure of all the video and audio recordings requested by Mr. Scott, now that over a year has elapsed since the incident on September 27, 2022.

1. A.B. 748 requires disclosure of the critical incident recordings requested by Mr. Scott.

When requested under the CPRA, “a video or audio recording that relates to a critical incident ... may be withheld only” for the limited reasons specified in A.B. 748. Govt. Code § 7923.625. The recordings requested by Mr. Scott relate to a critical incident to the extent they depict an “incident involving the discharge of a firearm at a person by a peace officer” and an “incident in which the use of force by a peace officer... resulted in death.” Govt. Code § 7923.625(e). SBCSD has not demonstrated that such recordings qualify for any delay in disclosure allowed by A.B. 748.

“During an active criminal or administrative investigation, disclosure of a recording related to a critical incident may be delayed for no longer than 45 calendar days after the date the agency knew or reasonably should have known about the incident.” Govt. Code § 7923.625(a)(1). That time has long since passed.

“After 45 days from the date the agency knew or reasonably should have known about the incident, and up to one year from that date, the agency may continue to delay disclosure of a recording if the agency demonstrates that disclosure would substantially interfere with the investigation.” Govt. Code § 7923.625(a)(2). Again, that time has long since passed.

Now that more than one year from the incident has elapsed, SBCSD may continue to delay disclosure only if it “demonstrates by clear and convincing evidence that disclosure would substantially interfere with the investigation,” explaining in writing “the specific basis for the agency’s determination that the interest in preventing interference with an active investigation outweighs the public interest in disclosure.” Govt. Code § 7923.625(a)(2).

The clear and convincing standard is significantly more demanding than a mere preponderance. It requires proof making it “highly probable” that the alleged fact is true, and the evidence must be “so clear as to leave no substantial doubt” and “sufficiently strong to command the unhesitating assent of every reasonable mind.” *Conservatorship of O.B.*, 9 Cal. 5th 989, 998 & n.2 (2020).

At this late date, it is not reasonable to assert that any alleged ongoing investigation would be compromised by disclosure of video and audio recordings that investigating officers and prosecutors have long had ample opportunity to review.

Without citing specific facts, SBCSD makes only an assertion that there is an “active investigation.” It is unclear what further there is to investigate over a year later, and in any event, an “active investigation” cannot justify prolonged withholding of records about an officer’s firearm use that resulted in multiple deaths over a year after the incident. Otherwise, the government’s burden to justify continued withholding by clear and convincing evidence would become meaningless, which the Legislature could not have intended.

After the one-year period expires, any ongoing refusal to disclose critical incident recordings must fall within a narrowly construed exception for clear and convincing proof that alleged interference with an active investigation outweighs the public’s strong interest in disclosure. Cal. Const. Art. I, § 3(b)(2) (statute must be “narrowly construed if it limits the right of access”). Under SBCSD’s generic position, the exception would improperly swallow the rule, in violation of the constitutional principle that any statute limiting access to public records must be narrowly construed.

2. S.B. 1421 requires disclosure of the recordings requested by Mr. Scott because the incident involved a discharge of a firearm at a person by a peace officer and the use of force by a peace officer against a person that resulted in death.

S.B. 1421 similarly compels disclosure of the requested recordings. Under S.B. 1421, “the following peace officer or custodial officer personnel records and records maintained by a state or local agency shall not be confidential and shall be made available for public inspection”:

- A. A record relating to the report, investigation, or findings of any of the following:
 - i. An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.
 - ii. An incident involving the use of force against a person by a peace officer or custodial officer that resulted in death or in great bodily injury.

Penal Code § 832.7(b)(1)(A)(i)-(ii).

“Records that shall be released pursuant to this subdivision include,” in relevant part, all “photographic, audio, and video evidence.” Penal Code § 832.7(b)(3).

S.B. 1421, like A.B. 748, provides only limited circumstances in which an agency may delay disclosure of covered records, none of which appear to apply here.

“During an active criminal investigation, disclosure may be delayed for up to 60 days from the date the misconduct or use of force occurred or until the district attorney determines whether to file criminal charges related to the misconduct or use of force, whichever occurs sooner.” Penal Code § 832.7(b)(8)(A)(i). Even if there were still an active criminal investigation of the incident in question, that time has long since passed.

Assuming there was “an administrative investigation” into the incident, an agency may delay disclosure on that ground for “no longer than 180 days after the date of the employing agency’s discovery of the misconduct or use of force, or allegation of misconduct or use of force, by a

person authorized to initiate an investigation.” Penal Code § 832.7(b)(8)(C). Again, that time has long since passed.

SBCSD has not asserted there are any pending “criminal charges ... related to the incident in which misconduct occurred or force was used,” Penal Code § 832.7(b)(8)(B), and therefore delayed disclosure cannot be authorized on that ground. Nor has SBCSD asserted that disclosure of the recordings would interfere with any “criminal enforcement proceeding” against any officer or anyone else. Penal Code § 832.7(b)(8)(A)(ii)-(iii).

In “officer-involved shootings, the public’s interest in the conduct of its peace officers is particularly great because such shootings often lead to severe injury or death,” as in fact happened in this case. *Long Beach Police Officers Ass’n. v. City of Long Beach*, 59 Cal. 4th 59, 74 (2014).


Because SBCSD has not demonstrated that A.B. 748 or S.B. 1421 justifies continued withholding of the recordings requested by Mr. Scott, those recordings must be disclosed immediately.

For all these reasons, SBCSD is unlawfully withholding the recordings requested by Mr. Scott, exposing the County to litigation that would result in an order compelling disclosure under the CPRA and awarding substantial fees and expenses. Govt. Code §§ 7923.100, 7923.115.

I hope to resolve this matter without litigation if possible. Please let me know if SBCSD will promptly release the requested recordings and make it unnecessary to pursue legal action to vindicate the public’s right to disclosure under A.B. 748 and S.B. 1421.

Very truly yours,

FIRST AMENDMENT COALITION



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