



San Diego County Sheriff's Department

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William D. Gore, Sheriff

July 16, 2018

James M. Chadwick
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Re: Your letter of July 5, 2018/KPBS

Dear Mr. Chadwick:

The Sheriff's Department is in receipt of your letter of July 5, 2018 to Amanda Lomnicky, expressing your disagreement over the Sheriff's Department's denial of your client's California Public Records Act (CPRA) request.

In Ms. Lomnicky's letter of July 2 to Ms. Trageser, she explained that the Sheriff's Department does not have in its possession a record that identifies the dates of each citizen complaint.¹ She also pointed out to you that such information is exempt from disclosure pursuant to Government Code sections 6254(f) and (k). You take issue with our invocation of these exemptions, but you do not address the most important point until the end of your letter, which is that the Sheriff's Department does not have a record that meets Ms. Trageser's description. You assert that "[t]he fact that this information for all such complaints from the beginning of 2011 to the present is not contained in a single

¹ We understood Ms. Trageser's June 22, 2018 request for information pertaining to the investigation of "citizen complaints" to refer to those complaints filed by members of the public against peace officers of the San Diego County Sheriff's Department pursuant to Penal Code § 832.5

It should also be noted that Mr. Trageser's written communication with the Sheriff's Department began with an email on April 19, 2018, to our Media Relations Unit, asking several questions (to which she was provided answers), and continued with several more follow-up emails (up through June 22) asking several more questions that were similarly answered by the Sheriff's Department. The subject line of Ms. Trageser's emails was "Public Records Act Request." Ms. Trageser should be made aware that a Public Records Act request is "a request for a copy of records that reasonably describes an identifiable record or records" (Government Code section 6263(b)). The Public Records Act does not require a representative of a public agency to answer questions. Ms. Trageser should be made aware that when the Sheriff's Department responds to her questions (as it did repeatedly), we do so voluntarily. There is no legal compulsion in the CPRA, or any other statute, to do so.

record is beside the point." On the contrary, it is a very significant point. Your letter makes clear that you are expecting the Sheriff's Department to do either one of two things: (1) create a new document that lists, for each calendar year from 2011 forward, the date the complaint was received, and the date of the completion of the investigation for each citizen complaint received from 2011 forward; or (2) provide you with redacted documents from said investigations that reveal the date the complaint was received as well as the date the investigation was completed. For the reasons I will explain, the Sheriff's Department is neither required nor permitted to perform either task.

It is well-settled law that the California Public Records Act does not require a public agency to create a new record for the purpose of responding to a CPRA request. *Haynie v. Superior Court* (2001) 26 Cal. 4th 1061, 1075 ("we find nothing in the [CPRA] itself that mandates any action other than opening for inspection the records identified as coming within the scope of the request or providing copies thereof at the expense of the person requesting copies"); *Fredericks v. Superior Court* (2015) 233 Cal. App. 4th 209, 227 ("If the agency would be required to create a new set of public records in order to provide responses to a CPRA request, such agency action may be found to exceed its statutory duties.")

Moreover, the information you seek is, by its very nature and definition, a "record of complaint[] to ... a local police agency," and therefore exempt from disclosure pursuant to Government Code section 6254(f). In your letter you, claim that the 6254(f) exemption applies only to *criminal* investigations. In support of that legal theory you cited to *City of Hemet v. Superior Court* (1995) 37 Cal. App. 4th 1411, 1422. *City of Hemet*, however, focuses on investigatory files, not complaints as set forth in Government Code 6254(f).

Further, *City of Hemet* does not stand for the principle that "Government Code section 6254 contains no exemption for 'law enforcement personnel investigations.'" In fact, *City of Hemet* implies the exact opposite. The *City of Hemet* court, in rejecting the argument that peace officer personnel records were not exempted from disclosure under Government Code Section 6254(b) found instead that they "are protected as records 'the disclosure of which is exempted or prohibited by ... law'" (Government Code 6254(k) *City of Hemet*, at 1431.

You also cite to *Dixon v. Superior Court* (2009) 170 Cal. App. 4th 1271. But the court in *Dixon* made very clear that that "our interpretation of Government Code 6254(f) investigatory file exemption is confined to coroner and autopsy reports which, like here, inquire into and determine the circumstances, manner and cause of a suspected homicide death..." *Dixon*, at fn. 3. *Dixon* cannot be read to hold that the exemption for 6254(f) applies only to criminal investigations, to the total exclusion of all other investigations conducted by a law enforcement agency. Such an unreasonable reading effectively reads out of the statute the language in 6254(f) that explicitly applies to records of complaints to a local police agency, as well as the exemption for investigatory files of investigations

conducted for "correctional, law enforcement, or licensing purposes" (Government Code section 6254(f)). Is it unclear how an investigative file of an investigation that was conducted for licensing purposes can be exempt (as explicitly contemplated by the legislature) if, as you claim, only criminal investigations are exempted by Section 6254(f).

Next, you assert that even if the Section 6254(f) exemption did apply, it would require the release of certain information, including "the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto...", pursuant to Section 6254(f)(2). This is a misreading of the statute. Subparagraphs 1-3 of subsection (f) "requires law enforcement agencies to "make public" certain information derived from those exempt records pertaining to **arrests made and complaints or requests for assistance received**" *Dixon v. Superior Court* (2009) 170 Cal. App. 4th, at fn. 2; See also *City of Hemet v. Superior Court* (1995) 37 Cal. App. 4th 1411, 1424 (finding that the subparagraphs of Section 6254(f) "require the disclosure of specified information about **arrests, arrestees, and complaints to which law enforcement personnel respond**")²

Nothing in the statute or in any case law suggests that Section 6254(f)(2) requires the disclosure of information contained in citizen complaints of peace officer misconduct. Even if it did, the confidentiality provisions of Penal Code section 832.7, both by itself and through its incorporation into the CPRA via Government Code section 6254(k) would trump any disclosure requirements by under the CPRA. "[T]he protection of Penal Code section 832.7 is illusory unless that statute is incorporated into CPRA through Government Code section 6254, subdivision (k). Logic does not permit the conclusion that information may be 'confidential' for one purpose, yet freely disclosable for another. In the court's apparent concern for allowing the city in that case to disseminate

² The following passage in *Long Beach Peace Officers Ass'n v. City of Long Beach* (2014) 59 Cal. 4th 59 further demonstrates that the subparagraphs of Government Code section 6254 (f) apply to calls or complaints for service and arrests, not citizen complaints, unless an incident falls under both categories.

Under [Government Code section 6254(f)], when a shooting by a peace officer occurs during an arrest (Gov. Code, § 6254, subd. (f)(1)) or in the course of responding to a complaint or request for assistance (*id.*, § 6254, subd. (f)(2)), and when the officer's name is recorded as one of the "factual circumstances" of the incident, disclosure of the officer's name is generally required. It thus appears that the Legislature draws a distinction between (1) records of factual information about an incident (which generally must be disclosed) and (2) records generated as part of an internal investigation of an officer in connection with the incident (which generally are confidential).

Long Beach Peace Officers Ass'n v. City of Long Beach (2014) 59 Cal. 4th 59, 72.

The information you seek (the date of the citizen's complaint, and the date that the investigation of the citizen complaint was completed) is information contained in records that are plainly "records generated as part of an internal investigation of an officer"

information as a matter of legitimate public interest, the court put a gloss on the word 'confidential' which we cannot accept." *City of Hemet v. Superior Court* (1995) 37 Cal. App. 4th 1411, 1430. Additionally, the Court in *Pasadena Police Officers' Association v. Superior Court* (2015) 240 Cal. App. 4th 268 cited to *Comm. On Peace Officer Standards & Training v. Superior Court* (2007) 43 Cal. 4th 278, 293 by stating that the "majority of the court found, however, that information in the database would be exempt from disclosure if it had been 'obtained from' personnel records maintained by the officers' employing agencies." Further, Government Code Section 6254(k) is not subject to, and does not contain, the same disclosure requirement as set forth under Government Code Section 6254(f)(2).

You next claim that notwithstanding the clear directive of the *City of Hemet* case, "the *Pitchess* statutes [Penal Code sections 832.7 and 832.8; Evidence Code section 1043 et seq.] do not permit non-disclosure of the information KPBS has requested". You cite *Comm. On Peace Officer Standards & Training v. Superior Court* (2007) 43 Cal. 4th 278, 293, and *Long Beach Peace Officers Ass'n v. City of Long Beach* (2014) 59 Cal. 4th 59, 72, for the premise that "the *Pitchess* statutes prohibit disclosure only of 'the types of information enumerated in [Penal Code] Section 832.8'". You correctly identify 832.8(e) ("Complaints, or investigations of complaints, concerning an event or transaction in which [the peace officer] participated, or which he or she perceived, and pertaining to the manner in which he or she performed her duties") as the subsection that defines a personnel record for purposes of Penal Code Section 832.7 confidentiality, however you fail to recognize or acknowledge that not only are "personnel records" confidential under 832.7 but also "information obtained from these records, are confidential." The date of a citizen complaint is obtained directly from the citizen's complaint form, and as such is clearly confidential.

You go on to claim Penal Code Section 832.8 does not apply because "KPBS is not seeking the complaints themselves, or the contents of any investigations thereof." This reflects a misunderstanding of the peace officer confidentiality statutes. Section 832.8 declares certain files to be confidential, which includes the documents contained therein, and the information contained in those documents. There is neither any statutory provision, nor any case that interprets this section to hold that information contained in confidential peace officer personnel files *must* be disclosed, notwithstanding the fact that the records themselves are explicitly confidential and not permitted to be disclosed.

Neither *POST* nor *Long Beach* holds to the contrary. In *POST*, the California Supreme Court held that the names, employing departments, and hiring and termination dates of peace officers were not made confidential by Section 832.8, reasoning that none of the above information fell into any of the categories of information enumerated in Section 832.8. Here, *POST* is not applicable to your request because the information you seek, unlike the information sought in *POST*, is information which is by its very nature is

information that is part of a complaint or investigation of a complaint of an incident involving a peace officer.

Nor is the *Long Beach* case applicable, which sought only the names of peace officers who were involved in a critical incident, information which the Long Beach court held was not covered by Penal Code section 832.8. Neither *Long Beach* nor *POST* can be read as support for the contention that information obtained from citizen complaints must be disclosed from complaints and investigations which themselves³ are not permitted to be disclosed.

Finally, you cite *Pasadena Police Officers' Association v. Superior Court* (2015) 240 Cal. App. 4th 268 for the premise⁴ that "the fact that [a record] contains privileged information does not bestow protected status on the entire documents." This is correct as a general matter, but not applicable in cases such as this where the *entire investigatory file* has been bestowed "protected status" by both Section 6254(f), (k), and by Penal Code 832.7/832.8. This is made clear by the very paragraph you cited from the *Pasadena* case:

The real issue is whether the Report is subject to an exemption. The mere fact that the Report contains privileged information does not bestow protected status on the entire document. Police officer personnel records include only the type of information specified in Penal Code section 832.8. (*Commission on Police Officer Standards, supra*, 42 Cal.4th at p. 293.) Only records generated in connection with a citizen complaint, or administrative appraisal or discipline, are protected. (*Long Beach Police, supra*, 59 Cal.4th at p. 71.)

Pasadena Police Officers' Association v. Superior Court (2015) 240 Cal. App. 4th 268. 289

You can clearly see by the paragraph cited above that "records generated in connection with a citizen complaint...are protected."

³ You also state, quite disingenuously, "[S]ection 832.7, which is the only statute that imposes any kind of requirement of confidentiality, expressly provides for the disclosure of 'data regarding the number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded) made against its officers that information is in a form which does not identify the individuals involved.' (Pen. Code § 832.7, subd. (c).) This is precisely the type of information KPBS has requested." It is not. KBPS has requested the complaint filing date and the date of the completion of the investigation, for every citizen complaint since 2011. This is not among the categories of information contained in a citizen complaint investigation that Section 832.7(c) allows a law enforcement agency to release.

⁴ *Pasadena* involved a report commissioned by the Pasadena Police Department, by an outside agency, to "review ...[a shooting] incident [by a PPD officer] for the benefit of the department and to evaluate how the department does business in the areas reviewed." The *Pasadena* court explicitly rejected the contention that the report was prepared in response to a citizen complaint. *Pasadena Police Officers' Association v. Superior Court* (2015) 240 Cal. App. 4th 268. 289

After reviewing your letter, and the authorities cited therein, the Sheriff's Department hereby denies your client's request pursuant to Government Code Sections 6254(f), (k), and Penal Code Section 832.5 et. seq.

Sincerely,

WILLIAM D. GORE, Sheriff

A handwritten signature in black ink, appearing to be the initials 'AT' or a stylized 'A2'.

Sanford A. Toyen, Legal Advisor
Office of the Sheriff – Legal Affairs Unit