



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.

### **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."

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

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

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)

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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.