



April 28, 2022

VIA ELECTRONIC MAIL

Mara W. Elliott, Esq.
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Re: Public Records Request #20-5069

Dear Ms. Elliott:

I write on behalf of Tasha Williamson, who submitted the above-referenced public records request to San Diego Police Department (“SDPD”) related to the shooting of Rosa Calva by Officer Andres Ruiz, which occurred on May 23, 2020. According to San Diego County Superior Court records, a criminal case against Ms. Calva, apparently arising from the same incident, was filed on June 4, 2020 (No. CD286182).

This letter is addressed to SDPD’s denial of Ms. Williamson’s request for the following records under A.B. 748:

“All police audio including all 911 and all radio transmissions from the beginning of the call to the end of the call of this incident” and “[a]ll body-worn camera footage from all officers associated with this call on May 23, 2020.”

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 § 6253. The foregoing recordings are public records. Govt. Code § 6252(e).

Citing Govt. Code § 6254(f)(4)(A) and Penal Code § 832.7(b)(7), SDPD denied the request on the grounds that the incident “is under criminal investigation by the San Diego Police Department and the subject of a criminal proceeding by the San Diego County District Attorney’s Office.” According to SDPD’s response:

- “Based on the facts and circumstances depicted in the recording, public disclosure would substantially interfere with the investigation and criminal proceeding by releasing critical evidence to the public, including potential witnesses and jurors, prior to the conclusion of the proceeding.”
- “[T]he release of evidence prior to trial will potentially interfere with the defendant’s right to a fair trial. The interest in maintaining confidentiality during the criminal investigation and the criminal enforcement proceeding promotes fair and impartial

review of evidence by the court, jury and parties to the case. Fair and impartial administration of justice outweighs the public interest in immediate disclosure of the requested recording.”

Under A.B. 748, those conclusory assertions cannot justify continued withholding of all video and audio recordings requested by Ms. Williamson now that almost two years have elapsed since the police shooting of Ms. Calva.

1. A.B. 748 requires disclosure of the critical incident recordings requested by Ms. Williamson.

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 § 6254(f)(4). The recordings requested by Ms. Williamson 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.” Govt. Code § 6254(f)(4)(C)(i). SDPD has not demonstrated that such recordings qualify for any exception contained in 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 § 6254(f)(4)(A)(i). 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 § 6254(f)(4)(A)(ii). Again, that time has long since passed.

Now that more than one year from the incident has elapsed, SDPD 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 § 6254(f)(4)(A)(ii). That demanding exception does not apply for two reasons.

First, it seems doubtful that any investigation should be ongoing now that charges have been filed against Ms. Calva. Presumably, any investigation of the incident should have long since concluded. It is implausible that an investigation of the shooting and surrounding events would not be complete after almost two years.

Second, SDPD cannot prove by clear and convincing evidence that any alleged interference with any ongoing investigation outweighs the public’s compelling interest in disclosure almost two years after the incident.

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).

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.” *Long Beach Police Officers Ass’n. v. City of Long Beach*, 59 Cal. 4th 59, 74 (2014). SDPD has advanced no evidence, much less clear and convincing proof, which outweighs the public’s overwhelming interest in disclosure of recordings covered by A.B. 748.

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, SDPD makes only a conclusory assertion that “public disclosure would substantially interfere with the investigation ... by releasing critical evidence to the public.” That assertion could be made about any investigation. Such generic speculation cannot justify prolonged withholding of records about an officer’s firearm use almost two years 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 SDPD’s generic position, the exception would improperly swallow the rule.

A.B. 748 contains no language stating that any pending criminal charges can justify withholding critical incident recordings. Even if it did, SDPD’s boilerplate assertions that disclosure will “potentially” interfere with a fair trial or “fair and impartial review” are not clear and convincing evidence that outweighs the public’s overwhelming right to disclosure at this time. Similar generic assertions could be made about any criminal case and cannot amount to clear and convincing evidence.

To the extent Ms. Calva’s right to a fair trial might be implicated by disclosure of the requested video and audio recordings, the court retains ample means to protect that right, such as thorough voir dire and cautionary instructions to disregard any extrajudicial statements or evidence about the case. *NBC Subsidiary (KNBC–TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1223-24 (1999); *People v. Cooper*, 53 Cal. 3d 771, 807 (1991). Such measures have been held sufficient to protect the right to fair trial even in a “highly publicized capital case,” especially in a large county such as San Diego. *Cooper*, 53 Cal. 3d at 806. In a “major metropolitan area” with a “large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empanelled is hard to sustain.” *People v. Famalaro*, 52 Cal. 4th 1, 23 (2011). Even if potential jurors were aware of pretrial publicity, the mere fact of “prior knowledge of a case does not necessarily disqualify a juror” and cannot justify continued withholding of the requested recordings. *People v. Suff*, 58 Cal. 4th 1013, 1049 (2014).

As to witnesses, presumably any officers who might testify are already aware of the requested recordings, which would presumably also have been provided to the defense in discovery. It is difficult to imagine how public disclosure at this late date would somehow interfere with the ability of witnesses to testify.

In any event, by requiring clear and convincing proof after the one-year period has elapsed, the Legislature established a strong presumption in favor of disclosure, which SDPD's "generalized conjecture" is insufficient to rebut. *NBC Subsidiary*, 20 Cal. 4th at 1225; cf. *Hurvitz v. Hoefflin*, 84 Cal. App. 4th 1232, 1242 (2000) ("Where a party contends his or her right to a fair trial has been or will be compromised by pretrial publicity, the law has long imposed on that party the burden of producing evidence to establish the prejudice. It is not enough for a court to decide that the fair trial right *may* be affected by the exercise of free speech.") (cleaned up).

2. No other law permits ongoing withholding of the requested critical incident recordings.

The recordings covered by A.B. 748 are not "personnel records" governed by S.B. 1421 as codified in Penal Code § 832.7(b). "[T]he information contained in the initial incident reports of an on-duty shooting are typically not 'personnel records.'" *Long Beach Police Officers Ass'n.*, 59 Cal. 4th at 71. The same is true for video and audio recordings of an officer's discharge of a firearm at a person.

To the extent S.B. 1421 also applies to non-personnel records, it does not displace the requirement of A.B. 748 to disclose critical incident recordings unless one of the limited exceptions contained in A.B. 748 is met. As noted, "a video or audio recording that relates to a critical incident ... may be withheld *only*" for one of the reasons specified in A.B. 748. Govt. Code § 6254(f)(4) (emphasis added). That language mandates disclosure of critical incident recordings covered by A.B. 748 regardless of any provisions in S.B. 1421 that might apply to other records.

Unlike S.B. 1421, A.B. 748 does not authorize delayed disclosure due to any pending criminal charges. Accordingly, recordings governed by A.B. 748 must be disclosed regardless of whether S.B. 1421 authorizes withholding of other records once "criminal charges are filed related to the incident in which misconduct occurred or force was used." Penal Code § 832.7(b)(8)(B).

Otherwise, A.B. 748's requirement for disclosure of critical incident recordings would be subsumed into S.B. 1421 and become superfluous, which the Legislature could not have intended. *In re C.H.*, 53 Cal. 4th 94, 103 (2011) ("It is a settled principle of statutory construction that courts should strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous. We harmonize statutory provisions, if possible, giving each provision full effect.") (citations and quotation marks omitted). While S.B. 1421 might permit withholding of other records when charges related to the underlying incident are pending, it must be harmonized with A.B. 748, which enacted a different rule for critical incident recordings.

Because SDPD has not demonstrated that any exception specified in A.B. 748 justifies continued withholding of the critical incident recordings requested by Ms. Williamson, those recordings must be disclosed immediately.

For all of these reasons, SDPD is unlawfully withholding the critical incident recordings requested by Ms. Williamson, exposing the City to litigation that would result in an order compelling disclosure under the CPRA and awarding substantial fees and expenses. Govt. Code §§ 6258, 6259.

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

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Loy', with a stylized flourish at the end.

David Loy
Legal Director