

Police Reports Draft For Discussion Purposes Only

Mercury News Comments — March 13, 2008

Section 5

Public Records

5.1 Public Information That Must Be Disclosed

5.1.1 Law Enforcement Information

5.1.1.010 Reports Prepared By Law Enforcement

All reports prepared by Law Enforcement, including “Police Report,” “Domestic Violence Supplemental,” “Property Report,” “Force Response Report,” “Traffic Collision Report” and “Juvenile Contact Report” (collectively referred to as “Police Reports”) are public records subject to disclosure, unless a general or specific exemption listed herein applies.

5.1.1.020 General Exemptions

A. Information may be redacted from any Police Reports if necessary to:

1. protect the safety of any particular person;

[See ACLU comments previously submitted.]

2. ensure the successful completion of the investigation to which the report pertains, or to a specific and identified related investigation;

[See ACLU comments previously submitted.]

3. prevent the disclosure of legitimate law enforcement techniques that require confidentiality in order to be effective; or,

4. ~~protect against~~prevent an clearly unwarranted invasion of personal privacy.

[Comment: The term “protect against” is vague in this context, and suggests that speculative concerns about possible effects on privacy would be sufficient to justify redaction. They City Attorney has indicated an intent to construe this exemption broadly, even to the extent of withholding all information except the information already required to be made public under the Public Records Act.]

The express exemptions in the proposed ordinance already protect all known privacy concerns. At a minimum, it needs to be clear that this exemption is reserved for exceptional and unforeseen circumstances.]

B. Information in a Police Report may not be redacted under the privacy exemption of 5.1.1.020(A)(4) if ~~that information was given to the police by the person who is making the request.;~~

1. the privacy interest that permits redaction is that of the person who is making the request;
2. the information pertains to the official conduct of a police officer or other law enforcement official; or
3. information required to be made public pursuant to Government Code section 6254(f) or any other provision of state or federal law.

[Comment: The proposed draft deletes two limits that restrict when information can be withheld based on privacy concerns. It is not clear why. As to the first limitation, there may be a concern that the term “pertains to” is too broad, and encompasses private information about persons other than the requestor. That concern can be addressed without limiting the exception to information provided by the requestor. By the same token, it does not seem necessary or appropriate to limit the exception to requests by witnesses, uncharged suspects, or victims. New language is suggested above. As to the second limitation, some limitation on the privacy exemption is necessary to ensure that the City does not use that exemption as a justification for redacting information of vital public interest, under the guise of privacy. Without this limitation, the police could withhold not only information such as the use of force or injuries or property damage caused by officers, but even routine information about how individual officers handled arrests and requests for assistance. Obviously, if an officer is the subject of an investigation, he or she should and will have the same rights as anyone else. But police officers and law enforcement officials are not typically suspects, victims, or witnesses. Rather, they are the ones rendering assistance or conducting investigations and arrests. The public indisputably has an interest in how they discharge their official duties, over and above its interest in criminal activity generally. Finally, the disclosure of information required by law to be made public cannot constitute an invasion of privacy, and this limit should also be expressly recognized.]

C. Redactions pursuant to this Section must be

1. limited to that information necessary to further the purpose of the exemption;
2. to the extent practical, use numerical or alphabetic designations as substitutes for names omitted; and
3. Justified in writing by reference to the pertinent exemption(s).

5.1.1.030 Specific Exemptions

A. Unless otherwise authorized by state or federal law, the following Police Reports are exempt in their entirety from disclosure:

1. A “Juvenile Contact Report” ~~and any police report that contains information about a juvenile who where the juvenile has not been charged with a crime, or whose case who is or has been handled the subject of proceedings~~ in juvenile court.

[Comment: The proposed draft expands the scope of this exception to embrace all Police Reports. That expansion is unnecessary. There is already an express exemption mandating nondisclosure of the names of all juvenile arrestees and suspects. That exception serves both to protect the privacy of juveniles and preserve the jurisdiction of the juvenile court over records related to matters that may come before it. Nothing more is required.]

2. A “Domestic Violence Supplemental.” ~~unless and until such report is filed with the Superior Court, in which case it should be obtained through the Court.~~

[Comment: There is no point having a provision in the ordinance that tells the public to go get records from the courts.]

3. Police Reports where a person is charged with Section 220, 261, 261.5, 262, 264. 264.1. 273.5, 286, 288. 288.5, 288a or 289 of the Penal Code or an attempt to violate any of these codes sections, unless disclosure would further the investigation or protect public safety.
4. Required Accident Reports and supplements as defined by Vehicle Code Section 20012.

B. Unless a report prepared by Law Enforcement is requested by a person entitled to the information under state or federal law, the following information must be redacted from any Police Report:

1. The name of any victim of any crime defined by Sections 422.6, 422.7 (hate crimes), 422.75, or 646.9 (stalking) of the Penal Code, as well as by Penal Code sections listed in 5.1.1.030(A)(3).
2. The name of any witness, juvenile or adult, unless the witness consents.
3. For any person other than an arrestee, residence address, residence telephone number or electronic email address, driver's license number, California Identification Card number, social security number, date of birth, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings or checking account number, or credit card number.
4. For an arrestee, residence address, residence telephone number or electronic email address, driver's license number, California Identification Card number, social security number, -place of employment, employee identification number, mother's maiden name, demand deposit account number, savings or checking account number, or credit card number.
5. The name of a juvenile arrestee or suspect, unless and until the juvenile is charged and prosecuted as an adult, provided that the first name and initial letter of the last name must be substituted in the Police Report.
6. Any other information that is prohibited from disclosure by state or federal law.

C. ~~After 45-Beginning 60~~ days ~~of after~~ the date ~~the incident which is the subject of the report is reported to Law Enforcement~~, ~~P~~olice ~~R~~eports must not be disclosed in response to a request based on a specific person, specific address, or other information that can be used to identify a specific person or specific address.

[Comment: The restriction of disclosure to 45 days after the date of the report is arbitrary and unduly restrictive. Public interest and concern regarding particular events and the need for information about them may persist for much more than 60 days. Moreover, most members of the public who may want such information will have little or no understanding of their ability to obtain reports, and it will take anyone who seeks a report time to determine what

information is available and how to obtain it. The date the triggers the deadline should be the date of the report itself, rather than “the date the incident which is the subject of the report is reported to Law Enforcement.” First, the date of the report will always be readily identifiable. It may not be clear, and indeed the report may not even reflect, the date the incident was reported to law enforcement. Moreover, a single report may address more than one incident, making it difficult to determine which incident is the subject of the report. The language as revised above is simpler and will be easier to comply with.]

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[Comments: An “unwarranted invasion of personal privacy” is the statutory standard currently used in the California Public Records Act (Gov’t Code § 6254(c)) to govern disclosure of information claimed to be private. The same standard is used in the federal Freedom of Information Act, where it is applied to both personnel files (5 U.S.C. § 552(b)(6)) and law enforcement records (552(b)(7)(C)). Thus, this is a standard with which public agencies (including the City of San Jose) are familiar, and as to which there is substantial legal guidance. It also necessarily includes violations of the California Constitutional Right to Privacy, Art 1, Sec 1. Changes to subsections 1 and 2 are necessary to prevent the exceptions from being so broad that they become meaningless. The District Attorney has taken the position that the release of any police report could potentially impact future investigations. Without the added modifiers, we fear the exceptions would be used to avoid releasing any police reports or use of force reports, defeating the purpose of the entire section.]

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D. Beginning sixty (60) days after the date of the Police Report, no Police Report shall be provided to any member of the public in response to a request that seeks such reports based on a name, address, or other information that can be used to identify a specific member of the public or residential address. Identifying information regarding members of the public mentioned in Police Reports disclosed under this provisions shall be redacted.

[Comments: Providing for redaction of police reports older than 60 days coupled with a prohibition on the police department providing reports to members of the public who request such reports based on a name, address, or other identifying information addresses privacy concerns that have been raised by both us and the district attorney. Under this provision, for example, the police department would be barred from providing copies of reports to a member of the public who requests years of reports on a particular individual. It protects the privacy rights of people who have been arrested and never charged or subsequently exonerated, victims, and witnesses. The public records act already provides for the mandatory release of

certain information about all arrests and requests for assistance. Gov't Code § 6254(f). There appears to be agreement that the release of police and use of force reports contemporaneous with the release of that mandatory information is permissible. With regard to older reports, the above provision, coupled with the other specific and general privacy protections in this section address, in our view, privacy concerns.

It should be noted that a different interpretation – one that held that redaction and the prohibition on filling requests for reports based on identifying information was insufficient – would lead to absurd results. Many departments throughout the state – even those many without specific sunshine ordinances – release police reports and other records that document how the police department functions and how its members interact with the public. If it is believed that this ordinance cannot be written in a way that would provide for the release of redacted older reports, that would, in essence, mean that the other departments who release such information are doing so in violation of state law. It would mean that a police department is foreclosed from attempting to allay community concerns by releasing documents to the public in response to those concerns – for example – in response to concerns about use of force, racial profiling, or Taser use. Surely this is not the case and there is not any language that I have seen in any of the cases cited by the District Attorney to suggest that this is true.

Police officers are public officials who work on behalf of the public. The public should have a right to underlying records that explain how its members are interacting with the public, so long as sufficient privacy protections (and other necessary exceptions already contained in the draft ordinance) are in place.

If it is not illegal for a police department to release such information, then there should be no barrier to crafting an ordinance, using the above language, which requires the disclosure of such information. On this point the Public Records Act is clear: “except as otherwise prohibited by law, a state or local agency may adopt requirements for itself which allow for greater access to records than prescribed by the minimum standards set forth in this chapter.” Gov't Code § 6253.1.]

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[Note: Proposed revisions to subsequent 5.1.1.030(B)(4) addressing redaction, can be eliminated in light of the broader exemption provided by this section.]