

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

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DATE: February 12, 2016

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Authority Over Public Disclosure of Body Camera Videos and Third-Party Videos Retained by the San Diego Police Department

INTRODUCTION

This Memorandum responds to a question from Councilmember David Alvarez, related to disclosure of San Diego Police Department (Department) records to the public, including body camera videos and third-party videos concerning a police-related incident. Third-party videos are produced by someone who is not a City of San Diego (City) employee that come into the possession of the Department during a police investigation or through other circumstances.

QUESTION PRESENTED

Under the San Diego City Charter (Charter), who has the authority to determine whether to disclose Department records, such as body camera and third-party videos, concerning a police-related incident to the public?

SHORT ANSWER

Disclosure of Department records involves consideration of various state laws and the Charter. Under Charter section 57, the Chief of Police (Chief) has “charge of the property . . . of the department” and exercises “all powers and duties provided by general laws or by ordinance of the Council.” “Property,” within the meaning of Charter section 57, includes Department records. Generally, the Chief has authority to make decisions on whether to disclose Department records to the public, in compliance with applicable laws, including federal and state law and ordinances of the Council. Under Charter section 11.1, the San Diego City Council (Council) has nondelegable authority to set public policy by ordinance or resolution. The Council may establish a general policy regarding disclosure of Department records, so long as that policy is consistent with applicable federal and state laws and does not interfere with the law enforcement authority of the Chief and her subordinates.

DISCUSSION

I. THE DISCLOSURE OF DEPARTMENT RECORDS, INCLUDING POLICE VIDEOS, MUST BE IN ACCORDANCE WITH APPLICABLE FEDERAL AND CALIFORNIA LAW.

To analyze the question of who in the City has authority to decide whether to disclose Department records, it is necessary to first understand the comprehensive state law framework related to public records disclosure. There are also federal laws affecting disclosure decisions. All decisions related to disclosure must conform to applicable federal and state laws, including the provisions of the California Constitution and the California Public Records Act (CPRA or Act), which specify which records the public has a right to see and which records may be exempt or protected from disclosure.

In 1968, the California Legislature adopted the CPRA, which is set forth at California Government Code (Government Code) sections 6250 through 6276.48. The CPRA states that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.” Cal. Gov’t Code § 6250. *See also Long Beach Police Officers Ass’n v. City of Long Beach*, 59 Cal. 4th 59, 66-67 (2014).

In 2004, California’s voters adopted an initiative measure, Proposition 59, which added to the California Constitution (Constitution) a provision granting to the people a constitutional “right of access to information concerning the conduct of the people’s business.” Cal. Const. art. I, § 3(b)(1). *See Long Beach Police Officers Ass’n*, 59 Cal. 4th at 66-67.

The Constitution states: “[T]he writings of public officials and agencies shall be open to public scrutiny.” Cal. Const. art. I, § 3(b)(2). The Constitution further provides guidance on the proper construction of statutes affecting this right of access: “A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access.” *Sierra Club v. Superior Court*, 57 Cal. 4th 157, 166 (2013) (citing and quoting Cal. Const. art. I, § 3(b)(2)). “Californians have a constitutional right to access the records of their public agencies. They have a strong interest in knowing how government officials conduct public business.” *BRV, Inc. v. Superior Court*, 143 Cal. App. 4th 742, 746 (2006).

Charter section 216.1, added by City voters in November 2004, mirrors the provisions in the Constitution, in providing: “The people have the right of access to information concerning the conduct of the people’s business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.” San Diego Charter § 216.1(b)(1). The Charter further provides:

A statute, court rule, or other authority, including those in effect on the effective date of this Section, shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access. A statute, court rule or other authority

adopted after the effective date of this Section that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

San Diego Charter § 216.1(b)(2).

The CPRA grants access to public records held by state and local agencies, including charter cities, like the City. Cal. Gov't Code § 6253(a). "The Act was passed 'to ensure public access to vital information about the government's conduct of its business.'" *City of San Jose v. Superior Court*, 74 Cal. App. 4th 1008, 1016 (1999) (citing and quoting *CBS, Inc. v. Block*, 42 Cal. 3d 646, 656 (1986)). "The Act's core purpose is to prevent secrecy in government and contribute significantly to the public understanding of government activities." *San Diego County Employees Retirement Ass'n v. Superior Court*, 196 Cal. App. 4th 1228, 1244 (2011). However, in adopting the CPRA, the California Legislature was also "mindful of the right of individuals to privacy." Cal. Gov't Code § 6250.

The CPRA broadly defines public records as including "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Cal. Gov't Code § 6252(e). "Writing" includes photographs and "and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." Cal. Gov't Code § 6252(g). The definition of public records is "intended to cover every conceivable kind of record that is involved in the governmental process." *San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 762, 774 (1983).

However, the mere possession by a public agency of a record does not make it a "public record" under the Act. *City Council of the City of Santa Monica v. Superior Court*, 204 Cal. App. 2d 68, 73 (1962). Although a record is prepared, used, and retained by a public agency, the critical question is whether the information contained in the record relates to "the conduct of the public's business." *Coronado Police Officers Ass'n v. Carroll*, 106 Cal. App. 4th 1001, 1006 (2003).

Prior to adoption of the Act, California courts had described a "public record" as "one made by a public officer in pursuance of duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference." *People v. Purcell*, 22 Cal. App. 2d 126, 130 (1937) (citations omitted). The word "public" means "of, pertaining to, or affecting, the people at large or the community." *Coldwell v. Board of Pub. Works of City & Cty. of San Francisco*, 187 Cal. 510, 520 (1921).

California courts interpreting the CPRA have described a "public record" as "[a]ny record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty." *San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d at 774.

Videos, including body camera videos and third-party videos in the possession of the Department, are “records” under the Act, but they may not be “public records.” As an example, pursuant to a search warrant, the Department may have seized and have in its possession personal records from a home or business. Depending on the circumstances, those records may not be public records subject to disclosure under the Act. *See, e.g., Board of Pilot Commissioners for the Bays of San Francisco, San Pablo & Suisun v. Superior Court*, 218 Cal. App. 4th 577, 593 (2013) (pilot logs not used in performance of official duties are not public records); *Coronado Police Officers Ass’n*, 106 Cal. App. 4th at 1006 (public defender’s data base with client information not public record). Any decision related to disclosure of Department records must take into consideration whether the record in the possession of the Department is, in fact, a public record subject to disclosure.

The CPRA specifies that “[p]ublic records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided.” Cal. Gov’t Code § 6253(a). Upon request for a copy of any identifiable public record, a state or local agency is required to promptly provide an exact copy, unless impracticable to do so, upon payment of fees covering the direct costs of duplication, or a statutory fee if applicable. Cal. Gov’t Code § 6253(b). “[A]ll public records are subject to disclosure unless the Legislature has expressly provided to the contrary.” *Williams v. Superior Court*, 5 Cal. 4th 337, 346 (1993).

The Legislature has authorized state and local agencies to withhold public records in specific cases. “[T]he [A]ct recognizes that certain records should not, for reasons of privacy, safety, and efficient governmental operation, be made public.” *Haynie v. Superior Court*, 26 Cal. 4th 1061, 1064 (2001). *See also Copley Press Inc. v. Superior Court*, 39 Cal. 4th 1272, 1282 (2006) (stating the right to access records is not absolute).

The California Legislature has adopted specific statutory exemptions to disclosure of records, set forth at Government Code sections 6254 through 6254.30, and sections 6275 through 6276.48. A public agency asserting an exemption must show that the requested information falls within an express exemption, or the public agency may rely on the “catchall exemption” at Government Code section 6255(a), which allows a public agency to “justify withholding any record by demonstrating that . . . on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” Cal. Gov’t Code § 6255(a). *City of Richmond v. Superior Court*, 32 Cal. App. 4th 1430, 1434 (1995). The California Supreme Court has stated that the catchall provision “contemplates a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality.” *Michaelis, Montanari & Johnson v. Superior Court*, 38 Cal. 4th 1065, 1071 (2006).

The statutory exemptions to disclosure are permissive, not mandatory, meaning they permit a local agency or other public agency to withhold a record, but they do not prohibit disclosure. *Berkeley Police Ass’n v. City of Berkeley*, 76 Cal. App. 3d 931, 941 (1977). However, other statutes may prohibit disclosure.

There is a broad exemption from disclosure for law enforcement investigatory records set forth at Government Code section 6254(f). *Williams*, 5 Cal. 4th at 349; *see also Rackauckas v. Superior Court*, 104 Cal. App. 4th 169, 174 (2002). In relevant part, section 6254(f) exempts from disclosure:

Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of . . . any state or local police agency, or any investigatory or security files compiled by any . . . local police agency, or any investigatory or security files compiled by any . . . local agency for correctional, law enforcement, or licensing purposes.

Cal. Gov't Code § 6254(f).

Videos in the custody of the Department, which are evidence in a case or ongoing investigation, likely fall under this exemption to disclosure. Note, however, that section 6254(f) requires disclosure of certain information to the victims or representatives of victims of incidents investigated by the police, “unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation.” *Id.* Further, law enforcement agencies must also make public certain information, including information about people arrested by the agency and information related to complaints or requests for assistance received by the agency, except when disclosure would endanger a person involved in the investigation or the successful completion of the investigation. *Id.* The names of victims of certain crimes may be withheld at the victim’s request or at the request of the victim’s parent or guardian if the victim is a minor. Cal. Gov’t Code § 6254(f)(2). Law enforcement agencies are also not required to disclose the portion of investigative files that reflect the analysis or conclusions of the investigating officer. Cal. Gov’t Code § 6254(f).

Videos in the possession of the Department may also fall under the exemption set forth at Government Code section 6254(k), which protects “[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.” This exemption “incorporates other [disclosure] prohibitions established by law.” *Copley Press, Inc.*, 39 Cal. 4th at 1283 (quoting *CBS, Inc. v. Block*, 42 Cal. 3d at 656). Federal or state laws that may prohibit disclosure include the Health Insurance Portability and Accountability Act of 1996 (HIPPA), at 45 C.F.R. §§ 160, 164 (2013), which protects medical information, and the California constitutional right to privacy. Cal. Const. art. I, § 1. *See also* Cal. Penal Code § 964 (protection of victim and witness information); Cal. Gov’t Code § 6254(c) (exempting from disclosure of “[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy”).

Under California Penal Code (Penal Code) section 832.7, peace officer personnel records are confidential, and are only subject to disclosure in criminal or civil proceedings if authorized by a judge following an in camera review. *See* Cal. Evid. Code §§ 1043, 1046. *See also Commission on Peace Officer Standards & Training v. Superior Court*, 42 Cal. 4th 278, 293 (2007). This statute would serve as a basis for exemption of a document under Government Code section 6254(k). Note, though, that peace officer personnel records under Penal Code section 832.7 are defined as:

[A]ny 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.

Cal. Penal Code § 832.8.

Investigatory documents related to an incident captured on video may fall under the statutory protection set forth in the Penal Code. *See also Long Beach Police Officers Ass'n v. City of Long Beach*, 59 Cal. 4th at 71. However, California courts have interpreted the definition of peace officer personnel records narrowly to include only the type of information specified in Penal Code section 832.8, and records generated in connection with a citizen complaint or discipline. *Pasadena Police Officers Ass'n v. Superior Court*, 240 Cal. App. 4th 268, 284-85 (2015); *City of Richmond*, 32 Cal. App. 4th at 1440.

Police body camera or third-party videos may fall under the "catchall exemption" of the CPRA, at Government Code section 6255(a). Reliance on this exemption requires a balancing of interests in public disclosure versus nondisclosure, and this exemption only applies when the public interest in nondisclosure greatly outweighs the interest in disclosure. *Fredericks v. Superior Court*, 233 Cal. App. 4th 209, 217 (2015) (quoting *Williams*, 5 Cal. 4th at 347 n.9).

In a recent case involving a question about disclosure of the names of police officers involved in on-duty shootings, the California Supreme Court analyzed the exemptions applicable to law enforcement records, and explained the balance that courts apply in protecting the public's interest in disclosure of information about officer-involved shootings and officers' private information:

In a case such as this one, which concerns 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. Here, therefore, in weighing the competing interests, the balance tips strongly in favor of identity disclosure and against the personal privacy interests of the officers involved. Of course, if it is essential to protect an officer's anonymity for safety reasons or for reasons peculiar to the officer's duties – as, for example, in the case of an undercover officer – then the public interest in disclosure of the officer's name may need to give way.

Long Beach Police Officers Ass'n, 59 Cal. 4th at 74.

Each request for disclosure of a Department record must be analyzed individually to determine the applicability of exemptions or prohibitions to disclosure. The question remains, who in the City has authority to make the final determination related to disclosure of records.

II. RESPONDING TO REQUESTS FOR DISCLOSURE OF RECORDS IS GENERALLY AN ADMINISTRATIVE DUTY SHARED BY THE MAYOR AND HIS SUBORDINATE DEPARTMENT HEADS, INCLUDING THE CHIEF.

The CPRA is a statewide law related to disclosure of records “prepared, owned, used, or retained” by local public agencies, including this City. Cal. Gov't Code § 6252. “[W]hen a city acts to implement a comprehensive system of state regulations affecting a matter of statewide concern, it is acting in an administrative capacity.” *W.W. Dean & Associates v. City of South San Francisco*, 190 Cal. App. 3d 1368, 1375-76 (1987).

Administrative acts are distinguished from acts by a legislative body, which has the authority to declare a public purpose and make provision for the ways and means of its accomplishment. *Lincoln Property Co. No. 41 v. Law*, 45 Cal. App. 3d 230, 234 (1975). “The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it.” 5 McQuillin Muni. Corp. § 16.53 (3d ed. 2015). See also *Reagan v. City of Sausalito*, 210 Cal. App. 2d 618, 621 (1962); *McKevitt v. City of Sacramento*, 55 Cal. App. 117, 124 (1921); *Valentine v. Town of Ross*, 39 Cal. App. 3d 954, 957 (1974).

The City's compliance with the CPRA is generally an administrative matter, which is under the purview of the Mayor, as the City's chief executive and administrative officer. See San Diego Charter §§ 28, 265. The Mayor has Charter-mandated authority “to promulgate and issue administrative regulations that give controlling direction to the administrative service of the

City.” San Diego Charter § 265(b)(2). Administrative regulations must conform to applicable laws, including local ordinances. The City has an administrative regulation on the disclosure of public records: Administrative Regulation 95.20, entitled, “Public Records Act Requests and Civil Subpoenas; Procedures for Furnishing Documents and Recovering Costs.” It was promulgated on July 1, 2004, and provides, in pertinent part, that City department heads are responsible for determining whether a City record should be disclosed in response to a CPRA request. *See* San Diego Admin. Reg. 95.20, § 4.1.

The Charter grants the Chief, with the Mayor’s approval, the authority to “direct and supervise the personnel” in the Department. San Diego Charter § 57. The Chief also has “charge of the property . . . of the department” and may “exercise all powers and duties provided by general laws or by ordinance of the Council.” *Id.* The property of the Department, as used in Charter section 57, includes the records of the Department. *See* 1976 Op. City Att’y 123 (76-14; May 5, 1976) (stating the files of the Police Department are under the control of the Chief and any determination as to what access to those files will be given anyone is for the Chief of Police to make, consistent with state law).

The Chief is a peace officer under California law. Cal. Penal Code §§ 830, 830.1. Peace officers must satisfy state-mandated training requirements, and their powers, including the power to detain and arrest in specified circumstances, are determined by federal and state law. Cal. Penal Code § 830.1. Among their duties, police officers must disclose information known to them, which may lead to the apprehension and punishment of those who break the law. *Alhambra Police Officers Ass’n v. City of Alhambra*, 113 Cal. App. 4th 1413, 1422-23 (2003). The Chief must understand and follow the laws related to records disclosure. The Chief has promulgated policies on seizing, preserving, and impounding videos taken by Department members and third parties (Department Procedure 3.26). The Chief has also promulgated policies on body worn cameras (Department Procedure 1.49).

Charter section 28 provides the Mayor may set aside any action taken by the Chief and may supersede her in authority in the functions of her office or employment. (Note, that the Chief is a sworn peace officer with state law authority. The extent to which the Chief has state-dictated authority or duties beyond the direction or control of the Mayor is beyond the scope of this Memorandum.) *See also* San Diego Charter §§ 265(b)(2) (stating the Mayor has the duty “to execute and enforce all laws, ordinances, and policies of the City, including the right to promulgate and issue administrative regulations that give controlling direction to the administrative service of the City”); 265(b)(10) (the Mayor has authority to dismiss the Chief, subject to the right of the Chief to appeal to the Council to overturn the Mayor’s decision).

This Office has previously advised that the Council may not direct the Mayor or the Chief to make specific changes to an administrative policy. 2000 City Att’y MOL 151 (2000-1; Jan. 4, 2000). Further, this Office has advised that it is the Department, not the Council, “that possesses knowledge of the contents of files and the scope and source of confidential information in order to make the determination in the first instance as to the need for preserving confidentiality outweighing the necessity for disclosure.” 1976 Op. City Att’y 112, 117 (76-13; May 4, 1976). This Office has explained that the Chief has obligations under federal and state law to maintain the confidentiality and prohibit disclosure of records and information obtained from the Federal

Bureau of Investigation and the California Department of Justice. 1976 Op. City Att’y 123 (76-14; May 5, 1976).

In keeping with this analysis, the Chief oversees the Department’s response to a request for records. Department Procedure 3.26 directs Department staff that “[p]ublic release of video, audio, or photographs is prohibited unless approved by the Chief of Police.” This Office previously concluded that the Chief may control access to Department files:

As to information gathered by the San Diego Police Department itself, the determination whether to allow access rests in the hands of the Chief of Police In making the determination to allow access, if such information is physically separated from that gathered from other sources so as to make access possible in the first instance, the Police Chief must consider a number of factors, not the least of which is the public interest against disclosure to protect ongoing investigations, the privacy of individuals and the right to a fair trial among others.

Id. at 132-33.

While responding to a request for Department records is generally administrative in nature, under the purview of the Chief, issues of disclosure may prompt legal questions or matters of public policy, requiring direction from other City officers.

III. THE COUNCIL MAY ESTABLISH GENERAL POLICIES RELATED TO DISCLOSURE OF CITY RECORDS, INCLUDING VIDEOS IN THE POSSESSION OF THE DEPARTMENT, AS LONG AS THE POLICIES CONFORM TO THE CHARTER AND STATE LAW.

The CPRA provides that, “[e]xcept as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter.” Cal. Gov’t Code, § 6253(e). It is the purview of the Council to set public policy by ordinance or resolution. San Diego Charter § 11.1.

As discussed above, Charter section 216.1 creates a public right of access to information, as long as it is within applicable federal and state law parameters. “[I]t is well settled that a charter city may not act in conflict with its charter. Any act that is violative of or not in compliance with the charter is void.” *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994) (citations omitted). The provisions of the Charter “supersede all municipal laws, ordinances, rules or regulations inconsistent therewith.” *Stuart v. Civil Service Com.*, 174 Cal. App. 3d 201, 206 (1985). “[A]n ordinance [or resolution] violative of or not in compliance with the city charter is void.” 5 McQuillin Muni. Corp. § 15.17 (3d ed. 2015). See also *San Diego City Firefighters, Local 145, AFL-CIO v. Board of Admin. of San Diego City Employees’ Ret. Sys.*, 206 Cal. App. 4th 594, 608 (2012).

The Council has legislative authority to adopt a citywide policy related to records. As explained earlier, the exemptions to disclosure under the CPRA are generally discretionary, meaning the City may disclose records, if it chooses to do so, unless disclosure is otherwise prohibited by federal or state law, or the Charter.

The Council could adopt a broad policy of transparency in City records. As an example, the Council exercised its legislative authority in adopting the City's Sunshine Act, which is codified at San Diego Municipal Code sections 22.4501-22.4506. The Mayor and the Chief must administer the legislative policies of the Council. Any legislative policy adopted by the Council must be consistent with applicable federal and state law, including the California constitutional right to privacy and statutory protections of peace officer personnel records. Further, in adopting a citywide policy, the Council must ensure that it does not infringe on the Charter-mandated authority of the Mayor and the Chief to manage the Department and the Chief's law enforcement authority.

IV. DISCLOSURE OF PUBLIC RECORDS IN THE CONTEXT OF LITIGATION IS A MATTER FOR THE CITY ATTORNEY TO DETERMINE, IN CONSULTATION WITH THE COUNCIL.

The duty to comply with the state laws related to disclosure of records rests with the City as a local agency, which acts through its officers and employees. If an agency fails to comply with the CPRA, a member of the public may enforce the act through injunctive or declaratory relief or a writ of mandate. Cal. Gov't Code § 6258. The CPRA also authorizes a reviewing court, upon a sufficient showing, to examine records in camera to determine whether they are being improperly withheld. Cal. Gov't Code § 6259. Failure to disclose a record that is not legally justified by an exemption or prohibition may result in litigation, in which the City Attorney and the Council become involved.

The City Attorney is "the chief legal adviser of, and attorney for the City and all Departments and offices thereof in matter relating to their official powers and duties, except in the case of the Ethics Commission." San Diego Charter § 40. The City Attorney performs duties of a legal nature as the Council requires. *Id.* The Council controls the expenditure of public funds, and controls litigation against the City to the extent it may impact City funds. San Diego Charter § 11.1. If a video in the possession of the Department becomes the subject of or an issue in litigation, then questions related to whether the video is privileged or otherwise protected become matters for the City Attorney, in consultation with the Council, the Mayor, and the affected Department.

Further, if a video is evidence in litigation, then the laws of discovery and evidentiary privilege govern requests and disputes related to disclosure. Further, the existence of a policy related to disclosure could impact the City's ability to assert an evidentiary privilege or could serve as a waiver of a privilege. For example, California Evidence Code section 1040 establishes the "official information" privilege, which provides that a public entity may refuse disclosure in specific circumstances, including when "[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." Cal. Evid. Code § 1040(b).

“Official information” is defined as “information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.” Cal. Evid. Code § 1040(a). An example of “official information” may be information obtained from confidential informants used in furtherance of a Department investigation.

If the City or the Department adopts a policy, mandating that the City will not rely on any discretionary exemptions under the CPRA and will only withhold from disclosure those records that are confidential under other federal or state laws, then the City’s ability to rely on an evidentiary privilege, such as the “official information” privilege, may be affected. On the contrary, the Department’s classification of all Department-retained videos as investigatory records may support assertion of a federal or state law privilege for confidentiality of official information. If the Council desires to adopt a policy related to records disclosure for the Department, further analysis may be needed to determine the legal effects of the policy.

CONCLUSION

Generally, determining whether to disclose a public record pursuant to a CPRA request is an administrative task, under the purview of the Mayor and his department heads, including the Chief. If the record requested is a video within the possession of the Department, the Chief has an established process for release. However, the Council has authority to establish a general policy related to disclosure of City records, as long as that policy is consistent with controlling federal and state law and the Charter.

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