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PRIVACY RIGHTS VERSUS PUBLIC ACCESS
TO PERSONNEL AND POLICE RECORDS:
NAVIGATING THE PUBLIC RECORDS ACT

Sample Forms and Practice Tips

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This paper was prepared with the assistance of Clare M. Gibson.
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I. INTRODUCTION: California's Public Records Act (Govt. Code § 6250 et seq.) creates a tension between the public's right to access public records and the right to privacy accorded to individuals by the California Constitution, statutory and case law. One court has aptly described the competing objectives of the Public Records Act as the "preservation of islands of privacy upon the broad seas of enforced disclosure." Black Panther Party v. Kehoe (1974) 42 Cal. App. 3d 645, 653. This presentation is intended to assist in navigating the Public Record Act's broad seas of enforced disclosure to the safe harbor of islands of privacy, specifically focusing on personnel records generally, and police records specifically, including "Pitchess motions."

II. PRIVACY RIGHTS AND PERSONNEL RECORDS

A. EMPLOYER'S RIGHT AND DUTY TO MAINTAIN PERSONNEL RECORDS.

1. State Law.

   a. Every employer in the state is required to keep a record of names and address of all employees (Labor Code §1174).
   b. Employers are required to maintain and preserve all applications, personnel, membership or employment referral records and files for at least two years after the files are created or after the employment action regarding applicants and terminated employees (Government Code §12946).


   a. Americans With Disabilities Act requires medical information received as a result of the medical examination "shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record." (See, generally, 42 U.S.C. § 12101 et seq.)
B. LIMITATIONS ON THIRD PARTY ACCESS TO PERSONNEL RECORDS

1. Records may be exempt from disclosure pursuant to the specific exemptions listed in Government Code §6254, or non-disclosure may be justifiable pursuant to so-called "catch-all" exemption of Government Code §6255. Statutory exemptions are construed narrowly by the courts.

**Practice Pointer:** The statutory exemptions listed in Government Code § 6254 are permissive in that they permit nondisclosure, but do not prohibit disclosure. Before permitting access to a potentially exempt record, bear in mind that selective disclosure is prohibited: once a record is disclosed, it loses exempt status and is available to anyone.

2. Government Code §6254(c) provides that "[p]ersonnel, medical or similar" records may be exempt from disclosure when disclosure would constitute an unwarranted invasion of privacy.

   a. California Constitution ARTICLE 1 SECTION 1: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property and pursuing and obtaining safety, happiness and privacy.

   b. Government Code §6254.8 states that employment contracts between a state or local agency or a public official or a public employee are public records.

   c. *Braun v. City of Taft* (1984)154 Cal.App.3d 332: Letters manifesting an employment contract, even though maintained in a personnel file, were subject to disclosure pursuant to 6254.8; disclosure of personal information on the face of an employee's salary card (phone number, birth date, address, social security number, credit union number and salary) did not constitute an unwarranted invasion of privacy.

   (1) The balancing test of §6255 is applied to test exemption from nondisclosure under §6254(c); burden on party claiming nondisclosure.
(2) Reduced expectation of privacy in public employment: "Although one does not lose his right to privacy upon accepting public employment, the very fact that he is engaged in the public's business strips him of some anonymity." *Braun v. Taft*, at 347.

3. Government Code §6254(k) - records may not be disclosed which are exempt or prohibited from disclosure pursuant to federal or state law, including but not limited to the Evidence Code relating to privilege. In addition to the Penal Code provisions which shield peace officer personnel records, discussed *infra*, sources of statutory exception from disclosure include the following:


(1) Section 1040(a) defines "official information" 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."

(2) The official information privilege is conditional and attached only when "there is a necessity of preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." *County of Orange v. Superior Court* (2000) 79 Cal. App. 4th 759, 763.

*Practice Pointer:* Set up a system which enables you to obtain as soon as possible the records requested or obtain information that the said requested records do not exist. Early retrieval and review of records will allow you to provide an appropriate response to the request in a timely manner.

Form #1: Memorandum to staff requesting accumulation of records pursuant to a Public Records Act request.

*Practice Pointer:* Contact requesting party. Determine the purpose of the request and what information is really needed to accomplish that purpose. This could avoid unnecessary disputes regarding privacy issues.
III. POLICE OFFICER PERSONNEL AND CITIZEN COMPLAINT RECORDS

A. POLICE OFFICER PERSONNEL RECORDS

1. Government Code §6254(c): Under this Public Records Act section, police officer personnel records—like any other personnel records—may be withheld if disclosure of the police officer's records would constitute an unwarranted invasion of privacy. Under this provision, information in the police officer's personnel records would need to be of a "personal" nature in order to avoid being subject to disclosure.

2. Penal Code §832.7 and 832.8: Peace officer personnel records are deemed to be confidential and may not be disclosed without the initiation of a court proceeding pursuant to Evidence Code §1043 and §1046 (i.e., Pitchess motion, discussed infra; see Pitchess v. Superior Court 11 Cal.3d 531 (1974)). Since police personnel records are made confidential by these sections, they are exempt from disclosure by Government Code §6254(k).

   a. Penal Code §832.8 defines peace officers personnel records which are subject to confidentiality, as "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 address 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 her or she perceived, and pertaining to the manner in which her or she performed his or her duties;

      (f) Any other information the disclosure of which would constitute an unwarranted invasion of privacy.

B. INTERNAL AFFAIRS INVESTIGATIONS AND INVESTIGATORY RECORDS (PENDING LITIGATION EXEMPTION)

1. Government Code §6254(f): Internal affairs investigations/investigatory records from disciplinary proceedings are exempt from disclosure:

   a. Williams v. Superior Court, 5 Cal.4th 337 (1993)(vacating trial court order for partial disclosure of records of internal disciplinary proceedings against two deputies):

      (1) Information becomes exempt as "investigatory" only when the prospect of enforcement proceedings becomes concrete and definite. Williams, at 356 (citing Black Panther Party v. Kehoe, supra, 42 Cal.App.3d at 833). Courts consider whether there was a prospect of enforcement proceedings at the time the record was prepared. Uribe v. Howie (1971) 19 Cal.App.3d 194,212-213. See Haynie v. Superior Court (2000) 80 Cal.App.4th 603 (radio broadcast and tape recordings generated before or during the vehicle stop not exempt as investigatory information, but statement given after personnel complaint submitted was exempt because it was created during an investigation into the complaint.) See also, Fairley v. Superior Court (1998) 66 Cal.App.4th 1414, 1421 (focusing on the purpose of the document because pending litigation exemption "serves to protect documents created by a public entity for its own use in anticipation of litigation.").

      (2) Exemption for law enforcement investigatory files does not end when the investigation ends. Williams, at 355.

   b. Certain information contained in these records may be subject to compelled disclosure of § 6254(f)(1) and (2):

   -5-
(1) Arrest Information Disclosure required by §6254(f)(1):
- full name and occupation
- physical description and DOB
- date and time of arrest
- date and time of booking
- location of arrest
- factual circumstances
- amount of bail
- release information/location held
- all charges
- outstanding warrants, parole, probation

(2) Disclosures required by § 6254(f)(1) and (2) are limited to contemporaneous police activity. County of Los Angeles v. Superior Court (1993) 18 Cal.App.4th 588, 595-96 (vacating order for disclosure of arrest records from a ten-year period preceding the arrest).

(3) Note: In Rivero v. Superior Court (1997) 54 Cal.App.4th 1048,1060, the court held that plaintiff was not entitled to information subject to release under §6254(f) because he only sought disclosure of the complete file: “No more narrow request was articulated. The holder of the file is not obligated to redraft the request to comply with section 6254, subdivision (f) or to offer the entire file to the court for in camera review and extraction of those records not exempt from disclosure.”

c. Cf., New York Times Co. v. Superior Court (1997) 52 Cal.App.4th 97 (holding neither §6254(c),(f)or (k) barred disclosure of the names of police officers who fired weapons during an incident in which a private citizen was killed).

C. POLICE RECORDS OF CITIZEN COMPLAINTS

1. Records of citizen complaints against law enforcement personnel, retained pursuant to Penal Code §832.5, are made confidential by Penal Code §§832.7 and 832.8, and are not subject to disclosure except by discovery pursuant to Evidence Code §§1043 and 1046 (which codify Pitchess...
B. PROCEDURAL STEPS

1. Determine Compliance with Notice Requirements. (Evid. Code §1043(a)):
   a. Written notice must be given to the agency with custody and control of the records.
   b. Written notice and motion must be served and filed at least 15 days before the hearing, 20 if served by mail. (Evid. Code §1043(a); C.C.P. §1005(b).

*Practice Pointer:* Evidence Code §1043(c) adds teeth to the notice requirements—absent full compliance, waiver of hearing by the agency or a showing of good cause the court will not hear the motion.

2. Determine Compliance with Requirements of Evidence Code §1043(b). The motion must include:
   a. Identification of:
      • the proceeding
      • the party seeking disclosure or discovery
      • the peace officer whose records are sought
      • the agency with custody and control of records
      • time and place for hearing of motion
   b. A description of the type of records or information sought

3. Sufficiency of Affidavit. The affidavit must:
   a. Set forth the materiality to the subject matter involved in the pending litigation; and
   b. State upon reasonable belief that the governmental agency identified has the records or information from the records. See City of San Jose v. Superior Court (1998) 67 Cal.App.4th 1135.
b. Request court reporter for open court and in camera.

*Practice Pointer:* Attend the Pitchess motion. Do not merely send the custodian of records. This sends a signal to the court that the city and the police department take these motions seriously and are concerned about privacy rights of the police officers.

8. The *In Camera* Hearing.

a. Recess to chambers: custodian, judge, court reporter.

b. Review relevance and exclusions.

c. Duty to submit complete file. See *People v. Mooc* (2000) 97 Cal.Rptr. 2d 456 (holding denial of Pitchess motion without rational basis where court was unable to review complete file in camera because of systematic pre-screening of file contents).

*Practice Pointer:* Having reviewed the records prior to the in-camera, you should be better able to answer specific questions of the judge and thus short-cut the length of the court's review. If the records do contain some sensitive material that are protected from disclosure, be prepared to further articulate the legal basis for non-disclosure.


a. Five year rule. (Evid. Code §1045)

   (1) Records of complaints concerning conduct which occurred more than 5 years prior to the incident are excluded from disclosure.

   (2) Sanctions may be imposed if records less than 5 years old are found to have been destroyed.

b. Findings and Conclusions. Findings and conclusions of the officer or the deputy investigating a citizen's complaint files pursuant to Penal code §832.5 are excluded from disclosure. (Evid. Code §1045.)

c. Remote Facts. Excluded if so remote as to make disclosure of little or no practical benefit. (Evid. Code §1045.)
motions). The confidentiality accorded these records under these provisions are incorporated into the Public Records Act through Government Code §6254(k) which provides that disclosure is not required for public records which are exempt from disclosure pursuant to federal or state law. City of Hemet v. Superior Court, 37 Cal.App.4th 1411 (1995).

D. ARREST RECORDS

1. California Government Code §6254(f)(3) prevents commercial exploitation of arrest records and limits access to addresses of arrestees and most crime victims by making it a crime to use them for commercial purposes. These addresses are private unless they are requested by a private investigator or for scholarly, journalistic, political or governmental purposes. (Subdiv. (f) recently survived a attack on First Amendment grounds in Los Angeles Police Department v. United Reporting Publishing Co. (1999) ___ U.S. ___, 120 S.Ct. 483, 145 L.Ed.2d 451.)

E. CRIMINAL INVESTIGATION RECORDS

1. The exemption for disclosure for these records under Government Code §6254(f) extends indefinitely even if the investigation is closed. Rivero v. Superior Court (1997) 54 Cal.App.4th 1048, 1059.

IV. PITCHESS MOTIONS.

Form #2: Synopsis - Discovery of Peace Officer’s Personnel Records


Practice Pointer: Upon receipt of the Pitchess motion, the governmental agency must notify the individual(s) whose records are sought.

Practice Pointer: Review the personnel record(s) as soon as possible to evaluate which information might be subject to disclosure. This review may help to narrow the scope of the opposition to the Pitchess motion and will allow you to answer any specific questions the judge may ask about the contents of the file.
is a link with the involved officer(s). *People v. Memro* (1985) 38 Cal.3d 658, 686.

i. Racial bias. In order to obtain information relating to an officer's alleged racial or ethnic bias, the declaration must establish that the defendant is a member of a racial or ethnic minority group. Information about dissimilar incidents not subject to disclosure, e.g., where excessive force charge is based on racism, past complaints that do not evidence racism may not be subject to disclosure. *People v. Memro* (1985) 38 Cal.3d 658, 685.

j. Debriefing the Judge. Number of items and the general nature of any privileged material reviewed in camera is prohibited from disclosure.


The custodial agency may elect to assert the "official information" privilege (Evid. Code §1040); the court must consider and determine the applicability of the privilege by applying the balancing standard. If court overrules privilege and agency refuses to disclose, sanctions may be applied including dismissal of the case, jury instructions regarding past incidents, preclusion of witness testimony or contempt.

11. After In-Camera Review: Open Court, Sealing Transcripts and Protective Orders

a. If anything is discoverable, custodian/attorney should return to open court and move for protective order that information released not be disclosed except as necessary to the investigation of the immediate case; and request compliance date for the release of information. Prepare Protective Order (Evidence Code §1045(d) and (e).)

Form #5 and #6: Protective Order (Blank Form and Sample)
Form #7 and #8: Notice of Entry of Protective Order (Blank Form and Sample)

b. Request order that transcript of the proceedings be prepared only upon a court order with at least ten days written notice to the law enforcement agency.
4. Allegations of excessive force require inclusion of police report with motion. (Evid. Code §1046.)

5. Notice to Custodian of Records

6. Prepare Opposition to Pitchess motion.

Practice Pointer: Prepare and submit written opposition to the Pitchess motion setting forth the appropriate legal requirements, emphasizing restrictions on disclosure of certain information which may be contained in the records under review and, in many instances, provides a more accurate and current statement of the law than as set forth in the Pitchess motion.

FORM #3 AND #4: Opposition to Defendant's Motion for Discovery of Peace Officers' Personnel Records (Blank Form and Sample)


b. If policies or pattern of conduct of public agency at issue, challenge on grounds that alternative public sources of the information are available. (Evid. Code §1045(c.).)

c. Additional grounds for nondisclosure discussed infra, and summarized in Form #2, under Disclosure of Files and Related Exceptions.

Practice Pointer: If possible, request and prepare a disclosure order describing the type of materials subject to disclosure before any in-camera review.

7. Appearance in Court.

a. Custodian required to appear; peace officer may be present.
Notes
d. Psychological Records. Psychological records generally not subject to disclosure unless necessary to defense, and no patient-therapist privilege exists. *People v. Memro* (1985) 38 Cal.3d 658, 687. In certain very limited situations, a defendant may be entitled to statements of psychiatrists or psychologists in a peace officer’s files to substantiate the character trait of that peace officer for excessive force, but it requires a substantial showing. The circumstances must also be present to show that the mental or emotional condition of the officer is at issue in the case.

e. Prior Arrest Reports. Not subject to discovery where peace officer is the victim. A defendant is not entitled to the names and addresses of all persons arrested by the victim peace officer for similar charges, as the value to the defendant is too remote and speculative when balanced against the legitimate right to privacy of third party arrested.

f. Dishonesty Character Impeachment. A motion would be inadequate if the declaration supporting it does not discuss how the officer or deputy witness is alleged to have lied in a crucial area of his or her involvement with the case, or may take the stand and lie during the testimony.

g. Name, Addresses & Phone Numbers. Initial disclosure of relevant complaints limited to names, addresses and phone numbers of complainants and witnesses contained in prior internal investigations and if applicable, the discipline imposed upon the officer for the event. See, e.g., *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84; *City of Azusa v. Superior Court* (1987) 191 Cal.App.3d 693-697.

h. Directly Involved in the Fracas. Records of officers not present during arrest, or who had no contact with party between time of arrest and time of booking are not subject to disclosure. (Evid. Code §1047.) A defendant is only entitled to discover information for the files of those officers who were directly "involved in the fracas" (or percipient witness) and attention must be paid to each officer's role in the incident based on the police report and the defendant's affidavit. *Hinojosa v. Superior Court* (1976) 55 Cal.App 3d 692, 697. However, records of non-involved officers may be disclosed if there
Practice Pointer: If you believe that the court has made an erroneous ruling, request that disclosure be delayed in order to provide an opportunity to consider an appeal.

V. CONCLUSION

Privacy rights and the public’s right to know is an ever-changing, delicate and shifting balance of important rights in conflict. By constantly keeping abreast of changes in the law, establishing and updating procedures to efficiently and timely handle requests, and taking into account the practical aspects of each situation, hopefully the city attorney will find a safe harbor while preserving those islands of privacy within the broad sea of disclosure.
PUBLIC RECORDS ACT REQUEST
(To be returned in 7 days)

1. Department ________________________________

2. Date ________________________________

3. Records Requested


4. Compliance:

/ / Unable to locate any documents.
/ / Copies attached.
/ / Other (explain).

Dated: ________________________________

Department Head
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FORM #4 Opposition to Defendant's Motion for Peace Officers' Personnel Records (Sample)

FORM #5 Protective Order (Blank Form)

FORM #6 Protective Order (Sample)

FORM #7 Notice of Entry of Protective Order (Blank Form)

FORM #8 Notice of Entry of Protective Order (Sample)
III.
The "Pitchess" Motion

When served with a Pitchess Motion the law enforcement agency or its legal representatives need to address it by taking the following steps:

1. **Determine Compliance with Notice Requirements.**

   In order to request personnel records of a peace officer a Subpoena duces tecum is inadequate unless it meets requirements set forth by Evidence Code § 1043, which require a written motion to be filed with the court in which the underlying case is pending, and served upon the agency having custody & control of the requested records. Service only upon the prosecuting agency is not sufficient. The written motion also must comply with notice requirements of CCP § 1005 (b) [15 days (+ 5 days for service is mail) notice before time of hearing.] The legal counsel for the law enforcement agency should review the moving papers to determine compliance with the time and notice requirements of Evidence Code § 1043(a).

2. **Determine compliance with the requirements of Evidence Code §1043(b)**

   The motion must identify the proceedings; the person requesting discovery; the peace officer(s) whose records are sought; agency having control of the records; place, date & time of the motion; description of the type of records or information sought; and include an affidavit showing good cause for discovery of the records.

3. **Sufficiency of Affidavit.**

   The Affidavit should be citing all supporting authorities and relevant case law required by the Evidence Code. Sufficiency of the affidavit supporting motion is critical. The custodian and the officer are entitled to the defendant's version of the facts incident to the arrest. When the motion is unintelligible or overly broad in its request, opposition based upon failure to comply with the "good cause" requirement should be successful. The Affidavit must demonstrate good cause for discovery. A motion requesting records of past dishonesty must demonstrate a plausible factual foundation of the "good cause" for discovery. Affidavit must contain specific allegations demonstrating relevance to the case when ethnic bias is alleged. Blanket request for all complaints is overboard. The affidavit must also show relevancy and make it clear that the material requested is not readily available or obtainable.

4. **Allegations of Excessive Force Require Inclusion of Police Report**

   If excessive force is alleged in connection with the arrest of the moving party, the motion must include a copy of the police report setting forth the
records. Advise the judge if the same files have recently been reviewed by another judge of the same court, and discovery was granted or denied, so the judge may take it into consideration. The custodian/attorney may be asked for or may volunteer input regarding matters concerning the records. Counsel may advise the judge as to his or her review of the documents brought and direct the judge immediately to the relevant and away from the irrelevant documents. To create a proper record and protect custodian in probably review by a higher court, the custodian may identify each document the judge reviews. It is critical that the custodian be thoroughly familiar with the records the judge is reviewing.

9. Disclosure of Files and Related Exceptions

At the conclusion of the in camera hearing, if the judge determines that the interests of justice and a fair trial outweigh the agency's interest in confidentiality, the judge may order disclosure of certain limited information. The disclosure is subject to the following limitations:

i. Five Year Rule.

Records of complaints concerning conduct which occurred more than (5) years prior to the incident are excluded from disclosure. Sanctions may be imposed if records less than 5 years are found to have been destroyed.

ii. Findings & Conclusions.

Findings & conclusions of the officer or the deputy investigating a citizen's complaint filed pursuant to Penal Code § 832.5 are excluded from disclosure.

iii. Remote Facts.

Facts so remote as to make disclosure of little benefit are excluded.

iv. Psychological Records.

In certain very limited situations, a defendant may be entitled to statements of psychiatrists or psychologists in a peace officer's files to substantiate the character trait of that peace officer for excessive force, but it requires a substantial showing. The circumstances must also be present to show that the mental or emotional condition of the officer is at issue in the case.
SYNOPSIS

DISCOVERY OF PEACE OFFICER’S PERSONNEL RECORDS

CALIFORNIA EVIDENCE CODE §§ 1043 - 1047

I. Introduction

State of California preserves privacy rights of public employees and peace officers, and limits access to their personnel records (California Constitution Article 1, § 1; CC § 1798 et seq.) Police officer’s personnel records are confidential and not to be disclosed in any proceeding except pursuant to Evidence Code §§1043 &.1046. Evidence Code §1043 contains exclusive procedures for obtaining information contained in peace officer’s personnel records.

Evidence Code §1043 was enacted in 1978 in response to the 1974 California Supreme Court decision Pitchess v. Superior Court (1974) 11 Cal.3d 531, requiring a specific procedure for discovery of peace officer’s personnel records. A “Pitchess” motion arises most frequently when a criminal defendant seeks information from a peace officer’s personnel records concerning prior complaints against that peace officer for excessive force or racial or ethnic prejudice. The burden of proof is on the person moving to compel disclosure of information.

II. Relevant Statutes

Evidence Code §§ 1043 - 1047 set forth the procedures for filing a motion for discovery of peace officer’s personnel records.

Penal Code § 832.5 requires agencies to establish a procedure to investigate complaints from public and to make a written description of that procedure available to public. Complaints and reports of such finding must be retained for at least 5 years.

Penal Code § 832.7 states that peace officer personnel files and records maintained pursuant to Penal Code § 832.5 are confidential and are not to be disclosed except by discovery pursuant to Evidence Code §§ 1043. Even Public Records Act under Government Code §§ 6250 et seq., does not apply to peace officer records.

Penal Code § 832.8 defines peace officer personnel records.

Evidence Code § 1103 sets forth the admissibility of character trait evidence.

overrules the privilege and the agency continues to refuse to reveal the material, the court may apply sanctions, including dismissal of the case, jury instructions regarding the past incidents, preclusion of witness testimony or contempt.

11. Sealing Transcripts and Protective orders

If anything is discoverable, custodian/attorney should return to open court and move for protective order that information released not be disclosed except as necessary to the investigation of the immediate case; and request compliance date for the release of information. Request a compliance date for discovery to allow time for judicial review of the trial court, if necessary. Also Request for an order that a transcript of the proceedings be prepared only upon a court order with at least ten days written notice to the law enforcement agency. Opposition to either request is unlikely.
circumstances under which the party was stopped and arrested (Evidence Code § 1043). Although failure to comply with this section may not seem crucial, compliance must be required as many Pitchess motions have been denied for failure to include the report and no other reason.

5. Notice to Custodian of Records

The law enforcement agency/attorney should immediately notify the custodian of records to (a) calendar the date of hearing; and, (b) make the records available for review of law enforcement agency/attorney; (c) to prepare to appear at the court with the requested personnel records, (d) to give notice to the officer whose records are sought. The officer may wish to seek separate counsel to represent his interests in the discovery matter, and agency’s failure to notify him immediately could prejudice his efforts, subjecting custodial agency to potential liability.

6. Opposition to Pitchess Motion

Law enforcement agency/attorney should calendar the deadline for filing opposition to the Pitchess motion [five (5) days before the hearing date] and file a written opposition, when appropriate. If the moving party’s motion is deficient for any reason, the custodial agency should file a written opposition, including memorandum of Points & Authorities, at least five (5) days preceding the hearing date, and serve on all parties to the action. If the motion complies with the “good cause” and plausible justification and is timely, the custodian will not file written opposition and the hearing will proceed to “in camera” examination of the records.

7. Appearance in Court

The custodian is required to appear in court while the attorneys representing the custodial agency, the peace officer and the custodian may also be present. The peace officer may also be present. When judge calls the matter, the custodian/attorney should indicate readiness to proceed, that the custodian INVOKES THE “PRIVILEGE” REGARDING CONFIDENTIALITY OF THE RECORDS, and should be prepared to estimate the approximate length of time for oral arguments opposing the motion, and in camera review, if the motion is granted. The Custodian/attorney should also request a court reporter to record the proceedings in open court, and in camera.

8. The “In Camera Hearing”

If the motion is granted, the custodian, the judge, the court reporter and whomever else the custodian wishes present will recess to the judge’s chambers for the “in camera” hearing. Neither the defendant nor defense counsel may be present at the in camera hearing. If the custodian has not brought the personnel files to court, or on the court’s own motion, another day may be set for the in camera review. The judge will most likely swear the witness (custodian) and proceed to review the personnel
Notes
v. Prior Arrest Reports.

Prior arrest reports are not subject to discovery, where peace officer is the victim. A defendant is not entitled to the names and addresses of all persons arrested by the victim peace officer for similar charges, as the value to the defendant is too remote and speculative when balanced against the legitimate right to privacy of third party arrested.

vi. Dishonesty Character Impeachment.

A motion would be inadequate if the declaration supporting it does not discuss how the officer or deputy witness is alleged to have lied in a crucial area of his or her involvement with the case, or may take the stand and lie during testimony.

vii. Name, Addresses & Phone Numbers.

Discovery is limited to the disclosure of names, addresses and phone numbers of complainants and witnesses contained in prior internal investigations and if applicable, the discipline imposed upon the officer for the event.

viii. Directly Involved in the Fracas.

A defendant is only entitled to discover information from the files of those officers who were "directly involved in the fracas" (OR PERCIPIENT WITNESS) and attention must be paid to each officer's role in the incident based on the police report and the defendant's affidavit.

ix. Racial Bias

In order to obtain information relating to an officer's alleged racial or ethnic bias, the declaration must establish that the defendant is a member of a racial or ethnic minority group.

x. Debriefing of the Judge

Number of items and the general nature of any privileged material reviewed in camera is prohibited from disclosure.

10. Sanctions for Non-Disclosure

The custodial agency's may elect to assert the "official information" privilege (Evidence Code § 1040), the court must consider and determine the applicability of the privilege by applying the balancing standard. If the court then
[DESCRIBE THE EVENTS LEADING TO THE CHARGES AND THE ARREST OF THE DEFENDANT.]

III. REQUESTED INFORMATION

Defendant has filed a "form" Pitchess motion (see, Pitchess v. Superior Court, 11 Cal.3d 531 (1974)) seeking disclosure of confidential information from the personnel file of Detective _________. The motion fails to satisfy the requirements of California Evidence Code §§ 1043 et seq, and seeks information that is not discoverable by filing a Pitchess motion. As a result, the motion should be denied.

Defendant seeks the following information:

[DESCRIBE THE INFORMATION OR DOCUMENTS REQUESTED BY THE DEFENDANT.]

The City and Detective _________ oppose the production of any of the documents as defendant's Pitchess motion fails to satisfy the requirements established by the California Legislature and California Courts interpreting such statutes.

IV. ARGUMENT

1. A POLICE OFFICER'S PERSONNEL FILE SHOULD ONLY BE RELEASED IF AN AFFIDAVIT SETS FORTH THE MATERIALITY OF THE INFORMATION, SHOWS GOOD CAUSE FOR ITS RELEASE AND REQUESTS THE INFORMATION WITH SPECIFICITY.

The State of California places a high priority on preserving the privacy of peace officers and other public employees by limiting access to their personnel records (California Constitution, Article I, § 1; Cal. Civ. Code § 1798 et seq.) Peace officer's personnel records are privileged and confidential under Penal Code § 832.7 and are protected by the constitutional right to privacy (City and County of San Francisco v. Superior Court (1981) 125 Cal. App. 3d 879, 882).

Section 1043 et seq. of the Evidence Code contains the exclusive procedures for obtaining information contained in peace officer personnel records (City of Fresno v. Superior Court, (1988) 205 Cal. App.3d. 1459, 1474). Under Section 1043, a motion that seeks the discovery of a police officer's personnel file must include "affidavits showing good cause" for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter.
FORM #3
Defendant has failed to limit her requests to the records pertinent to the facts of the case. For example, she has not limited her request to those personnel records involving fabrication of charges in undercover arrests. Accordingly, Defendant has failed to show good cause for discovery of records of fabrication of charges under City of San Jose, because the Defendant has failed to provide the required specific factual scenario, and because the requested information is too broad. As a result, the requested records should be denied.

B. Defendant's Request for Records of Acts Involving “Acts of Dishonesty or other Improper Tactics no Matter How Catalogued by the Department” Should Be Denied Because the Request is Impermissibly Broad.

As discussed above, Defendant has failed to provide the required specific factual scenario in support of Defendant’s allegations. Therefore, Defendant has failed to show good cause for discovery under City of San Jose and Evidence Code § 1043(b)(3). In City of San Jose, the court rejected a request for records including neglect of duty, dishonesty or deceit in the performance of duty, and acts involving morally lax character, because the defendant failed to request records pertinent to the alleged police misconduct. (Id.). Similarly, here, Defendant has not in any way tailored the information requested to the facts of this case, such as by seeking records of dishonesty related to vice investigations. As a result, Defendant’s request for information regarding acts of “improper conduct” or “conduct unbecoming a police officer” is impermissibly broad and her request for this disclosure should be denied.

2. ANY REVIEW OF AN OFFICER’S FILE SHOULD BE CONDUCTED IN-CAMERA IF THE COURT DETERMINES THE DEFENDANT’S MOTION IS SUFFICIENT AND THE MATERIAL IS RELEVANT.

Assuming that the Defendant has complied with all of the procedural requirements of section 1043, Evidence Code Section 1045(b) provides that “in determining relevance the court shall examine the information in chambers in conformity with Section 915.” Disclosure is appropriate only if the material is relevant to the case. Under Section 915, only the person who is claiming that the information is protected from disclosure, his or her attorney, and anyone specifically permitted by that person, are allowed in chambers with the Court.

///

Opposition to Defendant’s Motion for Discovery of Peace Officers’ Personnel Records (Evidence Code § 1043 et seq.)
IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA - FREMONT HALL OF JUSTICE

THE PEOPLE OF THE STATE OF) CASE NO: _________
CALIFORNIA, )

v. ) OPPosition to Defendant's
______) Motion for Discovery of Peace
Defendant. ) Officers' Personnel Records
(Evidence Code § 1043, et seq.)

DATE: 9:00 a.m., 2000
TIME: DEPT: __

The City of _______ ("City") claims the privilege for official information as set forth in California Evidence Code section 1040 et seq and hereby submits the following points and authorities in opposition to Defendant ____ ____'s Motion for an Order for Discovery.

I. INTRODUCTION

Defendant's Pitchess motion requests two (2) categories of information from the confidential personnel files of Detective ________, No. _____. Defendant's requests are not supported by good cause. Nor has she established the materiality of the records sought. Furthermore, Defendant's requests are impermissibly broad. As a result all of Defendant's requests should be denied.

II. STATEMENT OF FACTS

Defendant is charged with § ____ (__) of the Penal Code (__________). According to the police report, the following events occurred:
and Penal Code § 832.5.) Only if the names, addresses and telephone numbers prove to be inadequate should the defendant have more information. If disclosure is granted it should be limited to names, addresses and telephone numbers of complainants.

6. **THE CITY REQUESTS A PROTECTIVE ORDER.**

Evidence Code § 1045(d) states that the Court may make an order "to protect the officer or agency from unnecessary annoyance, embarrassment or oppression." Furthermore, Section 1045(e) requires that the records disclosed pursuant to Penal Code §§ 832.5 and 832.7 not be used for any purposes other than the specific court proceeding in which Defendant's motion is granted in part. Therefore, if Defendant's *Pitchess* motion is granted in any part, the City and Detective respectfully request that this Court issue a protective order providing that any disclosed material is confidential and shall not be disseminated in any fashion, written or oral, to any person other than those preparing this case for trial or appeal.

**V. CONCLUSION**

Defendant has the burden to prove that disclosure of the police records is justified under California Evidence Code § 500. Defendant must show that the right of privacy in the records is outweighed by the need for the records. Defendant has not met her burden. Nor has she provided any facts to support the good cause and materiality requirements needed for the motion to succeed.

For these reasons, the City respectfully requests that this Court deny Defendant's requests submitted in her motion to request peace officer's personnel records.

Dated: ______________

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: ____________________

Attorneys for Plaintiff
CITY OF
involved in the pending litigation” (Cal. Evid. Code §1043(b)(3)). The party seeking discovery must also identify the documents with reasonable particularity and demonstrate that the requested information is pertinent to the defense (People v. Municipal Court (1980) 102 Cal. App.3d 181, 184). “[T]he information sought must . . . be requested with adequate specificity to preclude the possibility that Defendant is engaging in a ‘fishing expedition’” (City of Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74, 85).

A recent case further clarified the good cause and materiality requirements of Evidence Code § 1043(b)(3). (City of San Jose v. Superior Court of Santa Clara County (1998) 67 Cal. App. 4th 1135,1149-50). To satisfy the good cause requirement of Evidence Code § 1043, Pitchess motions must provide a “specific factual scenario” establishing a “plausible foundation” for allegations of police misconduct, and request peace officer personnel records pertinent to the specific factual scenario of alleged wrongdoing. (Id., citing City of Santa Cruz v. Municipal Court (1989) 49 Cal. 3d 74, 85-86 and People v. Memro (1985) 38 Cal. 3d 658, 685).

In City of San Jose, the defendant alleged that the officers failed to obtain knowing, voluntary consent to enter, that the officers' reports and court testimony contained material misrepresentations, and that the officers mishandled evidence (Id. at 1139). Defendant sought discovery of records including those pertaining to illegal search and seizure, improper handling of evidence, failure to follow standard and/or outlined police procedure, neglect of duty, dishonesty or deceit in the performance of duty, false arrest, fabrication of evidence or charges, and morally lax character (Id.) The court found the defendant's allegations inadequate because they did not specify whether the officers coerced consent or merely failed to obtain it, which statements in the officers' reports or testimony contained misrepresentations, or what evidence was mishandled or how (Id. at 1147). Consequently, the court in City of San Jose held that the defendant failed to establish good cause for discovery, and ordered denial of the defendant's discovery motion.

In the instant case, Defendant's “specific factual scenario” is that [DESCRIBE HOW THE FACT PATTERN IN THE CURRENT MATTER IS GOVERNED BY THE RULES SET FORTH BY THE STATUTE AND THE PRECEDENCE.]
I. INTRODUCTION

Defendant's Pitchess motion requests eight categories of information from the confidential personnel file of Officer Degrano of the San Leandro Police Department. However, Defendant's allegations do not establish the materiality of any of the records sought. Moreover, Defendant's requests for records of acts involving morally lax character and other acts of dishonesty or improper tactics are impermissibly broad. As a result, all of Defendant's requests should be denied either because they are immaterial or because they are both immaterial and overly broad.
3. **DUE PROCESS REQUIRES THAT THE CITY AND THE OFFICERS BE PROVIDED A COMPLIANCE DATE AFTER THE IN-CAMERA HEARING.**

If an *in-camera* hearing is conducted, and the Court determines that there is relevant information within the files, the City and Detective _____________ should be provided with a compliance date to disclose the information. The information should not be ordered disclosed on the day of the *in-camera* hearing. This would effectively deny the City and Detective Sequeria of their due process rights to file, if needed, an appeal of the Court's discovery order. Accordingly, they should be given a compliance date after the *in-camera* hearing.

4. **EVEN IF THE COURT FINDS THE POLICE RECORDS ARE NOT FULLY PRIVILEGED, THE DEFENDANT IS NOT ENTITLED TO INFORMATION MORE THAN FIVE YEARS OLD.**

California Evidence Code section 1045(b)(1) specifically excludes from disclosure “information consisting of complaints concerning conduct occurring more than five years before the event or transaction which is the subject of the litigation in aid of which discovery or disclosure is sought.” Therefore, no information older than five years before the defendant's arrest may be disclosed.

5. **EVEN IF DISCLOSURE IS ORDERED THE DEFENDANT IS ENTITLED ONLY TO THE NAMES, ADDRESSES AND TELEPHONE NUMBERS OF COMPLAINANTS.**

It is well-settled that when a defendant is entitled to discovery or disclosure related to reports of citizen complaints against a police officer, the defendant is not entitled to the reports themselves. Defendant is initially only entitled to the names, addresses and telephone numbers of complainants. *(Kelvin L. v. Superior Court* (1976) 62 Cal. App. 3d, 823, 828-829; 133 Cal.Rptr. 325 citing *Pitchess, supra* at 538 and *Carruthers v. Municipal Court for Long Beach*, (1980) 110 Cal.App. 3d. 439, 168 Cal.Rptr. 33.)

Defendant’s motion in this case is too broad. Defendant is not yet entitled to the statements of complainants; statements of witnesses and other people interviewed; tape recordings, transcriptions, notes and memorandum of investigations of an investigating officer; records of the Police Department concerning statements, reputations and opinions of members of the police members; and discipline records. *(California Evidence Code 1045(b)(2) Opposition to Defendant's Motion for Discovery of Peace Officers' Personnel Records (Evidence Code § 1043 et seq.)*
Police Department jail, the Defendant was given Miranda warnings and indicated he needed a
lawyer.

While in jail the next day, the Defendant requested to give Officer Degrano a statement,
which Officer Degrano recorded in writing. In the statement, the Defendant confirms that he sought
to speak to an officer, and that the Defendant was advised of his right to an attorney. The statement
contains the Defendant’s admission that the other arrestees had nothing to do with the drugs
discovered at the trailer, that the drugs belonged to the Defendant, that they were methamphetamine,
and that the Defendant sells methamphetamine. The Defendant signed the written statement record
in two places; once indicating the Defendant was informed of and understood his rights, and once
beneath a written statement confirming the truth of the statement, and that it was made without any
threats or promises made to the Defendant.

III. REQUESTED INFORMATION

Defendant seeks the names, addresses, telephone numbers and statements of all those who
have made complaints against Officer Degrano for

1. fabrication of charges
2. fabrication of evidence
3. false or misleading police reports
4. obtaining statements from suspects by means of coercion, threats or force
5. obtaining statements from suspects by means of promises of leniency, special
treatment or release from custody
6. obtaining statements from suspects in violation of their Miranda rights
7. acts involving “morally lax” character
8. other acts of dishonesty or improper tactics no matter how catalogued by the
Department (such as conduct unbecoming an officer, neglect of duty and
miscellaneous)

IV. ARGUMENT
FORM #4
1. INFORMATION FROM A POLICE OFFICER'S PERSONNEL FILE SHOULD ONLY BE RELEASED IF AN AFFIDAVIT SETS FORTH THE MATERIALITY OF THE INFORMATION, SHOWS GOOD CAUSE FOR ITS RELEASE AND REQUESTS THE INFORMATION WITH SPECIFICITY.

The State of California places a high priority on preserving the privacy of peace officers and other public employees by limiting access to their personnel records (See California Constitution, Article I, § I; Cal. Civ. Code § 1798 et seq.). Peace officer personnel records are privileged and confidential under Penal Code Section 832.7 and are protected by the constitutional right to privacy (See City and County of San Francisco v. Superior Court (1981) 125 Cal. App. 3d 879, 882).

Section 1043 et seq. of the Evidence Code contains the exclusive procedures for obtaining information contained in peace officer personnel records (See City of Fresno v. Superior Court, (1988) 205 Cal. App.3d. 1459, 1474). Under Section 1043, a motion that seeks the discovery of a police officer's personnel file must include: “affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation” (Cal. Evid. Code §1043(b)(3)).

In addition, the party seeking discovery must identify the documents with reasonable particularity and demonstrate the requested information's pertinence to the defense (People v. Municipal Court (1980) 102 Cal. App.3d 181, 184). “The information sought must . . . be requested with adequate specificity to preclude the possibility that Defendant is engaging in a "fishing expedition"” (City of Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74, 85).

The recently decided case City of San Jose v. Superior Court of Santa Clara County clarifies, under City of San Jose, to satisfy Evidence Code Section 1043's good cause requirement, Pitchess motions must provide a “specific factual scenario” establishing a “plausible foundation” for allegations of police misconduct, and request peace officer personnel records pertinent to the specific factual scenario of alleged wrongdoing (City of San Jose v. Superior Court of Santa Clara County, no. H018225, (Cal. App. 6 Dist. 1998) 79 Cal. Rptr. 2d 624).
II. STATEMENT OF FACTS

The Defendant is charged with violating Section 11378 of the Health and Safety Code for possession of methamphetamine for sale. According to the police reports and supporting documents submitted with Defendant's motion, the following events occurred:

On February 10, 1999, at approximately 9:15 p.m., Officer Degrano, along with a sergeant, two detectives, and another officer of the San Leandro Police Department arrived at 2560 West Avenue 133 in San Leandro to execute a search warrant. The warrant ordered a search of a shed at the rear of the property, and of the person of "Bobby," a Filipino male meeting the physical description of the Defendant. The warrant authorized a search for methamphetamine, related paraphernalia and evidence of sales of methamphetamine.

As the officers approached the shed, they observed two males in the doorway of a fifth-wheel trailer five feet from the shed. For safety reasons, the officers detained the males. In doing so, the officers noticed two other males inside the trailer. The officers ordered all occupants of the trailer outside; all complied except for the Defendant, who turned toward the trailer rear and did not exit. The officers entered the trailer to conduct a protective sweep and detain the Defendant. It was evident to Officer Degrano that the Defendant met the description of the subject of the search warrant. In conducting the protective sweep, Officer Degrano observed in plain view a clear plastic bag containing what he suspected was methamphetamine.

The officers exited the trailer and searched the shed, finding nothing. Officer Degrano asked the detainees who owned the trailer. Detainee Conocono acknowledged the trailer belonged to him. Officer Degrano verified that detainee Conocono was the registered owner of the trailer, and sought Conocono's permission to search the trailer. Conocono consented to the search and signed the San Leandro Police Department consent to search form. Officer Degrano and the two detectives present then entered the trailer and recovered the bag Officer Degrano had already observed, as well another bag containing two large chunks of suspected methamphetamine, and numerous glass smoking pipes. The officers arrested all of the detainees, including the Defendant. Once at the San Leandro
The Defendant has failed to make any allegation of fabrication of charges; obtaining statements from suspects by means of coercion, threats or force; obtaining statements from suspects by means of promises of leniency, special treatment or release from custody; or obtaining statements from suspects in violation of their Miranda rights. The Defendant alleges only that Officer Degrano does not speak Tagalog, that the Defendant does not speak English, and that the Defendant was incapable of providing and did not provide an incriminating statement to Officer Degrano.

(Declaration of Robert Landeros in Support of Motion for Pretrial Discovery 2:22-27). In light of the Defendant’s failure to even make allegations pertaining to the information sought, the question of whether a “specific factual scenario” establishes a “plausible foundation” in support of allegations of police wrongdoing, as City of San Jose requires, is not even reached. (City of San Jose v. Superior Court of Santa Clara County, no. H018225, (Cal. App. 6 Dist. 1998) 79 Cal. Rptr. 2d 624, 633).

Accordingly, Defendant has failed to show good cause for discovery as Evidence Code Section 1043(b)(3) requires. Therefore, the Defendant’s request for disclosure of such information should be denied.

B. Defendant’s Request for Records of Fabrication of Evidence Should be Denied Because the Defendant Has Failed to Establish the Materiality of the Information Sought.

Under City of San Jose, to satisfy the good cause and materiality requirements of Evidence Code Section 1043(b)(3), Pitchess motions must provide a “specific factual scenario” establishing a “plausible foundation” for allegations of police misconduct. (Id.). In City of San Jose, the court rejected the discovery sought based on allegations that the police had mishandled evidence because the defendant failed to specify which evidence was mishandled, or how (Id. at 632). Similarly, here the Defendant has failed to indicate what evidence was fabricated, or how. Defendant has not specified what evidence has been fabricated; whether particular statements attributed to the Defendant are fabrications or whether the Defendant made no statement as claimed. Consequently, the Defendant has failed to provide a “specific factual scenario” establishing a “plausible foundation” for alleged police misconduct. As a result, the Defendant has failed to demonstrate
unbecoming an officer, neglect of duty and miscellaneous)” the Defendant is asking for virtually every negative record in Officer Moore’s personnel files. If an officer is frequently late for his shift, does that exhibit “morally lax” character? Would that be material? What about a habitually dirty uniform?

The burden is on the Defendant (1) to make a specific request (City of Santa Cruz v. Municipal Court, supra) and (2) to establish the materiality of the request (Evid. Code § 1043.). These two requests by the Defendant fail to meet either of these requirements. First, they are not specific enough “to preclude the possibility that defendant is engaging in a ‘fishing expedition’” (City of Santa Cruz v. Municipal Court), and second, they are too general and over-broad to enable the Court to weigh the materiality of any possible information that might fit into these categories.

If these two requests are granted, then the Court will have to review Officer Moore’s personnel file for essentially any record of a “bad act.” This would make a mockery of the entire Pitchess Motion process. What would be the need to make any request other than these two, since they are so broad that they would necessarily include all others? The five specific requests that the City has conceded would be superfluous, having been subsumed by these two requests.

E. Any Discovery as a Result of This Motion Should Be Limited to The Names, Addresses, And Telephone Numbers of Persons Making Complaints Within the Past Five Years.

Should this Court decide that the Defendant is entitled to the discovery of some of the materials requested, such discovery should be limited to the disclosure of the names, addresses, and telephone numbers of complainants and witnesses and the dates of the incidents in question. This position is supported by the rationale that such restraints are necessary to protect the privacy interests of the involved officer. (City of Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74, 84, 260 Cal.Rptr. 520, 525; City of Santa Cruz v. Superior Court (1987) 190 Cal.App.3d 1669, 236 Cal.Rptr. 155.) Only if the names, addresses, and phone numbers provided prove inadequate should further discovery of the complaints be allowed. (Kelvin L. v. Superior Court (1976, 62 Cal.App.3d 823, 828-29, 133 Cal.Rptr. 325.)

[T]he courts have generally refused to disclose verbatim reports or records of any kind from peace officers personnel files, ordering instead . . . that the agency reveal only the name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question. (City of Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74, 84, 260 Cal.Rptr. 520, 525.)
H018225, (Cal. App. 6 Dist. 1998) 79 Cal. Rptr. 2d 624, 633-34). Because Defendant has offered no allegations of "morally lax" character or other acts of dishonesty or improper tactics regarding Officer Degrano, it is impossible to determine the scope to which such requests should be limited under City of San Jose. Further, the Defendant has not in any way tailored the information requested to the facts of this case, such as by seeking records of improper tactics in conducting arrestee interviews or taking statements. As a result, Defendant's request for information regarding acts of "morally lax" behavior, and other acts of dishonesty or improper tactics, no matter how categorized, is impermissibly broad under City of San Jose. Because Defendant has failed to show the materiality of records of "morally lax" character, or other acts of dishonesty or improper tactics, and because the request is impermissibly broad, Defendant's request for disclosure of such information should be denied.

2. ANY DISCOVERY AS A RESULT OF THIS MOTION SHOULD BE LIMITED TO THE NAMES, ADDRESSES, AND TELEPHONE NUMBERS OF PERSONS MAKING COMPLAINTS WITHIN THE FIVE YEARS PRIOR TO THE DATE OF THE EVENT.

Assuming arguendo that Defendant is entitled to discovery of some of the materials requested, discovery should be limited to disclosure of the names, addresses, and telephone numbers of complainants and witnesses and the dates of the incidents in question.

[T]he courts have generally refused to disclose verbatim reports of records of any kind from peace officer personnel files, ordering instead . . . that the agency reveal only the name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question.

(City of Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74, 84. See also, Kelvin L. v. Superior Court (1976) 62 Cal. App.3d 823, 828-829; Carruthers v. Municipal Court (1980) 110 Cal. App.3d 439, 441; City of Azusa v. Superior Court (1987) 191 Cal. App.3d 693). In addition, Section 1045(b)(1) of the Evidence Code limits discovery to complaints concerning conduct occurring no more than five (5) years before the event or transaction that is the subject of this litigation.

28 Opposition to Defendant's Motion for Discovery of Peace Officer's Personnel Records (Evidence Code § 1043 et seq.)

In *City of San Jose*, the defendant alleged that the officers failed to obtain knowing, voluntary consent to enter, that the officers' reports and court testimony contained material misrepresentations, and that the officers mishandled evidence (*Id.* at 626). Based on these allegations the defendant sought discovery of records including those pertaining to illegal search and seizure, improper handling of evidence, failure to follow standard and/or outlined police procedure, neglect of duty, dishonesty or deceit in the performance of duty, false arrest, fabrication of evidence or charges, and morally lax character (*Id.*). The court found the defendant's allegations inadequate because they did not specify whether the officers coerced consent or merely failed to obtain it, which statements in the officers' reports or testimony contained misrepresentations, or what evidence was mishandled or how (*Id.* at 633). The court also found the defendant's requests overly broad, because the defendant had failed to request records pertinent to a specific factual scenario of alleged wrongdoing (such as records that the officers had coerced consent or failed to obtain consent) (*Id.* at 633, 634).

Consequently, the court in *City of San Jose* held that the defendant failed to establish good cause for discovery, and ordered denial of the defendant's discovery motion.

In the instant case, Defendant has failed to support his requests with a "specific factual scenario" establishing a "plausible foundation" for alleged police misconduct, and has failed to properly limit his requests to police officer records pertinent to a specific factual scenario of alleged wrongdoing. As a result, as is detailed below, Defendant has failed to satisfy the materiality and good cause requirements of Evidence Code Section 1043(b)(3) and Defendant's motion should be denied.

A. **Defendant's Request for Records of Fabrication of Charges; or of Obtaining Statements from Suspects by Means of Coercion, Threats or Force, or By Means of Promises of Leniency, Special Treatment or Release from Custody, or in Violation of Suspects' *Miranda* Rights; Should Be Denied Because the Defendant Has Not Alleged Such Misconduct.**

Opposition to Defendant's Motion for Discovery of Peace Officer's Personnel Records (Evidence Code § 1043 et seq.)
Any disclosed material is confidential and shall not be disseminated in any fashion, written or oral, to any person other than those preparing this case for trial or appeal.

V. CONCLUSION

Defendant has requested a broad range of information from the confidential personnel files of Officer Degrano. However, Defendant's requests are immaterial and over-inclusive and threaten the constitutional right to privacy of Officer Degrano in his personnel records. For these reasons, the City of San Leandro respectfully requests that this Court deny Defendant's requests.

Dated: February 29, 2000

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: ____________________________

Michael S. Riback
Attorneys for
CITY OF SAN LEANDRO
good cause for discovery and the materiality of the information sought under City of San Jose.

Therefore, the Defendant’s request for records regarding fabrication of evidence should be denied.

C. Defendant’s Request for Records of False or Misleading Police Reports Should be Denied Because the Defendant Has Failed to Establish the Materiality of the Information Sought.

In City of San Jose, the court found that allegations that police reports contained material misrepresentations concealing a failure to obtain consent to search failed to provide a “specific factual scenario” establishing a “plausible factual foundation” for alleged misconduct. (City of San Jose v. Superior Court of Santa Clara County, no. H018225, (Cal. App. 6 Dist. 1998) 79 Cal. Rptr. 2d 624, 633). The court found that the allegations failed to specify what statement or statements in the police report contained misrepresentation, or in what respect the statements were incorrect. (Id.). Similarly, here the Defendant’s allegations only assert that Officer Degrano and the Defendant lack a common language, and that the Defendant could not have given an incriminating statement. (Declaration of Robert Landeros in Support of Motion for Pretrial Discovery 2:22-27). Defendant does not specify which statements, if any, in Officer Degrano’s report are false or misleading, or in what way. Accordingly, the Defendant has failed to provide a “specific factual scenario” establishing a “plausible foundation” for alleged misconduct, and thus failed to show good cause and materiality under City of San Jose. Therefore, Defendant’s request for records of false or misleading police reports should be denied.

D. Defendant’s Request for Records of Acts Involving “Morally Lax” Character, and Other Acts of Dishonesty or Improper Tactics No Matter How Catalogued Should Be Denied Because the Defendant Has Not Established the Requests’ Materiality, and the Requests are Too Broad.

Defendant fails to allege that Officer Degrano committed acts reflecting “morally lax” character, or other acts of dishonesty or improper tactics. As a result, Defendant has failed to show the materiality of such information as Evidence Code Section 1043(b)(3) requires. Moreover, City of San Jose requires that requested peace officer personnel records must pertain to a specific factual scenario of alleged wrong doing (City of San Jose v. Superior Court of Santa Clara County, no. 607

Opposition to Defendant’s Motion for Discovery of Peace Officer’s Personnel Records (Evidence Code § 1043 et seq.)
On a Pitchess motion, a court should initially release only limited information and refuse to
disclose verbatim reports or records of any kind from a police officer’s personnel file. The court’s
release of only limited information is necessary to protect the privacy interests of the involved
officers (City of Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74, 84; City of Santa Cruz v.

3. ANY REVIEW OF AN OFFICER’S FILE SHOULD BE CONDUCTED IN-CAMERA

Section 1045(b) of the Evidence Code provides that “in determining relevance the court shall
examine the information in chambers in conformity with Section 915.” Under Section 915, only the
person who is claiming that the information is protected from disclosure, his or her attorney, and
anyone specifically permitted by that person, are allowed in chambers with the Court.

4. DUE PROCESS REQUIRES THAT THE CITY AND THE OFFICERS BE
PROVIDED A COMPLIANCE DATE AFTER THE IN-CAMERA HEARING.

If an in-camera hearing is conducted, and the Court determines that there is relevant
information within the files, the City and Officer Degrano should be provided with a compliance
date to disclose the information. The information should not be ordered disclosed on the day of the
in-camera hearing. This would effectively deny the City and Officer Degrano of their due process
rights to file, if needed, an appeal of the Court’s discovery order. Accordingly, they should be given
a compliance date after the in-camera hearing.

5. THE CITY OF SAN LEANDRO REQUESTS A PROTECTIVE ORDER.

Section 1045(d) of the Evidence Code states that the Court may make an order “to protect the
officer or agency from unnecessary annoyance, embarrassment or oppression.” Furthermore,
Section 1045(e) requires that the records disclosed pursuant to Penal Code Sections 832.5 and 832.7
not be used for any purposes other than the specific court proceeding in which Defendant’s motion is
granted in part. Therefore, if Defendant’s Pitchess motion is granted in any part, the City and Officer
Degrano respectfully request that this Court issue a protective order providing that:

Opposition to Defendant’s Motion for Discovery of Peace Officer’s Personnel Records (Evidence Code
§ 1043 et seq.)
4. Use of the information ordered disclosed from Officer _____'s personnel file is limited to you and to your attorney of record in this case, and to an expert employed by said attorney, and you or your attorney shall not divulge it, either in writing or orally, to persons not having a need to, or access to (including the media), the disclosed material for any purpose whatsoever, including for the purposes of preparing this matter for trial or for appeal.

This order does not restrict the conveyance, transfer, publishing or distribution of information solely between the parties to this matter or their respective attorneys during the course of these proceedings.

Violation of this order would constitute contempt or court and an invasion of privacy.

The parties shall be deemed to have reserved until trial any objections to admissibility of any of the information ordered disclosed from Officer _____’s personnel file.

YOU ARE FURTHER ORDERED to return all copies of information ordered disclosed from the personnel file of Officer _____ at the final conclusion of the instant proceeding to Captain _____, Custodian of Records, ______ Police Department, (ADDRESS OF THE RELATED DEPARTMENT.)

Dated: ________________

____________________
Judge of the ____________ Court
FORM #5

PROTECTIVE ORDER

Dept. No. ___

Good cause exists to issue an order to protect Police Officer from unnecessary annoyance, embarrassment or oppression.

To defendant, defendant's agents, employees, attorneys and anyone acting in concert or participating with defendant, YOU ARE HEREBY ORDERED:

1. Not to knowingly copy, duplicate, reproduce; or authorize another to copy, duplicate or reproduce the information ordered disclosed from Officer 's personnel file pursuant to the in camera hearing in this case.

2. Not to convey, transfer, publish, distribute; or authorize another to convey, transfer, publish or distribute the information ordered disclosed from Officer 's personnel file pursuant to the in camera hearing in this case.

3. Use of the information ordered disclosed from Officer 's personnel file is limited to the defense of this criminal matter and you or your attorney, or any other individual shall not utilize it in any other criminal or civil proceeding; and,
3. Use of the information ordered disclosed from Officer T. Young's personnel file is limited to the defense of this criminal matter and you or your attorney, or any other individual shall not utilize it in any other criminal or civil proceeding; and,

4. Use of the information ordered disclosed from Officer T. Young's personnel file is limited to you and to your attorney of record in this case, and to any experts employed by said attorney, and you or your attorney shall not divulge it, either in writing or orally, to persons not having a need to, or access to (including the media), the disclosed material for any purpose whatsoever, including for the purposes of preparing this matter for trial or for appeal.

This order does not restrict the conveyance, transfer, publishing or distribution of information solely between the parties to this matter or their respective attorneys during the course of these proceedings.

Violation of this order would constitute contempt or court and an invasion of privacy.

The parties shall be deemed to have reserved until trial any objections to admissibility of any of the information ordered disclosed from Officer T. Young's personnel file.

YOU ARE FURTHER ORDERED to return all copies of information ordered disclosed from the personnel file of Officer T. Young at the final conclusion of the instant proceeding to Captain Joe Kitchen, Custodian of Records, San Leandro Police Department, Civic Center Complex, 901 East 14th Street, San Leandro, California 94577.

Dated this _____ day of April, 1998.

PEGGY HORA
Judge of the Municipal Court
MUNICIPAL COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA, SAN LEANDRO-HAYWARD JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
v.

Defendant.

NOTICE OF ENTRY OF PROTECTIVE ORDER

PLEASE TAKE NOTICE that the Protective Order submitted by the City of ________ for signature was executed by the Honorable ________ on ________, 2000.

Attached for your records is a true and correct copy of the executed Protective Order (Exhibit “A”).

Dated: ____________

Respectfully submitted,

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: ____________________________

Attorneys for Defendant
CITY OF ____________
MUNICIPAL COURT OF CALIFORNIA, COUNTY OF ALAMEDA
SAN LEANDRO-HAYWARD JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

KENNETH B. FOBBS a.k.a. JOHNNY-FOBBS

Defendant.

PROTECTIVE ORDER

Good cause exists to issue an order to protect San Leandro Police Officer T. Young, from unnecessary annoyance, embarrassment or oppression.

To defendant, defendant’s agents, employees, attorneys and anyone acting in concert or participating with defendant, YOU ARE HEREBY ORDERED:

1. Not to knowingly copy, duplicate, reproduce; or authorize another to copy, duplicate or reproduce the information ordered disclosed from Officer T. Young’s personnel file pursuant to the in camera hearing in this case.

2. Not to convey, transfer, publish, distribute; or authorize another to convey, transfer, publish or distribute the information ordered disclosed from Officer T. Young’s personnel file pursuant to the in camera hearing in this case.
MUNICIPAL COURT OF CALIFORNIA, COUNTY OF ALAMEDA
SAN LEANDRO-HAYWARD JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
v.
KENNETH B. FOBBS a.k.a. JOHNNY-FOBBS
Defendant.

Dept. No. 5
No. 323560

NOTICE OF ENTRY OF PROTECTIVE ORDER

PLEASE TAKE NOTICE that the Protective Order submitted by the City of San Leandro for signature was executed by The Honorable Peggy Hora on May 7, 1998. Attached as Exhibit “A” to this Notice is the signed Protective Order.

Dated: February 29, 2000
Respectfully submitted,

MEYERS, NAVE, RIBACK, SILVER & WILSON

By:
Arne B. Sandberg
Attorneys for Defendant
CITY OF SAN LEANDRO
FORM #8