

**From:** Bert Robinson

**Sent:** Friday, March 6, 2020 4:57 PM

**To:** Liccardo, Sam <sam.liccardo@sanjoseca.gov>; Jones, Chappie <Chappie.Jones@sanjoseca.gov>; District8 <district8@sanjoseca.gov>; Arenas, Sylvia <sylvia.arenas@sanjoseca.gov>; McGarrity, Patrick <Patrick.McGarrity@sanjoseca.gov>; District 10 <District10@sanjoseca.gov>; Khamis, Johnny <johnny.khamis@sanjoseca.gov>; District 6 <district6@sanjoseca.gov>; Groen, Mary Anne <maryanne.groen@sanjoseca.gov>; Davis, Dev <dev.davis@sanjoseca.gov>  
**Cc:** Taber, Toni <toni.taber@sanjoseca.gov>; Sykes, Dave <Dave.Sykes@sanjoseca.gov>; Garcia, Edgardo <EDGARDO.GARCIA@sanjoseca.gov>

**Subject:** Followup to my address to the Rules Committee

[External Email]

Committee members:

I'd like to offer a few specific comments on the February 27 memo from Chief Edgardo Garcia regarding the SJPd response to the public records request from the Bay Area News Group under SB 1421. I'm doing this in hopes of helping you understand the way this process has unfolded from my vantage point — because what the memo describes is only intermittently recognizable to me. I am not seeking to disparage the work of any individual within the department, but to help the committee understand the degree of foot-dragging that has taken place. I have confirmed that SJPd has released two additional cases beyond what I knew at the meeting — bringing its total to 5 — but it is going to take a much more significant change in orientation to set this right. I promise you, if the department had been responsive and committed throughout this process, I would not troubling you for assistance.

**Garcia memo, p. 1, 4th paragraph, “Retroactive incidents”:** *“In early April 2019, the California First District Court of Appeal found records for retroactive incidents to be releasable. The department followed this guidance — and continues to follow it today — and contacted the previously denied requestors.”*

The department changed its stance and contacted requestors only after a communication from BANG pointing out that its previous refusal to engage this issue no longer had even the remotest legal basis in the wake of the appellate court ruling. Once the department acknowledged this, BANG requested a meeting with the department to discuss its proposed timeline for release, reminding the department that the Public Records Act required it to produce such a timeline immediately. The department refused BANG's request for a meeting, and after months in which no records were released, the chief failed to respond to a personal request to him for a discussion to break the logjam. No timeline was released until October, following repeated requests, at which point the department said it would release the records we requested in Jan. 2019 by Oct. 2023. It has since amended its target date to Jan. 2022.

**Garcia memo, p. 2, 1st full paragraph, “Statutory timelines to release records”:** *“These records cannot be released until criminal enforcement processes (i.e. prosecution) have concluded.” P. 5, 4th paragraph: “This means that for incidents in which a criminal*

*enforcement process (i.e. prosecution) is still in progress, the records are not yet eligible for public disclosure.”*

This is a grossly incorrect characterization, as we informed the department months ago. Unfortunately, the department similarly mischaracterized SB 1421 in its initial communication with the Santa Clara County District Attorney’s office, according to emails we have reviewed, throwing another roadblock in the path of this process. Even if a case is “in progress,” the law requires the release of records that will not interfere with that progress, under strict time frames. We have been working with the DA, and an initial list of 51 “ongoing cases” developed in response to SJPd’s erroneous direction to the DA has been whittled to nine. Our discussions with the DA continue because it is not clear to us that all of the nine remaining cases meet the definitions of non-disclosable under SB 1421.

**Garcia memo, page 3, first full paragraph, ANALYSIS:** *“Historically, the department has tried to respect the privacy interests of public records requestors by not publishing the details of their requests. While that generally serves the public good . . .”*

If this is indeed the department’s historic practice, it is contrary to the law — and it underscores some of my concerns about how the department handles public records releases generally. Its procedures seem to be based on how the department wishes the law worked rather than how it is actually written. Public records requests are themselves a public record; the public has a strong interest in understanding how government performs its obligations under the California Public Records Act. Privacy interests are appropriately protected through redacting private information, not withholding public documents.

**Garcia memo, page 6, full page, “Time needed to process records.”**

The extraordinary times listed here point to a need for the department to condense and prioritize its processing. While I am no expert, I note that redacting records is not a new endeavor for the department — records that become part of court cases and end up in public files are regularly redacted. In the case of the 12/25/18 OIS mentioned here, many of these records had already been released in redacted form publicly by the DA’s office, which reviews OIS incidents.

As I noted in my testimony, other departments are releasing extensive records in much shorter time frames. It is not accurate, as the department representative stated during the rules committee meeting, that the departments I cited are releasing only small portions of files for individual cases. I invite you to look at the 80 cases listed on the San Diego Sheriff’s website here <https://www.sdsheriff.net/publicrecords.html> and the 35 on the San Diego Police Department website here <https://sandiego.nextrequest.com/requests/18-4827> . You’ll see these releases include substantial amounts of audio, video and photographic material. I attempted unsuccessfully to persuade the department’s representative to look at these websites with me at the end of the Rules Committee meeting.

I’m not suggesting that the mayor’s suggestion for the department to prioritize which records it releases from each file is not a good idea. It is a good idea. I’m simply making the point that it would be possible to release a full slate of documents (even in cases with hundreds of pages), audio and video for individual cases and still do it at a quick pace, because that is what is happening elsewhere.

I hope the above commentary gives insight into my belief that SJPd has yet to engage in an earnest and good-faith effort to release records at a pace that is in the public interest. For these

reasons, I renew the request I made at the Rules Committee meeting: instruct the city manager and the city attorney to negotiate a pre-litigation settlement with BANG that commits the department to a far more aggressive time frame — in the December meeting with SJPd, I proposed four months to release the 74 cases in BANG's original request. The pre-litigation agreement should include provisions for enforcement, allowing BANG to ask a court to enforce the agreement if the department fails to live up to it. I request that you instruct the city attorney, city manager and BANG to return to this committee with a completed agreement by a time certain four weeks from today.

**Bert Robinson** Senior Editor | Editorial