

ATTACHMENT I

Mark Brnovich
Arizona Attorney General
Attn: Civil Litigation Division/A.R.S. §41-194.01
1275 West Washington Street
Phoenix, AZ 85007

SB 1487 Investigation Request by Legislator Jay Lawrence

Question Presented: Whether the City of Phoenix Police Department's "Transparency Protocol" violates A.R.S. § 38-1109?

I. Phoenix Police Department's Transparency Protocol

On or about July 14, 2017, the City of Phoenix Police Department announced its new "Transparency Protocol." (See Attachment 2). The Transparency Protocol is intended to provide an accelerated release of information and records to the public when the Phoenix Police Department is involved in critical incidents. The protocol states that "critical incidents may include police involved shootings, exceptional uses of force incidents, officer death or injury, in-custody deaths or any other incidents generating significant community concern." (Attachment 2). The Transparency Protocol sets forth timeline goals for dissemination of information and records following a critical incident. The timeline sets forth a new goal of providing public release of records and information surrounding a critical incident within 30 days.

II. Relevant Arizona Statutes

In 2014, the Fifty-first Legislature passed H.B. 2562, which became the Peace Officers Bill of Rights (A.R.S. § 38-1101 *et seq.*), effective on January 1, 2015.

A.R.S. § 38-1109. Confidentiality of Records; exception

A. An employer shall not include in that portion of the personnel file of a law enforcement officer that is available for public inspection and copying any information about an investigation until the investigation is complete or the employer has discontinued the investigation.

B. If the law enforcement officer has timely appealed a disciplinary action, the investigation is not complete until the conclusion of the appeal process. This subsection does not apply to a law enforcement officer who is employed by an agency of this state as an at will employee.

III. Practical Application

Following the occurrence of a critical incident, law enforcement agencies in Arizona typically respond in the same manner. A criminal investigation is immediately commenced by the appropriate agencies and County attorney to investigate whether a crime was committed. Simultaneously, the agency commences an internal investigation to determine whether the officer(s) involved violated any administrative policies of that agency. Within hours or days of the critical incident, media and other public outlets request public records and information from the law enforcement agency. When the agency believes that release of the records or information will not harm the involved officer(s) and would not jeopardize its ability to conduct a thorough and accurate investigation, the agency will release information and records internally to other law enforcement officers throughout the agency (intended to de-brief the critical incident) and to the public. Often, before the investigations have cleared the involved officer(s) of any culpability, the agency releases the names of the

officers, details of the critical incident, and redacted body camera footage of the incident. This despite the ongoing criminal and internal investigations.

The City of Phoenix Police Department has released records and information regarding critical incidents, pointing to the City's responsibility to comply with Arizona's public records laws (A.R.S. §39-121 *et seq.*). The City has taken the position that A.R.S. §38-1109 does not prohibit law enforcement agencies from distributing the records and information internally to its employees. In the wake of past critical incidents, the City has received several public records request and released the information and records when it was believed that release of the records would not jeopardize its investigations into the incident. In those instances, the City believed it did not have a legitimate government interest to support withholding the requested materials from the public. However, this ignores the statutory confidentiality of these records under A.R.S. §38-1109.

While there can be no dispute that the records and information at issue constitute "public records," where the interests of confidentiality, privacy, or the best interests of the state, outweigh the public's right of inspection, the state can properly refuse inspection; but the state has the burden of overcoming the legal presumption favoring disclosure. *Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broadcasting Co.*, 191 Ariz. 297, 955 P.2d 534 (1998). Where public records are confidential under specific statute, they are not public records subject to disclosure under A.R.S. §39-121 *et seq.* *Phoenix Newspapers v. Arizona Dep't of Economic Sec.*, 186 Ariz. 446, 924 P.2d 450, 209 Ariz. Adv. Rep. 32, 1996 Ariz. App. LEXIS 14 (Ariz. Ct. App. 1996).



Phoenix Police Department Critical Incident Transparency Protocol

This protocol contains guidelines for timely and standardized release of existing video, records, and information following a police critical incident. The protocol is intended to provide a template for consistent, timely and systematic dissemination of accurate, available records and information following a critical incident. Public Information Officers will continue to provide initial, immediate information on all critical incidents.

Critical Incidents:

- Officer Involved shootings
- Exceptional use of force
- Death or injury of an officer
- In-custody deaths
- Incidents generating significant community concern

Timeline goals for dissemination of information and records following a critical incident:

3 – 7 Days: Name(s) of involved officer(s) will be released to the public

7 – 14 Days: Information and records will be shared with:

- Involved officer(s)
- Valley community leaders
- Union representative
- Community Relations Bureau
- Command staff

14 – 30 Days: Information and records will be shared with:

- Involved person's family
- Police department - Internal
- Media

30 Days: Police report and related records

Every incident will involve unique circumstances and therefore release timelines may vary.

From: Web Detail <web.detail@phoenix.gov>
Date: July 14, 2017 at 11:49:16 MST
Subject: ENS - New Transparency Protocol - Message from the Chief

New Transparency Protocol

As your Police Chief, I directed the Public Affairs Bureau and Investigations Team to establish a Transparency Protocol* to help us communicate in a fair and consistent manner with our community when we have critical incidents involving your officers. These critical incidents may include police involved shootings, exceptional uses of force incidents, officer death or injury, in-custody deaths, or any other incident generating significant community concern. The sharing of information is critical to ensuring legitimacy with the people we serve. We must balance our need to be transparent with our responsibility to maintain the integrity of investigations while respecting the rights of victims, suspects and others involved.

After much discussion and review, we have established the following guidelines for information sharing following any critical incident. The new protocol will help us achieve higher levels of transparency while still protecting the rights of those involved. As you will see, our new goals for release allow us to share the bulk of information with everyone within 30 days of an incident. This protocol provides a standardized method of sharing information which was one of my goals when becoming Chief.

I appreciate the support and patience of our officers, prosecutors, and community members as we implement this accelerated information release timeline.

God Bless and Be Safe,
Jeri Williams

*View attachment for specifics.