

SECOND 15-DAY PUBLIC COMMENTS AND DEPARTMENT OF JUSTICE RESPONSES

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770.2(g), “Gang Member or Associate” definition	3.3	<p>“[T]his Third Modification [does not] address the problematic “associate” category of database entries. Considering the confusion surrounding the term, even among law enforcement experts, its use should be eliminated.”</p>	<p>No change has been made in response to this comment because no substantive change was made to this section in the third modified regulations. Further, it appears to be based on the misunderstanding that a person may be designated in a shared gang database based on a criterion that the person is a “gang associate.” However, these regulations permit designation and entry based only on whether the person is a “Gang Member or Associate,” which is a defined term that incorporates specific requirements for entry. Only once a person is entered into a shared gang database could there be a separate notation made in the database that the law enforcement suspects the person is a “non-member gang associate.” This notation serves only an ancillary purpose and does not alter the specific requirements for initial entry into the database.</p>
770.4, Access to a Shared Gang Database	4.10	<p>“[E]liminate all access to shared gang databases in California by agencies outside of California, including all federal agencies, in order to go farther in protecting the spirit if not the letter of the law enacted with AB 90.”</p>	<p>No change has been made in response to this comment because no substantive change was made to this section in the third modified regulations. Further, under subdivision (a)(3) of Penal Code section 186.34, out-of-state and federal agencies are included in the definition of “law enforcement agencies;” therefore, it is the Department’s interpretation that out-of-state agencies and federal agencies may request access to a shared gang database. When the Legislature</p>

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			<p>amended Assembly Bill (AB) 90 (Stats. 2017, Ch. 695) during the drafting process, it specifically removed subdivision (g) from Penal Code section 186.36 which would have explicitly forbid access to any federal agency, multistate agency, or agency of another state to access a shared gang database. (Sen. Amend to Assem. Bill 90 (2017-2018 Reg. Sess.) Sept. 8, 2017.) Following the removal of this subdivision, no language was incorporated that would otherwise suggest that it was still the intent of the Legislature for the Department to forbid access to the aforementioned parties.</p>
<p>771.6(b), Minimum Age of Entry and Requirements to Enter a Person into a Shared Gang Database</p> <p>And</p> <p>771.8(a)(1)(A), Criteria to be Designated as a Gang Member or Associate, “The person has admitted...”</p>	<p>2.1</p>	<p>“You are now asking a third party data-entry person to interpret and regurgitate an officer’s reasonable suspicion. Which, by the way, is a subjective legal standard that lawyers and judges disagree on every single day in courtrooms throughout this country. And then you ask that same third party, to make a similar conclusion about the voluntariness of a subject’s self-admission and then ‘certify’ it. These are legal conclusions. Our job is to collect intelligence and use it to solve and prevent crime. Legal challenges can be lodged when that intelligence becomes material in an investigation or is alleged to have negatively impacted someone. To the best of my knowledge, the special interest groups driving these changes still</p>	<p>No change has been made in response to this comment because no substantive changes were made to these sections in the third modified regulations. Regarding the comment concerning a third-party data-entry person, these regulations do not require a third person data-entry person to interpret and regurgitate an officer’s reasonable suspicion. Subdivision (b) of section 771.6 requires that the law enforcement officer document the specific information that serves as the basis for the reasonable suspicion; therefore, the data entry person is not responsible for drawing any conclusions. Regarding the comment concerning the same third party certification of a subject’s self-admission, these regulations do not</p>

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		haven't proven that anyone has suffered from the supposedly flawed practices or errors found in the database."	require a third-party data-entry person to interpret the law enforcement officer's conclusion. However, the supervisory review process set forth in section 772.2 does require a determination as to "whether the proposed entry and underlying documentation complies with these regulations, including, but not limited to, whether the reasonable suspicion requirement was satisfied..." This supervisory review process is intended to hold law enforcement officers accountable and ensure that their potential shared gang database entries are being reviewed by a supervisor prior to entry in a shared gang database. Furthermore, the Department believes this supervisory review requirement will serve to increase the accuracy of shared gang databases and reduce or prevent the likelihood of overinclusion. Regarding the comment concerning flawed practices or errors, the Department is required by Penal Code section 186.36 to promulgate regulations which implement changes in response to problems found during the 2016 audit conducted by the California State Auditor's Office.
	4.06	<i>This comment references the CalGang database but has been included as the Department believes the comment could apply to the Shared Gang Databases regulations.</i>	No change has been made in response to this comment because no substantive change was made to this section in the third modified regulations. Further, raising the minimum age to 16 would run contrary to the findings of empirical

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		<p>“Raise the minimum age. The proposed regulations state that no one under the age of 13 shall be entered into the CalGang Database. The raising of the minimum age would fall in line with several state laws and Prop 57, which eliminates the ability of the District Attorney to direct file youth into adult court. Several chaptered state bills encourage the raising of the age requirement such as, SB 1391 (Mitchell/Lara) which ends the transfer of youth under the age of 16 to be transferred to adult court; SB 395 (Mitchell/Lara) which requires that all youth under the age of 16 speak to a defense attorney before any law enforcement interrogation in order to ensure that they understand their Miranda rights; SB 458 (Wright) which requires a local law enforcement agency to provide written notice to a minor’s parents/guardian prior to designating that minor as a suspected gang member, associate, or affiliate in a shared gang database.”</p>	<p>research studies that examine age of gang members and activity. These empirical studies show that self-identified gang membership typically begins between 12 and 14 years of age, peaking between 14 to 16 years of age, and decreasing by 17 years of age.</p>
<p>771.8(a)(2), Criteria to be Designated as a Gang Member or Associate, “The person has been arrested...”</p>	<p>4.12</p>	<p>“Remove the criteria regarding ‘arrested for an offense consistent with gang activity listed in subdivision of 186.22 ‘STEP Act’ and replace it with ‘was convicted of a gang enhancement’. It allows for due process rights for an individual to challenge the allegations that their action(s) was/were ‘committed for the benefit of, at the direction of, or in association with any criminal</p>	<p>No change has been made in response to this comment because no substantive change was made to this section in the third modified regulations. Further, Title 28 of the Code of Federal Regulations does not limit the content of shared gang databases to convictions. An arrest which satisfies the definition of an “offense consistent with gang activity” must be based on reasonable</p>

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		street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.”	suspicion that the individual is involved in criminal activity. The Department believes that such arrests are relevant criminal intelligence and should be included.
771.8(a)(4), Criteria to be Designated as a Gang Member or Associate, “The law enforcement officer has observed the person associating...”	4.07	<p><i>This comment references the CalGang database but has been included as the Department believes the comment could apply to the Shared Gang Databases regulations.</i></p> <p>“Individuals will be unfairly included in a criminal gang database because of who they (1) are related to, (2) live with, or (3) spend time with. Sections 752.4(a)(4) and 771.6(a)(4) allow law enforcement officers to include community members into CalGang or other shared gang database if they are seen ‘associating’ with individuals who ‘are already entered, or are in the process of being entered’ into the criminal database. The breadth of this criterion creates a likelihood that the resulting database will 1) be less accurate, 2) unfairly categorize individuals as gang members, and 3) fail to prevent crime. This criterion will disproportionately affect those individuals who do not participate in criminal behavior, but who may have an attenuated relationship to gang activity. For instance, a working mother may not be able to police who her child hangs out with, and may allow the child to have friends over after school. If one of the child’s</p>	No change has been made in response to this comment because no substantive changes were made to this section in the third modified regulations. Regarding the comment concerning the use of this criterion, the criteria is consistent with the Department's empirical research in the rulemaking file. Each criterion is referenced to some degree as being related to gangs and gang membership in one or more of the studies, even if not the primary subject of any one particular study. In addition, the criteria do not conflict with or contradict any study. The Department is not aware of any empirical research determining that the criteria in the regulation lacks any probative value for identifying a gang member. The Department also considered the experience of law enforcement officers who are experts in criminal gang activity. Studies included in the rulemaking file indicate that the majority of individuals identified as gang members by law enforcement officers ultimately self-admit to gang membership, and are significantly more criminally active compared to delinquent but non-gang-affiliated counterparts. The criteria established by the Department is consistent with

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		<p>friends is a documented gang member, that child and the child’s mother will likely find themselves included in a criminal gang database despite having committed no crime. This is so because, within the framework of the regulations, a law enforcement officer can interpret the mother’s and child’s actions as ‘contributing to’ the gang’s activities.”</p>	<p>these studies, which support law enforcement officers’ ability to accurately identify gang members. The law enforcement officials with whom the Department engaged shared their observations about gang membership indicators and advised the Department that, based on their extensive knowledge of and history with gang members, the criteria in the regulation are strong indicators of gang membership. Regarding the comment concerning the likelihood of friendships causing a person to be included, subdivision (a)(4)(A) of section 771.8 states that reasonable suspicion must exist that “they contribute to, or are participating in, the criminal street gang’s illegal activities.” Simply having a gang member in one’s home does not provide reasonable suspicion to satisfy this criteria. Subdivision (a)(2) of section 771 requires User Training to include “a comprehensive description of each criterion, the limitations and restrictions applicable to each criterion.” The Department will be sure to highlight examples such as the one provided by this commenter in our training curriculum for law enforcement officers and those that will conduct supervisory reviews.</p>
771.8(e), Criteria to be Designated as a Gang Member or Associate	4.08	<p>“Require that law enforcement face-to-face contact must be made with an individual in order to designate a person as a gang member, and remove social media, e-mails, photos</p>	<p>No change has been made in response to this comment because no substantive change was made to this section in the third modified regulations. Further, the Department</p>

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		<p>and observations made through patrol or surveillance as point of contact. This better ensures that law enforcement bias and/or inaccurate assessment of a situation or image is not leading to the designation of a person on a shared gang database. This would further require record gathering and transparency as outlined under AB 953 governing all law enforcement contact with civilians, and would further enable public officials and the larger community the data needed to monitor against unlawful or inaccurate gang allegations.”</p>	<p>believes this proposed requirement is contrary to the objective of an intelligence database and would require law enforcement to ignore plain evidence of gang membership, like a closed-circuit video of a person being stabbed by a rival gang member while the gang name is shouted. In addition, these regulations require law enforcement to carefully evaluate the legitimacy and probative value of recordings and social media posts, and require that any recordings be lawfully obtained.</p>
<p>773(c)(1), Notifying a Person of Inclusion in a Shared Gang Database</p> <p>And</p> <p>773.4(b)(3), An Agency’s Response to an Information Request</p>	<p>1.2</p>	<p>“This provision is inconsistent with the express requirements of A.B.90, which requires agencies to provide ‘information as to the basis of the designation.’ Sec. 186.34(d)(1)(B). It is also inconsistent with the petition scheme enacted by the Legislature to allow an individual to meaningfully challenge their inclusion with the agency, Sec. 186.34(e), and, if unresolved, to create a sufficient evidentiary record at the agency level for a court to determine whether an individual is an active gang member by clear and convincing evidence. Sec. 186.35(c) ([t]he evidentiary record for the court’s determination of the petition shall be limited to the agency’s statement of the basis of its designation . . . and the documentation provided to the</p>	<p>Regarding the comment concerning “information as to the basis of the designation,” no change has been made in response to this comment. Penal Code section 186.34(c) and (d) requires the release of a statement from the law enforcement agency regarding the basis of the designation. It does not require or authorize the release of source documents supporting the basis of the designation. Furthermore, on September 1, 2017, the Legislature deleted language in AB 90 that would have required production of source documents. No other language in the statute suggests the Legislature intended source documents be provided as part of a notice or a response to a request for information. See also Government Code section 6254(f) (exempting</p>

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		agency by the person contesting the designation.’).”	certain investigatory and intelligence information from disclosure under the Public Records Act). However, the Department has added language to require User Agencies to identify the source documents in their possession and provide a description of how each source document supports any criteria in a notice or response to a request for information. Regarding the comment concerning the petition scheme, no change has been made in response to this comment because it is outside the scope of these regulations. These regulations do not govern the procedures of the court petition process created by Penal Code section 186.35 nor do these regulations govern what a court may or may not review. Such procedures are prepared by the judicial branch and described in California Rules of Court section 3.2300. Additionally, Penal Code section 186.34 entitles an individual to written notice of his or her entry into a shared gang database and a written notice of the basis of designation. The statute does not create an exception to the general rule of confidentiality for police investigative and intelligence records, or the privileges held under Evidence Code sections 1040 and 1041.
	1.3	<i>This comment references the CalGang database but has been included as the Department believes the comment could apply to the Shared Gang Databases regulations.</i>	No change has been made in response to this comment. Penal Code section 186.34(c) and (d) requires the release of a statement from the law enforcement agency regarding the

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		<p>“[B]y denying the individual access to the evidence used against them, they will not be able to meet their own burden to ‘submit written documentation to the local law enforcement agency contesting the designation’ in support of their request for removal. . . . Without being provided sufficient facts about the encounters that the police claim satisfy CalGang criteria—and any documentation that purportedly demonstrates that law enforcement’s claimed facts are true—the individual cannot effectively challenge the agency’s conclusion.”</p>	<p>basis of the designation. It does not require or authorize the release of source documents supporting the basis of the designation. Furthermore, on September 1, 2017, the Legislature deleted language in AB 90 that would have required production of source documents. No other language in the statute suggests the Legislature intended source documents be provided as part of a notice or a response to a request for information. See also Government Code section 6254(f) (exempting certain investigatory and intelligence information from disclosure under the Public Records Act). However, the Department has added language to require User Agencies to identify the source documents in their possession and provide a description of how each source document supports any criteria in a notice or response to a request for information. The details that will be disclosed by User Agencies may assist the person in seeking such source documents from the User Agency under other laws and local policies.</p>
	1.4	<p><i>This comment references the CalGang database but has been included as the Department believes the comment could apply to the Shared Gang Databases regulations.</i></p> <p>“[A]n agency’s claim that an individual has satisfied the criteria establishing active gang membership is not always supported by the</p>	<p>Regarding the comment concerning supplying source documentation and the comment concerning an individual being able to contest and officer’s interpretation, no change has been made in response to this comment. Penal Code section 186.34(c) and (d) requires the release of a statement from the law enforcement agency regarding the basis of the designation.</p>

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		<p>underlying source documents. During the public comments throughout this regulatory process, many individuals shared personal narratives recounting instances when the police documented facts that were demonstrably untrue....[A]llowing an agency to rely upon descriptions of its purported evidence along with conclusions as to why it satisfies CalGang criteria—without requiring it to provide the actual source documentation—will result in individuals remaining in the CalGang database where the available evidence does not support inclusion....Under the currently-proposed regulation, an agency is neither required to review the source documentation underlying the individual’s entry when the individual contests or inquires as to their status, nor are agencies required to provide the source documents to the accused prior to contesting....By failing to require the agencies to internally review and disclose the source documentation to the accused, the proposed regulations undermine the transparency and accountability mechanisms created by the Legislature in A.B. 90 and ensure that individuals will remain within the database improperly....If an individual is merely informed that they were captured on body camera footage admitting membership—without being shown the video—they may not recall the exchange in</p>	<p>It does not require or authorize the release of source documents supporting the basis of the designation. Furthermore, on September 1, 2017, the Legislature deleted language in AB 90 that would have required production of source documents. No other language in the statute suggests the Legislature intended source documents be provided as part of a notice or a response to a request for information. See also Government Code section 6254(f) (exempting certain investigatory and intelligence information from disclosure under the Public Records Act). However, the Department has added language to require User Agencies to identify the source documents in their possession and provide a description of how each source document supports any criteria in a notice or response to a request for information. The details that will be disclosed by User Agencies may assist the person in seeking such source documents from the User Agency under other laws and local policies. Regarding the comment concerning requiring an agency to review the source documentation underlying the individual’s entry, no change has been made in response to this comment because law enforcement agencies generally review the entire intelligence file whenever a request for removal is received. Additionally, these regulations require a supervisory review of all related intelligence data</p>

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		<p>sufficient detail to even be aware that this misunderstanding took place, much less able to meaningfully contest the officer’s interpretation to either the agency or a court.....Merely informing an individual that they are supposedly captured on video wearing gang attire, displaying gang hand signs, or frequenting a ‘gang-related address,’ and then providing a description of why the agency believes that its documentation supports its conclusion that the individual is a gang member, does not give the individual the opportunity to dispute the accuracy of the agency’s characterization of the evidence.”</p>	<p>before an entry is made in a shared gang database. However; the Department encourages the commenter to submit this and other comments in future rulemaking proceedings.</p>
	1.5	<p><i>This comment references the CalGang database but has been included as the Department believes the comment could apply to the Shared Gang Databases regulations.</i></p> <p>“[R]elieving agencies of their duty to provide the actual evidence supporting their conclusion that an individual is an active gang member prevents courts from exercising their statutory obligation of determining whether someone is an active gang member by clear and convincing evidence based upon the record produced during the agency review. When an individual challenges an agency’s refusal to remove them from CalGang, the Legislature has limited ‘[t]he evidentiary record for</p>	<p>Regarding the comment concerning the evidentiary record, no change has been made in response to this comment because it is outside the scope of these regulations. These regulations do not govern the procedures of the court petition process created by Penal Code section 186.35 govern what a court may or may not review. Such procedures are prepared by the judicial branch and described in California Rules of Court section 3.2300. Additionally, Penal Code section 186.34 entitles an individual to written notice of his or her entry into a shared gang database and a written notice of the basis of designation. The statute does not create an exception to the general rule of confidentiality for police</p>

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		<p>the court’s determination of the petition . . . to the agency’s statement of the basis of its designation . . . and the documentation provided to the agency by the person contesting the designation.’ Sec. 186.35(c). Thus, the record in the Superior Court is limited to the documents the agency has provided to the accused in the course of providing notice, and the documents the accused has provided the agency to contest its designation. A court cannot possibly make a factual finding by clear and convincing evidence that an individual is an active gang member based on conclusory evidence, such as an agency’s own determination as to why unseen evidence supports the finding that an individual is a gang member....The DOJ did not amend its Statement of Reasons to explain why it settled on this proposed regulation rather than the alternative, which would be to require the agency to produce the actual source documents it relied on to conclude that criteria had been satisfied.....[T]here is already a statutory authorization for withholding the underlying source documentation in cases where there is a legitimate law enforcement justification. Additionally, some agencies, such as the Los Angeles Sheriff’s Department and Placentia Police Department, have in some cases provided source documentation to the accused for the purpose of</p>	<p>investigative and intelligence records, or the privileges held under Evidence Code sections 1040 and 1041. Regarding the comment concerning the Department’s decision to not amend its Initial Statement of Reasons during the last comment period, as explained in the update to the Initial Statement of Reasons set forth in the Final Statement of Reasons, Penal Code section 186.34(c) and (d) requires the release of a statement from the law enforcement agency regarding the basis of the designation. It does not require or authorize the release of source documents supporting the basis of the designation. Furthermore, on September 1, 2017, the Legislature deleted language in AB 90 that would have required production of source documents. No other language in the statute suggests the Legislature intended source documents be provided as part of a notice or a response to a request for information. Regarding the comment concerning the statutory authorization for withholding underlying source documents, no change has been made in response to this comment because it is outside the scope of these regulations. The Department cannot mandate all law enforcement agencies to provide source documentation because subdivision (f) of Government Code section 6254 exempts certain investigatory and intelligence information from</p>

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		<p>contesting inclusion in CalGang. The DOJ provides no reason why it could not, or should not, mandate all agencies to do the same by adopting a regulation clarifying that ‘information as to the basis of their designation’ includes any source documentation the agency relied upon, or intends to rely upon in a proceeding in Superior Court, to assert that the accused is an active gang member.”</p>	<p>disclosure under the Public Records Act. However, the Department has added language to require User Agencies to identify the source documents in their possession and provide a description of how each source document supports any criteria in a notice or response to a request for information. The details that will be disclosed by User Agencies may assist the person in seeking such source documents from the User Agency under other laws and local policies.</p>
	3.2	<p>“[T]his Third Modification [does not] substantially address the problems exposed by the recent LAPD scandal. These proposed regulations impose no accountability measures that are both rigorous and publicly transparent. Furthermore, these regulations continue to allow law enforcement agencies to withhold evidence from individuals seeking removal from a shared gang database. By doing so, these regulations will allow law enforcement agencies to continue to practice only paper accountability with Penal Code sections 186.34 and 186.35, thereby undermining the first and most important accountability measure imposed by the Legislature, the right to notice and appeal.”</p>	<p>Regarding the comment concerning the LAPD scandal, no change has been made in response to this comment because the Department believes the proposed regulations establish rigorous guidelines for entering persons into the database, including requirements for supervisory review, accountability, auditing, and oversight. The Department also believes these provisions will result in more accurate designations, less overinclusion, and less misuse of the database system. To the extent, misuse still occurs after these regulations are in effect, the Department is committed to reevaluating and revising the regulations as necessary. Regarding the comment concerning withholding evidence, no change has been made in response to this comment. Penal Code section 186.34(c) and (d) requires the release of a statement from the law enforcement agency regarding the</p>

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			<p>basis of the designation. It does not require or authorize the release of source documents supporting the basis of the designation. Furthermore, on September 1, 2017, the Legislature deleted language in AB 90 that would have required production of source documents. No other language in the statute suggests the Legislature intended source documents be provided as part of a notice or a response to a request for information. See also Government Code section 6254(f) (exempting certain investigatory and intelligence information from disclosure under the Public Records Act). However, the Department has added language to require User Agencies to identify the source documents in their possession and provide a description of how each source document supports any criteria in a notice or response to a request for information.</p>
	4.03	<p>‘This provision is inconsistent with the express requirements of A.B.90, which requires agencies to provide ‘information as to the basis of the designation.’ Sec. 186.34(d)(1)(B). It is also inconsistent with the petition scheme enacted by the Legislature to allow an individual to meaningfully challenge their inclusion with the agency, Sec. 186.34(e), and, if unresolved, to create a sufficient evidentiary record at the agency level for a court to determine whether an individual is an active gang member</p>	<p>Regarding the comment concerning “information as to the basis of the designation,” no change has been made in response to this comment. Penal Code section 186.34(c) and (d) requires the release of a statement from the law enforcement agency regarding the basis of the designation. It does not require or authorize the release of source documents supporting the basis of the designation. Furthermore, on September 1, 2017, the Legislature deleted language in AB 90 that would</p>

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		<p>by clear and convincing evidence. Sec. 186.35(c) ('[t]he evidentiary record for the court's determination of the petition shall be limited to the agency's statement of the basis of its designation . . . and the documentation provided to the agency by the person contesting the designation.')."</p>	<p>have required production of source documents. No other language in the statute suggests the Legislature intended source documents be provided as part of a notice or a response to a request for information. See also Government Code section 6254(f) (exempting certain investigatory and intelligence information from disclosure under the Public Records Act). However, the Department has added language to require User Agencies to identify the source documents in their possession and provide a description of how each source document supports any criteria in a notice or response to a request for information. Regarding the comment concerning the petition scheme, no change has been made in response to this comment because it is outside the scope of these regulations. These regulations do not govern the procedures of the court petition process created by Penal Code section 186.35 nor do these regulations govern what a court may or may not review. Such procedures are prepared by the judicial branch and described in California Rules of Court section 3.2300. Additionally, Penal Code section 186.34 entitles an individual to written notice of his or her entry into a shared gang database and a written notice of the basis of designation. The statute does not create an exception to the general rule of confidentiality for police investigative and intelligence records,</p>

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			or the privileges held under Evidence Code sections 1040 and 1041.
773.6, An Agency's Response to a Request for Removal	4.13	"Require that body cam, dash cam, video and audio tape from interrogations be presented with evidence when a designation on the shared gang database is challenged. The importance of this was recently demonstrated by a parental inquiry that required review of LAPD's footage and revealed that footage did not match the officers' description of events."	No change has been made in response to this comment because no substantive changes were made to these sections in the third modified regulations. Nothing in statute requires evidence to be presented when responding to a request for removal. Penal Code section 186.34(c) and (d) requires the release of a statement from the law enforcement agency regarding the basis of the designation. It does not require or authorize the release of source documents supporting the basis of the designation. Furthermore, on September 1, 2017, the Legislature deleted language in AB 90 that would have required production of source documents. No other language in the statute suggests the Legislature intended source documents be provided as part of a notice or a response to a request for information. See also Government Code section 6254(f) (exempting certain investigatory and intelligence information from disclosure under the Public Records Act). However, the Department has added language to require User Agencies to identify the source documents in their possession and provide a description of how each source document supports any criteria in a notice or response to a request for information.

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773.8, Retention Period for Adult Records And 774, Retention Period for Juvenile Records	4.09	“Require that at least two of the remaining criteria for inclusion must be established in order to reset the retention period, rather than just one. In addition, remaining criteria used to establish a person’s re-designation as a gang member should be required to meet the standard of reasonable suspicion that they are engaged in criminal activity under the direction of a gang.”	No change has been made in response to this comment because no substantive changes were made to these sections in the third modified regulations. Further, subdivision (b) of sections 773.8 and 774 require two criteria and the reasonable suspicion requirement set forth in subdivision (b) of section 771.6 to remain satisfied in order to reset the retention period.
	4.11	“Limit the five-year retention period of gang database records to two years. Research studies, including those cited by the Federal Department of Justice, indicate that most people who are involved in gangs, are involved for less than two years. Furthermore, a person who has no system contact, as well as anyone with system contact in the past time period who has completed any court or system requirements – such as release from Probation or Parole – should have their name removed from CalGang and any other shared gang databases.”	No change has been made in response to this comment because no substantive changes were made to these sections in the third modified regulations. Further, while there was sufficient empirical evidence to inform juvenile retention periods, the empirical research on adults’ gang involvement duration is limited and inconsistent. For example, in one study, adults reported leaving gangs after an average of over 11 years of membership, while another study conducted by the same author indicated that only 17% of youth and adults remain involved in gang activities for more than three years, illustrating the wide variability in reported gang membership duration among adults—dependent upon the adults sampled. ^{1,2,3} It is also important to note that gang activity in the

¹ Decker and Pyrooz, “Leaving the Gang: Logging Off and Moving On,” *Council on Foreign Relations*, (2011)

² Densley, James A., and David C. Pyrooz, "A signaling perspective on disengagement from gangs," *Justice Quarterly* 36, no. 1 (2019): 31-58.

³ Pyrooz, David C. "'From your first cigarette to your last dyin' day': The patterning of gang membership in the life-course." *Journal of Quantitative Criminology* 30, no. 2 (2014): 349-372.

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			<p>CalGang database is not recorded or paused while a person is incarcerated. In contrast to the other regulatory issues, there is considerable scholarly research on gang involvement while incarcerated. Incarceration has been shown to be a strong predictor for continued gang membership with nearly 75% of those incarcerated continuing gang membership behind bars and after release.⁴ A study conducted by the Urban Institute indicated that the average prison time served for non-violent crimes in California was 3.3 years, increasing to 8.2 years for violent offenders.⁵ Taken together with the scholarly literature on persistent gang membership in prison, it is likely that gang unit specialists and law enforcement agencies are losing data on gang members, especially violent offenders, while the gang members are incarcerated, due to the current five-year limitation on data retention. The Department acknowledges and considered the extant empirical research on gang involvement duration. Based, in part, on review of this research, the Department reduced the retention period for juveniles, as there was sufficient empirical evidence indicating that the vast majority of juveniles that admit to</p>

⁴ Pyrooz, David C., Nancy Gartner, and Molly Smith. "Consequences of incarceration for gang membership: A longitudinal study of serious offenders in Philadelphia and Phoenix." *Criminology* 55, no. 2 (2017): 273-306.

⁵ "A matter of time: The hidden story of rising time served," Urban Institute, 2017, <https://apps.urban.org/features/long-prison-terms/trends.html>.

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Section/Topic	Comment Number(s)	Summarized Comment	Department of Justice Response
			gang membership, admit involvement for three years or less. ^{6,7,8,9}
Comments on “Gang Member Definitions, Criteria, and Identification: AB 90 Empirical Literature Review Supplement”	1.6	<p><i>This comment references the CalGang database but has been included as the Department believes the comment could apply to the Shared Gang Databases regulations.</i></p> <p>“The Supplemental Report states that the authors limited its review of the existing research to focus only on indicators of gang membership “related to those criteria utilized in the CalGang Database.” This statement underscores DOJ’s persistent and unnecessary focus on justifying the continued use of the criteria originally used by law enforcement—and found by the Legislature to be inaccurate and overinclusive—rather than identifying new and more reliable indices of gang membership. The Supplemental Report also conveys significant logical fallacies that seemingly undergird the Department’s entire set of proposed criteria. Throughout the Supplemental Report, the authors suggest that studies finding that</p>	<p>No change has been made in response to this comment because the criteria are consistent with the Department's empirical research in the rulemaking file. Each criterion is referenced to some degree as being related to gangs and gang membership in one or more of the studies, even if not the primary subject of any one particular study. In addition, the criteria do not conflict with or contradict any study. The Department is not aware of any empirical research determining that the criteria in the regulation lacks any probative value for identifying a gang member. The Department also considered the experience of law enforcement officers who are experts in criminal gang activity. Studies included in the rulemaking file indicate that the majority of individuals identified as gang members by law enforcement officers ultimately self-admit to gang membership, and are significantly more criminally active compared to delinquent but non-gang-affiliated counterparts. The criteria established</p>

⁶ Hill, Karl G., Christina Lui, and J. David Hawkins. *Early precursors of gang membership: A study of Seattle youth*. Washington, DC: US Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, 2001.

⁷ Thornberry, Terence P., David Huizinga, and Rolf Loeber. "The causes and correlates studies: Findings and policy implications." *Juv. Just.* 9 (2004): 3.

⁸ Leverso, John, and Ross L. Matsueda. "Gang Organization and Gang Identity: An Investigation of Enduring Gang Membership." *Journal of Quantitative Criminology* (2019): 1-33.

⁹ Melde, Chris, and Finn-Aage Esbensen. "The relative impact of gang status transitions: Identifying the mechanisms of change in delinquency." *Journal of Research in Crime and Delinquency* 51, no. 3 (2014): 349-376.

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		<p>purported gang members engaged in certain conduct—like wearing certain colors or associating with others who are also members of the gang—support the DOJ’s decision to rely on those behaviors as criteria. This type of reasoning exemplifies the Type 1 error cautioned against in the original report, ‘Gang Membership, Duration, and Desistence: Empirical Literature Review’ (‘Original Report’)... The Supplemental Report appears to fail to grasp the distinction that even if all members of a group can be shown to do X, it does not mean that all those who do X are a member of that group. The criteria adopted by these regulations should be indicators that are unique to those who are active gang members. At bare minimum, they should at least occur at a substantially higher frequency than among those who are not active gang members. None of the research cited in the Original Report or Supplemental Report even addresses whether the frequency of these observable criteria is substantially higher within the supposed gang population than the general population or local community. If the regulations adopt criteria that are easily observed in non-gang members—such as wearing the color blue or other common youth attire, or merely existing in an area where police claim there is a gang presence—then non-gang members will continue to be included in</p>	<p>by the Department is consistent with these studies, which support law enforcement officers’ ability to accurately identify gang members. The law enforcement officials with whom the Department engaged shared their observations about gang membership indicators and advised the Department that, based on their extensive knowledge of and history with gang members, the criteria in the regulation are strong indicators of gang membership.</p>

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		<p>CalGang because they will clearly satisfy these criteria.... Such unfettered discretion—which inevitably results in racially-biased application—is precisely the conduct that A.B. 90 was enacted to address, yet the Supplemental Report is almost explicit in its endorsement of criteria that will undeniably lead to this outcome.”</p>	
	3.4	<p>“[E]ven if the Department is unwilling to pursue a fundamentally new approach to shared gang databases, the Department must at least respect the Legislature’s instruction to eliminate ambiguous and overbroad criteria for entry by looking to empirical social science for a more rigorous approach. As your new research paper, ‘Gang Member Definitions, Criteria, and Identification: AB 90 Empirical Literature Review Supplement’ states, the only criteria with broad acceptance in the social sciences is self-identification in a context that encourages truthfulness. Your literature review supplement cites a few outlier studies that use other criteria, but the rarity of these methods show they are exceptions that prove the rule. The clear finding of your Department’s research is that only individuals who self-admit (or are convicted of a gang crime) will meet the criteria for entry imposed by Penal Code section 186.36.”</p>	<p>No change has been made in response to this comment because the criteria are consistent with the Department's empirical research in the rulemaking file. Each criterion is referenced to some degree as being related to gangs and gang membership in one or more of the studies, even if not the primary subject of any one particular study. In addition, the criteria do not conflict with or contradict any study. The Department is not aware of any empirical research determining that the criteria in the regulation lacks any probative value for identifying a gang member. The Department also considered the experience of law enforcement officers who are experts in criminal gang activity. Studies included in the rulemaking file indicate that the majority of individuals identified as gang members by law enforcement officers ultimately self-admit to gang membership, and are significantly more criminally active compared to delinquent but non-gang-affiliated counterparts. The criteria established</p>

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			<p>by the Department is consistent with these studies, which support law enforcement officers' ability to accurately identify gang members. The law enforcement officials with whom the Department engaged shared their observations about gang membership indicators and advised the Department that, based on their extensive knowledge of and history with gang members, the criteria in the regulation are strong indicators of gang membership.</p>
General Recommendations	2.2	<p>"I have held out hope until now, but it is pretty clear that this system will be completely useless within a couple of years as the vast majority of useful data purges out and it is replaced with the scraps that meet the ridiculous standards imposed upon us by those who don't understand its use and have an agenda contrary to public safety. In the end, this will likely represent a major step backwards in information sharing technology and is contrary to the whole criminal intelligence process. Individual agencies will have robust files which can't be easily searched, accessed, or shared by others."</p>	<p>No change has been made in response to this comment, which is interpreted to be an observation rather than a specific recommendation of any change to these regulations.</p>
General Opposition	1.1	<p>"Throughout this rulemaking process, the DOJ has continued to develop regulations that are inconsistent with the authorizing statute and are not only unnecessary to its purpose, but directly undermine</p>	<p>No change has been made in response to this comment, which is interpreted to be an observation rather than a specific recommendation of any change to these regulations.</p>

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		the goals of the Legislature. The latest amendments continue this unfortunate pattern.”	
	3.1	“Like the last modification, this Third Modification to the proposed regulations does nothing substantial to improve the fundamentally flawed approach that law enforcement has taken to gang databases for over three decades. These regulations continue to perpetuate an approach to gangs that is mired in ineffective and outdated thinking, to say nothing of its deeply racist roots or its racially disproportionate effects.”	No change has been made in response to this comment, which is interpreted to be an observation rather than a specific recommendation of any change to these regulations.
	3.5	<p><i>This comment references the CalGang database but has been included as the Department believes the comment could apply to the Shared Gang Databases regulations.</i></p> <p>“[T]his Third Modification eliminates the July 1st effective date and does not include any new date. These regulations are already five months past their January 1, 2020 statutory deadline. While we applaud the Department’s intent to consider these regulations carefully, the Legislature’s imposition of a deadline should not simply be ignored. Considering this deadline, the Department should impose another moratorium on CalGang until these regulations are implemented.”</p>	No change has been made to the regulations in response to this comment, after five public meetings of the Gang Database Technical Advisory Committee, two public hearings, and five public comment periods, the Department is working diligently to promulgate these regulations as soon as possible while considering hundreds of public comments from legislators, law enforcement, and civil rights organization. Under the Administrative Procedure Act (APA), the Department has one-year to submit the final rulemaking for OAL approval. The one-year time period was extended by an executive order and the Department intends to meet this APA deadline, as extended. The moratorium authorized by Penal Code

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			section 186.36, subdivision (s) has ended and is not related to the effective date of the regulations.
	4.01	<p>“I authored AB 90 with the intent of remedying the harmful effects of excessive law enforcement discretion in the use of shared gang databases. But the proposed regulations you have drafted fail to accomplish that purpose in their two most important provisions: criteria for entry and retention period. I strongly urge you to revise the regulations to better reflect the intent of the legislation that authorizes them.”</p>	<p>Regarding the comment concerning the criteria for entry, no change has been made in response to this comment because the criteria are consistent with the Department's empirical research in the rulemaking file. Each criterion is referenced to some degree as being related to gangs and gang membership in one or more of the studies, even if not the primary subject of any one particular study. In addition, the criteria do not conflict with or contradict any study. The Department is not aware of any empirical research determining that the criteria in the regulation lacks any probative value for identifying a gang member. The Department also considered the experience of law enforcement officers who are experts in criminal gang activity. Studies included in the rulemaking file indicate that the majority of individuals identified as gang members by law enforcement officers ultimately self-admit to gang membership, and are significantly more criminally active compared to delinquent but non-gang-affiliated counterparts. The criteria established by the Department is consistent with these studies, which support law enforcement officers' ability to accurately identify gang members. The law enforcement officials with</p>

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			<p>whom the Department engaged shared their observations about gang membership indicators and advised the Department that, based on their extensive knowledge of and history with gang members, the criteria in the regulation are strong indicators of gang membership. Regarding the comment concerning the retention period, no change has been made in response to this comment because while there was sufficient empirical evidence to inform juvenile retention periods, the empirical research on adults' gang involvement duration is limited and inconsistent. For example, in one study, adults reported leaving gangs after an average of over 11 years of membership, while another study conducted by the same author indicated that only 17% of youth and adults remain involved in gang activities for more than three years, illustrating the wide variability in reported gang membership duration among adults—dependent upon the adults sampled.^{10,11,12} It is also important to note that gang activity in the CalGang database is not recorded or paused while a person is incarcerated. In contrast to the other regulatory issues, there is considerable scholarly research on gang involvement while incarcerated.</p>

¹⁰ Decker and Pyrooz, "Leaving the Gang: Logging Off and Moving On," *Council on Foreign Relations*, (2011)

¹¹ Densley, James A., and David C. Pyrooz, "A signaling perspective on disengagement from gangs," *Justice Quarterly* 36, no. 1 (2019): 31-58.

¹² Pyrooz, David C. "'From your first cigarette to your last dyin'day': The patterning of gang membership in the life-course." *Journal of Quantitative Criminology* 30, no. 2 (2014): 349-372.

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			<p>Incarceration has been shown to be a strong predictor for continued gang membership with nearly 75% of those incarcerated continuing gang membership behind bars and after release.¹³ A study conducted by the Urban Institute indicated that the average prison time served for non-violent crimes in California was 3.3 years, increasing to 8.2 years for violent offenders.¹⁴ Taken together with the scholarly literature on persistent gang membership in prison, it is likely that gang unit specialists and law enforcement agencies are losing data on gang members, especially violent offenders, while the gang members are incarcerated, due to the current five-year limitation on data retention. The Department acknowledges and considered the extant empirical research on gang involvement duration. Based, in part, on review of this research, the Department reduced the retention period for juveniles, as there was sufficient empirical evidence indicating that the vast majority of juveniles that admit to gang</p>

¹³ Pyrooz, David C., Nancy Gartner, and Molly Smith. "Consequences of incarceration for gang membership: A longitudinal study of serious offenders in Philadelphia and Phoenix." *Criminology* 55, no. 2 (2017): 273-306.

¹⁴ "A matter of time: The hidden story of rising time served," Urban Institute, 2017, <https://apps.urban.org/features/long-prison-terms/trends.html>.

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			membership, admit involvement for three years or less. ^{15,16,17,18}
	4.02	<p>“The proposed regulations will not remedy the problem that people – specifically young men of color – are inappropriately being placed on the database because they offer few substantive improvements over the problematic criteria that they are supposed to replace. In fact, the Initial Statement of Reasons expressly state that ‘the purpose of this [criteria] section is to codify existing designation criteria, while requiring thorough documentation in order to substantiate their use.’ This is most definitely not what the Legislature asked the Department to do.”</p>	<p>No change has been made in response to this comment, which is interpreted to be an observation rather than a specific recommendation of any change to these regulations. The proposed regulations aim to balance the protection of individuals’ rights, public safety, and the legitimate needs of law enforcement users as required under AB 90. The proposed regulations establish rigorous guidelines for entering persons into the database, including requirements for supervisory review, accountability, auditing, and oversight. Since AB 90 allowed the improvement, maintenance, and development of the CalGang database and other shared gang databases, it indicates that state lawmakers viewed the databases as critical tools for fighting gang violence and crime. Regarding the comment concerning codifying the existing designation criteria, no change has been made in response to this comment because the criteria are consistent with the Department's empirical research in the rulemaking</p>

¹⁵ Hill, Karl G., Christina Lui, and J. David Hawkins. *Early precursors of gang membership: A study of Seattle youth*. Washington, DC: US Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, 2001.

¹⁶ Thornberry, Terence P., David Huizinga, and Rolf Loeber. "The causes and correlates studies: Findings and policy implications." *Juv. Just.* 9 (2004): 3.

¹⁷ Leverso, John, and Ross L. Matsueda. "Gang Organization and Gang Identity: An Investigation of Enduring Gang Membership." *Journal of Quantitative Criminology* (2019): 1-33.

¹⁸ Melde, Chris, and Finn-Aage Esbensen. "The relative impact of gang status transitions: Identifying the mechanisms of change in delinquency." *Journal of Research in Crime and Delinquency* 51, no. 3 (2014): 349-376.

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			<p>file. Each criterion is referenced to some degree as being related to gangs and gang membership in one or more of the studies, even if not the primary subject of any one particular study. In addition, the criteria do not conflict with or contradict any study. The Department is not aware of any empirical research determining that the criteria in the regulation lacks any probative value for identifying a gang member. The Department also considered the experience of law enforcement officers who are experts in criminal gang activity. Studies included in the rulemaking file indicate that the majority of individuals identified as gang members by law enforcement officers ultimately self-admit to gang membership, and are significantly more criminally active compared to delinquent but non-gang-affiliated counterparts. The criteria established by the Department is consistent with these studies, which support law enforcement officers' ability to accurately identify gang members. The law enforcement officials with whom the Department engaged shared their observations about gang membership indicators and advised the Department that, based on their extensive knowledge of and history with gang members, the criteria in the regulation are strong indicators of gang membership.</p>

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	4.04	<p><i>This comment references the CalGang database but has been included as the Department believes the comment could apply to the Shared Gang Databases regulations.</i></p> <p>“[T]he recent scandal involving the Los Angeles Police Department, where officers fabricated information to be entered into CalGang Database in order to meet an informal quota of daily gang contacts, demonstrates the need for more robust oversight and accountability than is mandated by these regulations.”</p>	<p>No change has been made in response to this comment because the Department believes the proposed regulations establish rigorous guidelines for entering persons into the database, including requirements for supervisory review, accountability, auditing, and oversight. The Department also believes these provisions will result in more accurate designations, less overinclusion, and less misuse of the database system. To the extent, misuse still occurs after these regulations are in effect, the Department is committed to reevaluating and revising the regulations as necessary.</p>
	4.05	<p>“The newest regulations have eliminated the date for their implementation(1/1/2020) set forth by AB 90. The imposed deadline in statute that is simply being ignored by the Department. In the meantime, law enforcement continue to use the gang database under the old rules without any type of reform. I understand that we are recovering from COVID-19, but the department has known about the deadline since approval of the Governor and chaptering in on 10/12/17. Additionally, with the tragedy of George Floyd it is crucial that we get these changes implemented correctly as stated in AB 90. We appreciated the Attorney General’s commitment to reviewing and reforming Police</p>	<p>No change has been made to the regulations in response to this comment, after five public meetings of the Gang Database Technical Advisory Committee, two public hearings, and five public comment periods, the Department is working diligently to promulgate these regulations as soon as possible while considering hundreds of public comments from legislators, law enforcement, and civil rights organization. Under the Administrative Procedure Act (APA), the Department has one-year to submit the final rulemaking for OAL approval. The one-year time period was extended by an executive order and the Department intends to meet this APA deadline, as extended. The moratorium authorized by Penal Code</p>

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		Department Policies and Practices, specifically in Vallejo.”	section 186.36, subdivision (s) has ended and is not related to the effective date of the regulations.