

INITIAL STATEMENT OF REASONS

PROBLEM STATEMENT

Criminal street gang activity in California is a significant threat to public safety. The CalGang database is a shared gang intelligence database created by proprietary software that has been in operation for over 20 years. It is designed to enhance officer safety and improve the efficiency of criminal investigations by providing a central repository of gang-related intelligence information reported by local law enforcement agencies. Data is entered directly into the CalGang database by multiple local law enforcement agencies to record and share gang intelligence information to facilitate cross-agency collaboration for investigating and prosecuting gang-related violent crimes.

The California Legislature (Legislature) adopted Assembly Bill (AB) 90 (Stats. 2017, Ch. 695) in October 2017, establishing the CalGang database in statute and shifting authority to the Department of Justice (Department) to oversee the administration of it and any shared gang databases in California other than it (shared gang databases). AB 90 was introduced in response to an audit conducted by the California State Auditor's Office (State Auditor) in 2016. The State Auditor found that the CalGang database needed a different oversight structure to ensure that the information within the database was reliable and all users adhered to requirements that protected the rights of the individuals listed therein. These findings would also apply to shared gang databases by extension. At the time of the audit, maintenance of the CalGang database was funded by the Department, but the database was governed by uncodified policies and procedures and two informal oversight committees, the California Gang Node Advisory Committee, which oversaw day to day operations, and the CalGang Executive Board, which made administrative and policy decisions. The committees were made up of representatives from law enforcement agencies and functioned independently from the State.

To maintain the integrity of the CalGang database, local law enforcement agencies using the database are required to comply with the criminal intelligence requirements in Code of Federal Regulations, Title 28, Part 23, and the Department's *Model Standards and Procedures for Maintaining Criminal Intelligence Files and Criminal Intelligence Operational Activities* (November 2007). However, the State Auditor determined that the previous governance structure did not adequately ensure that the user agencies were complying with either the federal regulations or the Department's guidelines.

In its audit, the State Auditor recommended that the Legislature adopt state law assigning the Department responsibility for oversight of the CalGang database and defining the requirements under which the database shall operate, such as periodic record reviews. AB 90 amended Government Code section 70615, added Penal Code section 186.36, and repealed and added Penal Code sections 186.34 and 186.35, all of which relate to the governance of the CalGang database and any shared gang database in California. Subdivisions (k), (l), (n), and (o) of Penal Code section 186.36 set forth the topics on which the Department is required to promulgate regulations. As a result of the guidance provided by these subdivisions of Penal Code section 186.36, the Department puts forth two chapters of proposed regulations. Proposed Chapter 7.5

pertains to the governance of the CalGang database and, in a separate rulemaking package, proposed Chapter 7.6 pertains to the governance of any shared gang database.

The Department is committed to continuously working to improve the effectiveness of any shared gang database in California and the data therein, balancing the need of law enforcement users, and at the same time protecting individual's rights. Even after the regulations are adopted, the Department will continue collecting data and conducting empirical research to evaluate the effectiveness of the CalGang and any other shared gang database. The Department will engage in a separate rulemaking process upon the conclusion of the empirical research to further bolster the oversight of the CalGang and any other shared gang database and to enhance the quality and integrity of the data.

BENEFITS

The Department anticipates that these regulations will benefit the health and welfare of California residents because they seek to establish and maintain a law enforcement intelligence database comprised of reliable information that can only be used for the limited purpose of assisting criminal investigators. Through increased training, requirements concerning the entry of information, regular and thorough oversight, and strict limitations on the use of the database, these regulations are part of a continuing effort to produce an effective database that protects the privacy rights of Californians.

Specifically, these regulations place strict limitations on the use of this intelligence tool. The fact that an individual is entered into the database cannot form the basis of any official action, including any step within the criminal law process, or any impact on civilian matters such as employment, education, or receipt of benefits. The regulations expand training requirements to address best practices for gathering criminal intelligence, how to mitigate the entry and release of inaccurate data, implicit bias, and the negative impact of releasing data for unauthorized purposes. The regulations place limits on who may enter data into the database, and require node and user agencies to include additional justification when utilizing specific criteria for entry into the database and maintain source documentation and other pertinent information for specified periods of time. The regulations directly impact criteria that is used to enter an individual into the database, make the criteria for designating an individual as a gang member or associate more robust, increasing the minimum age for entry into the database, and limiting the circumstances when a tattoo may be used as a way to designate an individual as a gang member or associate. They implement the requirement that an individual be notified of his or her inclusion in the database, and they increase the number of required audits of records in the database both for individuals and gangs and implement an audit requirement in relation to proxy queries.

These regulations will ensure that the local law enforcement agencies that enter information into the database and use the CalGang database collect and maintain criminal intelligence, do so in a manner that preserves the privacy rights of the individuals listed therein.

PURPOSE AND NECESSITY

§ 770. Title and Scope.

The purpose of this regulation is to establish the scope of the new chapter—Chapter 7.6, named “Regulations for the Fair and Accurate Governance of Shared Gang Database Systems.” It is necessary to include this regulation because it explains that the entire chapter is devoted to governing any shared gang database, except those excluded by subdivision (b) of Penal Code section 186.34 and the CalGang database. It distinguishes shared gang database from the CalGang database and establishes that the CalGang database shall be governed by Chapter 7.5. This distinction is necessary because the CalGang database is the only shared gang database that exists in California at this time. The Department has access to the CalGang database and drafted regulations that are in sync with the current CalGang database system functions.

§ 770.2. Definition of Key Terms.

Subdivisions (a) through (bb) of this regulation define terms that will be used throughout the chapter. It is necessary for these terms to be defined because many of these terms may have multiple definitions depending on the context of their usage.

Subdivision (a) establishes that “access” means the ability to view, query, add, delete, or retrieve records in a shared gang database. This definition is necessary because there are multiple ways in which a shared gang database can be accessed. For example, some users have view-only access, so they can view records but not make changes to them. Other users, such as System Administrators, have full accessibility to a shared gang database and possess the ability to view, query, add, delete, and retrieve records. The level of access that is granted to a user by a System Administrator depends on the user’s right to know and need to know.

Subdivision (b) establishes that “agency” means any law enforcement agency. The purpose of this term is to distinguish it from user agency because an agency that is not a user agency may or may not have access to a shared gang database, pursuant to Article 8 of these regulations. This definition is necessary so that there is no confusion between a user agency or an agency.

Subdivision (c) establishes that “audit” means the process of objective examination of a shared gang database pertaining to the maintenance of records, as well as the examination of a sample of randomly selected records to determine whether a shared gang database is in compliance with these regulations. This definition is necessary because it defines what an audit is and how the audits in Article 10 of the regulations will be conducted.

Subdivision (d) establishes that “contact” means any observation of a person by a law enforcement agency or any lawful interaction between a person and a law enforcement officer. This definition is necessary because it is used in Articles 5 and 7 as the only time a law enforcement officer may gather gang-related criminal intelligence to input into a shared gang database pursuant to the requirements set forth in Article 5. This definition is intended to cover all interactions, which include but are not limited to, surveillance and observations, which are permissible under the Fourth Amendment to the United States Constitution.

Subdivision (e) establishes that “criminal predicate” means that there exists a reasonable suspicion based on the analysis of legally obtained information that the subject of the information is, or may be involved in, definable criminal conduct and/or activity that supports,

encourages, or otherwise aids definable criminal conduct. This definition is necessary to provide clarity on how criminal predicate should be defined by law enforcement officers who work with gathering gang-related criminal intelligence. This definition is based on the one provided in Code of Federal Regulations, Title 28, Section 23.20(c) and the Department's *Model Standards and Procedures for Maintaining Criminal Intelligence Files and Criminal Intelligence Operational Activities* (November 2007) page 3.

Subdivision (f) establishes that "Department" means the California Department of Justice. This definition is necessary to specify the state agency that is issuing these regulations and distinguishes that it is the California Department of Justice, not the United States Department of Justice.

Subdivision (g) establishes that "dissemination" means the sharing of criminal intelligence among law enforcement authorities in any agency or agencies on a need to know and right to know basis. This definition is necessary to provide clarity on how dissemination should be defined by law enforcement officers who work with a shared gang database. This definition is based on the one provided in the Department's *Model Standards and Procedures for Maintaining Criminal Intelligence Files and Criminal Intelligence Operational Activities* (November 2007) page 3.

Subdivision (h) establishes that a "gang associate" means a person who satisfies the requirements set forth in subdivision (c) of section 771.8. This definition is necessary because it provides law enforcement with a standardized definition for gang associate.

Subdivision (i) establishes that a "gang member" means a person who satisfies the requirements set forth in subdivision (b) of section 771.8. This definition is necessary because it provides law enforcement agencies with a standardized definition for gang member.

Subdivision (j) establishes that a "juvenile" means a minor or a person between the ages of 13 through 17. This definition is necessary because a juvenile is typically understood to mean any person that is under 18 years of age. The Department wants to clarify that it has made a policy decision to limit the age of the juveniles that may be entered into a shared gang database to those who are 13 through 17 years of age. No juveniles below the age of 13 shall be entered into a shared gang database.

Subdivision (k) establishes that "need to know" means a state of facts that supports the legitimacy of access to specific intelligence by a person or an agency with a right to know. The need to know shall be pertinent and necessary to the performance of a specific law enforcement activity. This definition is necessary because it provides law enforcement agencies with a standardized definition for the need to know. This definition is based on the one provided in the Department's *Model Standards and Procedures for Maintaining Criminal Intelligence Files and Criminal Intelligence Operational Activities* (November 2007) page 4.

Subdivision (l) establishes that a "non-user" means a person or an agency that does not have access to a shared gang database. This definition is necessary because it contrasts a non-user from a user.

Subdivision (m) establishes that an “offense consistent with gang activity” means either those offenses that are listed in subdivisions (a) or (e) of Penal Code section 186.22, Penal Code section 186.26 or 186.28, or those offenses committed in a manner described in subdivision (b)(1) of Penal Code section 186.22. This definition is necessary because it narrows the types of offenses that law enforcement agencies can use to designate as consistent with gang activity, and cite them as such when entering information into a shared gang database in order to meet the criterion specified in subdivision (a)(2) of section 771.6.

Subdivision (n) establishes that “purge” means the elimination of any record from a shared gang database and/or any printed form of the record when it is no longer in compliance with these regulations. This definition is necessary because it clarifies that when a user agency purges a record from the database, it must also purge printed copies of the record.

Subdivision (o) establishes that “reasonable suspicion” means the state of known information which establishes sufficient facts to give a trained law enforcement or criminal investigative agency officer, investigator, or employee a basis to believe that there is a reasonable possibility that a person or an organization is involved in a definable criminal activity or enterprise. This definition is necessary to provide clarity on how reasonable suspicion should be defined by law enforcement officers who work with gathering gang-related criminal intelligence. This definition is based on the one provided in Code of Federal Regulations, Title 28, Section 23.20(c) and the Department’s *Model Standards and Procedures for Maintaining Criminal Intelligence Files and Criminal Intelligence Operational Activities* (November 2007) page 4.

Subdivision (p) establishes that “record” means information contained in a shared gang database that pertains to a particular person. This definition is necessary because it specifies that criminal intelligence gathered by a law enforcement agency and entered into a shared gang database is either entered into a record belonging to a person or a record belonging to a person is created if the gang-related criminal intelligence meets the requirements set forth in Article 5.

Subdivision (q) establishes that “reliable source” means someone who the officer reasonably believes is trustworthy based on the totality of circumstances such as, but not limited to, the following factors: (1) basis of knowledge; (2) veracity; and (3) reliability. This definition is necessary because AB 90 required the Department to purge any information that was entered into the CalGang database if it was provided by an untested informant. (Pen. Code, § 186.36, subd. (r).) The Legislature did not require the Department to remove information from the CalGang database that was provided by a reliable informant. Although these regulations do not apply to the CalGang database, they were based on those regulations that do apply to the CalGang database; thus, the same reasoning exists for both. The Department defined reliable source so that user agencies could use this definition any time they believe that a person meets the criterion provided in subdivision (a)(3) of section 752.4. The definition for reliable source uses factors from *Alabama v. White* (1990) 496 U.S. 325, a case which set forth the “test” for determining whether reasonable suspicion exists based on an informant’s statements to the police.

Subdivision (r) establishes that “revoked,” as it applies to a user’s account, means the account is invalid and the user is permanently prohibited from accessing the account. This definition is

necessary to clarify how a user account that is revoked differs from a user account that is suspended.

Subdivision (s) establishes that “right to know” means the status of being an agency or a person engaged in a law enforcement activity that, because of official capacity and/or statutory authority, may have access to a shared gang database if there is a need to know. This definition is necessary because it provides law enforcement agencies with a standardized definition for the right to know. This definition is based on the one provided in the Department’s *Model Standards and Procedures for Maintaining Criminal Intelligence Files and Criminal Intelligence Operational Activities* (November 2007) page 4.

Subdivision (t) establishes that “shared gang database” means any shared gang database, excluding the CalGang database. This subdivision is necessary because the Department wants to be clear that, although the CalGang database is a shared gang database, it is not included in any references to shared gang databases in the context of these regulations.

Subdivision (u) establishes that “source documents” mean documentation that supports one or more criteria entered into a person’s record in a shared gang database. Such documents may include, but are not limited to, arrest reports, field interview cards, photographs, and jail records. This definition is necessary because it defines the types of documents that are considered source documents so that they can be used to satisfy the existence of the criteria set forth in section 771.6.

Subdivision (v) establishes that “suspended,” as it applies to a user account, means that the user’s access to the account is prohibited for a defined period or until satisfaction of conditions under these regulations. This definition is necessary to clarify how a user account that is suspended differs from a user account that is revoked.

Subdivision (w) establishes that “System Administrator” means a person who acts as a leader by organizing, training, providing technical support, and coordinating the information collection activities of user agencies. This subdivision is necessary because it defines who a System Administrator is and clarifies his or her functions.

Subdivision (x) establishes that “System Administrator’s Designee” means a person selected by the System Administrator to act as the System Administrator when the System Administrator is not available. This subdivision is necessary to clarify that the Department authorizes a System Administrator to designate a person to perform the same functions as the System Administrator if the System Administrator is not available.

Subdivision (y) establishes that “system misuse” or “account misuse” means unauthorized access or misuse of information in a shared gang database. This definition is necessary to provide System Administrators and user agencies with guidance on what this term means as it is used throughout the regulations.

Subdivision (z) establishes that “unauthorized access” means access by a person who does not have a need to know and a right to know. This definition is necessary because it specifies that

access is unauthorized and cannot be granted if a need to know and a right to know is not present.

Subdivision (aa) establishes that “user” means authorized employees listed within subdivision (k)(6) of Penal Code section 186.36 whose employment duties require access to a shared gang database. This definition is necessary because it simplifies the requirements set forth by subdivision (k) of Penal Code section 186.36 into one word, “user,” so that this term can be easily understood by the persons affected by these regulations as they read through the text of the regulations.

Subdivision (bb) establishes that “user agency” means a law enforcement agency that has access to a shared gang database. This definition is necessary and was included in these regulations so that a user agency could be distinguished from an agency.

§ 770.4. Access to a Shared Gang Database.

The purpose of subdivisions (a) through (e) is to set forth the requirements that shall be fulfilled by an agency before creating a new shared gang database and by a user in order to gain access to a shared gang database. These subdivisions are necessary because in order to practice proper oversight of all shared gang databases, the Department needs to be made aware of any that are created. In addition, these subdivisions are necessary because under Code of Federal Regulations, Title 28, Section (e) access to a shared gang database is only granted to individuals with a need to know and a right to know the information contained therein. This protects the privacy of those California residents who are designated as gang members or gang associates in a shared gang database.

The purpose of subdivision (b) is to limit access to a shared gang database to employees meeting the definition of authorized employees within subdivision (k)(6) of Penal Code Section 186.36. This subdivision is necessary because granting access to employees who do not meet the definition of authorized employees would expose the information contained within a shared gang database to individuals who do not have a need to know and a right to know.

The purpose of subdivision (c) is to satisfy the requirement set forth in subdivision (k)(2) and (o) of Penal Code section 186.36 and require standardized training for shared gang database users.

The purpose of subdivision (d) is to require user agencies to enter into a written memorandum of understanding or user agency agreement with their respective System Administrator before a person employed by the user agency may receive access to the database. This subdivision is necessary because keeping written documentation of all users is important for auditing purposes to allow the Department to maintain oversight of all user agencies.

The purpose of subdivision (e) is to require the Department to instruct the System Administrator to ensure that a user’s account is disabled if the user is no longer employed with the user agency. This subdivision is necessary because allowing a user’s account to remain active after the user is no longer performing the role for which the user was granted access to a shared gang database

would expose the information contained within a shared gang database to individuals who do not have a need to know and a right to know.

The purpose of subdivision (f) is to require System Administrators to provide a list of active, suspended, or revoked accounts to the Department upon request. This subdivision is necessary because the Department must have access to user account information in order to properly practice its oversight responsibilities.

§ 770.6. Limitations to Access Provided to an Out-of-State or a Federal Agency.

The purpose of this regulation is to address sharing information from a shared gang database with federal and out-of-state law enforcement agencies, as authorized in subdivision (I)(7) of Penal Code section 186.36. This regulation is necessary because it provides that federal and out-of-state agencies who wish to access a shared gang database shall be held to the same standards, as set forth in these regulations, as user agencies within the state of California. The memorandum of understanding that each federal or out-of-state agency shall enter into with the Department is not an agreement that is incorporated by reference in the regulation because it is not a form document that will apply generally to all federal and/or out-of-state agencies; rather each memorandum of understanding shall be tailored to address the access requirements of the specific requesting federal or out-of-state agency.

§ 770.8. Proxy Query to the Information Contained in a Shared Gang Database.

The Department is responsible for ensuring that a shared gang database and the information contained therein is only used for authorized purposes. As such, subdivisions (a) through (c) are necessary in order to safeguard a shared gang database, the information it contains, and, by extension the privacy rights of the individuals designated therein.

The purpose of subdivision (a) is to control who is able to view the information contained in a shared gang database and define the process for a non-user that demonstrates a right to know and a need to know to be able to access it. This subdivision is necessary because it protects the privacy rights of the individuals whose information is contained within a shared gang database.

The purpose of subdivision (a)(1) is to require that System Administrators either create a form to collect specified information of the requester or create a proxy feature within a shared gang database in order to capture the same information. This subdivision is necessary because it creates a mechanism for System Administrators and the Department to monitor the dissemination of information to non-users and ensure that no information is provided for unauthorized purposes or to non-users who do not have a need to know and a right to know. The Department determined that requiring the completion of the form (electronic or otherwise) would be the most straight-forward way to track who has requested access, for what purpose, whether requests are granted, and what information is disseminated, for auditing purposes.

The purpose of subdivision (a)(2) is to specify the information that must be collected from the non-user prior to the processing of a proxy query. This subdivision is necessary because it standardizes the information that is collected and maintained by System Administrators, which

ensures consistency. The information is consistent with that collected in relation to proxy query requests for the CalGang database.

The purpose of subdivision (b) is to monitor the frequency of proxy query requests made by non-users and place a limitation on the number of times per year a proxy query may be placed. The Department determined that a non-user can request information via proxy query up to 12 times a year. The Department concluded that on average, the same non-user makes requests via proxy query three to four times per year. The limit of 12 times per year would allow a non-user who has a need to know and a right to know in all cases the ability to request information via proxy query once per month if a case s/he is working on requires it. This subdivision is necessary because a limit prevents non-users who submit proxy query requests from doing so to bypass requirements for obtaining direct access to a shared gang database.

The purpose of subdivision (c) is to specify that this Article does not limit or supersede other areas of these regulations or the Penal Code. This subdivision is necessary because the Department wants to be clear as to the extent that this Article may impact other law.

§ 771. User Training.

The purpose of this section is to ensure compliance with subdivision (k)(2) of Penal Code section 186.36.

The purpose of subdivision (a) is to establish that only instructors approved by a System Administrator may provide training on a shared gang database. This subdivision is necessary because it will ensure that training is consistent and provided by individuals who have a thorough understanding of the system and its uses.

The purpose of subdivision (b) is to specify minimum training requirements for users. This subdivision is necessary because it provides universal training requirements. Standardizing a baseline training program ensures that all users are aware of and understand applicable laws, policies, and procedures in regards to a shared gang database; how to identify and designate individuals as gang members and associates; how to utilize a shared gang database; and appropriate and inappropriate uses of information contained therein. This is vital to avoiding erroneously designating individuals as gang members or associates.

Moreover, subdivisions (b)(10) through (b)(12) were included as protections for the health and welfare of the public. These subdivisions are necessary to ensure that users are aware of and understand the impact that designation as a gang member or associate can have on the individuals listed in a shared gang database. One general concern voiced by some members of the GDTAC and many members of the public is that designation as a gang member or associate can be influenced by law enforcement bias and application of stereotypes. These regulations are necessary to ensure that users of a shared gang database are aware of potential implicit bias, as well as the effect that misuse of the information contained in a shared gang database can have on the public.

The purpose of subdivision (c) is to enable training instructors or System Administrators to require additional training hours. This subdivision is necessary to account for areas where additional region-specific gang-related training might be needed. For example, a training instructor or System Administrator may choose to include training regarding criminal street gangs or trends present in only its region. The Department wants to make it clear that training instructors and System Administrators are not restricted from doing so.

§ 771.2. Initial Exam Information and Recertification Exam.

The purpose of subdivisions (a) through (c) is to explain the certification and recertification process. These regulations are necessary to put safeguards in place, ensure users who access a shared gang database have undergone the required training and understand all aspects of a shared gang database, including who may and may not be included therein, and inform users that they may not use the database for unauthorized purposes. Without this certification, neither the Department nor a System Administrator will be able to verify that a user meets the qualifications for access to a shared gang database, and the chances of misuse of information contained in a shared gang database increase significantly.

Moreover, the purpose of subdivision (b) is to specify the length of time for which a certification or recertification is valid and require certification results to be stored in a shared gang database or a physical file maintained by a System Administrator. The regulations are necessary to establish that users are required to recertify every two years in order to refresh their knowledge of a shared gang database, as well as learn about any changes that have been made to policies and procedures during that time. Constant use can desensitize an individual to the specific requirements for access and use, so it is vital to ensure that knowledge stays current. In addition to proving knowledge of a shared gang database, it is important for accountability and auditing purposes that users acknowledge their understanding of and adherence to the policies and procedures of a shared gang database.

The purpose of subdivision (c) is to protect the privacy rights of the individuals designated in a shared gang database by requiring users who are unable to pass the certification or recertification exam to undergo additional training prior to being allowed access to the information contained within a shared gang database. This subdivision is necessary because it is vital that users of a shared gang database be familiar with its functions; criteria that qualifies individuals for designation in the system and the associated meanings of same; policies, procedures, regulations, and best practices regarding its use; security and information dissemination requirements, and consequences for misuse. Failure of the certification or recertification exam may illustrate that the user does not adequately understand a shared gang database or parameters of appropriate use. As such, it is necessary for those who fail the exam on multiple attempts to be retrained and retested prior to their access to the system beginning or resuming. This protects the privacy rights of the individuals designated in a shared gang database

§ 771.4. Requirements to Become an Approved Instructor.

The purpose of these regulations is to establish the requirements and process for becoming an approved instructor and require recertification training for previously-approved instructors.

These regulations are necessary to ensure that only the most qualified individuals with a high level of system proficiency are training others on a shared gang database. Requiring recertification training for instructors is necessary to ensure that instructors are aware of any changes and can educate users accordingly on system changes or updates, new mandates, and regulations.

§ 771.6. Criteria to be Designated as a Gang Member or a Gang Associate.

The purpose of this section is to list all gang related criteria in one section for clarity purposes. These criteria were shared with the GDTAC and crafted in conjunction with the GDTAC's advice. In addition, this section is to codify existing designation criteria, while requiring thorough documentation in order to substantiate their use. The Department reviewed and analyzed existing research on gang membership and association and determined that the research was insufficient to inform regulations of any shared gang database. On average, most gang members identified by law enforcement officers are adults, whereas empirical research tends to focus exclusively on youth. (Cal. Dept. of Justice, *Gang Membership, Duration, and Desistance: Empirical Literature Review*, Drafted to Support AB90 (CalGang) Work (undated), pages 20-21). In addition, the Department has not located any substantial research to justify significantly altering or removing current criteria used by participating agencies. The Department will continue to research gang membership and association and will update the designation criteria based upon empirical data supported by the research findings.

The purpose of subdivision (a) is to define the criteria for designating a person as a gang member or gang associate pursuant to subdivision (d)(2) of Penal Code section 186.36. This is necessary because such criteria are not currently denoted in existing statute.

The purpose of subdivision (a)(1) is to establish that an admission to being a gang member or gang associate under circumstances that do not undercut truthfulness is a criterion for designation as a gang member or gang associate in a shared gang database. This subdivision is necessary because its inclusion will ensure that the self-admit criterion is more reliable and protect persons from being entered into the database if they self-admit to being a gang member as a result of force, fear, duress, or threat of bodily harm from individuals who participate in gang-related activities. Requiring documentation of the circumstances surrounding the self-admit will also indicate whether a person was under the influence or in an altered mental state at the time.

The purpose of subdivision (a)(2) is to establish that being arrested for an offense consistent with gang activity is a criterion for a designation as a gang member or gang associate in a shared gang database. This subdivision is necessary because the Department wants to clarify that an arrest for any one or more of the offenses defined as being consistent with gang activity qualifies as a criterion for designation in a shared gang database.

The purpose of subdivision (a)(3) is to specify that a reliable source identifying an individual as a gang member or gang associate may be utilized as a criterion for entry into a shared gang database. This subdivision is necessary because case law from *Alabama v. White* (1990) 496

U.S. 325 provides a definition for reliable source that is restrictive enough to ensure that a source is, in fact, reliable enough for the source's identification to be treated as truthful.

The purpose of subdivision (a)(4) is to establish that being seen associating with an individual meeting the criteria for entry into a shared gang database as a gang member may be used as a criterion for entry into a shared gang database. This subdivision is needed because a previous criterion for entry into the CalGang database included the language, "person must be arrested with and has been seen associating with" gang members. This caused issues in court because it was believed that a gang member had to be both arrested with and seen associating with other gang members in order to meet the criterion. While these regulations do not apply to the CalGang database, the criteria outlined in these regulations mirror those that regulate the CalGang database. Law enforcement officials with whom the Department engaged asserted that, based on their extensive knowledge of and history with gang members, association with gang members is a strong indicator of a person being involved in, or associated with, a gang.

The purpose of subdivision (a)(5) is to establish that being seen displaying one or more symbols and/or hand signs that is tied to a specific criminal street gang may be used as a criterion for entry into a shared gang database and to require law enforcement to document the criterion as specified. This subdivision is necessary because it increases the documentation requirements for law enforcement officers. It also protects against inaccurate designation as a gang member or gang associate for an individual who displays widely-known and recognized symbols and/or hand gestures for a gang in a non-threatening or joking manner as opposed to using it to identify himself or herself as a member or associate of a criminal street gang.

The purpose of subdivision (a)(6) is to establish that a person being seen at one or more gang-related addresses or locations can be used as a criterion for entry into a shared gang database and require law enforcement to document pertinent information regarding the encounter(s). This subdivision is necessary because gang addresses and locations are designated as such due to their high gang presence. By including gang locations/addresses that a person must stay away from in gang injunctions, the courts have established the existence of gang locations/addresses. Thus, presence at a gang address or location is a strong indicator of gang membership and association. The regulation is also necessary because requiring that specific information be documented enables the record to be audited.

The purpose of subdivision (a)(7) is to establish that being seen wearing a style of dress or accessories tied to a specific criminal street gang may be used as a criterion for entry into a shared gang database. This subdivision is necessary because requiring that the style of dress or accessories tie to a specific criminal street gang protects against inaccurate designation as a gang member or gang associate for an individual who happens to be wearing colors identified with multiple criminal street gangs. The regulation is also necessary because requiring that specific information be documented provides clear justification for inclusion of the criterion if/when the record is audited or challenged.

The purpose of subdivision (a)(8) is to establish that having one or more tattoos, marks, scars, or branding indicating criminal street gang membership may be used as a criterion for entry into a shared gang database. This subdivision is necessary because requiring that specific information

be documented provides clear justification for inclusion of the criterion if/when the record is audited or challenged.

The purpose of subdivision (b) is to inform law enforcement officers that they do not need to collect information to meet two criteria during one contact. This subdivision informs law enforcement officers that they are able to collect the information on separate occasions in order to meet the requirements to be entered into a shared gang database. This subdivision is necessary because it allows law enforcement the flexibility to document criteria on multiple occasions and enter them cumulatively as one record.

The purpose of subdivision (c) is to require criteria to be supported by source documents. This subdivision is necessary because documentation is the only way to substantiate a designation to an auditor, so it is vital that source documents be accurate, complete, and easy to interpret.

§ 771.8. Minimum Age of Entry and Requirements to Enter a Person into a Shared Gang Database.

The purpose of subdivision (a) is to establish the minimum age requirement for entry into a shared gang database. This subdivision is necessary because the Department reviewed and analyzed existing research on gang membership and association, along with statistical data regarding the ages of individuals designated within a shared gang database and concluded that 13 years of age was a proper age for entry (Cal. Dept. of Justice, *Gang Membership, Duration, and Desistance: Empirical Literature Review*, Drafted to Support AB90 (CalGang) Work (undated), and Cal. Dept. of Justice, Number of Minors Per Age in CalGang, (Mar. 11, 2019)).

The purpose of subdivisions (b) and (c) is to require that a person must meet, based on a trained law enforcement officer's reasonable suspicion, at least two criteria listed in these regulations in order to qualify for initial designation as a gang member or gang associate, respectively, in a shared gang database. These subdivisions are necessary because they specify the standard for entry in the CalGang database. The reasonable suspicion standard is consistent with Code of Federal Regulations, Title 28, Section 23.20(a) and the Department's *Model Standards and Procedures for Maintaining Criminal Intelligence Files and Criminal Intelligence Operational Activities* (November 2007) page 7. In addition, based on the Department's research, meeting two criteria is consistent with the requirements for shared gang databases outside of California. The Department was unable to locate meaningful research to support changing the number of criteria that must be satisfied. Further, it is necessary to differentiate between initial entry of an individual designated as a gang member and an individual designated as a gang associate because different requirements must be met for each.

Moreover, the purpose of subdivision (c)(1) is to specify that a gang associate's record must be linked to the record of a gang member, as well as satisfy at least one additional criterion, in order to be entered into a shared gang database. This subdivision is necessary to convey to the public that not everyone can be entered as an associate based only on their association with a gang member.

§ 772. Other Rules Pertaining to the Entry of a Person in a Shared Gang Database.

The purpose of subdivision (a) is to allow for a single criterion to be added to a record after the initial entry of two criteria identified in section 771.6 are entered. This subdivision is necessary to specify that an individual whose information has purged from a shared gang database may be designated again if s/he meets two criteria identified in section 771.6.

The purpose of subdivisions (b) and (c) is to establish that a criterion may not be duplicated on subsequent occasions unless specified conditions are met. These subdivisions are necessary in order to safeguard the rights of individuals.

The purpose of subdivision (b) is to restrict the re-entry of a tattoo, mark, scar, or branding into the database that remains unmodified and on the same place on a person's body that was previously used to satisfy a criterion, unless the record of that person meets the elements of subdivision (d) or has since been purged from a shared gang database. This subdivision is necessary to eliminate duplication of criterion unless the record of the person noting the criterion is being openly displayed, presented, or flashed as a means of intimidation has been purged from a shared gang database. This would be helpful in a situation where a law enforcement officer comes into contact with a person who no longer participates in gang activity but has an old gang tattoo that s/he was unable to have removed. Additionally, this subdivision is necessary to clarify that a law enforcement officer is restricted from re-entering an existing criterion, which would prevent it being used as a means to extend a purge date for a record.

The purpose of subdivision (c) is to describe the limitations of entry of a tattoo, mark, scar, or branding into a shared gang database. This subdivision addresses how law enforcement officers may handle instances when a person has the same or similar tattoo, mark, scar, or branding on multiple parts of their body for purposes of documenting separate and distinct criteria and ensures that each is documented only once each. This subdivision is necessary because it is possible that the law enforcement officer who documented the tattoo, mark, scar, or branding initially did not notice the same or similar tattoo on the difference part of the individual's body when s/he initially designated the person in a shared gang database and/or the individual obtained the same or similar tattoo, mark, scar, or branding subsequent to contact with the original law enforcement officer.

The purpose of subdivision (d) is to establish that a tattoo, mark, scar, or branding that was previously used to satisfy a criterion may be re-entered into a shared gang database only if the person is openly displaying, presenting, or flashing the tattoo, mark, scar, or branding in a public setting. This subdivision is necessary because tattoos, marks, scars, or branding can be used by gang members to cause fear and intimidation to those around them and jeopardize the safety of the public. Additionally, the Department wants to establish the relevant circumstances that must be documented to ensure proper use of the criterion.

§ 772.2. Criteria for an Organization to be Designated as a “Criminal Street Gang.”

The purpose of subdivision (a) is to establish policies and procedures for designating a criminal street gang in a shared gang database, as required by subdivision (1)(4) Penal Code section 186.36. This subdivision is necessary because such requirements are not specifically addressed

in current policies and procedures. This subdivision sets forth a documentation requirement so that organizations and associations are not added arbitrarily.

The purpose of subdivision (a)(1) is to establish that a user agency must have reasonable suspicion that is able to be articulated, as well as documentation of the basis of the reasonable suspicion prior to entering a new criminal street gang into a shared gang database. This subdivision is necessary to establish a standard for designating an organization as a criminal street gang. The reasonable suspicion standard is consistent with Code of Federal Regulations, Title 28, Section 23.20(a) and the Department's *Model Standards and Procedures for Maintaining Criminal Intelligence Files and Criminal Intelligence Operational Activities* (November 2007) page 7. This subdivision also ensures that users clearly outline sufficient facts to establish their basis for believing that there is a reasonable possibility that the organization is involved in a criminal activity or enterprise. A hallmark of a criminal street gang, as defined in subdivision (a)(1) of Penal Code section 186.34, is having the commission of an enumerated crime as one of its primary activities; without that, an organization cannot rise to the level of criminal street gang.

The purpose of subdivision (a)(2) is to specify that an association or organization must have at least three individuals who meet the criteria to be designated as gang members in a shared gang database in order to be classified as a criminal street gang. It also requires that a request for the association or organization to be classified as a criminal street gang in a shared gang database be reviewed and approved by a System Administrator prior to entry. This subdivision is necessary to ensure that the association or organization both meets the definition of criminal street gang outlined in subdivision (a)(1) of Penal Code section 186.34 and is reviewed and approved by a System Administrator.

The purpose of subdivision (a)(3) is to specify that an association or organization must have a common sign, symbol, and/or name in order to be classified as a criminal street gang in a shared gang database. It also requires the user agency to include documentation of same and explain why the agency interprets it as belonging to the proposed criminal street gang. This subdivision is necessary because documentation is necessary for a System Administrator's review and to ensure that the association or organization meets the definition of criminal street gang outlined in subdivision (a)(1) of Penal Code section 186.34. It is also necessary because documentation substantiates the entry of the criminal street gang into a shared gang database when an audit is conducted.

The purpose of subdivision (a)(4) is to specify that the organization, association, or its members must have collectively or individually engaged in a pattern of definable criminal activity in order to be classified as a criminal street gang in a shared gang database. This subdivision is necessary to ensure that users clearly document sufficient facts to establish their basis for believing that there is a reasonable possibility that the organization is involved in a criminal activity or enterprise. A hallmark of a criminal street gang, as defined in subdivision (a)(1) of Penal Code section 186.34, is engagement by its members in a pattern of definable criminal activity; without that, an organization cannot rise to the level of criminal street gang.

The purpose of subdivision (b) is to establish that only a System Administrator can designate an organization as a criminal street gang in a shared gang database. This subdivision is necessary as a protection measure, to ensure that gangs are not being added to the database without a checks-and-balances system being in place.

§ 772.4. Supervisory Review Process.

The purpose of this regulation is to require user agencies to conduct a supervisory review of all criminal street gang intelligence prior to entry into a shared gang database, as required in subdivisions (k)(3) and (l)(8) of Penal Code section 186.36. This regulation is necessary to require an additional level of review in order to protect the safety of the public and the integrity of the system by ensuring that information meets the threshold for inclusion in a shared gang database and was obtained in a manner consistent with applicable law, policy, and ordinance. This requirement is consistent with the Department's *Model Standards and Procedures for Maintaining Criminal Intelligence Files and Criminal Intelligence Operational Activities* (November 2007) page 7.

§ 772.6. User Agency's Discretion to Delete Unsupported Records.

The purpose of subdivision (a) is to stipulate the circumstances in which a user agency has the ability to delete a record that it created or entered into a shared gang database outside of the audit process. This subdivision is necessary because there are many reasons, outside of the audit process, that a user agency would need to remove a record, such as discovering that two records for the same individual exist. In this case, the Department wants to enable a user agency that discovers the duplication to carry the pertinent information into one entry and remove the duplicate record.

The purpose of subdivision (b) is to require the deleting user agency to notify the other user agencies that have entered additional information to support that record or entry in a shared gang database. This subdivision is necessary because there must be a notification system in place so that the user agencies that have used or contributed to the record or entry being deleted are aware that that record is no longer valid. The deletion of a record could affect another record or entry that a user agency has entered. An example would be one agency removing a record for a gang member to whom one or more gang associates are linked. If the gang member is removed, then the records or any gang associated linked to him or her would need to be reexamined to ensure it still meets the threshold for inclusion in a shared gang database. Additionally, there may be another record for the same individual that a user agency entered based on the criteria in the record or entry that will be deleted. In this example, the user agency would need to be made aware that the record is being deleted so they can adjust its records accordingly if the individual no longer meets the threshold for inclusion in a shared gang database.

§ 772.8. Notifying a Person of Inclusion in a Shared Gang Database.

The purpose of this section is to implement subdivision (l)(5) of Penal Code section 186.36 and establish the policies and procedures for delivering a notice of inclusion to a person who will be entered into a shared gang database. These subdivisions clarify reasons that a notice would not

be sent and address situations when issuing a notice would compromise an active investigation or the health or safety of a juvenile designated in a shared gang database in accordance with subdivision (c) of Penal Code section 186.34.

The purpose of subdivision (b) is to establish the specific methods of notice delivery that may be used at the discretion of the user agency delivering the notice. This subdivision is necessary because other methods of delivery can be insecure. One example of such a method is email, which can be hacked or sent to the wrong person by mistake. The purpose of this subdivision is also to specify that a law enforcement officer will presume that the address provided by the juvenile at the point of contact is the correct physical address for at least one parent or guardian. This presumption is necessary because it prevents the law enforcement officers from being required to perform extensive research into the accuracy of addresses provided at the point of contact with a juvenile.

Moreover, subdivision (b)(1) requires law enforcement officers to confirm the physical address provided by a juvenile at the point of contact if it is suspected that the juvenile will be designated as a gang member or gang associate. This subdivision is necessary because it is possible for individuals who are 17 years of age or younger to live with someone who is not a parent or guardian. This subdivision will provide the user agency responsible for ensuring that notifications of inclusion are sent with the current physical address for both the juvenile and the juvenile's parent or guardian.

The purpose of subdivision (c) is to expand upon the requirement set forth in subdivision (c) of Penal Code section 186.34 and require that additional information be included in a written notice to a person of his or her designation in a shared gang database. This subdivision is necessary because each user agency has its own version of a notification of inclusion. This subdivision will standardize the components that must be included in a notification without placing unnecessary burdens or restrictions on the user agency issuing the notification.

The purpose of subdivision (d) is to authorize a user agency to include the name of the criminal street gang that the person is connected to in a shared gang database in a notice of inclusion in a shared gang database. This subdivision is necessary because inclusion of information outside of that listed in this subdivision could potentially compromise and active investigation and/or the mission of a shared gang database.

The purpose of subdivision (e) is to require a user agency to document the attempted delivery of each notice. This subdivision is necessary because requiring that specific information be documented provides clear substantiation that a user agency did its due diligence in attempting to notify the designee of his or her inclusion in a shared gang database.

The purpose of subdivision (f) is to establish circumstances under which the notice requirement set forth in subdivision (c) of Penal Code section 186.34 is satisfied. This subdivision further explains that in the event a juvenile to whom the notice pertains resides at the same physical address as a parent or guardian, the user agency shall send two notices, one addressed to the juvenile and one addressed to the parent or guardian, to fulfill the notice requirement prescribed by subdivision (c) of Penal Code section 186.34. This subdivision is necessary because a loop of

trying to verify receipt of a notification can go on indefinitely. For instance, it is not uncommon for individuals to provide an inaccurate or old address. Without reasonable stipulations as to what satisfies the notification requirements, user agencies could exhaust valuable time and resources on something outside of their control.

The purpose of subdivision (g) is to address circumstances in which the first attempt at notifying an individual of the individual's inclusion in a shared gang database fails to be delivered and the user agency has more than one method of contacting the individual. This subdivision further specifies the actions a user agency shall take if the circumstances arise. This subdivision is necessary because a user agency is expected to perform due diligence in notifying a person of inclusion in a shared gang database and the Department wants to clarify what constitutes due diligence in these circumstances.

The purpose of subdivision (h) is to limit the places a user agency may knowingly send notice letters. This subdivision is necessary because sending a notice letter to one of the areas listed as prohibited herein can compromise the privacy of the recipient of the notification, as well as interfere with the recipient's employment or housing opportunities if it is mistakenly opened and read by an individual other than the intended recipient.

The purpose of subdivision (i) is to specify the circumstances in which a user agency would not be required to attempt to deliver a notice of inclusion in a shared gang database and, further, establishes the documentation that must be completed by a user agency in these circumstances. This subdivision is necessary because subdivision (c) of Penal Code section 186.34 stipulates that notices of inclusion are not required to be sent if doing so would compromise an active criminal investigation or the health and safety of a juvenile designated in a shared gang database. As these circumstances are unique, it is important to establish requirements that must be met in lieu of notifying the individual of his or her inclusion in a shared gang database. This subdivision is also necessary because requiring the documentation of reasoning for a notification of inclusion not being sent provides clear substantiation that sending a notice would compromise an active investigation of the health and safety of a juvenile, as specified, should the record be audited or challenged.

§ 773. Information Requests and Verifying the Identity of the Requesting Party.

The purpose of subdivisions (a) through (c) is to allow any agency to develop a verification of identity form to seek the requesting persons' information to determine if an information request is made by an authorized person pursuant to subdivision (d) of Penal Code section 186.34. These subdivisions additionally set the limitations as to what information an agency may seek from the requesting party. These subdivisions are necessary to allow an agency the authority to verify the identity of individuals submitting information requests to the agency without being burdensome on the requesting party or infringing on the privacy of the requester or the individuals designated within a shared gang database.

§ 773.2. An Agency's Response to an Information Request.

The purpose of subdivisions (a) through (d) is to implement subdivision (I)(6) of Penal Code section 186.36 and establish and standardize the policies and procedures for responding to an information request, in accordance with subdivision (d) of Penal Code section 186.34 and subdivision (I)(6) of Penal Code section 186.36. These subdivisions specifically mention an agency's response because the responding party is not always the agency that originally entered the person into a shared gang database and could be any law enforcement agency. These subdivisions are necessary because subdivision (d) of Penal Code section 186.34, which provides the foundation for information requests and associated responses, does not stipulate specific information that must be included in a response to an information request.

The purpose of subdivision (a) is to establish the information that shall be communicated in a response to an information request. This subdivision is necessary because transparency into the process ensures accountability, while standardization ensures that requesters receive the same information without compromising the security and integrity of a shared gang database and the records therein.

The purpose of subdivision (b) is to allow an agency the ability to include the name of the criminal street gang that the person is connected to in a shared gang database within the response at the agency's discretion. This subdivision is necessary because stipulating what information can be included in the response to an information request ensures information that could compromise the security and integrity of a shared gang database and the information therein is not disseminated.

The purpose of subdivision (c) is to require agencies to ensure that the dissemination of the requested information does not compromise an active criminal investigation or the health or safety of a juvenile that has been designated as a gang member or gang associate in a shared gang database. This subdivision is necessary because it ensures that the provisions of subdivision (d) of Penal Code section 184.34 are met and protects the integrity of open investigations as well as the safety of the public.

The purpose of subdivision (d) is to establish that an agency is not required to respond to an information request if doing so would compromise an active criminal investigation or the health or safety of a juvenile that has been designated as a gang member or gang associate in a shared gang database. This subdivision is necessary because it supports and clarifies the exemption provided in subdivision (d) of Penal Code section 186.34.

Moreover, subdivision (d)(1) requires that agencies document instances in which an information request is not responded to and maintain the documentation until the record pertaining to that person is purged from a shared gang database. This subdivision is necessary because it ensures that documentation of exemptions is maintained for auditing purposes.

§ 773.4. Agency's Response to a Request for Removal.

The purpose of this section is to allow an agency the discretion to deliver a notice denying a request for removal from a shared gang database after the 30-day time frame established by subdivision (e) of Penal Code section 186.34 as deeming a request for removal denied. This

regulation is necessary because statute does not specify whether the issue being addressed by this section is authorized and the Department thinks that it is reasonable to allow delivery of denials subsequent to the 30-day time frame.

§ 773.6. Retention Period for Records.

This purpose of this regulation is to implement subdivision (l)(3) of Penal Code section 186.36 and specify the retention period for records in a shared gang database and to clarify how the entry of additional criteria affects the resetting of the retention period. This regulation is necessary because the statute does not currently dictate the retention period and establishing a five-year retention period ensures consistency with the regulations for the CalGang database. The Department consulted with academic researchers and reviewed existing research on the duration of gang membership and concluded that the results of the current research was insufficient to inform regulation of the CalGang database. Empirical gang research tends to focus exclusively on the youth or incarcerated adults, while the majority of gang members identified by law enforcement officers are non-incarcerated adults. Scholarly research indicates that, though gang careers for adolescents last less than three years on average, a subset of gang-involved adolescents will maintain gang membership into adulthood (Cal. Dept. of Justice, *Gang Membership, Duration, and Desistance: Empirical Literature Review*, Drafted to Support AB90 (CalGang) Work (undated), pages 20-21). Moreover, there is currently no tolling period on an individual's data while the individual is incarcerated. Empirical research and research experts have indicated that the majority of gang members who become incarcerated maintain their membership while incarcerated and after release. As such, a reduced retention period coupled with no tolling period may result in the destruction of intelligence data on gang members during their incarceration. In addition, the Department has not located any substantial research to justify reducing the retention period and a five-year retention period is consistent with Code of Federal Regulations, Title 28, Section 23.20(h), and the Department's *Model Standards and Procedures for Maintaining Criminal Intelligence Files and Criminal Intelligence Operational Activities* (November 2007) page 22. The Department will continue to research average duration of gang membership and association and will update the retention period if research supports doing so.

§773.8. Retention Period for Notice of Inclusion.

The purpose of this regulation is to require user agencies to maintain copies of each notification to a recipient that was issued pursuant to subdivision (c) of Penal Code section 186.34 and the related documentation. This subdivision is necessary for auditing purposes and/or for substantiation if an individual designated in a shared gang database asserts that s/he was not notified of inclusion in a shared gang database.

§ 774. Retention Period for Information Requests and Responses.

The purpose of this regulation is to require agencies to maintain copies of all information requests received pursuant to subdivision (d) of Penal Code section 186.34, along with the associated responses. This subdivision is necessary for auditing purposes. It is also necessary should an individual challenge his or her inclusion in a shared gang database because subdivision (c) of Penal Code section 186.35 stipulates that the evidentiary record for purposes of petitions to

be removed from a shared gang database is limited to the information contained within the response to the information request.

§ 774.2. Source Documents.

The purpose of subdivision (a) is to require a user agency that enters information into a shared gang database to maintain the supporting source documents. This subdivision is necessary to substantiate the inclusion of each record in a shared gang database. The Department requires user agencies to document their contacts thoroughly to ensure that the reasons for designating a person in a shared gang database are substantiated and meet the threshold for inclusion. Such substantiation must be made available to an auditor and should be easy to evaluate when an auditor reads the source documents.

The purpose of subdivision (b) is to permit photographs that are legally obtained to be used as source documents. The phrase “legally obtained” was used to cover any pictures captured through legal means and not only through the consent of the individual. This would be applicable, for example, in an instance where an individual posts a picture of himself or herself displaying a personal tattoo of a gang symbol on social media. This subdivision would allow a user agency to include that picture as a source document to substantiate a criterion for designation in a shared gang database.

The purpose of subdivision (c) is to require a user agency to remove unsupported criteria if the associated source documents are found to be missing or incomplete. This subdivision is necessary because all criteria associated with a shared gang database record must be substantiated by source documents.

Moreover, subdivision (c)(1) establishes a time frame for removal of any criteria for which the source documents are found to be lacking or inappropriate. This subdivision is necessary because there is currently no time frame stipulating when removal shall be conducted. The Department has provided the user agency with a maximum of 30 calendar days to remove the unsubstantiated criteria because the Department acknowledges that the user agency may be preoccupied with cases and other pressing tasks and may be unable to immediately remove the criteria. The Department determined that 30 calendar days, if not sooner, is a reasonable length of time.

§ 774.4. Audits of Records in a Shared Gang Database.

The purpose of subdivisions (a) through (c) is to address subdivision (n) of Penal Code section 186.36 by requiring periodic audits of the information contained within a shared gang database to ensure its accuracy, reliability, and proper use. These subdivisions are necessary to standardize procedures, as well as ensure transparency of the audit process.

The purpose of subdivision (a) is to require that System Administrators conduct audits on a sample of randomly selected records annually, as well as require purging of records and/or criteria found to be out of compliance with Articles 5 and/or 9 of these regulations within 30 calendar days of completion of the audit. This subdivision is necessary to ensure that System Administrators conduct and complete audits regularly.

The purpose of subdivision (b) is to establish the parameters of the audits required by this section. This subdivision is necessary to provide standardization for the elements that must be considered and analyzed during the course of an audit and uphold the integrity of the information contained within a shared gang database.

The purpose of subdivision (c) is to authorize a user agency to audit its own records and purge any record that is not in compliance with subdivision (a), as well as require results of such audits to be communicated to a System Administrator within 30 calendar days. This subdivision is necessary because the Department wants to allow user agencies to be more proactive in auditing their own records. Additionally, the Department has provided the user agency with a maximum of 30 calendar days to report the audit results, as the Department acknowledges that a user agency may be preoccupied with cases and other pressing tasks and may be unable to immediately remove the criteria. The Department determined that 30 calendar days, if not sooner, are a reasonable length of time.

The purpose of subdivision (d) is to require System Administrators to report the results of their annual audits and any audits conducted pursuant to subdivision (c) to the Department by September 1 of each year. This subdivision is necessary because it enables the Department to ensure that audits are completed regularly.

The purpose of subdivision (e) is to establish actions that the Department may take to address violations of this section. This subdivision is necessary in order to maintain consistency with subdivision (u) of Penal Code section 186.36.

§ 774.6. Audits of Criminal Street Gangs.

The purpose of subdivisions (a) through (c) is to address subdivision (q) of Penal Code section 186.36 by requiring periodic audits of all criminal street gangs listed in a shared gang database to ensure the information is accurate, reliable, and meets the threshold for inclusion. These subdivisions are necessary because it standardizes procedures, ensures transparency of the audit process, implements subdivision (q) of Penal Code section 186.36.

The purpose of subdivision (d) is to establish the parameters of audits of criminal street gangs listed in a shared gang database. This subdivision is necessary to provide standardization for System Administrators and uphold the integrity of a shared gang database.

The purpose of subdivision (e) is to require System Administrators to communicate the results of the criminal street gang audits to the Department. This subdivision is necessary in order to ensure accountability and allow the Department to review the practices and results of the audits as a part of its oversight responsibilities.

The purpose of subdivision (f) is to establish actions that the Department may take to address violations of this section. This subdivision is necessary in order to maintain consistency with subdivision (u) of Penal Code section 186.36.

§ 774.8. The Department's Authority to Audit User Agencies.

The purpose of this section is to clarify the Department's role and establish its authority to access and audit information and documents for each user agency. This section is necessary because the Department requires access to all records in order to thoroughly engage in its oversight responsibilities. The phrases "may audit" and "may request" are purposefully permissive to demonstrate the Department's ability to choose if and when a review or audit of individual records, information, or documents is necessary.

§ 775. Information Sharing and Disclosures.

The purpose of this section is to specify how information within a shared gang database may be utilized, purposes for which disclosure is prohibited, and what information may be shared with federal immigration authorities. These subdivisions are necessary because they protect the health and welfare of the individuals designated within a shared gang database.

The purpose of subdivision (a) is to specify that release of the information contained in a shared gang database shall only be on a right to know and need to know basis. This requirement is consistent with Code of Federal Regulations, Title 28, Section 23.20 (e) and the Department's *Model Standards and Procedures for Maintaining Criminal Intelligence Files and Criminal Intelligence Operational Activities* (November 2007) page 17. This subdivision is necessary because the privacy of the individuals designated in a shared gang database is dependent on closely controlling who has access to the information included therein and ensuring that those individuals have a valid reason for accessing it.

The purpose of subdivision (b) is to restrict the reference to or attachment of shared gang database records in reports. This subdivision is necessary because, as an intelligence database, a shared gang database is not meant to provide users with information upon which official actions may be taken. Inclusion of shared gang database records in a report could result in the information being used as a basis for official actions. Thus, this subdivision will ensure that the records in a shared gang database are not used as in a manner that is inconsistent with these regulations, as well as maintain their confidentiality.

The purpose of subdivision (c) is to implement subdivisions (k)(7) and (k)(8) of Penal Code section 186.36 and to establish purposes for which shared gang database records shall not be disclosed. This subdivision is necessary because the health and welfare of California residents is paramount and disclosure of records within a shared gang database for the restricted purposes would pose a threat to the ability of an individual designated in a shared gang database to stay in the United States, find employment and/or housing, and/or join the military.

The purpose of subdivision (d) is to specify that users may send to, and receive from, other federal, state, or local government entities information regarding a person's citizenship and immigration status. This subdivision is necessary to expressly state that it does not interfere with or supersede with federal law.

§ 775.2. Equipment Security and Inspection.

The purpose of subdivision (a) is to address subdivision (k)(4) of Penal Code section 186.36 by ensuring system integrity and precluding access by unauthorized personnel. This regulation is necessary to establish physical security measures for terminals and equipment that transmit or receive database information without prescribing exact locations in which equipment must be located. The regulation is consistent with Code of Federal Regulations, Title 28, Section 23.20(g).

The purpose of subdivision (b) is to require System Administrators to inspect equipment to ensure that it is in compliance with subdivision (a) of this section. The subdivision is necessary because the Department wants to be clear that it imposes this responsibility on System Administrators as a means of supporting the Department in performing its oversight functions.

The purpose of subdivision (c) is to require user agencies to grant the Department access to inspect equipment that facilitates access to a shared gang database. This is necessary to enable the Department to ensure compliance as a part of its oversight responsibilities.

§ 775.4. Notifying the System Administrator of Missing Equipment.

The purpose of this section is to address subdivision (k)(5) of Penal Code section 186.36 by requiring user agencies to notify their respective System Administrator of any missing equipment that could compromise the confidentiality and security of a shared gang database. This section establishes a one-calendar-day time frame for both a user agency to notify its System Administrator and the System Administrator to notify the Department. This section is necessary to ensure prompt notification to the System Administrator and the Department. As the equipment could potentially compromise the confidentiality and security of a shared gang database and the individuals listed therein, it is vital that notification be made as soon as possible to allow the Department to immediately engage with the impacted user agency and work with the System Administrator to institute safeguards against unauthorized access.

§ 775.6. System Misuse.

The purpose of subdivision (a) is to establish that any violation of shared gang database-related policies and procedures shall be investigated by a System Administrator or his or her designee. This subdivision is necessary because most law enforcement agencies have an internal affairs unit who investigates any officer or civilian misconduct.

The purpose of subdivision (b) is require the Department to instruct a System Administrator to revoke access to a shared gang database for any user who discloses information from a shared gang database for unauthorized purposes. This subdivision is necessary because disclosing information for unauthorized purposes is a blatant disregard for the laws, policies, and procedures that govern use of a shared gang database and is not to be taken lightly.

§ 775.8. Enforcement of these Regulations by the Department.

The purpose of this section is to specify that the Department shall instruct a System Administrator to take one or more actions upon violation of these regulations. This section is a restatement of subdivision (u) of Penal Code section 186.36. Restatement of the consequences

for violation in this subdivision is necessary because the Department wants to be clear that it has the authority to impose this responsibility on a System Administrator as a means of supporting the Department in performing its oversight functions.

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

Creation or Elimination of Jobs Within the State of California

The Department determined that these regulations will not have a significant impact on the creation or elimination of jobs within the State of California. The Department has determined that these regulations will not affect job creation or elimination in the private sector because the Department does not require small businesses to participate in the use of a shared gang database in any way, and training for the CalGang database, used to assist in determining baseline costs for these regulations, is typically provided by personnel within the node or user agencies. It is possible that user agencies of a shared gang database created in the future could choose to contract with a private business to conduct the training; however, it is not possible for the Department to anticipate how many user agencies may do so or what the scope of the training would be.

Creation of New Businesses or the Elimination of Existing Businesses Within the State of California

For the reason identified above, the Department determined that these regulations will not create new business or eliminate existing businesses within the State of California.

Expansion of Businesses Currently Doing Business Within the State of California

For the reason identified above, the Department determined that these regulations will not expand existing businesses within the State of California.

The CalGang database, which is regulated by proposed Chapter 7.5, is the only shared gang database in California. These regulations are written to implement performance standards, rather than prescriptive actions. This was done intentionally to allow for flexibility in building the requirements into any future shared gang database, with minimal to no fiscal impact resulting directly from these regulations.

Cost to Any Local Agency or School District

The Department has determined that the proposed regulatory action could result in additional approximate costs to local agencies ranging from \$2,395,100 to \$4,082,600 in the current State Fiscal Year which are reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and sections 17500 et seq. of the Government Code. However, it is difficult to approximate the potential fiscal effect these proposed changes may have, due to the fact that participation would be voluntary and there the CalGang database is currently the only shared gang database in California. It is unknown how many, if any, California law enforcement agencies would choose to participate if a shared gang database other than the CalGang database

was created. As of April 4, 2019, there 187 user agencies participating in the CalGang database. The Department is using this number to estimate potential costs to local agencies that may result if a new shared gang database was created.

Such agencies could incur costs as a result of some of the requirements outlined in these regulations, most of which would be related to staff time. For example, agencies that want to begin participating in the CalGang database would be required to designate a point of contact. This individual would be responsible for facilitating training, retrieving source documents, and updating CalGang records, as necessary. The extent of the staff time that would need to be dedicated to this role would depend on the number of individuals who will require direct access to the CalGang database and the records therein, the level of suspected gang activity in the area, and the level of participation in the database, among other factors. The Department estimates that these activities would occupy no more than 10% of the designated individual's time. Many of the existing users of the CalGang database are employed at the Detective classification, so the Department is using that as the basis for estimating the cost of additional staff hours. According to the California Employment Development Department, the median salary for a Detective in California was approximately \$98,000 annually, or \$47 hourly, in 2018 (Retrieved April 26, 2019, from <https://www.labormarketinfo.edd.ca.gov/OccGuides/Detail.aspx?Soccode=333021&Geography=0604000073>). Assuming the responsibility would be assigned to a Detective, the Department estimates that a new user agency could incur a cost of approximately \$9,800 annually for the performance of the point-of-contact duties. This would result in local agencies incurring a cost of \$1,832,600 annually.

Pursuant to Penal Code section 186.36, any individual with access to the CalGang database or the records contained therein are required to undergo the comprehensive training. The Department estimates that required training hours could range from four to 16, depending on the method of instruction and length of each component instituted by the System Administrator. Based on the number of existing user agencies (187) and active users (3,000) of the CalGang database, the Department estimates that approximate 16 individuals per new user agency would need to participate in training. The Department estimates that local agencies could incur approximate costs ranging from \$562,500 to \$2,250,000 in staff time as a result of attending training.

As noted above, the training is typically provided by node or user agencies; however, the agencies could also choose to work with an outside vendor to provide some specific components of the required training, such as database security or implicit bias. The costs resulting from contracted training would depend on the components being taught, the number of participants, and the length of the class(es), and would vary widely. As such, the Department cannot estimate the potential cost to local agencies.

Pursuant to Penal Code sections 186.34, user agencies are required to notify an individual prior to designating him/her as a gang member or gang associate in a shared gang database. It also authorizes an individual to request information from a law enforcement agency as to whether s/he is designated in a shared gang database, requires the agency receiving the request to respond, except as specified, and outlines a process by which an individual can contest his/her

designation in the database. While the specific information that must be contained in the designation notifications and information request responses are delineated in Sections 753.6, 754, and 754.2 of the regulation, the statute implements the requirements on local agencies. As such, the associated costs are not a result of the regulations. In an effort to alleviate impact to user agencies, the Department has made every attempt to enact performance standards rather than prescribing actions, as often as possible.

Cost or Savings to Any State Agency

These regulations could result in additional costs to State government, specifically the Department, in the amount of \$2,431,000. The Department received an ongoing appropriation and position authority for 11.0 new positions, beginning in the Fiscal Year 2017-2018, in relation to an audit conducted by the California State Audit regarding the CalGang database and Assembly Bill 90 (2017), which requires the CalGang regulations. This appropriation, based on input from the Department, was designed to enable the Department to address the following areas of responsibility:

- Drafting regulations to establish parameters for usage, data governance, etc.
- Providing administrative support to the technical advisory committee.
- Overseeing the review of the approximately 200,000 individual records currently in the system.
- Developing marketing materials such as Information Bulletins to increase both agency usage and knowledge and understanding of regulations.
- Developing, implementing, and maintaining training and audits.
- Conducting system user outreach to discuss enhancements and additional features to better meet agency needs.
- Creating and publishing quarterly and annual reports.
- Ensuring implementation of audit recommendations and legislative mandates.
- Building safeguards to protect against entry of incomplete and unverified records, as well as those for which criteria for entry has not been met.
- Ensuring that individuals are notified prior to being designated in the CalGang system.
- Generating relevant CalGang statistics.
- Facilitating coordination between the California Gang Node Advisory Committee, technical advisory committee, and technical and administrative teams within the Department, as well as all associated meeting.

In developing the regulations, the Department has determined that it will need one Associate Governmental Program Analyst (AGPA) in addition to the resources already appropriated. The AGPA is needed to address the expanded audit and training responsibilities of the Department, as outlined in these regulations. There are currently three positions dedicated to performing the administrative functions outlined above; however, the demand for training has exceeded their capabilities, as has the need to conduct back-end audits of new and existing data within the CalGang database.

These regulations are beneficial to the health and welfare of California's residents because they address accuracy, consistency, transparency, and fairness in the collection, accessing, and

sharing of gang membership or association designations in a shared gang database, including enacting reforms recommended in the State Auditor's 2016 audit of a shared gang database. These regulations will benefit California residents by providing protections against sharing of records with a shared gang database for inappropriate purposes and errant designation in a shared gang database. These regulations will also benefit agencies that opt to participate in a shared gang database by providing greater access to useful criminal prevention and investigative tools by increasing the accuracy of the information contained therein.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS.

1. California State Auditor, *The CalGang Criminal Intelligence System, As the Result of Its Weak Oversight Structure, It Contains Questionable Information That May Violate Individuals' Privacy Rights*, Report 2015-130 (Aug. 2016).
2. Cal. Dept. of Justice, *Gang Membership, Duration, and Desistance: Empirical Literature Review*, Drafted to Support AB90 (CalGang) Work (undated).
3. Cal. Dept. of Justice, *Model Standards and Procedures for Maintaining Criminal Intelligence Files and Criminal Intelligence Operational Activities*, (Nov. 2007).
4. Cal. Dept. of Justice, *Number of Minors Per Age in CalGang*, (Mar. 11, 2019).

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Department finds that these regulations would not have statewide adverse economic impact on businesses because these regulations seek to regulate persons who are not a part of a functioning business.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

No other reasonable alternatives were presented to, or considered by, the Department that would be either more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome.

DUPLICATION OR CONFLICT WITH FEDERAL REGULATIONS

The Department determines that these regulations are not duplicative, nor do they pose a conflict with federal regulations, including Code of Federal Regulations, Title 28, Part 23.