

California Attorney General Opinion No.
17-302

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OFFICE OF THE ATTORNEY GENERAL

State of California

XAVIER BECERRA

Attorney General

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OPINION

:

No. 17-302

:

of

:

July 6, 2017

:

XAVIER BECERRA

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Attorney General

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CATHERINE BIDART
General :

: Deputy Attorney

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THE HONORABLE VICKI L. HENNESSY, Sheriff of the
City and County of San Francisco, has requested
an opinion on the following question:

Penal Code section 4030, subdivision (k), specifies that any person (other than medical staff) who conducts, or is present at, or is within sight of, a strip search, body cavity search, or body scan of specified prearrestment detainees must be the "same sex" as the person searched. Does the term "sex," as used in this provision, refer to the searched person's gender, including the person's gender identity and gender expression?

CONCLUSION

"Sex" as used in Penal Code section 4030, subdivision (k) refers to the searched person's gender, including the person's gender identity and gender expression.

ANALYSIS

Penal Code section 4030^[1] governs strip searches, body cavity searches, and body scans conducted on prearrestment detainees, including specified minors, arrested for an infraction or misdemeanor.^[2] Subdivision (k) of the statute provides that any person (other than medical staff) who conducts, is present at, or is within sight of, the search, must be the "same sex" as the person being searched. We have been asked whether the term "sex," as used in subdivision (k), refers to the gender of the person searched, including the person's gender identity and gender expression. For the reasons that follow, we conclude that it does.

Subdivision (k) states:

- A person conducting or otherwise present or within sight of the inmate during a strip search or visual or physical body cavity search shall be of the same sex as the person being searched, except for physicians or licensed medical personnel.
- A person within sight of the visual display of a body scanner depicting the body during a scan shall be of the same sex as the person being scanned, except for physicians or licensed medical personnel.^[3]

To ascertain the Legislature's intent, we first look to the ordinary meaning of the words of the statute.^[4] Although section 4030 and case law do not define the term, we find that the word "sex" is consistently defined throughout the codes to mean "gender," and "gender" is consistently defined to mean "sex" and includes "gender identity and gender expression."^[5]

The Penal Code itself defines "gender" as "sex," including "gender identity and gender expression;" "gender expression" means "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."⁶ This definition applies throughout the Penal Code "unless an explicit provision of law or the context clearly requires a different meaning."⁷

We find no contrary provision or context here.

In addition, the legislative history of section 4030 strongly supports a conclusion that "sex" means "gender." Section 4030 has been amended twice since its enactment in 1984.⁸ Legislative committee analyses of the first bill that amended the statute reveal an intent^[6] that "sex" means "gender."^[7] The bill language, like the statute, sets forth a samesex search requirement, but the analyses invariably describe it as a "same-gender" search requirement: a person who conducts, is present, or within sight of the search must be the same gender as the person searched.^[8] As the committee analyses consistently interpret the term "sex" to mean "gender," we believe the intent for "sex" to mean "gender" is clear. And again, in the Penal Code, "gender" means "sex" and includes "gender identity and gender expression," unless clearly indicated otherwise.^[9]

⁶ Pen. Code, § 422.57. ⁷ Pen. Code, § 422.57.

⁸ Stats. 2016, ch. 162, § 1 (authorizing use of visual body scanner); Stats. 2015, ch. 464, § 1 (persons present during search include persons within view of search); Stats. 1984, ch. 35, § 2 (enacting Penal Code section 4030).

Accordingly, we conclude that "sex" as used in

Penal Code section 4030, subdivision (k) refers to the searched person's gender, including the person's gender identity and gender expression.

[1] All subsequent undesignated section references are to the Penal Code.

[2] Pen. Code, § 4030, subs. (b), (k).

[3] Pen. Code, § 4030, subd. (k).

[4] *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977; Pen. Code, § 7, subd. (16).

[5] E.g., Civ. Code, §§ 51, subd. (e)(5); Ed. Code, §§ 210.766260.7; Gov. Code, § 12926, subd. (r)(2); Ins. Code, §§ 10140, subd. (h); Pen. Code, § 422.56, subd. (c).

[6] *Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 Cal.App.3d 417, 427 (committee reports presumed to evidence legislative intent).

[7] Neither the legislative history of section 4030 as enacted, nor that of the second bill that amended the statute, shed light on the intended meaning of "sex."

[8] See, e.g., Off. of Sen. Floor Analysis, 3d reading of Assem. Bill 303 (2015–2016 Reg. Sess.), August 31, 2015, p. 5 ("bill maintains the existing practice of permitting strip searches of inmates prior to them entering the general population and simply specifies that all persons within view of the search must also be of the same gender"); Sen. Comm. on Pub. Saf., analysis of Assem. Bill 303 (2015–2016 Reg. Sess.), June 9, 2015, p. 8 (same); Assem. Comm. on Approps., analysis of Assem. Bill 303 (2015–2016 Reg. Sess.), April 29, 2015, p. 2 ("bill mandates that these searches be conducted out of view of all persons not of the same gender as the person being searched"); Assem. Comm. on Pub. Saf., analysis of Assem. Bill 303 (2015–2016 Reg. Sess.), April 21, 2015, pp. 4-5 (describing

bill as “small modification of existing law, which already requires that persons conducting strip searches of persons in police custody must be of the same gender as the person being searched,” and explaining “bill simply specifies that all persons within view of the search must also be of the same gender”).

[9] Pen. Code, §§ 422.56, subd. (c), 422.57.
