

---

# CALIFORNIA PERSONNEL ADMINISTRATORS ASSOCIATION OF CALIFORNIA (CPAAC)

Lodi, California  
March 29, 2019  
Wine & Roses Conference Center

---

Art Hartinger, Partner  
Renne Public Law Group  
[www.publiclawgroup.com](http://www.publiclawgroup.com)  
[www.RPLG.solutions](http://www.RPLG.solutions)

# SB 1421 / AB 748

---

- Underlying Structure of the Public Records Act
- Review the New Provisions
- Identify Issues
- Status of Litigation
- Discussion

# THE CALIFORNIA PUBLIC RECORDS ACT – KEY PROVISIONS

---

- “In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in the state.” (Cal. Gov. Code § 6250.)
- “All people are by nature free and independent, and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, **and privacy.**” (Cal. Const. Art I, § 1.)

# CONSTITUTIONAL RIGHT

---

- “The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the **meetings** of public bodies **and** the **writings** of public officials and agencies **shall be open to public scrutiny.**” (Cal. Const., Art. I, § 3(a).)

# PROCESS

---

- “Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.” (Cal. Gov. Code § 6253(a).)

# PROCESS

---

- “Each agency, upon a request for a copy of records, **shall, within 10 days from receipt of the request**, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and reasons therefor.” (Cal. Gov. Code § 6253(c).)
- The ten day period may be extended by written notice for **no more than 14 days**, in “unusual circumstances.” (*Id.*)

# PROCESS

---

- “When the agency dispatches the determination, and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available.” (Gov. Code § 6253(c).)



# PROCESS

- “Unusual circumstances”:

- The need to search for and collect the requested records from field facilities, or other places separate from the office processing the request.
- The need to search for and collect, and examine, a voluminous amount of separate and distinct records.
- The need for consultation with another agency.
- The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data. (Cal. Gov. Code § 6253 (c)(4).)

# PROCESS

---

- It is permissible to to direct a person requesting records to a web site. (Cal. Gov. Code § 6253(f).)

# ENFORCEMENT

---

- Any person may institute proceedings for injunctive or declarative relief or writ of mandate to enforce the Public Records Act. (Cal. Gov. Code § 6258)
- The requestor is entitled to reasonable attorney's fees should the requestor prevail. (Cal. Gov. Code § 6259(d).)

# RECORDS NOT SUBJECT TO DISCLOSURE (CAL. GOV. CODE § 6254)

- “Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, *if the public interest in withholding those records outweighs the public interest in disclosure.*” (Cal. Gov. Code § 6254(a).)
- “Records pertaining to pending litigation...until the pending litigation or claim has been finally adjudicated or otherwise settled.” (*Id.* § 6254 (b).)
- “Personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.” (*Id.* § 6254(c).)

# PEACE OFFICER RECORDS – THE WAY IT WAS...

---

- Peace officer or custodial officer records, and information obtained from those records, were not disclosable except by discovery pursuant to the Evidence Code (Pitchess Motions). (Cal. Penal Code § 832.7)
- *Copley Press, Inc. v. Superior Court*, 39 Cal. 4<sup>th</sup> 1272 (2006) (upholding confidentiality of peace officer personnel records, including civil service disciplinary records and the identity of officers subject to complaints).
- But See *Long Beach Police Officers Association v. City of Long Beach*, 59 Cal. 4<sup>th</sup> 59 (2014) (names of officers involved in shooting incidents over five year period is disclosable).

# SB 1421 (SIGNED BY THE GOVERNOR SEP. 30, 2018) – EFFECTIVE JANUARY 1, 2019

---

## ■ FINDINGS:

–“Our society depends on peace officers’ faithful exercise of [peace officer powers]. Misuse of that authority can lead to grave constitutional violations, harms to liberty and the inherent sanctity of human life, as well as significant public unrest.”

# SB 1421 - FINDING

---

- “The public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force.” (§ 1 (b).)

# LITIGATION

- Issue: Does the requirement to disclose records that were previously confidential apply to records created prior to the effective of the law – January 1, 2019?
- Cases brought in various counties, including Contra Costa County; Los Angeles County; Kern County; San Bernardino County; Riverside County; Ventura County.
- TROs issued in some cases; Ventura County Court issued a preliminary injunction pending review. Supreme Court has denied direct petitions for writs.



# LITIGATION

---

- In the Contra Costa litigation, the First District Court of Appeal summarily denied the request for a stay. The court ruled on the merits in a short order filed on March 12, 2019.

# AMENDMENTS TO SECTION 832.7 OF THE PENAL CODE

---

- Makes previously confidential records subject to disclosures under the Public Records Act.

# RECORDS SUBJECT TO DISCLOSURE

---

- A record relating to the report, investigation, or findings of any of the following:
  - An incident involving the: discharge of a firearm ...at a person ...by a peace officer or custodial officer.
  - An incident in which the use of force by a peace officer or a custodial officer against a person resulted in **death**, or in **great bodily injury**.

# ISSUE: WHAT CONSTITUTES “GREAT BODILY INJURY?”

---

- Different Penal Code Definitions:
  - Severe concussion
  - Prolonged loss of consciousness
  - Loss of member or organ
  - Protracted impairment of body member or organ
  - Broken bone?
  - Severe disfigurement
  - Laceration requiring at least three sutures
  - Severe physical pain inflicted by impact weapon

# RECORDS SUBJECT TO DISCLOSURE

---

- Any record relating to an incident in which a **sustained finding** was made by **any law enforcement agency** or **oversight agency** that a peace officer or custodial officer **engaged in sexual assault involving a member of the public.**

# DEFINITION OF “SEXUAL ASSAULT”

---

- “The commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, officer of leniency or other official favor, or under the color of authority.”
- Propositioning for or commission of any sexual act while on duty is considered a sexual assault.

# RECORDS SUBJECT TO DISCLOSURE

---

- “Any record relating to an incident in which a sustained finding was made by a law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer....”
- Includes “any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.”

# ISSUE REGARDING DISHONESTY

---

- When a police officer is dishonest when interviewed about his / her own alleged misconduct, and there is a sustained finding of dishonesty, is that subject to disclosure?



# WHAT RECORDS ARE TO BE RELEASED?

---

- Investigative reports
- Photographic, audio, and video evidence
- Transcripts or recordings of interviews
- Autopsy reports
- Materials presented to the DA or other body charged with determining whether conduct was lawful and/or consistent with policy, or what discipline to impose or corrective action to take.
- Copies of disciplinary records relating to the incident, including letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other corrective action.

# ISSUES

---

- If an officer is being disciplined for a sustained finding of dishonesty, are the records disclosable if the officer invokes a right to appeal, and the appeal process has not yet been exhausted?

# INCIDENTS INVOLVING MULTIPLE OFFICERS

---

- Allegations about an officer shall not be released unless there is a sustained finding against that officer.
- However, **factual information about that action of an officer** during an incident, or **the statements of an officer** about an incident, shall be released if they are relevant to a sustained finding against another officer that is subject to release.

# REDACTIONS ONLY FOR THE “FOLLOWING PURPOSES”

---

- To remove personal data or information, such as home address, telephone number, or identifies of family members.
- To preserve the anonymity of complainants and witnesses.
- To protect confidential medical, financial, or other information of which disclosure is prohibited by federal law or would cause an unwarranted invasion of personal privacy that outweighs the strong public interest of the public in disclosure.
- Where there is a specific, articulable, and particularized reason to believe that disclosure would pose a danger to the officer or another person.

# REDACTIONS

---

- OK if based on the facts of a particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information.

# OK TO WITHHOLD USE OF FORCE RECORDS...

- A record of an incident that is subject to an active criminal or administrative investigation:
  - During an active criminal investigation, disclosure may be delayed for up to 60 days from the date of use of force or until the DA determines whether to file criminal charges, whichever is sooner.
  - After 60 days, the agency may continue to delay the disclosure if reasonable basis to believe would interfere with a criminal enforcement proceeding against an officer who used force. Must issue written descriptions of the bases why disclosure would interfere with a criminal enforcement proceeding at 180 day intervals.
  - Disclosure is mandatory when the basis for withhold is resolved, when the proceeding is no longer active, or by no later than 18 months after the incident...unless under “extraordinary circumstances”.

# OK TO WITHHOLD

---

- Civilian complaints, and related investigative materials, if the complaint is frivolous.

# OK TO RELEASE

---

- Factual information concerning a disciplinary investigation if the officer who is the subject of the investigation publicly makes a statement he or she knows to be false concerning the investigation or the imposition of disciplinary action.
- The false statement must have been published by an established medium of communication, such as TV, radio or newspaper.



# ISSUE: NOTICE TO EMPLOYEE

---

- Agency should consider providing notice to the affected employee and union in order to give the employee an opportunity to object.

---

# **AB 748 – LAW ENFORCEMENT OFFICERS – VIDEO AND AUDIO RECORDINGS**

# APPLIES

---

- Effective July 1, 2019
- Video or Audio Recordings
- Relates to “Critical Incidents”

# CRITICAL INCIDENTS

---

- An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.
- An incident in which the use of force by a peace officer or custodial officer against a person resulted in death or in great bodily injury.

# AB 748 PERMITS DELAY OF DISCLOSURE

---

- If disclosure would substantially interfere with the investigation.
- No longer than 45 day delay after the date the agency knew or reasonably should have known about the incident.
- Must provide in writing to the requestor the specific basis for the determination that disclosure would substantially interfere with the investigation, and the estimated date for disclosure.
- Longer delay with certain restrictions permitted, with reassessments every thirty days.

# AB 748 – PERMITTED REDACTIONS

---

- Where the release would violate the reasonable expectation of privacy of a subject depicted in the recording.
- May use redaction technology to obscure specific portions of the recording.
- The redaction may not interfere with the viewer's ability to fully, completely and accurately comprehend the events captured.
- No other portions may be edited.
- The agency must provide in writing to the requestor the specific basis for the expectation of privacy and the public interest served by withholding the recording.

# AB 748 – IF REDACTION WON'T CURE THE PRIVACY ISSUE...

---

- The agency must still provide the recording to the person who is the subject of the recording whose privacy is to be protected, or his or her authorized representative.
- If the subject is a minor, to the parent or legal guardian of the subject whose privacy is to be protected.
- If the subject whose privacy is to be protected is deceased, to an heir, beneficiary, designated immediate family or authorized legal representative.

# AB 748 DELAY IN DISCLOSURE PERMITTED

---

- If substantial interference with the investigation, there are delays permitted, subject to extensions.



# NOTE...SB 748

---

- “An agency may provide greater public access to video or audio recordings than the minimum standards set forth in this paragraph.”

# CONCLUSION / QUESTIONS

---

THANK YOU!