SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2017 - 2018 Regular

Bill No:	AB 2327	**Hearing Date:**	May 15, 2018
Author:	Quirk		
Version:	February 13, 2018		
Urgency:	No	**Fiscal:**	Yes
Consultant:	GC		

Subject: ***Peace Officers: Misconduct: Employment***

HISTORY

Source: Author

Prior Legislation: AB 1428 (Low), 2017, held on Senate Appropriations Suspense
AB 953 (Weber), Ch.466, Stats. 2015
AB 619 (Weber), 2015 held on Assm. Appropriations Suspense
SB 1286 (Leno), 2016, held Sen. Appropriations Suspense
AB 71 (Rodriguez), Ch. 462, Stats. 2015
SB 1019 (Romero), 2008, failed passage in Assembly Pub. Safety
AB 1648 (Leno), 2007, failed passage in Assembly Pub. Safety

Support: California Immigrant Policy Center; California Public Defender's Association

Opposition: None known

Assembly Floor Vote: 68 - 0

PURPOSE

The purpose of this bill is to require peace officers seeking employment with a law enforcement agency to give written permission for the hiring law enforcement agency to view his or her general personnel file and any separate disciplinary file. Requires each law enforcement agency to make a record of any investigations of misconduct involving a peace officer in his or her general personnel file or a separate file designated by the department or agency.

Existing law requires peace officers to meet all of the following minimum standards (Gov. Code, § 1031):

- Be a citizen of the United States or a permanent resident alien who is eligible for and has applied for citizenship, except as specified;
- Be at least 18 years of age;
- Be fingerprinted for purposes of search of local, state, and national fingerprint files to disclose a criminal record;
- Be of good moral character, as determined by a thorough background investigation;

- Be a high school graduate, pass the General Education Development Test or other high school equivalency test approved by the State Department of Education that indicates high school graduation level, pass the California High School Proficiency Examination, or have attained a two-year, four-year, or advanced degree from an accredited college or university; and
- Be found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer.

    - Physical condition shall be evaluated by a licensed physician and surgeon;
    - Emotional and mental condition shall be evaluated by either of the following:

        - A physician and surgeon who holds a valid California license to practice medicine, has successfully completed a postgraduate medical residency education program in psychiatry, and has a specified amount of experience; or
        - A psychologist licensed by the California Board of Psychology with a specified amount of experience.

States that the physician and surgeon or psychologist shall also have met any applicable education and training procedures set forth by the California Commission on Peace Officer Standards and Training designed for the conduct of pre-employment psychological screening of peace officers. (Gov. Code, § 1031)

Existing law specifies that the peace officer requirements do not preclude the adoption of additional or higher standards, including age. (Gov. Code, § 1031, subd. (g).)

Existing law states that for purposes of performing a thorough background investigation for applicants not currently employed as a peace officer, an employer shall disclose employment information relating to a current or former employee, upon request of a law enforcement agency, if all of the following conditions are met (Gov. Code, § 1031.1.):

- The request is made in writing;
- The request is accompanied by a notarized authorization by the applicant releasing the employer of liability; and
- The request and the authorization are presented to the employer by a sworn officer or other authorized representative of the employing law enforcement agency.

Existing law requires every peace officer candidate be the subject of employment history checks through contacts with all past and current employers over a period of at least ten years, as listed on the candidate's personal history statement. (Code of Regulations, Title 11, § 1953, subd. (e)(6).)

Existing law requires proof of the employment history check be documented by a written account of the information provided and source of that information for each place of employment contacted. All information requests shall be documented. (Code of Regulations, Title 11, § 1953, subd. (e)(6).)

Existing law states that if a peace officer candidate was initially investigated in accordance with all current requirements and the results are available for review, a background investigation update, as opposed to a complete new background investigation, may be conducted for either of the following circumstances: (Code of Regulations, Title 11, § 1953, subd. (f)(a).)

- The peace officer candidate is being reappointed to the same POST-participating department. Per regulations, a background investigation update on a peace officer who is reappointed within 180 days of voluntary separation is at the discretion of the hiring authority; or
- The peace officer candidate is transferring, without a separation, to a different department; however, the new department is within the same city, county, state, or district that maintains a centralized personnel and background investigation support division.

Existing law requires each department or agency in this state that employs peace officers to establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies, and shall make a written description of the procedure available to the public. (Pen. Code, § 832.5, subd. (a)(1).)

Existing law requires complaints and any reports or findings relating to these complaints be retained for a period of at least five years. (Pen. Code, § 832.5, subd. (b).)

Existing law specifies prior to any official determination regarding promotion, transfer, or disciplinary action by an officer's employing department or agency, the complaints, as specified, shall be removed from the officer's general personnel file and placed in separate file designated by the department or agency, in accordance with all applicable requirements of law. (Pen. Code, § 832.5, subd. (b).)

Existing law states that each law enforcement agency shall annually furnish to the Department of Justice, a report of all instances when a peace officer employed by that agency is involved in any of the following: (Government Code, § 12525.2, subd. (a).)

- An incident involving the shooting of a civilian by a peace officer;
- An incident involving the shooting of a peace officer by a civilian;
- An incident in which the use of force by a peace officer against a civilian results in serious bodily injury or death; and
- An incident in which use of force by a civilian against a peace officer results in serious bodily injury or death.

Existing law specifies that each year, the Department of Justice (DOJ) shall include a summary of information contained in the use of force reports received through the department's OpenJustice Web portal. (Government Code, § 12525.2, subd. (c).)

Existing law includes within Department of Justice's annual reporting requirements the number of citizens' complaints received by law enforcement agencies which shall indicate the total number of these complaints, the number alleging criminal conduct of either a felony or misdemeanor, and the number sustained in each category. (Pen. Code, § 13012, subd. (e).)

This bill requires peace officers seeking employment with a law enforcement agency to give written permission for the hiring law enforcement agency to view his or her general personnel file and any separate disciplinary file.

This bill requires each law enforcement agency to make a record of any investigations of misconduct involving a peace officer in his or her general personnel file or a separate file designated by the department or agency.

COMMENTS

1. Need for This Bill

According to the author:

> Existing law requires law enforcement agencies to establish a procedure for investigating complaints against a peace officer. However, those investigations do not always make it into the officer's personnel or conduct file. In some cases, even if an investigation does make it in, the employing agency may not appropriately review the file to ensure the officer is still qualified. This is because statute is silent on what the process is for reviewing the personnel records of current peace officers.
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> A recent *Los Angeles Times* article highlighted cases where the Los Angeles Sheriff's Department hired dozens of officers even though their personnel records revealed wrongdoing, incompetence or poor performance. According to the article, several individuals involved in the hiring did not review personnel records. This could be attributed to statute being silent on what the requirement is for reviewing records.
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> Any law enforcement agency considering a lateral transfer candidate from another department needs full prior employment disclosure.
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> This lack of statutory direction can cause rifts in the relationships between law enforcement and the communities they are sworn to protect.
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> AB 2327 requires a law enforcement agency to maintain a record regarding the reason for, and the circumstances surrounding, a peace officer's departure of service. Further, this bill clarifies the process a peace officer and the hiring law enforcement agency must follow to be granted permission for the hiring agency to view their personnel file prior to employment. This ensures that a peace officer's work history is properly recorded and accessible to a new agency for hiring consideration.

2. Peace Officer Background Checks

Government Code section 1031 establishes the minimum standards needed to qualify as a peace officer. One of the requirements is that the individual be of good moral character, as determined by a thorough background investigation. (Gov. Code, § 1031, subd. (d).). That statute does not provide a further description of the requirements of that background check generally, nor does it specify what type of background check is required for an individual that is currently a peace officer and is applying for a job as a peace officer with a new law enforcement agency.

The California Code of Regulations, Title 11, § 1953 provides further specifications on the required background investigation for peace officers. Section 1953 mandates that every peace officer candidate shall be the subject of employment history checks through contacts with all past and current employers over a period of at least ten years, as listed on the candidate's personal history statement and requires that proof of the employment history check shall be documented by a written account of the information provided and source of that information for each place of employment contacted.

That section does allow for a background information update, as opposed to a complete new background investigation under limited circumstances for individuals that have already completed a peace officer background investigation. Section 1953 does not specify whether a current peace officer undergoing a new background check, or an updated background check must give the hiring agency access to personnel files for any law enforcement agency at which the officer has previously worked. Section 1953 does not specify whether an applicant must authorize the hiring agency access to personnel records that would otherwise be confidential under law.

While the behavior is not codified in law, it seems that it is common practice for hiring law enforcement agencies to require prospective applicants to sign authorizations for the hiring agency to access records from previous employers. It seems that the authorizations typically include permission to access an applicant's disciplinary records if that applicant had previously been employed as a peace officer with another agency.

Given the liability risk of hiring an officer with a disciplinary record as a peace officer, one would expect that hiring agencies would be vigilant in checking on an applicant's employment background, particularly if that employment was with another law enforcement agency. Hiring law enforcement agencies have a strong incentive to require peace officer applicants to sign authorizations giving the hiring agency access to law enforcement personnel records that would ordinarily be confidential. To the extent an applicant who was a peace officer at another agency does not give authorization for the hiring agency to check his or her disciplinary record at the previous agency, such a refusal would set off alarm bells for the hiring agency.

3. POST Guidelines on Peace Officer Background Investigations

The Commission on Peace Officer Standards and Training (POST) publishes a manual that contains guidelines for the investigator conducting the background check on peace officers. That publication is the POST Background Investigation Manual: Guidelines for the Investigator and can be found at http://lib.post.ca.gov/Publications/bi.pdf

The Background Investigation Manual identifies two goals of the pre-employment background investigation:

1) Assuring compliance with all applicable minimum standards for appointment; and
2) Screening out candidates who, based on their past history or other relevant information, are found unsuitable for the positions in question.

In its introductory material, the Background Investigation Manual emphasizes that the manner in which a background investigation is conducted can make the difference between hiring an individual who will truly protect and serve versus someone who may cause harm to oneself, the

agency, and society. The Manual stresses that the peace officer background investigation must be comprehensive if it is to lead to informed hiring decisions. Past misconduct and other signs of unsuitability must be uncovered so that dangerous or otherwise unfit candidates are screened out. (http://lib.post.ca.gov/Publications/bi.pdf)

The Code of Regulations requires an investigation of a peace officer candidate's employment history for a minimum of the past 10 years (Code of Regulations, Title 11, § 1953, subd. (e)(6).); however, the peace officer Personal History Statement requires candidates to document their entire employment history.

The POST Background Guidelines suggest that employment information inquiries include the following:

- Disciplinary actions;
- Being fired, released from probation, or asked to resign;
- Workplace violence;
- Resignation in lieu of termination;
- Subject of written complaints or counseling for poor performance;
- Subject of discrimination accusations;
- Attendance problems;
- Unsatisfactory performance reviews;
- Misuse of confidential information ;
- Misuse of sick leave;
- Poor performance as a result of drug/alcohol consumption; and
- History and status of applications to other law enforcement agencies

The POST Background Guidelines Manual includes a suggested authorization form for employment background investigations of Peace Officers. The suggested form includes authorization for the hiring agency to access information that would be part of an officer's confidential personnel file, if the officer had previously worked at another law enforcement agency. It is not clear if all hiring law enforcement agencies include permission to access otherwise confidential law enforcement personnel records in their authorization form. As discussed above, the general hiring behavior of law enforcement agencies tend to suggest that such permission is common place, even though it is not statutorily required.

4. Overview of California Law Related to Police Personnel Records

In 1974, in *Pitchess v. Superior Court* (1974) 11 Cal. 3d 531 the California Supreme Court allowed a criminal defendant access to certain kinds of information in citizen complaints against law enforcement officers. After *Pitchess* was decided, several law enforcement agencies launched record-destroying campaigns. As a result, the California legislature required law enforcement agencies to maintain such records for five years. In a natural response, law enforcement agencies began pushing for confidentiality measures, which are currently still in effect.

Prior to 2006, California Penal Code Section 832.7 prevented public access to citizen complaints held by a police officer's "employing agency." In practical terms, citizen complaints against a law enforcement officer that were held by that officer's employing law enforcement agency were confidential; however, certain specific records still remained open to the public, including both

(1) administrative appeals to outside bodies, such as a civil service commission, and (2) in jurisdictions with independent civilian review boards, hearings on those complaints, which were considered separate and apart from police department hearings.

Before 2006, as a result of those specific and limited exemptions, law enforcement oversight agencies, including the San Francisco Police Commission, Oakland Citizen Police Review Board, Los Angeles Police Commission, and Los Angeles Sheriff's Office of Independent Review provided communities with some degree of transparency after officer-involved shootings and law enforcement scandals, including the Rampart investigation.

On August 29, 2006, the California Supreme Court re-interpreted California Penal Code Section 832.7 to hold that the record of a police officer's administrative disciplinary appeal from a sustained finding of misconduct was confidential and could not be disclosed to the public. The court held that San Diego Civil Service Commission records on administrative appeals by police officers were confidential because the Civil Service Commission performed a function similar to the police department disciplinary process and therefore functioned as the employing agency. As a result, the decision now (1) prevents the public from learning the extent to which police officers have been disciplined as a result of misconduct, and (2) closes to the public all independent oversight investigations, hearings and reports.

After 2006, California has become one of the most secretive states in the nation in terms of openness when it comes to officer misconduct and uses of force. Moreover, interpretation of our statutes have carved out a unique confidentiality exception for law enforcement that does not exist for public employees, doctors and lawyers, whose records on misconduct and resulting discipline are public records.

5. Secrecy of Police Personnel Records Under Current California Law

The California Public Records Act, provides generally that "every person has a right to inspect any public record," except as specified in that act. As described above, there is another set of statutes that make peace officer personnel records confidential and establish a procedure for obtaining these records, or information from them. The complex interaction between these interrelated statutory schemes has given rise to a number of decisions interpreting various specific provisions.

In August of 2006, the California Supreme Court held in that the right of access to public records under the California Public Records Act did *not* allow the San Diego Union Tribune to be given access to the hearing or records of an administrative appeal of a disciplinary action taken against a San Diego deputy sheriff. (*Copley Press, Inc.* v. *Superior Court*, 39 Cal. 4th 1272 (2006).) The decision by the court, provided that a public administrative body responsible for hearing a peace officer's appeal of a disciplinary matter is an "employing agency" relative to that officer, and therefore exempt from disclosing certain records of its proceedings in the matter under the California Public Records Act. (*Id.*)

> In January 2003, the San Diego Union-Tribune newspaper learned that the Commission had scheduled a closed hearing in case No. 2003-0003, in which a deputy sheriff of San Diego County (sometimes hereafter referred to as County) was appealing from a termination notice. The newspaper requested access to the hearing, but the Commission denied the request. After the appeal's completion, the newspaper filed several CPRA

> requests with the Commission asking for disclosure of any documents filed with, submitted to, or created by the Commission concerning the appeal (including its findings or decision) and any tape recordings of the hearing. The Commission withheld most of its records, including the deputy's name, asserting disclosure exemptions under Government Code section 6254, subdivisions (c) and (k). (*Id.* at 1279.)

The newspaper then filed a petition for a writ of mandate and complaint for declaratory and injunctive relief. The trial court denied the publisher's disclosure request under the California Public Records Act. The Fourth District Court of Appeal reversed. The California Supreme Court then reversed and remanded the matter to the Court of Appeal.

In reversing and remanding the matter, the California Supreme Court held that "Section 832.7 is not limited to criminal and civil proceedings." (*Id.* at 1284.)

> Petitioner's first argument—that section 832.7, subdivision (a), applies only to criminal and civil proceedings—is premised on the phrase in the statute providing that the specified information is "confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." In *Bradshaw v. City of Los Angeles* (1990) 221 Cal. App. 3d 908, 916 [270 Cal. Rptr. 711] (Bradshaw), the court opined that the word "confidential" in this phrase "is in its context susceptible to two reasonable interpretations." On the one hand, because the word "is followed by the word 'and,' " it could signify "a separate, independent concept [that] makes the [specified] records privileged material." (*Ibid*.) "On the other hand," the word could also be viewed as merely "descriptive and prefatory to the specific legislative dictate [that immediately] follows," in which case it could mean that the specified records "are confidential only in" the context of a "'criminal or civil proceeding.'" (*Ibid.*) The Bradshaw court adopted the latter interpretation, concluding that the statute affords confidentiality only in criminal and civil proceedings, and not in "an administrative hearing" involving disciplinary action against a police officer. (*Id. at p. 921*.)
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> We reject the petitioner's argument because, like every appellate court to address the issue in a subsequently published opinion, we disagree with Bradshaw's conclusion that section 832.7 applies only in criminal and civil proceedings. When faced with a question of statutory interpretation, we look first to the language of the statute. (*People v. Murphy* (2001) 25 Cal.4th 136, 142 [105 Cal. Rptr. 2d 387, 19 P.3d 1129].) In interpreting that language, we strive to give effect and significance to every word and phrase. (*Garcia v.* [1285] *McCutchen* (1997) 16 Cal.4th 469, 476 [66 Cal. Rptr. 2d 319, 940 P.2d 906].) If, in passing section 832.7, the Legislature had intended "only to define procedures for disclosure in criminal and civil proceedings, it could have done so by stating that the records 'shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code … ,' without also designating the information 'confidential.' (Pen. Code, § 832.7, subd. (a).)" (*Richmond*, supra, 32 Cal.App.4th at p. 1439; see also SDPOA, supra, 104 Cal.App.4th at p. 284.) Thus, by interpreting the word "confidential" (§ 832.7, subd. (a)) as "establish[ing] a general condition of confidentiality" (*Hemet*, supra, 37 Cal.App.4th at p. 1427), and interpreting the phrase "shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code" (Pen. Code, § 832.7, subd. (a)) as "creat[ing] a limited exception to the general principle of confidentiality," we

> "give[] meaning to both clauses" of the provision in question. (*Hemet*, supra, 37 Cal.App.4th at p. 1427.)

The Court goes on to state:

> . . .Bradshaw's narrow interpretation of section 832.7 would largely defeat the Legislature's purpose in enacting the provision. "[T]here is little point in protecting information from disclosure in connection with criminal and civil proceedings if the same information can be obtained routinely under CPRA." (*Richmond, supra*, 32 Cal.App.4th at p. 1440.) Thus, "it would be unreasonable to assume the Legislature intended to put strict limits on the discovery of police personnel records in the context of civil and criminal discovery, and then to broadly permit any member of the public to easily obtain those records" through the CPRA. (*SDPOA, supra*, 104 Cal.App.4th at p. 284.) "Section 832.7's protection would be wholly illusory unless [we read] that statute … to establish confidentiality status for [the specified] records" beyond criminal and civil proceedings. (SDPOA, supra, at p. 284.) We cannot conclude the Legislature intended to enable third parties, by invoking the CPRA, so easily to circumvent the privacy protection granted under section 832.7. We therefore reject the petitioner's argument that section 832.7 does not apply beyond criminal and civil proceedings, and we disapprove *Bradshaw v. City of Los Angeles, supr*a, 221 Cal. App. 3d 908, to the extent it is inconsistent with this conclusion. (*Id.*, *supra*, at 1284-86 (footnotes omitted).)

The court additionally held that the "Commission records of disciplinary appeals, including the officer's name, are protected under section 832.7." (*Id.* at 1286.)

> [I]t is unlikely the Legislature, which went to great effort to ensure that records of such matters would be confidential and subject to disclosure under very limited circumstances, intended that such protection would be lost as an inadvertent or incidental consequence of a local agency's decision, for reasons unrelated to public disclosure, to designate someone outside the agency to hear such matters. Nor is it likely the Legislature intended to make loss of confidentiality a factor that influences this decision. (*Id.* at 1295.)

The Court repeated continuously throughout the opinion that weighing the matter of whether and when such records should be subject to disclosure is a policy matter for the Legislature, not the Courts, to decide:

> Petitioner's appeal to policy considerations is unpersuasive. The petitioner insists that "public scrutiny of disciplined officers is vital to prevent the arbitrary exercise of official power by those who oversee law enforcement and to foster public confidence in the system, especially given the widespread concern about America's serious police misconduct problems. There are, of course, competing policy considerations that may favor confidentiality, such as protecting complainants and witnesses against recrimination or retaliation, protecting peace officers from publication of frivolous or unwarranted charges, and maintaining confidence in law enforcement agencies by avoiding premature disclosure of groundless claims of police misconduct. "… the Legislature, though presented

> with arguments similar to the petitioner's, made the policy decision "that the desirability of confidentiality in police personnel matters does outweigh the public interest in openness." ... ***[I]t is for the Legislature to weigh the competing policy considerations.*** As one Court of Appeal has explained in rejecting a similar policy argument: "[O]ur decision ... cannot be based on such generalized public policy notions. As a judicial body, ... our role [is] to interpret the laws as they are written." (*Id.*, *supra*, 1298-1299, citations omitted, emphasis added.)

6. Final Report of the President's Task Force on 21st Century Policing (2015)

The Task Force was Co-Chaired by Charles Ramsey, Commissioner, Philadelphia Police Department and Laurie Robinson, Professor, George Mason University. The nine members of the task force included individuals from law enforcement and civil rights communities. The stated goal of the task force was **"**. . . to strengthen community policing and trust among law enforcement officers and the communities they served, especially in light of recent events around the county that have underscored the need for and importance of lasting collaborative relationships between local police and the public." (Final Report of the President's Task Force on 21st Century Policing (2015), p. v.) Based on based on their investigation, the Task Force provided thoughts and recommendations for law enforcement to foster a culture of transparency.

> **Recommendation 2.15:** The U.S. Department of Justice, through the Office of Community Oriented Policing Services, should partner with the International Association of Directors of Law Enforcement Standards and Training (IADLEST) to expand its National Decertification Index to serve as the National Register of Decertified Officers with the goal of covering all agencies within the United States and its territories.

The National Decertification Index is an aggregation of information that allows hiring agencies to identify officers who have had their license or certification revoked for misconduct. It was designed as an answer to the problem "wherein a police officer is discharged for improper conduct and loses his/her certification in that state . . . [only to relocate] to another state and hire on with another police department." (Final Report of the President's Task Force on 21st Century Policing (2015), p. 29-30.)

This bill is consistent with recommendations of the Report, in that it seeks to ensure that prior misconduct of an officer is available for review by a law enforcement hiring agency.

7. Argument in Support

According to the *California Public Defender's Association:*

> In October 2017, in 'Convicted, But Still Policing," the Minnesota Star Tribune reported that over the past two decades, hundreds of Minnesota law enforcement officers had been convicted of criminal offenses yet were never disciplined. See www.startribune.com/minnesota-police-officers-convicted-of serious-crimes-still-on-the-job/437687453. The report showed that officers were not being held accountable for reckless, sometimes violent, misconduct. One of the problems identified in the report was that police officers who committed serious misconduct

would sometimes change police departments to avoid discipline, yet the hiring police agencies would never know about the officer's prior history of misconduct.

This legislation will go a long way towards (1) improving policing in the State of California, (2) closing loopholes when a peace officer changes employment agencies and (3) creating uniformity between police agencies in learning about and handling police officer employment misconduct.

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