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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

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**Bill No:** AB 748                      **Hearing Date:** July 11, 2017  
**Author:** Ting  
**Version:** July 5, 2017  
**Urgency:** No                              **Fiscal:** Yes  
**Consultant:** GC

**Subject:** *Peace Officers: Body-Worn Cameras*

### HISTORY

**Source:** California Newspaper Publishers Association

**Prior Legislation:** AB 2533 (Santiago), 2016, failed passage in this committee  
AB 1957 (Quirk) 2016, failed passage on the Assembly Floor  
AB 1940 (Cooper), 2016, failed passage in this committee  
AB 66 (Weber), 2015, failed passage in Assembly Appropriations

**Support:** American Civil Liberties Union; California Attorneys for Criminal Justice;  
California Civil Liberties Advocacy; California Public Defenders Association

**Opposition:** Association for Los Angeles Deputy Sheriffs; Association of Deputy District Attorneys; California Association of Code Enforcement Officers; California Association of Highway Patrolmen; California College and University Police Chiefs Association; California Correctional Supervisors Organization; California Narcotic Officers Association; California State Sheriffs' Association; Los Angeles County Probation Officers Union AFSCME Local 685; Los Angeles District Attorney's Office; Los Angeles Professional Peace Officers Association; Los Angeles Police Protective League; Peace officers Research Association of California

**Assembly Floor Vote:** 77 - 0

### PURPOSE

*The purpose of this bill is to establish a standard for the release of body-worn camera footage captured by law enforcement agencies by balancing privacy interests and the public's interest in the footage.*

*Existing law*, under the California Constitution, declares the people's right to transparency in government. ("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, Sec. 3.)

*Existing law* provides individuals an express right to privacy specifically designed to "prevent government ... from collecting and stockpiling unnecessary information about us and misusing

information gathered for one purpose in order to serve another purpose.” (Cal. Const., art. I, Sec. 1; *White v. Davis* (1975) 13 Cal.3d 757, 774.)

*Existing law*, under the California Public Records Act (CPRA), governs the disclosure of information collected and maintained by public agencies. (Gov. Code Sec. 6250 et seq.) Generally, all public records are accessible to the public upon request, unless the record requested is exempt from public disclosure. (Gov. Code Sec. 6254.) There are 30 general categories of documents or information that are exempt from disclosure, essentially due to the character of the information, and unless it is shown that the public’s interest in disclosure outweighs the public’s interest in non-disclosure of the information, the exempt information may be withheld by the public agency with custody of the information. (Gov. Code Sec. 6254 et seq.)

*Existing law* provides that if a state or local agency discloses a public record, that is otherwise exempt, to a member of the public, the disclosure constitutes a waiver of the exemptions as specified. (Gov. Code Sec. 6254.5.)

*Existing law* provides that 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 specified. 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. (Gov. Code Sec. 6253(a).)

*Existing law* provides that any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records, and authorizes an award of court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation, and those costs and fees are required to be paid by the public agency, as specified. (Gov. Code Secs. 6258, 6259(d).) The test for determining whether a record may be withheld from public access is whether the public’s interest in disclosure is outweighed by the public’s interest in withholding disclosure of the record. (Gov. Code Sec. 6255.)

*Existing law*, under the California Constitution, requires that a statute that limits the right of access to information concerning the conduct of the people’s business be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest. (Cal. Const., art. 1, Sec. 3(b)(2).)

*This bill* specifies that a video or audio recording that relates to a matter of public concern may be withheld if the agency demonstrates that, on the facts of a particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure.

*This bill* specifies a balancing test for measuring the public interests in disclosure of a video or audio recording by considering the following:

- 1) The constitutional right of the people to access information concerning the conduct of law enforcement officers and agencies.
- 2) Whether a subject shown in the recording has a reasonable expectation of privacy, based on the facts and circumstances depicted in the recording.

*This bill* states that if the agency determines that release of the recording would violate the reasonable expectation of privacy of the subject shown in the recording, the agency shall articulate that interest, and may use redaction technology to obscure those portions of the recording that protect that interest, provided the redaction does not interfere with the viewer's ability to comprehend the events captured on the video footage.

*This bill* specifies that unless the agency demonstrates the public interest in nondisclosure clearly outweighs the public interest in disclosure, a video or audio recording shall be released if it relates to a matter of public concern.

*This bill* defines "public concern" for the purpose of this section as an incident involving a law enforcement officer's use of force, or an incident which the applicant for release of the video or audio reasonably believes involves a violation of law or public policy.

*This bill* requires that an agency shall release any video or audio recording promptly unless there is an articulable factual basis why disclosure would substantially impede an active investigation. Further specifies that an agency may not withhold recordings under this section for a period of time exceeding 90 days.

*This bill* provides, that upon request, a recording shall be disclosed to any subject of the recording, or specified relatives.

*This bill* specifies that any agency may provide greater public access to a video or audio recording than the minimum standards set forth in this bill.

*This bill* provides for specified limitations on third-party access to the audio and video recordings. These limitations include:

- 1) Prohibits disclosure to a third-party contractor except for the purpose of the contractor performing data storage for the agency.
- 2) Specifies that a third-party contractor shall only store data, and shall not otherwise access, use, analyze, modify, or disclose recordings.
- 3) Requires that third-party contractors retain exclusive ownership and control of all recordings.
- 4) Prohibits an agency from selling a recording for any purpose.
- 5) Specifies that an agency shall not process a recording using any biometric scanning program or application, including, but not limited to, facial recognition software.

## COMMENTS

### 1. Need for This Bill

According to the author:

Current law does not require law enforcement agencies to have a policy on how it does or does not release recordings made by body cameras. As a result, the public may not know how or if such recordings may be requested, which adds confusion and controversy to already sensitive situations, like the days following an incident of violence involving law enforcement.

## 2. California Public Records Act (CPRA)

The Public Records Act generally governs requests for the release of information in the hands of public agencies. It is designed to give the public access to information in possession of public agencies: "public records are open to inspection at all times during the office hours of the...agency and every person has a right to inspect any public record, except as . . . provided, [and to receive] an exact copy" of an identifiable record unless impracticable. (Gov. Code, § 6253.) There are a number of exceptions to disclosure, but to ensure maximum access, they are read narrowly. The agency always bears the burden of justifying nondisclosure, and "any reasonably segregable portion . . . shall be available for inspection...after deletion of the portions which are exempt." (Id.)

Legislation enacting CPRA was signed in 1968. The fundamental precept of the CPRA is that governmental records shall be disclosed to the public, upon request, unless there is a specific reason not to do so. Most of the reasons for withholding disclosure of a record are set forth in specific exemptions contained in the CPRA. However, some confidentiality provisions are incorporated by reference to other laws. Also, the CPRA provides for a general balancing test by which an agency may withhold records from disclosure, if it can establish that the public interest in nondisclosure clearly outweighs the public interest in disclosure. There are two recurring interests that justify most of the exemptions from disclosure. First, several CPRA exemptions are based on a recognition of the individual's right to privacy (e.g., privacy in certain personnel, medical or similar records). Second, a number of disclosure exemptions are based on the government's need to perform its assigned functions in a reasonably efficient manner (e.g., maintaining confidentiality of investigative records, official information, records related to pending litigation, and preliminary notes or memoranda). If a record contains exempt information, the agency generally must segregate or redact the exempt information and disclose the remainder of the record. If an agency improperly withholds records, a member of the public may enforce, in court, his or her right to inspect or copy the records and receive payment for court costs and attorney's fees. ([http://ag.ca.gov/publications/summary\\_public\\_records\\_act.pdf](http://ag.ca.gov/publications/summary_public_records_act.pdf))

In response to a request for records, an agency has 10 days to decide if copies of the records will be provided. In "unusual" cases (request is "voluminous," seeks records held off-site, OR requires consultation with other agencies), the agency may, upon written notice to the requesters, give itself an additional 14 days to respond. These time periods may not be used solely to delay access to the records.

## 3. Exemptions to CPRA for Law Enforcement Investigative Records

Law Enforcement investigative records are currently exempt under the CPRA. Records of complaints, preliminary inquiries to determine if a crime has been committed, and full-scale investigations, as well as closure memoranda are investigative records. In addition, records that are not inherently investigatory may be covered by the exemption where they pertain to an enforcement proceeding that has become concrete and definite. Investigative and security records created for law enforcement, correctional or licensing purposes also are covered by the exemption from disclosure. The exemption is permanent and does not terminate once the investigation has been completed. Even though investigative records themselves may be withheld, CPRA mandates that law enforcement agencies disclose specified information about

investigative activities. However, the agency's duty to disclose such information only applies if the request is made contemporaneously with the creation of the record in which the requested information is contained.

CPRA requires that basic information must be disclosed by law enforcement agencies in connection with calls for assistance or arrests, unless to do so would endanger the safety of an individual or interfere with an investigation. With respect to public disclosures concerning calls for assistance and the identification of arrestees, the law restricts disclosure of address information to specified persons. However, CPRA expressly permits agencies to withhold the analysis and conclusions of investigative personnel. Thus, specified facts may be disclosable pursuant to the statutory directive, but the analysis and recommendations of investigative personnel concerning such facts are exempt.

#### **4. Recent Body Worn-Camera Legislative Efforts in California**

Law enforcement agencies across California have elected to use body-worn cameras to record their daily interactions with the public. Since the rise to prominence of this practice, there have been various attempts at passing legislation to codify the process for accessing the footage recorded by the cameras. Presently, there is no uniform set of procedures that police departments must follow in deciding whether to release footage. However, recordings are often withheld from the public on the grounds that they are "investigative records" and therefore exempt from mandatory disclosure pursuant to the CPRA. (Section 6254 (f).)

The CPRA requires disclosure of public records upon a reasonably focused and specific request, except with respect to public records exempt from disclosure by express provisions of law. (Section 6253 (b).) When a record is not specifically exempt from disclosure, the CPRA provides a balancing test to be used when determining whether records should be released. (Section 6254.16 (f).) If the public interest in nondisclosure clearly outweighs the public interest in disclosure, the records will not be released. (*American Civil Liberties Union of Northern Cal. v. Superior Court* (2011) 202 Cal.App.4th 55, 62.) Currently, law enforcement investigative records are exempt from mandated disclosure under the CPRA. (Section 6254 (f).) This includes records of complaints, preliminary inquiries to determine if a crime has been committed, and full-scale investigations, as well as closure memoranda. (Section 6254.)

In 2015, AB 66 (Weber) sought to tackle the issue of access to body-camera recordings by requiring that law enforcement agencies comply with set guidelines, including a mandate that policies be posted conspicuously on the agency's website, and a prohibition on the copying of camera files for personal use. The bill also provided a list of suggested guidelines that law enforcement agencies must consider in adopting their own policies. That bill failed passage in the Assembly Committee on Appropriations. Another bill from 2015, AB 1246 (Quirk), aimed to prohibit the disclosure of a recording made by a body-worn camera, except to the person whose image is recorded by the camera. That bill failed passage in the Assembly Committee on Public Safety. SB 175 (Huff and Gaines), also from 2015, sought to require each police department using body-worn cameras to adopt a policy relating to the use of those cameras. It also required that the policies were developed in accordance with specified acts governing employee organizations, with designated representatives of nonsupervisory officers. That bill failed on the Assembly Floor.

In 2016, AB 1940 (Cooper) again attempted to require police departments which use body-worn cameras to adopt a policy pertaining to the use of the cameras. Among its objectives was to require law enforcement agencies to have a policy to prohibit a peace officer from making a video or audio recording in a health facility or medical office when a patient may be in the view of the body-worn camera, or when a health care practitioner is providing care to an individual. However, that bill required that officers be permitted to view body camera footage prior to the drafting of police reports. That bill, like its predecessors, did not become law. It failed passage in this committee. AB 2533 (Santiago) sought to require that a police officer be provided with a minimum of three business days' notice before a public safety department or other public agency releases, on the Internet, any audio or video of the officer recorded by the officer. This bill also failed in this committee. Finally, AB 2611 (Low, 2016) sought to amend the CPRA to prohibit disclosure of any audio or video recording depicting the death of a peace officer unless authorized by the officer's immediate family. That bill failed in the Assembly Judiciary Committee, given that it prohibited disclosure of the recordings, unlike the bill's original form in which it passed the Committee, which would have exempted such recordings from mandatory disclosure, but still allowed an agency to disclose them when the public interest in withholding the recordings did not clearly outweigh the public interest in disclosing them.

## 5. California Public Records Act and Specified Recordings

The California Public Records Act (CPRA) provides that public records are open to inspection at all times during the office hours of a state or local agency, and that every person has a right to inspect any public record, unless otherwise exempted from disclosure. Existing law further provides that in the event that a record contains non-disclosable information, "any reasonably segregable portion of the record shall be available" to the requestor. (Gov. Code Sec. 6253.)

Relevant here, records of complaints and investigations conducted by various police agencies, or any investigatory or security files compiled by those agencies are exempted from disclosure under the CPRA. (Gov. Code Sec. 6254(f).) However, state and local law enforcement agencies are required to disclose certain information, such as the names of persons involved in, or witnesses to, the incident, certain details of the incident, and statements related to the incident. But even that information can be withheld if the disclosure would endanger the safety of a witness or other person involved in the investigation, or disclosure would endanger the successful completion of the investigation or a related investigation.

With regard to records that are not covered by an exemption, agencies may withhold *any* record if "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by the disclosure of the record." (Gov. Code Sec. 6255.)

This bill would add two specific factors that must be considered by an agency when balancing the competing public interests:

- 1) The constitutional right of the people to access information concerning the conduct of law enforcement officers and agencies.
- 2) Whether a subject shown in the recording has a reasonable expectation of privacy, based on the facts and circumstances depicted in the recording.

Additionally, this bill provides that if the agency determines that release of the recording would violate the reasonable expectation of privacy of the subject shown in the recording, the agency shall articulate that interest, and may use redaction technology to obscure those portions of the recording that protect that interest, provided the redaction does not interfere with the viewer's ability to comprehend the events captured on the video footage. The recording shall not otherwise be edited or altered." This provision of the bill would provide additional guidance to agencies when determining whether to disclose such recordings.

Presumably, if the agency decided to redact or distort a recording, as suggested by one of these listed considerations, the agency would still need to justify such redaction or distortion through one of the two circumstances provided in this bill.

## **6. Exemption for Ongoing Investigations – 90 Days Limitation**

The bill calls for the release of footage upon the balance of public interests, "unless disclosure would endanger the successful completion of an investigation...and the video or audio recording may be withheld by the agency for a maximum of 90-calendar days." Depending upon the nature of an investigation, a 90-day limitation may not give a law enforcement agency sufficient time to complete their investigation. Disclosing video of an active investigation to the public could damage efforts to accurately and effectively investigate an event. Witnesses may have their independent recollection of an event clouded by camera footage. A strict 90-day window may limit effective law enforcement investigations that may take longer to conduct than the time allotted.

## **7. Related Legislation, Consistent with AB 459 (Chau)**

The provisions of this bill are substantially similar to the safeguards included in AB 459 (Chau) which is also being heard by the committee today. AB 459 (Chau) This bill would add another category of records exempt from disclosure requirements. AB 459 would provide that video or audio recordings that are created during the commission or investigation of the crimes of rape, incest, sexual assault, domestic violence, or child abuse are not required to be disclosed if they depict the face, intimate body part, or voice of a victim of the incident depicted in the recording.

However, the exemption in AB 459 would only apply where the agency can justify withholding the video or audio recording "by demonstrating, pursuant to Section 6255 [of the Government Code], that on the facts of the particular case, the public interest served by not disclosing the recording clearly outweighs the public interest served by disclosure of the recording." Section 6255 of the Government Code already allows an agency to withhold *any record* by "demonstrating . . . that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Therefore, this provision would not create any new basis to withhold the recordings specified.

However, AB 459 would add two specific factors that must be considered by an agency when balancing the competing public interests: "(1) The constitutional right to privacy of the person or persons depicted in the recording"; and, "(2) Whether the potential harm to the victim caused by disclosing the recording may be mitigated by redacting the recording to obscure images showing intimate body parts and personally identifying characteristics of the victim or by distorting portions of the recording containing the victim's voice, provided that the redaction does not prevent a viewer from being able to fully and accurately perceive the events captured on

the recording. The recording shall not otherwise be edited or altered.” This provision of AB 459 would provide additional guidance to agencies when determining whether to disclose such recordings.

Presumably, if the agency decided to redact or distort a recording, as suggested by one of these listed considerations, the agency would still need to justify such redaction or distortion through one of the two circumstances provided in this bill.

## 8. Argument in Support

According to the California News Publishers Association:

AB 748 updates the California Public Records Act (CPRA) in an era where body cameras, smartphones, and other recording devices capture footage of law enforcement activities that finds its way into the public sphere. In recent years, this footage has often driven public debate on important public policy issues related to law enforcement activity.

Current law, specifically Government Code 6254(f), has been misused by local agencies to deny the public access to video footage labeled “investigatory.” This interpretation of the law has empowered agencies that utilize body cameras, including the Los Angeles Police Department, to declare a policy of blanket secrecy and refuse to release any footage the cameras capture. However, even the LAPD has recognized that the release of video footage can be valuable to public discourse.

In October 2016, LAPD Police Chief Charlie Beck deviated from the absolute secrecy policy, ordering the release of security camera video of the fatal officer-involved shooting of Carnell Snell Jr. The Los Angeles Times reported that Beck said he “acted out of concern for public safety as well as to correct claims by some who knew Snell who said that the teen didn’t have a gun.” See Kate Mather, “Protests continue after LAPD releases video showing moments before fatal police shooting,” Los Angeles Times (Oct. 4, 2016), available at <http://www.latimes.com/local/lanow/la-me-shooting-video-20161004-snap-story.html>.

The value of body camera and other video footage in illuminating the facts about incidents of high public concern, like a deadly use of force by police, is undeniable. But current law, which gives police the unfettered discretion to determine what footage to release, lets law enforcement pick and choose which cases deserve transparency—and which cases don’t.

The investigatory record exemption, which was not drafted with body cameras in mind, only requires that *information contained in* investigatory records shall be disclosed. It does not require disclosure of the *actual record*, only the release of summary information.



Summaries invite sanitization and bias. This completely undercuts the stated purpose of using body cameras—transparency. This also defeats the promise of accountability.

AB 748 would limit an agency's discretion to withhold footage under Section 6254(f) when a member of the public seeks a recording related to an incident that is a matter of public concern, including incidents where there is a use of force by police.

Making available body camera and other similar files promotes transparency by giving the public a dispassionate view of events that relate to a matter of public concern. It also ensures that the official government record of an incident of public concern is available to the public. This helps ground the news media's reporting in fact, and promotes a greater public understanding of what happened. This is particularly true when bystander footage is also available or posted online. Policy debate in California has long been driven by incidents captured on camera. For example, video of the Rodney King beating ultimately led to restrictions on LAPD officers' use of aluminum batons.

Preventing the public from ever being able to review video footage captured by law enforcement deprives community members, local leaders, legislators, taxpayers, and journalists of the information and facts the footage contains, and ultimately, the reform the footage contents may demand.

Despite CNPA's belief that body camera footage should be presumptively disclosable, AB 748 also recognizes that the very real public interest in disclosure may be outweighed by an individual's privacy interests, or other important considerations. The measure specifies that if the agency conducts a balancing test and determines that the footage should be withheld, there is a basis for nondisclosure.

AB 748 also specifically recognizes that the agency may assert an investigatory interest in delaying disclosure of the record by including this provision: "An agency shall release any video or audio recording promptly unless there is an articulable factual basis why disclosure would substantially impede an active investigation."

Moreover, the CPRA is structured to ensure that all other exemptions in the Act are applicable to any footage sought by a requester. A couple of examples include the personal privacy and medical information exemption in Government Code 6254(c), as well as Government Code 6254(k), which incorporates other confidentiality provisions in law. These provisions of law provide separate bases for nondisclosure. Additionally, other duties imposed by the CPRA, including the duty to redact information exempt from disclosure, would apply.

AB 748 is a balanced approach that takes into account the various interests in nondisclosure in ultimately mandating the release of body camera footage and other similar files when there is a paramount interest in public disclosure.

## 9. Arguments in Opposition

According to the Association for Los Angeles Deputy Sheriffs:

Although the proposed amendments were not shared with any of our organizations, and they are not even in print as this letter is being composed, we did receive them from a party not connected with your office. We would note parenthetically that these are major changes to the content of AB 748 and we don't understand why they weren't openly shared and discussed with relevant stakeholders in a timeframe greater than during a July 4<sup>th</sup> week that is a scant eight days prior to the bill's scheduled policy committee hearing.

The impact of this bill is to effectively reclassify investigatory materials as being under the rubric of the Public Records Act. Although the proposed language purports to say that an agency may withhold investigatory video or audio recordings, the bar for such action is set unreasonably high. Under the proposed amendments a simple allegation from the requester of the video and/or audio would meet the so-called "public concern" threshold which would place the investigatory materials on a glide path to public release.

The proposed language to be added to AB 748 is contrary to settled case law which holds that investigatory materials are squarely under the aegis of the California Public Records Act exemption for law enforcement records of investigation. The impact of this bill is to degrade that long settled exemption by effectively stripping footage of its investigatory nature.

According to the California State Sheriffs' Association:

We understand that the pending amendments, the new version of the bill would create a presumption that audio or video recordings of incidents involving a law enforcement officer's use of force or alleged law or policy violation by an officer shall be released unless the agency affirmatively demonstrates that the public interest in nondisclosure clearly outweighs the public interest in disclosure.

Local agencies should maintain the authority to determine when and how such recordings should be released including whether they will be released at all. Even if an investigation is ongoing, the language specifies that a recording may not be withheld for more than 90-days. This inelastic time frame will mandate the public release of information that could be crucial evidence in a pending criminal case or could be information that, if released, would violate the sanctity of an ongoing employee discipline action.

AB 748 also precludes a recording from being used with any biometric scanning program including facial recognition software. Proponents have offered no worthy justification for arresting the use of a powerful tool in such an arbitrary fashion.

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