SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
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Author:	Skinner		
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Consultant:	GC		

Subject: ***Peace Officers: Release of Records***

HISTORY

Source: Alliance for Boys and Men of Color
American Civil Liberties Union of California
Anti Police – Terror Project
Black Lives Matter – California
California Faculty Association
California News Publishers Association
Communities United for Restorative Youth Justice
PICO California
PolicyLink
Youth Justice Coalition

Prior Legislation: SB 1286 (Leno). 2016, failed passage in Senate Appropriations
SB 1019 (Romero), 2008, failed passage in Assembly Pub. Safety
AB 1648 (Leno), 2007, failed passage in Assembly Pub. Safety

Support: Advancement Project; AF3IRM Los Angeles; AFSCME Local 329; Alliance San Diego; American Friends Service Committee; Anaheim Community Coalition; Anti-Recidivism Coalition; Arab American Civic Council; Asian Americans Advancing Justice; Asian Law Alliance; Bend the Arc: Jewish Action; The Black Jewish Justice Alliance; Cage-Free Repair; California Alliance for Youth and Community Justice; California Broadcasters Association; California Church IMPACT; California Federation of Teachers, AFT, AFL-CIO; California Immigrant Policy Center; California Immigrant Youth Justice Alliance; California Latinas for Reproductive Justice; California Nurses Association; California Public Defenders Association; Californians Aware; Californians for Justice; Californians United for Responsible Budget; Catholic Worker Community; CDTech; Center for Juvenile and Criminal Justice; Chican@s Unidos; Children's Defense Fund; Chispa; Church in Ocean Park; Climate Action Campaign; Coalition for Justice and Accountability; Committee for Racial Justice (CRJ); Community Coalition; Conference of California Bar Associations; Council on American-Islamic Relations, California; Courage Campaign; Critical Resistance; CTT; Davis People Power; Dignity and Power No; Drain the NRA; Earl B. Gilliam Bar Association; East Bay Community Law Center; The Education Trust-West; Ella Baker Center for Human Rights; Equal Justice Society; Equity for Santa Barbara; Fannie Lou Hamer Institute; First Amendment Coalition; Friends Committee on Legislation of California; Greater Long Beach; Homeboy Industries; Immigrant Legal

Resource Center; Indivisible CA: StateStrong; InnerCity Struggle; Interfaith Worker Justice San Diego; IUCC Advocates for Peace and Justice; Jack and Jill America of America, Incorporated, San Diego Chapter; Journey House; Koreatown Immigrant Workers Alliance; LA Voice; LAANE; Law Enforcement Accountability Network (LEAN); Lawyers Committee for Civil Rights, San Francisco Bay Area; Legal Services for Prisoners with Children; March and Rally Los Angeles; Media Alliance; Mexican Legal Defense and Education Fund (MALDEF); Mid-City CAN; Motivating Individual Leadership for Public Advancement; National Juvenile Justice Network; National Lawyers Guild, Los Angeles; National Lawyers Guild, San Francisco Bay Area; A New Path; A New Way of Life Re-entry Project (ANWOL); Oak View ComUNIDAD; Oakland Privacy; Orange County Communities Organized for Responsible Development; Orange County Equality Coalition; Partnership for the Advancement of New Americans; Press4Word; Prevention Institute; Public Health Justice Collective; R Street Institute; Reporters Committee for Freedom of the Press; Resilience Orange County; Richard Barrera, Trustee, Board of Education; San Diego Unified School District; Riverside Coalition for Police Accountability; Riverside Temple Beth El; Root and Rebound; San Diego Organizing Project; San Francisco District Attorney's Office; San Francisco Public Defender; San Gabriel Valley Immigrant Youth Coalition; Santa Ana Building Healthy Communities; Service Employees International Union (SEIU) Local 1000; Showing Up for Racial Justice, Long Beach; Showing Up for Racial Justice, Marin; Showing Up for Racial Justice, Rural-NorCal; Showing Up for Racial Justice, Sacramento; Showing Up for Racial Justice, Santa Barbara; Silicon Valley De-Bug; Social Justice Learning Institute; Stop LAPD Spying Coalition; Street Level Health Project; Think Dignity; Transgender Law Center; UAW 2865, UC Student-Workers Union; Union of the Alameda County Public Defender's Office; UNITE HERE Local 11; Urban Peace Institute; Urban Peace Movement; Village Connect; The W. Haywood Burns Institute; White People for Black Lives/AWARE LA; Women For: Orange County; Women Foundation of California; Young Women's Freedom Center; Youth Alive; 8 private individuals

Opposition: Association of Deputy District Attorneys; Association for Los Angeles Deputy Sheriffs; California Association of Highway Patrolmen (CAHP); California District Attorneys Association; California Narcotic Officers' Association; California State Sheriffs' Association; Los Angeles County Professional Peace Officers Association; Los Angeles Deputy Probation Officers, AFSCME Local 685; Los Angeles Police Protective League; Peace Officers Research Association of California (PORAC); San Bernardino Sheriff-Coroner's Office

PURPOSE

The purpose of this bill is to permit inspection of specified peace and custodial officer records pursuant to the California Public Records Act. Records related to reports, investigations, or findings may be subject to disclosure if they involve the following: (1) incidents involving the discharge of a firearm or electronic control weapons by an officer; (2) incidents involving strikes of impact weapons or projectiles to the head or neck area; (3) incidents of deadly force or serious bodily injury by an officer; (4) incidents of sustained sexual assault by an officer; or (5) incidents relating to sustained findings of dishonesty by a peace officer.

Existing law finds and declares in enacting the California Public Records Act, 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 this state. (Gov. Code § 6250.)

Current law requires that in any case in which discovery or disclosure is sought of peace officer or custodial officer personnel records or records of citizen complaints against peace officers or custodial officers or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records, as specified. Upon receipt of the notice, the governmental agency served must immediately notify the individual whose records are sought.

The motion must include all of the following:

- Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace officer or custodial officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure must be heard.

- A description of the type of records or information sought.

- Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.

No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions, except upon a showing by the moving party of good cause for noncompliance, or upon a waiver of the hearing by the governmental agency identified as having the records. (Evid. Code § 1043.)

Existing law states that nothing in this article can be construed to affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of those investigations, concerning an event or transaction in which the peace officer or custodial officer, as defined in Section 831.5 of the Penal Code, participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties, provided that information is relevant to the subject matter involved in the pending litigation.

In determining relevance, the court examines the information in chambers in conformity with Section 915, and must exclude from disclosure:

- Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought.

- In any criminal proceeding, the conclusions of any officer investigating a complaint filed pursuant to Section 832.5 of the Penal Code.

- Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit. (Evid. Code § 1045, subds. (a) and (b).)

Existing law states that when determining relevance where the issue in litigation concerns the policies or pattern of conduct of the employing agency, the court must consider whether the information sought may be obtained from other records maintained by the employing agency in the regular course of agency business which would not necessitate the disclosure of individual personnel records. (Evid. Code § 1045, subd. (c).)

Existing law states that upon motion seasonably made by the governmental agency which has custody or control of the records to be examined or by the officer whose records are sought, and upon good cause showing the necessity thereof, the court may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression. (Evid. Code § 1045 subd. (d).)

Existing law states that the court must, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to Section 1043, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law. (Evid. Code § 1045 subd. (e).)

Existing law requires that in any case, otherwise authorized by law, in which the party seeking disclosure is alleging excessive force by a peace officer or custodial officer, as defined in Section 831.5 of the Penal Code, in connection with the arrest of that party, or for conduct alleged to have occurred within a jail facility, the motion shall include a copy of the police report setting forth the circumstances under which the party was stopped and arrested, or a copy of the crime report setting forth the circumstances under which the conduct is alleged to have occurred within a jail facility. (Evid. Code § 1046.)

Existing law provides that any agency in California that employs peace officers shall establish a procedure to investigate complaints by members of the public against the personnel of these agencies, and must make a written description of the procedure available to the public. (Pen. Code § 832.5, subd. (a)(1).)

Existing law provides that complaints and any reports or findings relating to these complaints must be retained for a period of at least five years. All complaints retained pursuant to this subdivision may be maintained either in the officer's general personnel file or in a separate file designated by the agency, as specified. However, prior to any official determination regarding promotion, transfer, or disciplinary action by an officer's employing agency, the complaints determined to be frivolous shall be removed from the officer's general personnel file and placed in separate file designated by the department or agency, as specified. (Pen. Code § 832.5, subd. (b).)

Existing law provides that complaints by members of the public that are determined by the officer's employing agency to be frivolous, as defined, or unfounded or exonerated, or any portion of a complaint that is determined to be frivolous, unfounded, or exonerated, shall not be maintained in that officer's general personnel file. However, these complaints shall be retained in other, separate files that shall be deemed personnel records for purposes of the California Public Records Act and Section 1043 of the Evidence Code (which governs discovery and disclosure of police personnel records in legal proceedings). (Pen. Code § 832.5, subd. (c).)

Existing law provides that peace or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are 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. This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office. (Pen. Code § 832.7, subd. (a).)

Existing law states that a department or agency must release to the complaining party a copy of his or her own statements at the time the complaint is filed. (Pen. Code § 832.7, subd. (b).)

Existing law provides that a department or agency that employs peace or custodial officers may disseminate data regarding the number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved. (Penal Code § 832.7, subd. (c).)

Existing law provides that a department or agency that employs peace or custodial officers may release factual information concerning a disciplinary investigation if the officer who is the subject of the disciplinary investigation, or the officer's agent or representative, publicly makes a statement he or she knows to be false concerning the investigation or the imposition of disciplinary action. Information may not be disclosed by the peace or custodial officer's employer unless the false statement was published by an established medium of communication, such as television, radio, or a newspaper. Disclosure of factual information by the employing agency pursuant to this subdivision is limited to facts contained in the officer's personnel file concerning the disciplinary investigation or imposition of disciplinary action that specifically refute the false statements made public by the peace or custodial officer or his or her agent or representative. The department or agency shall provide written notification to the complaining party of the disposition of the complaint within 30 days of the disposition. (Pen. Code § 832.7, subds. (d) and (e).)

Existing law provides that, as used in Section 832.7, "personnel records" means any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following:

- Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.
- Medical history.
- Election of employee benefits.
- Employee advancement, appraisal, or discipline.
- Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.
- Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy. (Pen. Code § 832.8.)

Existing law states that an administrative appeal instituted by a public safety officer under this chapter is to be conducted in conformance with rules and procedures adopted by the local public agency. (Gov. Code §, 3304.5.)
Existing law creates the California Public Records Act, and states that 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 this state. (Gov. Code §§ 6250 and 6251.)

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 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. (Gov. Code § 6253, subd. (a).)

Existing law provides that any public agency must justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or 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. (Gov. Code §, 6255, subd. (a).)

Existing law provides that records exempted or prohibited from disclosure pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege, are exempt from disclosure under the California Public Records Act. (Gov. Code §, 6250, et seq.)

This bill provides the public access, through the CPRA, to records related to:

- Reports, investigation, or findings of:
    - Incidents involving the discharge of a firearm at a person by an officer.
    - Incidents involving the discharge of an electronic control weapon at a person by an officer.
    - Incidents involving a strike with an impact weapon or projectile to the head or neck of a person by an officer.
    - Incidents involving use of force by an officer which results in death or serious bodily injury.

- Any record relating to an incident where there was a sustained finding that an officer engaged in sexual assault of a member of the public.

- Any record relating to an incident where there was a sustained finding that an officer was dishonest relating to the reporting, investigation, or prosecution of a crime, or relating to the misconduct of another peace officer, including but not limited to perjury, false statements, filing false reports, destruction/falsifying/or concealing evidence, or any other dishonesty that undermines the integrity of the criminal justice system.

This bill provides that the records released are to be limited to the framing allegations or complaint and any facts or evidence collected or considered. All reports of the investigation or

analysis of the evidence or the conduct, and any findings, recommended findings, discipline, or corrective action taken shall also be disclosed if requested pursuant to the CPRA.

This bill states that records from prior investigations or assessments of separate incidents are not disclosable unless they are independently subject to disclosure under the provisions of this Act. *This bill* provides that when investigations or incidents involve multiple officers, information requiring sustained findings for release must be found against independently about each officer. However, factual information about actions 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.

This bill provides for redaction of records under the following circumstances:

- To remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of officers.
- To preserve the anonymity of complainants and witnesses.
- To protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct by peace officers and custodial officers.
- Where there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the officer or another person.

This bill permits a law enforcement agency to withhold a record that is disclosable during an investigation into the use of force by a peace officer until the investigating agency determines whether the use of force violated the law or agency policy. Additionally the agency may withhold a record until the district attorney determines whether to file criminal charges for the use of force. However, in no case may an agency withhold that record for longer than 180-days from the date of the use of force.

COMMENTS

1. Need for This Bill

According to the author:

> SB 1421, benefits law enforcement and the communities they serve by helping build trust. Giving the public, journalists, and elected officials access to information about actions by law enforcement will promote better policies and procedures that protect everyone. We want to make sure that good officers and the public have the information they need to address and prevent abuses and to weed out the bad actors. SB 1421 will help identify and prevent unjustified use of force, make officer misconduct an even rarer occurrence, and build trust in law enforcement.

2. 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.

3. Effect of This Bill

SB 1421 opens police officer personnel records in very limited cases, allowing local law enforcement agencies and law enforcement oversight agencies to provide greater transparency around only the most serious police complaints. Additionally, SB 1421 endeavors to protect the privacy of personal information of officers and members of the public who have interacted with officers. This independent oversight strikes a balance: in the most minor of disciplinary cases, including technical rule violations, officers will still be eligible to receive private reprimands and retraining, shielded from public view. Additionally, in more serious cases, SB 1421 makes clear the actions of officers who are eventually cleared of misconduct through the more public,

transparent process. SB 1421 also allows law enforcement agencies to withhold information where there is a risk or danger to an officer or someone else, or where disclosure would cause an unwarranted invasion of an officer's privacy.

SB 1421 is consistent with the goals of enhancing police-community relations and furthers procedural justice efforts set out in the President's Task Force on 21st Century Policing, Action Item 1.5.1: "In order to achieve external legitimacy, law enforcement agencies should involve the community in the process of developing and evaluating policies and procedures."[1]

Permits Limited Public Access to Peace and Custodial Officer Personnel Records

Peace officer personnel records are currently protected under Penal Code 832.7. This legislation provides limited, through the CPRA, to records related to:

- Records relating to reports, investigation, or findings of:
    - Incidents involving the discharge of a firearm at a person by an officer.
    - Incidents involving the discharge of an electronic control weapon at a person by an officer.
    - Incidents involving a strike with an impact weapon or projectile to the head or neck of a person by an officer.
    - Incidents involving use of force by an officer which results in death or serious bodily injury.

- Any record relating to an incident where there was a sustained finding that an officer engaged in sexual assault of a member of the public.

- Any record relating to an incident where there was a sustained finding that an officer was dishonest relating to the reporting, investigation, or prosecution of a crime, or relating to the misconduct of another peace officer, including but not limited to perjury, false statements, filing false reports, destruction/falsifying/or concealing evidence, or any other dishonesty that undermines the integrity of the criminal justice system.

Restrictions on Disclosure

The records released are to be limited to the framing allegations or complaint and any facts or evidence collected or considered. All reports of the investigation or analysis of the evidence or the conduct, and any findings, recommended findings, discipline, or corrective action taken shall also be disclosed if requested pursuant to the CPRA.

Records from prior investigations or assessments of separate incidents are not disclosable unless they are independently subject to disclosure under the provisions of this Act.

[1] In December 2014, President Barack Obama established the Task Force on 21st Century Policing. The Task Force identified best practices and offered 58 recommendations on how policing practices can promote effective crime reduction while building public trust. The Task Force recommendations are centered on six main objectives: Building Trust and Legitimacy, Policy and Oversight, Technology and Social Media, Community Policing and Crime Reduction, Officer Training and Education, and Officer Safety and Wellness. The Task Force's final report is available at: http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

When investigations or incidents involve multiple officers, information requiring sustained findings for release must be found against independently about each officer. However, factual information about actions 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.

The bill provides for redaction of records under the following circumstances:

- To remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of officers.
- To preserve the anonymity of complainants and witnesses.
- To protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct by peace officers and custodial officers.
- Where there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the officer or another person.

The bill permits a law enforcement agency to withhold a record that is disclosable during an investigation into the use of force by a peace officer until the investigating agency determines whether the use of force violated the law or agency policy. Additionally the agency may withhold a record until the district attorney determines whether to file criminal charges for the use of force. However, in no case may an agency withhold that record for longer than 180-days from the date of the use of force.

4. 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.)

5. What Is the Discovery ("*Pitchess*") Process for Obtaining Police Personnel Records?

The California Supreme Court has described the discovery process, also known as a *Pitchess* motion, for a party obtaining information from a police officer's personnel records. This process is an independent method of obtaining very limited access to officer personnel records through an ongoing litigation discovery process.

> In 1978, the California Legislature codified the privileges and procedures surrounding what had come to be known as "*Pitchess* motions" (after our decision in *Pitchess v. Superior Court* (1974) 11 Cal. 3d 531 [113 Cal. Rptr. 897, 522 P.2d 305]) through the enactment of Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045. The Penal Code provisions define "personnel records" (Pen. Code, § 832.8) and provide that such records are "confidential" and subject to discovery only pursuant to the procedures set forth in the Evidence Code. (Pen. Code § 832.7.) Evidence Code sections 1043 and 1045 set out the procedures for discovery in detail. As here pertinent, section 1043, subdivision (a) requires a written motion and notice to the governmental agency which has custody of the records sought, and subdivision (b) provides that such motion shall include, inter alia, "(2) A description of the type of records or information sought; and [para.] (3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that such governmental agency identified has such records or information from such records."
> A finding of "good cause" under section 1043, subdivision (b) is only the first hurdle in the discovery process. Once good cause for discovery has been established, section 1045 provides that the court shall then examine the information "in chambers" in conformity with section 915 (i.e., out of the presence of all persons except the person authorized to claim the privilege and such other persons as he or she is willing to have present), and shall exclude from disclosure several enumerated categories of information, including: (1) complaints more than five years old, (2) the "conclusions of any officer investigating a complaint . . ." and (3) facts which are "so remote as to make disclosure of little or no practical benefit." (§ 1045, subd. (b).)
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> In addition to the exclusion of specific categories of information from disclosure, section 1045 establishes general criteria to guide the court's determination and insure that the privacy interests of the officers subject to the motion are protected. Where the issue in litigation concerns the policies or pattern of conduct of the employing agency, the statute requires the court to "consider whether the information sought may be obtained from other records . . . which would not necessitate the disclosure of individual personnel records." (§ 1045, subd. (c).) The law further provides that the court may, in its discretion, "make *any order which justice requires* to protect the officer or agency from unnecessary annoyance, embarrassment or oppression." (§ 1045, subd. (d), italics added.) And, finally, the statute mandates that in any case where disclosure is permitted, the court "shall . . . order that the records disclosed or discovered shall not be used for any purpose other than a court proceeding pursuant to applicable law." (§ 1045, subd. (e), italics added.) (C*ity of Santa Cruz* v. *Mun. Court*, 49 Cal. 3d 74, 81-83 (1989, footnotes and citations omitted.).)

A so-called "*Pitchess* motion" is most commonly filed when a criminal defendant alleges the officer who arrested him or her used excessive force and the defendant wants to know whether that officer has had complaints filed against him or her previously for the same thing. The Supreme Court described the purpose of this discovery process: "The statutory scheme thus carefully balances two directly conflicting interests: the peace officers just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to his defense." (*City of Santa Cruz* v. *Mun. Court, supra*, at, 84.)

6. Lack of Privacy Interests Exist for Other Public Employees

The secrecy afforded police records stands in contrast to the records of all other public employees of this state, to which the public has a settled right of access to facts about a complaint, investigation and outcome of misconduct.

The standard of mandating disclosure was first set in *Chronicle Publishing v. Superior Court*, where the Court held that "strong public policy" requires disclosure of both publicly and privately issued sanctions against attorneys. 54 Cal.2d 548, 572, 574 (1960). For charges that lead to discipline, the Court held in the 1978 case, *AFSCME v. Regents*, that the disclosure of public employees' disciplinary records "where the charges are found true, or discipline is imposed" is required because "the strong public policy against disclosure vanishes." 80 Cal. App. 3d 913, 918. "In such cases a member of the public is entitled to information about the complaint, the discipline, and the "information upon which it was based." *Id*.

This line of reasoning was affirmed in the 2004 case, *Bakersfield City School Dist. v. Superior Court*, which involved a school official accused of conduct including threats of violence. The Court held that the public's right to know outweighs an employee's privacy when the charges are found true or when the records "reveal sufficient indicia of reliability to support a reasonable conclusion that the complaint was well founded." 118 Cal. App. 4th 1041, 1047. Two years later, in *BRV, Inc. v. Superior Court*, the court went further to require the disclosure of records reflecting an investigation of a high-level official, even as to charges that may be unreliable. The Court found that "the public's interest in understanding why [the official] was exonerated and how the [agency] treated the accusations outweighs [the official's] interest in keeping the allegations confidential," the court concluded. 143 Cal. App. 4th 742, 758-759 (2006).

The reasoning in *BRV* is particularly salient as applied to police shootings: Whether there is reason to infer misconduct or not, the public has a right to know how an agency investigates and resolves questions into serious uses of force.

7. Argument in Support

According to the American Civil Liberties Union:

> California is one of the most secretive states in the nation when it comes to officer misconduct and deadly uses of force. Sections 832.7 and 832.8 of the Penal Code make all records relating to police discipline secret, prohibiting public disclosure through the Public Records Act. Courts have interpreted these provisions broadly, blocking access to any records that could be used to assess discipline, including

civilian complaints, incident reports, internal investigations, and any other records related to uses of force or misconduct.[2]

SB 1421 will pierce the secrecy that shrouds deadly uses of force and serious officer misconduct by providing public access to information about these critical incidents, such as when an officer shoots, kills, or seriously injures a member of the public, is proven to have sexually assaulted a member of the public, or is proven to have planted evidence, committed perjury, or otherwise been dishonest in the reporting, investigation, or prosecution of a crime. Access to records of how departments handle these serious uses, or abuses, of police power is necessary to allow the public to make informed judgements about whether existing processes and infrastructures are adequate. To account for privacy and safety interests, SB 1421 permits withholding these records if there is a risk of danger to an officer or someone else, or if disclosure would represent an unwarranted invasion of an officer's privacy.

Under current law, California deprives the public of basic information on how law enforcement policies are applied, even in critical incidents like officer-involved shootings and when an officer has been found to have committed sexual assault or fabricated evidence. In contrast, many other states recognize that disclosure of records of critical incidents is a basic element of police oversight. Police disciplinary records are generally available to the public in 12 states, including Florida, Ohio, Wisconsin, and Washington, and available to the public under limited circumstances in another 15, including Texas, Massachusetts, Louisiana, and Illinois.[3]

Even in California, this secrecy is not afforded to any public employees other than law enforcement. For all other public employees, disciplinary records are public, and even allegations of misconduct are generally public, as long as the complaint is not trivial and there is reasonable cause to believe it is well-founded.[4] For high-profile public officials, the standard of reliability for allegations is even lower, because "the public's interest in understanding why [they were] exonerated … outweighs [their] interest in keeping the allegations confidential."[5]

In contrast, records relating to even high-profile and controversial killings of civilians by police are kept completely secret by agencies, even though the public's interest in understanding how the agency handled such critical incidents should normally outweigh the officer's privacy interests. Only then can the public properly engage in democratic debate about the way we are policed, the fiscal consequences of police misconduct, and whether the existing processes for preventing and correcting serious abuses by police are adequate.

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[2] *Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272, 1286–87 (2006); *see also* Wesley Lowery, *How many police shootings a year? No one knows*, WASHINGTON POST (Sept. 8, 2014), available at http://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows/.

[3] Lewis, R, N Veltman and X Landen, *Is police misconduct a secret in your state?* WNYC News (Oct. 15, 2015), available at https://www.wnyc.org/story/police-misconduct-records/.

[4] *See Bakersfield City Sch. Dist. v. Superior Court*, 118 Cal. App. 4th 1041, 1044 (2004).

[5] *BRV, Inc. v. Superior Court*, 143 Cal. App. 4th 742, 758 (Ct. App. 2006), *as modified on denial of reh'g* (Oct. 26, 2006).

SB 1421 will honor the public's right to know how police departments deal with officer shootings, beatings, and cases of serious and proven sexual assault and corruption. It will provide the public with the tools to determine whether agencies apply standards consistent with community values, and whether they hold officers who violate those standards accountable. It will allow communities to see systems of accountability at work.

California deserves accountable and transparent decision-making by all government officials, particularly those with the state-sanctioned ability to kill civilians. The ACLU is proud to cosponsor SB 1421 and thanks you for your leadership on this critical issue.

8. Argument in Opposition

According to the Los Angeles County Professional Peace Officer Association:

This bill will significantly undermine the protections of current law for peace officer personnel records. Peace officers take a sworn oath to defend and protect the communities they serve, all while facing extraordinary risks of danger daily. Oftentimes, we forget that those individuals who become peace officers are still public employees who are protected under the California Public Records Act, which assures that disciplinary records are not made public in an unfettered fashion.

Current law already provides for a focused and appropriate access to police officer records through the Pitchess motion process. In contrast to the relevant access of the Pitchess process, Senate Bill 1421 calls for the release of information concerning an officer even where his or her activities are entirely lawful, and entirely within the scope of departmental policy. We are aware of no other area of public employment where an employee's information is made public for conduct that conforms entirely within the scope of departmental policy. Far from building community trust, the release of officer records where the officer has been entirely within policy will give the misperception that there was "something wrong" with the officer's conduct. Again, such release of personnel information – where the conduct in question is totally lawful and within policy is unheard of in any other area of public employment.

Moreover, out reading of Senate Bill 1421 is that making the records of an officer's lawful and in policy conduct is retroactive in its impact. In other words, notwithstanding that the officer's conduct was entirely in policy, his or her records are available for public inspection irrespective of whether or not they occurred prior to the effective date of SB 1421.

The Los Angeles County Professional Peace Officer Association believes that Senate bill 1421 singles out police officers for public opprobrium even where they have behaved entirely within law and agency policy and must respectfully oppose the bill.

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