SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No:	AB 1600	**Hearing Date:**	July 9, 2019
Author:	Kalra		
Version:	June 28, 2019		
Urgency:	No	**Fiscal:**	No
Consultant:	GC		

Subject: ***Discovery: Personnel Records: Peace Officers and Custodial Officers***

HISTORY

Source: American Civil Liberties Union of California; California Public Defenders Association

Prior Legislation: SB 1421 (Skinner), Ch. 998, Stats. of 2018
SB 1286 (Leno), 2015, held in the Senate Appropriations
AB 1648 (Leno), 2007, failed in Assembly Public Safety
SB 1019 (Romero), 2007, failed in Assembly Public Safety

Support: California Attorneys for Criminal Justice; Ella Baker Center Human Rights; Youth Justice Coalition

Opposition: California Association of Highway Patrolmen; California Association of Joint Powers Authorities; California Police Chiefs Association; Excess Insurance Authority; League of California Cities; Peace Officers Research Association of California

Assembly Floor Vote: 45 - 27

PURPOSE

The purpose of this bill is to shorten the notice requirement in criminal cases when a defendant files a motion to discover police officer misconduct from 16-days to 10-days. Additionally, creates a limited exception to the prohibition on the release of supervisorial officer records.

Existing law states that notwithstanding specified provisions of the California Public Records Act (CPRA), or any other law, the following peace officer or custodial officer personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to CPRA:

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

2) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public; and,
3) Any record relating to an incident in which a sustained finding was made by any law enforcement agency of dishonesty by a peace officer, as specified. (Pen. Code, § 832.7, subd. (b)(1)(A)-(C).)

Existing law states that a law enforcement agency may withhold a record of an incident that is the subject of an active criminal or administrative investigation, as specified. (Pen. Code, § 832.7, subd. (b)(7).)

Existing law provides in any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records, as specified, the party seeking the discovery 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, and written notice shall be given at the times described in the Code of Civil Procedure. (Evid. Code, § 1043, subd. (a).)

Existing law requires the motion to include all of the following:

1) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace 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 shall be heard;
2) A description of the type of records or information sought; and
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 the governmental agency identified has the records or information from the records. (Evid. Code, § 1043, subd. (b)(1)-(3).)
4) Specifies that no hearing upon a motion for discovery of law enforcement personnel records shall be held without full compliance with the required 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, subd. (c).)

Existing law specifies that moving and supporting papers shall be served and filed at least 16 court days before the hearing, as specified. (Code of Civ. Proc., § 1005, subd. (b).)

Existing law allows the party to a case 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, 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. (Evid. Code, § 1045, subd. (a).)

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

Existing law provides that records of peace officers or custodial officers, as specified, including supervisorial officers, who either were not present during the arrest or had no contact with the party seeking disclosure from the time of the arrest until the time of booking, or who were not present at the time the conduct is alleged to have occurred within a jail facility, shall not be subject to disclosure. (Evid. Code, §1047.)

Existing law specifies that a public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice. (Evid. Code, §1040, subd. (b)(2).)

Existing law states that a case must be dismissed when a defendant in a misdemeanor is not brought to trial within 30 days after he or she is arraigned or enters his or her plea, whichever occurs later, if the defendant is in custody at the time of arraignment or plea. (Pen. Code, §1382, subd. (a)(3).)

This bill requires a written motion for discovery of peace officer personnel records or information from those records, to be served and filed, as specified, at least 10 court days before the hearing, by the party seeking the discovery in a criminal matter.

This bill requires all papers opposing a motion described above, be filed with the court at least five court days, and all reply papers at least two court day, before the hearing.

This bill requires proof of service of the notice to the agency in possession of the records, to be filed no later than five court days before the hearing.

This bill creates an exception to the prohibition on release of records of officers who were not present during an arrest, had no contact with the party seeking disclosure, or were not present at the time of contact by permitting the disclosure of records of a supervisorial officer if the supervisorial officer issued command directives or had command influence over the circumstances at issue and had direct oversight of a peace officer or a custodial officer who was present during the arrest, had contact with the party seeking disclosure from the time of the arrest until the time of booking, or was present at the time the conduct at issue is alleged to have occurred within a jail facility.

COMMENTS

1. Need for This Bill

> In California, a criminal defendant's right to access relevant records regarding prior misconduct by a law enforcement officer was established by the California Supreme Court's ruling in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 *(Pitchess)*. In Pitchess, a defendant charged with battery on four sheriff's deputies claimed he was defending himself against the deputies' use of excessive force. In his defense, the defendant claimed his actions were in self-defense and sought discovery of evidence of the deputies' propensity for violence, which he believed would be revealed through the examination of the deputies' personnel records.

The California Supreme Court held that the defendant had a limited right to discover records regarding previous complaints about the officers' use of excessive force. Following the *Pitchess* decision, the Legislature enacted statutes specifying the procedures by which a criminal defendant may seek access to those records.

Unfortunately, the statutory procedures for *Pitchess* motions set a sixteen-day notice requirement, far longer than that for other motions in criminal cases. For example, most criminal discovery motions are limited to a ten-day notice requirement. This places a significant burden on the defense who must balance the intersection of *Pitchess* motion timelines and the defendant's right to a speedy trial within 30 days. A defendant who is in custody on misdemeanor charges, with the right to a speedy trial within thirty days, cannot, as a practical matter, obtain access to misconduct records in time to be able to use those records.

Finally, the *Pitchess* statutes also prohibit access to information on supervising officers who were not present at the arrest or had no contact with the defendant from arrest to booking. Protecting these officers protects supervisors who approve and validate subordinate's reports, even if they may know those reports to be inaccurate or dishonest. Supervisors who sign off on other officers' reports should not be exempt from having relevant records of misconduct disclosed.

By making these modest changes, California can make *Pitchess* procedures less burdensome and time consuming while balancing the need to increase access to due process in criminal proceedings and provide greater transparency.

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.

In 2018, the California Legislature passed, and Governor Brown signed SB 1421 (Skinner), Ch. Ch. 998, Stats. of 2018 which opened up specified personnel records as public records. The legislation mandated disclosure of all police records in possession of a department that related to use of excessive force, sustained sexual assault, and sustained dishonesty. The law also mandated disclosure for all relevant records in possession of police agencies prior to the enactment of the legislation. SB 1421 opened 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 endeavored to protect the privacy of personal information of officers and members of the public who have interacted with officers. This independent oversight struck 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 made clear the actions of officers who are eventually cleared of misconduct through the more public, transparent process. SB 1421 also allowed 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. The bill further permitted redaction of an officer's identity when the safety of the officers outweighed the public interest in disclosure. Finally, the bill balanced the interests of ongoing investigations and prosecutions by allowing delay in disclosure to protect the integrity of those criminal proceedings.

SB 1421 was consistent with the goals of enhancing police-community relations and furthered 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]

[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.

3. Defense Motions to Discover Law Enforcement Misconduct

In California, a criminal defendant's right to access relevant records regarding prior misconduct by a law enforcement officer was established by the California Supreme Court's ruling in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. In *Pitchess*, a defendant charged with battery on four sheriff's deputies claimed he was defending himself against the deputies' use of excessive force. In his defense, the defendant claimed his actions were in self-defense and sought discovery of evidence of the deputies' propensity for violence, which he believed would be revealed through the examination of the deputies' personnel records.

The California Supreme Court held that the defendant had a limited right to discover records regarding previous complaints about the officers' use of excessive force. Following the *Pitchess* decision, the Legislature enacted statutes specifying the procedures by which a criminal defendant may seek access to those records.

The *Pitchess* statutes require a criminal defendant to file a written motion that identifies and demonstrates good cause for the discovery sought. If such a showing is made, the trial court then reviews the law enforcement personnel records in camera with the custodian, and discloses to the defendant any relevant information from the personnel file. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.) Absent compliance with these procedures, peace officer personnel files, and information from them, are confidential and cannot be disclosed in any criminal or civil proceeding. The prosecution, like the defense, cannot discover peace officer personnel records without first following the *Pitchess* procedures. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1046.) Any records disclosed are subject to a mandatory order that they be used only for the purpose of the court proceeding for which they were sought. (*Id*. at p. 1042.)

As part of those procedures, there is a requirement that the party seeking discovery of the records provide notice to the agency 16 days before the date of the court hearing on discovery of the law enforcement personnel records. The 16 day notice requirement applies in criminal cases as well as in civil cases. In criminal cases, when a defendant is in custody, and time to investigate a case is at a premium, at 16 days notice requirement can impose a significant hurdle. Such a notice requirement is particularly challenging on a misdemeanor charge where a defendant has a right to have a trial within 30 days of entry of a plea of not guilty. A 16 day notice requirement force an in custody defendant to choose between taking the time to seek discovery regarding law enforcement personnel records or asserting their right to have a trial within 30 days. This bill would lower the notice requirement to the agency in custody of the law enforcement personnel records from 16 days to 10 days for criminal cases, while leaving the notice requirement at 16 days for civil cases, where time limitations are not as restrictive as in criminal cases.

4. Limited Exception to the Prohibition on Discovery of Personnel Records for Supervisors

Current law specifies that records of peace officers, including supervisorial officers, who either were not present during the arrest or had no contact with the party seeking disclosure from the time of the arrest until the time of booking, shall not be subject to disclosure. As a general matter, that prohibition makes sense because it is rare that an officer that was not at the scene of an incident that forms the basis of a criminal or civil case, will be relevant as a witness. However, this blanket prohibition prevents parties in civil and criminal cases from using the *Pitchess* procedures to get misconduct information on law enforcement witnesses who testify as expert witnesses. Some information on such a witness is now available through the CPRA based

on SB 1421. However, for other misconduct information which might be relevant to the action before the court, current law does not provide any mechanism for review.

This bill provides that if a supervisorial officer whose records are being sought had direct oversight of an officer, and issued command directives, or had command influence over the circumstances at issue, the supervisorial officer's records shall be subject to discovery if the peace officer or custodial officer under supervision was present during the arrest, had contact with the party seeking disclosure from the time of the arrest until the time of booking, or was present at the time the conduct at issue is alleged to have occurred within a jail facility.

5. Argument in Support

According to the California Public Defenders Association:

> In California, a criminal defendant's right to access relevant records regarding prior misconduct by a law enforcement officer was established by the California Supreme Court's ruling in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. The *Pitchess* case provides a good example of how such records can be critically important to a defense: the defendant was charged with battery on four sheriff deputies and claimed that he was defending himself against the deputies' excessive use of force. Prior use of force by the law enforcement officers may tend to show that they were acting similarly on this occasion and thus, support the defendant's claim of self-defense.

6. Argument in Opposition

According to the League of California Cities:

> With respect to the proposed expedited timeframe, it is already difficult for cities to sufficiently prepare for *Pitchess* motions within the current sixteen day timeframe. Once a city receives a defendant's *Pitchess* motion, several procedural steps are taken. The officer(s) are notified, the custodian has to make arrangements to be present, and a diligent search for records has to occur. Importantly, a city attorney's office must also write any written objections and oppositions within the prescribed timeframe. In many cases, defendants' motions are overbroad and seek information to which parties are not entitled, which makes these oppositions imperative. Shortening this notice requirement from ten court days to five court days would make it far more difficult to pull together all of these necessary items, and would thereby reduce cities' opportunity to prepare a meaningful and appropriate opposition to a *Pitchess* motion.
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> While we recognize that many public defenders carry heavy caseloads, creating an unworkable timeframe for custodians of records and/or city attorneys to meaningfully respond is not the solution, especially considering the important interests that are balanced in the *Pitchess* motion process (i.e. a defendant's right to a fair trial versus a peace or custodial officer's right to privacy).

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