# SENATE COMMITTEE ON PUBLIC SAFETY

**Senator Nancy Skinner, Chair**
**2017 - 2018 Regular**

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| **Bill No:** | AB 887 | **Hearing Date:** | June 27, 2017 |
| **Author:** | Cooper | | |
| **Version:** | June 26, 2017 | | |
| **Urgency:** | No | **Fiscal:** | No |
| **Consultant:** | GC | | |

**Subject:** ***Public Safety Officers: Investigations and Interviews***

## HISTORY

Source: Association of Orange County Deputy Sheriffs

Prior Legislation: AB 729 (Hernández), of the 2013-2014 Legislative Session, vetoed
SB 388 (Lieu), of the 2013-2014 Legislative Session, vetoed
SB 313 (De Leon), Chapter 779, Statutes of 2013
AB 955 (De Leon), Chapter 494, Statutes of 2009

Support: 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 Peace Officers Association; California Narcotics Officers Association; California Statewide Law Enforcement Association; Fraternal Order of Police, Law Enforcement Managers' Association; Long Beach Police Officers Association; Los Angeles County Professional Peace Officers Association; Los Angeles Police Protective League; Peace Officers Research Association of California; Riverside Sheriffs' Association; Sacramento County Deputy Sheriffs' Association

Opposition: Alliance for Boys and Men of Color; A New Way of Life Reentry Project; American Civil Liberties Union; American Friends Service Committee; California Police Chiefs Association; California Public Defenders Association; California State Sheriffs; Chief Probation Officers of California; Courage Campaign; Lawyers Committee for Civil Rights of the San Francisco Bay Area; PACT: People Acting in Community Together; PolicyLink; San Diego Organizing Project; Western Regional Advocacy Project

Assembly Floor Vote: 60 - 6

## PURPOSE

***The purpose of this bill is to describe what information must be provided to a peace officer prior to questioning in an administrative disciplinary proceeding. The bill additionally states that specified communications between peace officers and their union representatives are confidential.***

*Existing law* defines “public safety officer” as all peace officers, except as specified. (Gov. Code, § 3301.)

*Existing law* finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations between public safety employees and their employers. (Gov. Code, § 3301.)

*Existing law* provides that when any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action, the interrogation shall be conducted under the specified conditions. (Government Code, § 3303.)

*Existing law* states that, for purposes of the POBOR, "punitive action" means any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment. (Government Code, § 3303.)

*Existing law* specifies that when any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action, the interrogation shall be conducted under the following conditions:

- The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise; (Government Code, § 3303, subd. (a).)
- The public safety officer under investigation shall be informed prior to the interrogation of the rank, name, and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation; (Government Code, § 3303, subd. (b).)
- The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation; (Government Code, § 3303, subd. (c).)
- The interrogating session shall be for a reasonable period taking into consideration gravity and complexity of the issue being investigated. The person under interrogation shall be allowed to attend to his or her own personal physical necessities; (Government Code, § 3303, subd. (d).)
- The public safety officer under interrogation shall not be subjected to offensive language or threatened with punitive action, except that an officer refusing to respond to questions or submit to interrogations shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action; (Government Code, § 3303, subd. (e).)
- The employer shall not cause the public safety officer under interrogation to be subjected to visits by the press or news media without his or her express consent nor shall his or her home address or photograph be given to the press or news media without his or her express consent; (Government Code, § 3303, subd. (e).)
- No statement made during interrogation by a public safety officer under duress, coercion, or threat of punitive action shall be admissible in any subsequent civil proceeding, subject to certain qualifications; (Government Code, § 3303, subd. (f).)

- The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. No notes or reports that are deemed to be confidential may be entered in the officer's personnel file; (Government Code, § 3303, subd. (g).)
- If prior to or during the interrogation of a public safety officer it is deemed that he or she may be charged with a criminal offense, he or she shall be immediately informed of his or her constitutional rights; (Government Code, § 3303, subd. (h).)
- Upon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters that are likely to result in punitive action against any public safety officer, that officer, at his or her request, shall have the right to be represented by a representative of his or her choice who may be present at all times during the interrogation; and (Government Code, § 3303, subd. (i).)
- The representative shall not be a person subject to the same investigation. The representative shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information received from the officer under investigation for noncriminal matters. (Government Code, § 3303, subd. (i).)

*Existing law* states that the restrictions on interrogation shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer, nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities. (Government Code, § 3303, subd. (i).)

*Existing law* specifies that no public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights under the Public Safety Officers Procedural Bill of Rights, or the exercise of any rights under any existing administrative grievance procedure. (Gov. Code, § 3304.)

*Existing law* states that administrative appeal by a public safety officer Public Safety Officers Procedural Bill of Rights shall be conducted in conformance with rules and procedures adopted by the local public agency. (Gov. Code, § 3304.5.)

*Existing law* no public employee shall be subject to punitive action or denied promotion, or threatened with any such treatment, for the exercise of lawful action as an elected, appointed, or recognized representative of any employee bargaining unit. (Gov. Code, § 3502.1.)

*Existing law* public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights to join unions. (Gov. Code, § 3506.)

*Existing law* provides that a public agency shall not do any of the following: (Gov. Code, § 3506.5.)

- Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter;
- Deny to employee organizations the rights guaranteed to them by this chapter;

- Refuse or fail to meet and negotiate in good faith with a recognized employee organization;
- Dominate or interfere with the formation or administration of any employee organization, contribute financial or other support to any employee organization, or in any way encourage employees to join any organization in preference to another; and
- Refuse to participate in good faith in an applicable impasse procedure.

*This bill* States that prior to an interrogation of a peace officer as part of an administrative disciplinary proceeding the officer shall be informed of the following:

- The time and date of any incident at issue;
- The location of any incident at issue;
- The internal affairs case number, if any;
- The title of any policies, orders, rules, procedures, or directives alleged to have been violated with a brief factual description of the conduct upon which the allegation against the public safety officer is based.

*This bill* clarifies that this bill does not provide a right to full discovery of investigation reports and witness statements before the officer's interrogation.

*This bill* states that neither a representative of a recognized employee organization nor a public safety officer shall be required to disclose, or be subject to punitive action for refusing to disclose, the existence of, or content of, any communication between them seeking representation or regarding matters within the scope of the organization's representation.

## COMMENTS

### 1. Need for This Bill

According to the author:

> Existing law requires that when a peace officer is the subject of an internal administrative (IA) that he/she must be notified of the nature of the investigation and that the communications between the peace officer and their chosen representative is confidential for non-criminal, administrative complaints. AB 887 creates a minimum standard for the type of information provided to the officer prior to the IA and clarifies that the protected communication is guaranteed to the peace officer and their selected union representative for a non-criminal administrative investigation.
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> Specifically, Government Code 3300 states that the rights and protections provided to peace officers constitute a matter of statewide concern and declare that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers.
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> Law requires that when a peace officer is the subject of an IA they must be "informed of the nature of investigation prior to any interrogation". Furthermore, the law requires a peace officer be allowed to have representation during an IA

interrogation. The law prohibits the peace officers representative from being questioned regarding any communication between them or the peace officer(s) they represent in non-criminal, administrative investigations.

The problem is that some employers' have narrowly interpreted the "…nature of investigation…" to mean only the date, time, place of the interrogation and sometimes charge of the interrogation. The notice often omits date, time, location of incident, charge against the officer and summary of the incident. This has created delays in the IA process and unnecessarily stalled investigations. AB 887 will define the minimum amount of information provided to the peace officer and their representative so that IA investigations can be conducted more efficiently and conclude in a timely manner only in non-criminal, administrative investigations. AB 887 does not seek, nor require, to obtain the details of the administrative investigation such as witness statement(s), complainant statement(s), physical/video, audio evidence, etc. prior to the interrogation.

The law also protects the peace officers' union representative from being ordered by the employer to disclose any communications between them and the peace officer, regarding an IA. However, by statute, it does not prohibit the employer from questioning the peace officer about the communications he/she had with an official representative.

The problem is that even though most employers have traditionally respected the privilege of this communication both ways, more recently peace officers are being ordered to disclose that they talked to a union representative, and even the content of that communication. AB 887 will clarify that that communication is privileged for both the union representative and the employee.

AB 887 seeks to maintain the employer-employee relationship by providing the peace officer and their union representative with the minimum amount of information to respond to IA interrogations in a timely manner and to clarify the basic right of privileged communications between the union member and union representative in non-criminal, administrative investigations.

**2. Public Safety Officers Bill of Rights (POBOR)**

POBOR provides peace officers with procedural protections relating to investigation and interrogations of peace officers, self-incrimination, privacy, polygraph exams, searches, personnel files, and administrative appeals. When the Legislature enacted POBOR in 1976 it found and declared "that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern." While the purpose of POBOR is to maintain stable employer-employee relations and thereby assure effective law enforcement, it also seeks to balance the competing interests of fair treatment to officers with the need for swift internal investigations to maintain public confidence in law enforcement agencies. (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564.)

**3. Providing a "Factual Description" Before Interrogation of an Officer**

Under POBOR, an interrogation is an investigatory interview of the public safety officer regarding a matter which would form the basis of an administrative disciplinary action. The rules under POBOR which pertain to "interrogations" do not apply when investigating actions of a police officer that are potentially criminal in nature. Existing law requires that the public safety officer under investigation for disciplinary purposes be informed of the "nature" of the investigation prior to any interrogation (Government Code, § 3303, subd. (c).) Courts have not explicitly interpreted through any published opinions what exactly constitutes the "nature" of an investigation. Opponents to this legislation argue that this bill goes beyond the bounds of a reasonable disclosure by requiring that officers be provided a factual description of the incident in question. Stating the "nature" of an inquiry could be something as simple as stating the type of inquiry (i.e. a harassment complaint, allegations of making false statements, etc). Requiring a "factual description" could arguably provide the person being interviewed information that could color their testimony.

In interpreting POBOR, the court in *Ellins v. City of Sierra Madre* (2016) 244 Cal.App.4th 445, discussed the benefits of disclosing the "nature" of the investigation to the officer prior to the interrogation.

> Although the disclosure of *discovery* regarding misconduct in advance of an interrogation might 'frustrate the effectiveness of any investigation' by 'color[ing] the recollection of the person to be questioned or lead[ing] that person to confirm his or her version of an event to that given by witnesses' whose statements have been disclosed in discovery, advanced disclosure of *the nature of the investigation* has the opposite effect: It allows the officer and his or her representative to be 'well-positioned to aid in a full and cogent presentation of the [officer's] view of the matter, bringing to light justifications, explanations, extenuating circumstances, and other mitigating factors' and removes the incentive for uninformed representative[s] … to obstruct the interrogation 'as a precautionary means of protecting employees from unknown possibilities.' Thus, advance disclosure of the nature of the investigation serves *both* purposes of POBRA by contributing to the efficiency and thoroughness of the investigation while also safeguarding the officer's personal interest in fair treatment. (*Id.* at 454, citations omitted.)

The court in *Ellins* contrasted disclosure of the nature of the investigation prior to the interview to a requirement that the officer to be provided discovery prior to the interview. Discovery requires full disclosure of witness statements and any other evidence supporting an allegation of misconduct. The court pointed out that disclosure of the discovery prior to an interview is likely to diminish the effectiveness of the interview.

> . . . , to require disclosure of crucial information about an ongoing investigation to its subject before interrogation would be contrary to sound investigative practices. During an interrogation, investigators might want to use some of the information they have amassed to aid in eliciting truthful statements from the person they are questioning. Mandatory pre-interrogation discovery would deprive investigators of

> this potentially effective tool and impair the reliability of the investigation. This is true in any interrogation, whether its purpose is to ferret out criminal culpability or, as in this case, to determine if a peace officer used a mailing list in contravention of a direct order by his superiors. Pasadena Police Officers Assn. vs. City of Pasadena 51 Cal.3d 564.

This bill would require the following disclosures to the officer prior to the interrogation:

- The time and date of any incident at issue;
- The location of any incident at issue;
- The internal affairs case number, if any;
- The title of any policies, orders, rules, procedures or directives alleged to have been violated *with a brief factual description of the conduct* upon which the allegation(s) against the public safety officer were based.

**4. Relationship Between Employees and Union Representatives**

California does not have an evidentiary privilege for communications between employees and their union representatives. AB 729 (Hernández), of the 2013-2014 Legislative Session, would have provided that a union agent and a represented employee or represented former employee have a privilege to refuse to disclose any confidential communication between the employee or former employee and the union agent while the union agent was acting in his or her representative capacity, except as specified. AB 729 was vetoed by the Governor.

This bill would create a right to confidentiality regarding communications between officers and union representatives when the communication involves seeking representation or regarding matters within the scope of the union's representation.

There are policy reasons to protect communications between employees and their union representatives. *Peterson v. State* (2012) 280 P.3d 559, 565, decided by the Supreme Court of Alaska, discussed that fact that an expectation of confidentiality can allow a union member to be more open about issues involving working conditions. The court in *Peterson* stated that the expectation of confidentiality is critical because without it "union members would be hesitant to be fully forthcoming with their representatives, detrimentally impacting a union representative's ability to advise and represent union members with questions or problems."

> The *Peterson* court held that the union agent-represented worker privilege in the state of Alaska "extends to communications made: (1) in confidence; (2) in connection with representative services relating to anticipated or ongoing disciplinary or grievance proceedings; (3) between an employee (or the employee's attorney) and union representatives; and (4) by union representatives acting in official representative capacity. The privilege may be asserted by the employee or by the union on behalf of the employee. Like the attorney-client privilege, the union-relations privilege extends only to communications, not to underlying facts." (*Id*.)

The author states that "AB 887 will ensure that the communications between an employee and his/her union representative are confidential over matters within the scope of the organization's representation." To the extent that confidentiality of those communications serves legitimate policy interests, it raises the question whether it is appropriate to single out law enforcement officers as the category of employees that are entitled to such protection under law.

**5. Argument in Support**

According to the Fraternal Order of Police:

> Current law requires that when a peace officer is notified that they are the subject of an internal investigation, that the communication between them and a chosen representative remain confidential for non-criminal, administrative complaints. Unfortunately, the law only protects union representatives and does not prohibit an employer from asking the peace officer if they have spoken with their union representative. AB 887 simply clarifies that communications for these types of internal investigations between the peace officer and their union representative is privileged communication.
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> AB 887 also seeks to provide the peace officer and their union representative with the appropriate level of notice to respond to the internal investigation. By clarifying the law, we can ensure our peace officers and union representatives are privy to the necessary information, treated fairly, and also ultimately saving our departments time and resources.

**6. Argument in Opposition**

According to the California Police Chiefs Association:

> Assembly Bill 887, which would require additional information to be provided to a public safety officer under investigation prior to any interrogation. This information would include the time and date of any incident at issue, the location of any incident as issue, the internal affairs case number, the title of any alleged violation, and a brief summary of any complaint.
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> Unfortunately, this last requirement will seriously undermine the integrity of peace officer investigations. Nearly 25 years ago, the California Supreme Court, acting in *Pasadena POA v. City of Pasadena*, disapproved the concept of so-called pre-interview discovery whereby a subject officer was told everything about the complaint before having to answer any questions. The Court noted that the objective of an internal affairs investigation is to ascertain both the truth of the matter concerning the complaint as well as whether the officer was being truthful in his/her

answers. To reveal details of the complaint before an interview or interrogation would thwart this objective. While not calling for full pre-interview discovery, the aforementioned addition is nonetheless contrary to the public policy declared by the Court in Pasadena in that it goes beyond simply identifying the event or transaction from which the complaint arises, but would reveal the full nature of the complaint, thus enabling an officer to tailor his/her responses. This portion of the proposed amendment is intended only to empower and fore warn an officer, and does nothing to materiality aid in ascertainment of the truth of the matter nor to ensure ascertainment of whether the officer is being truthful in his/her responses.

**-- END –**