SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	SB 1286	**Hearing Date:**	April 12, 2016
Author:	Leno		
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Urgency:	No	**Fiscal:**	Yes
Consultant:	JRD		

Subject: ***Peace Officers: Records of Misconduct***

HISTORY

Source: American Civil Liberties Union of California; California Newspaper Publishers Association; PICO California; Youth Justice Coalition

Prior Legislation: AB 1648 (Leno) – died in Assembly Public Safety, 2007
SB 1019 (Romero) – died in Assembly Public Safety, 2007

Support: ACCE Action; Anti-Racist Action – Los Angeles/People Against Racist Terror; BerekelyLaw; Black and Pink Prison Abolition Now; Black Lives Matter Sacramento; Black Lives Matter Long Beach; Bill of Rights Defense Committee / Defending Dissent Foundation; Boys and Men of Color, Santa Ana; California Immigrant Youth Justice Alliance; California Public Defenders Association; California Immigrant Policy Center; Californians for Justice; Chinese for Affirmative Action; California Attorneys for Criminal Justice; Coalition for Grassroots Progress; Community Coalition; Courage Campaign; Critical Resistance; Dignity and Power Now; Ella Baker Center for Human Rights; Fathers and Families of San Joaquin; Friends Committee on Legislation of California; Islamic Shura Council of Southern California; Justice Not Jails; Legal Services for Prisoners with Children; Los Angeles Workers Assembly; National Center for Youth Law; A New PATH; A New Way of Life Re-Entry Project; Partnership for the Advancement of New Americans; Public Counsel; Riverside Temple Beth El; Riverside Coalition for Police Accountability; San Diego Immigrant Rights Consortium; Silicon Valley De-Bug; Skid Row Housing Trust; Southeast Asia Resource Action Center; Transgender, Gender Variant and Intersex Justice Project; UAW Local 2865; UNITE HERE Local 30; Unite for Reproductive and Gender Equity; Urban Peace Institute; The W. Haywood Burns Institute; Women's Foundation of California; Youth ALIVE! Youth Justice Coalition

Opposition: Association for Los Angeles Deputy Sheriffs; Association of Orange County Deputy Sheriffs; California College and University Police Chiefs Association; California Correctional Peace Officers Association; California District Attorneys Association; California Peace Officers Association; California Correctional Supervisors' Organization; California Narcotic Officers Association; California Police Chiefs Association; California School Employees Association; California State Sheriffs' Association; California Statewide Law Enforcement Association;

Fontana Police Officers Association; Fraternal Order of Police; Labor Coalition; Long Beach Peace Officers Association; Los Angeles County Federation of Labor, AFL-CIO; Los Angeles County Professional Peace Officers Association; Los Angeles Police Protective League; Office of the District Attorney, County of Ventura; Office of the San Diego County District Attorney; Orange County Employees Association; Peace Officers Research Association of California; Riverside Sheriffs Association; San Diego Police Officers Association; Sacramento County Deputy Sheriffs Association; Southern California Alliance of Law Enforcement

PURPOSE

The purpose of this legislation is to provide greater public access to peace officer personnel records and administrative hearings, as specified.

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. (Evidence 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.

(Evidence Code § 1045(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. (Evidence Code § 1045(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. (Evidence Code § 1045(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. (Evidence Code § 1045(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. (Evidence 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. (Penal Code § 832.5(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. (Penal Code § 832.5(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). (Penal Code § 832.5(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. (Penal Code § 832.7(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. (Penal Code § 832.7(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(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. (Penal Code § 832.7(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.

(Penal 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. (Government 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. (Government 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. (Government Code § 6253(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. (Government Code § 6255(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. (Government Code § 6250, et seq.)

This bill would, notwithstanding any confidentiality afforded the personnel records of peace officers or custodial officers, authorize a municipality or local public agency that employs peace officers or custodial officers to hear and adjudicate administrative appeals, or to empower a body to hear and adjudicate those appeals, in proceedings that are open to the public and in which some or all documents filed are available for public inspection, as specified.

This bill would require a department or agency to provide, in the written notification to the complaining party of the disposition of a complaint, at a minimum, the charges framed in response to the complaint, the agency's disposition with respect to each of those charges, any

factual findings on which the agency based its dispositions, and any discipline imposed or corrective action taken, as specified.

This bill would authorize a municipality, county, or agency that employs peace officers to do both of the following:

- Hold hearings, which may be open to the public, to hear complaints by members of the public, consider evidence, and adjudicate the complaints or recommend adjudications.

- Establish a body to hold these hearings.

This bill would expand the scope of the exceptions to the California Public Records Act for investigations or proceedings concerning the conduct of peace officers or custodial officers, to apply to, among other things, investigations or proceedings conducted by civilian review agencies, inspectors general, personnel boards, police commissions, civil service commissions, city councils, boards of supervisors, or any entities empowered to investigate peace officer misconduct on behalf of an agency, conduct audits of peace officer discipline on behalf of an agency, adjudicate complaints against peace officers or custodial officers, hear administrative appeals, or set policies or funding for the law enforcement agency. The bill would also require an entity described in those exceptions to comply with specified confidentiality provisions.

This bill would require, notwithstanding any other law, certain peace officer or custodial officer personnel records and records relating to complaints against peace officers and custodial officers to be available for public inspection pursuant to the California Public Records Act, including:

- A record related to the investigation or assessment of any use of force by a peace officer that is likely to or does cause death or serious bodily injury, including but not limited to, the discharge of a firearm, use of an electronic control weapon or conducted energy device, and any strike with an impact weapon to a person's head.

- A record related to any finding by a law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault, an excessive use of force, an unjustified search, detention or arrest, racial or identity profiling, as defined in subdivision (e) of Section 13519.4, discrimination or unequal treatment on the basis of race, color, ethnicity, national origin, age, religion, gender identity or expression, sexual orientation, or mental or physical disability, or any other violation of the legal rights of a member of the public.

- A record related to any finding by a law enforcement agency of job-related dishonesty by a peace officer or custodial officer, including, but not limited to, perjury, false statements, filing false reports, or destruction or concealment of evidence.

The bill would provide that this information includes but is not limited to, the framing allegation or complaint, the agency's full investigation file, any evidence gathered, and any findings or recommended findings, discipline, or corrective action taken. The bill would require records disclosed pursuant to this provision to be redacted only 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 peace officers and custodial officers, to preserve the anonymity of complainants and witnesses, or to protect confidential medical, financial, or other information in which disclosure 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, or where there is a specific, particularized reason to believe that disclosure would pose a significant danger to the physical safety of the peace officer, custodial officer, or others, as specified.

This bill would specify that the provisions that establish discovery procedures for obtaining peace officer personnel files do not bar or limit access in any proceeding to peace officer or custodial officer personnel records or records relating to complaints against peace officers and custodial officers, and would provide that those provisions do not require a party to a proceeding pending in a court or administrative agency to seek records through alternate means before filing a motion pursuant to the discovery provisions described above.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, Coleman v. Brown, Plata v. Brown (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Legislation

According to the author:

> SB 1286 is a reasonable commonsense measure that increases government transparency, and improves accountability and trust in law enforcement.
>
> Our state's hardworking peace officers risk their lives daily to protect the people of California. The good work of these dedicated public servants should not be tarnished by the actions of the few among their ranks who may engage in wrongdoing.
>
> However, recent events – such as excessive deadly uses of force, sexual assaults, and other types of police misconduct – have sparked widespread concerns about police accountability.
>
> Polls show, for example, that only 30% of Americans believe that law enforcement agencies do a good or excellent job of holding officers accountable, and that number drops to just 10% amongst Black Americans.
>
> To build public trust and legitimacy, the President's Task Force on 21st Century Policing recommends that law enforcement agencies establish a culture of transparency and accountability—both cornerstones of our democracy.
>
> However, in California, when it comes to the tax-paying public having access to information about police-community interactions, law enforcement agencies cannot tell the public whether an officer engages in misconduct. Law enforcement agencies cannot tell the public if discipline is imposed on an officer who violates a law, department policy or community norms, nor meaningfully inform the public about officer-involved shootings or other serious uses of force.
>
> By contrast, in states like Texas, Kentucky, Utah, and approximately a dozen others, such information is made public when an officer is found to have engaged in misconduct. In addition, at least ten other states; including Florida, Ohio, and Washington; provide transparency irrespective of the conclusion.

In addition, a recent poll found that almost four in five California voters (79%) believe the public should have access to the findings and conclusions of investigations when police are found to have engaged in misconduct.

SB 1286 addresses the crises of confidence in our system of policing by providing transparency for serious use of force incidents and when egregious misconduct – such as racial or identity profiling, sexual assault, or an illegal search or seizure – is found to have occurred.

2. 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.

> 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).)
>
> 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.)

3. Copley Press, Inc. v. Superior Court

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. Perhaps the most notorious of these decisions is *Copley Press, Inc. v. Superior Court.*

In August of 2006, the California Supreme Court held in *Copley Press, Inc. v. Superior Court*, that the right of access to public records under the California Public Records Act did *not* allow Copley Press 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).) *Copley*, additionally, provides 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 Copley Press, Inc. (Copley), which publishes 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. Copley requested access to the hearing, but the Commission denied the request. After the appeal's completion, Copley 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.)

Copley Press 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.)

> Copley'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*.)
>
> We reject Copley'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 Copley'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.

(*Copley Press, Inc*. v. *Superior Court, supra,* at 1284-86 (footnotes omitted).)

The *Copley* 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:

> Copley's appeal to policy considerations is unpersuasive. Copley 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 Copley'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."

(*Copley Press, Inc*. v. *Superior Court, supra,* 1298-1299, citations omitted, emphasis added.)

5. Effect of This Bill

Public Access to Peace officer Personnel Records

Peace officer personnel records are currently protected under Penal Code 832.7. This legislation loosens those protections by providing the public access to records related to:

1. The investigation or assessment of any use of force by a peace officer that is likely to or does cause death or serious bodily injury, including but not limited to, the discharge of a firearm, use of an electronic control weapon or conducted energy device, and any strike with an impact weapon to a person's head.

2. Any finding by a law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault, an excessive use of force, an unjustified search, detention or arrest, racial or identity profiling, as defined in subdivision (e) of Section 13519.4, discrimination or unequal treatment on the basis of race, color, ethnicity, national origin, age, religion, gender identity or expression, sexual orientation, or mental or physical disability, or any other violation of the legal rights of a member of the public.

3. Any finding by a law enforcement agency of job-related dishonesty by a peace officer or custodial officer, including, but not limited to, perjury, false statements, filing false reports, or destruction or concealment of evidence.

While relaxing the protections of 832.7, this legislation provides for redaction of those documents when disclosure 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, or where there is a specific, particularized reason to believe that disclosure would pose a significant danger to the physical safety of the peace officer, custodial officer, or others.

Public Access to Hearings

As discussed above, *Copley* held that Penal Code section 832.7 protections extended beyond civil and criminal proceedings, thus denying public access to certain disciplinary appeals hearings. Post-*Copley*, the First District Court of Appeals in California held that a police review commission's investigative and hearing process were, additionally, subject to the protections of penal code 832.7. (*Berkeley Police Assn. v. City of Berkeley*, 167 Cal. App. 4th 385 (Cal. App. 1st Dist. 2008).)

This legislation provides for public access to such hearings, if localities so chose. Specifically, this legislation authorizes a:

- Municipality or local public agency that employs peace officers or custodial officers to hear and adjudicate administrative appeals, or to empower a body to hear and adjudicate those appeals, in proceedings that are open to the public and in which some or all documents filed are available for public inspection.

- Municipality, county, or agency that employs peace officers to hold public hearings to hear complaints by members of the public, consider evidence, and adjudicate the complaints or recommend adjudications.

6. Argument in Support

The American Civil Liberties Union of California states,

> California law currently makes peace officer misconduct and discipline confidential. This means law enforcement agencies cannot tell the public whether an officer engages in misconduct, or when discipline is imposed on officers who violate a laws, department policies or community norms, nor meaningfully inform the public about officer-involved shootings or other serious uses of force.

California is among the most restrictive states in the U.S. on public access to information about peace officer misconduct and investigations into critical police-community incidents. Texas, Florida, Kentucky, Utah, and nearly a dozen other states, provide public access to such information when misconduct is confirmed. In addition, at least 10 other states make records related to complaints against officers publicly available regardless of whether misconduct is found to have occurred.

SB 1286 will resolve the deficit in California law by allowing public access to information about serious uses of force and misconduct by peace officers. It would also allow people who file complaints about officer misconduct to find out what happened in response to their complaints, permit cities and counties to hold public hearings and appeals on allegations of misconduct, and allow governmental bodies to review officer personnel files while keeping them confidential.

Addressing police secrecy is critical to improving the lack of community trust in our system of justice, especially in communities of color, where people are killed by police at alarming rates. As an example, a recent Pew Research Center poll found that only 30 percent of all Americans believe law enforcement agencies are doing a good or excellent job of holding officers accountable for misconduct and that number drops to a mere 10 percent when the same question is asked of black Americans specifically. Another poll shows that nearly 80 percent of Californians believe the public should have access to information about confirmed officer misconduct, and nearly two-thirds believe that the public should have access in all cases in which an officer is accused of misconduct. As the LA Times Editorial Board stated this February:

> Far from being a beacon of transparency, California — when it comes to the public's ability to assess the performance of its law enforcement agencies — is the nation's information black hole . . . [SB 1286] would restore the disclosure that Californians once considered a basic element of police oversight here, as it still is in many other states.[1]

Under current law, the public is all too often left in the dark when there appears to be police wrongdoing. Each instance of police secrecy erodes public trust. Californians do not know why officers were allowed to shoot Fridoon Nehad in San Diego, Charlie "Africa" Keunang on Skid Row in Los Angeles, or Mario Woods in San Francisco. We do not understand why officers were permitted to beat Marlene Pinnock, or threaten people over social media. SB 1286 would break this wall of silence, and allow the tax-paying public to get meaningful answers.

Public trust in law enforcement cannot be improved without true openness about how agencies address serious uses of force and proven misconduct.

[1] http://www.latimes.com/opinion/editorials/la-ed-0224-police-transparency-20160224-story.html.

7. Argument in Opposition

According to the Ventura County District Attorney,

> I agree that peace officers are given great responsibility and that allegations of misconduct must be thoroughly investigated. But I do not believe that existing procedures to address allegations are inadequate. My experience has been that law enforcement agencies take complaints seriously, investigate them responsibly, and impose appropriate discipline. I do not believe that SB 1286 would accomplish the stated goal of increasing public confidence in peace officers.
>
> The longstanding protections for peace officer personnel files are based on officers' unique job responsibilities. Unlike any other profession, peace officers' duties include using physical force against others and engaging in daily confrontations with criminals. Unfortunately, some individuals they encounter have no scruples against fabricating charges in order to escape criminal liability for themselves or to seek financial gain. No other group—teachers, firefighters, etc.—are placed in this position. But SB 1286 would actually give officers **fewer protections** tha[n] other professions, who are generally entitled to closed hearings and confidential records for disciplinary matters.
>
> Under the Ralph M. Brown Act, public employees accused of misconduct are entitled to closed hearings unless they request a hearing. (Gov. Code, § 54957, subd. (b).) An employee's personnel records are presumed to be confidential, and require a judicial weighing of public interest before they are released. (Cal. Const., art. I, § 1; *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 525-526; *Johnson v. Winter* (1982) 127 Cal.App.3d 435.) SB 1286 would not only eliminate existing protections for peace officers, but would go too far the other way, depriving them of privacy rights accorded other professions.
>
> SB 1286 would amend Penal Code section 832.7 to provide sweeping and unwarranted exceptions to the confidentiality of peace officer personnel files. The bill would allow Public Records Act access to the full investigative file, all evidence gathered, and the specific discipline imposed for several categories of internal investigations. This is in stark contrast to other provisions of the Public Records Act, which exempt from disclosure personnel records (Gov. Code, § 6254, subd. (c)) and law enforcement investigatory files. (Gov. Code § 6254 (f).) SB 1286 would give peace officers lesser privacy rights in investigation files than those afforded murderers, pedophiles, and other criminals.
>
> In sharp departure from longstanding *Pitchess* protections, dissemination of peace officer personnel records and would not be limited to those who have a need for them in court. In addition, this bill would eliminate the effect of protective orders, currently required to limit use of peace officer personnel information to the case in which the information is obtained. (Evid. Code, § 1045, subd. (e).) Elimination of these protections is not justified.
>
> Open hearings on complaints against peace office[r]s may actually **discourage** members of the public from coming forward. Investigations are currently handled with confidentiality and discretion that protects not only the officer but the complaining parties

and witnesses. The prospect of having to testify against police at a public meeting is likely to discourage some citizens from complaining at all.

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