
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 459 **Hearing Date:** July 11, 2017
Author: Chau
Version: June 15, 2017
Urgency: No **Fiscal:** Yes
Consultant: GC

Subject: *Public Records: Video or Audio Recordings: Crime*

HISTORY

Source: Author

Prior Legislation: AB 2611 (Low), 2016, failed in Assembly Judiciary
AB 2533 (Santiago), 2016, failed in this committee
AB 69 (Rodriguez), 2015, Ch. 461, Stats. of 2015
SB 175 (Huff), 2015, failed on the Assembly Floor
AB 1940 (Cooper), 2015, failed in this committee

Support: Association of Orange County Deputy Sheriffs; California Partnership to End Domestic Violence; California Statewide Law Enforcement Association; Chief Probation Officers of California; Crime Victims United of California; Fraternal Order of Police; Long Beach Police Officers Association; National Association of Social Workers; Peace Officers Research Association of California; Sacramento County Deputy Sheriffs Association

Opposition: None known

Assembly Floor Vote: 69 - 0

PURPOSE

The purpose of this bill is to provide that public agencies are not required to disclose video or audio created during the commission or investigation of the crimes of rape, incest, sexual assault; domestic violence, or child abuse that depicts the victim of the incident, as specified.

Existing law, under the California Constitution, declares the people's right to transparency in government. ("The people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny....") (Cal. Const., art. I, Sec. 3.)

Existing law provides individuals an express right to privacy specifically designed to "prevent government ... from collecting and stockpiling unnecessary information about us and misusing information gathered for one purpose in order to serve another purpose." (Cal. Const., art. I, Sec. 1; *White v. Davis* (1975) 13 Cal.3d 757, 774.)

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

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

Existing law provides that public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as specified. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law. (Gov. Code Sec. 6253(a).)

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

This bill would provide that the CPRA does not require disclosure of a video or audio recording that was created during the commission or investigation of the crime of rape, incest, sexual assault, domestic violence, or child abuse that depicts the face, intimate body part, or voice of a victim of the incident depicted in the recording. An agency would be required to justify withholding the video or audio recording by demonstrating, pursuant to Section 6255 of the Government Code, that on the facts of the particular case, the public interest served by not disclosing the recording clearly outweighs the public interest served by disclosure of the recording.

This bill would require an agency to consider the following factors when balancing the public interests in disclosure and nondisclosure:

- the constitutional right to privacy of the person or persons depicted in the recording; and
- whether the potential harm to the victim caused by disclosing the recording may be mitigated by redacting the recording to obscure images showing intimate body parts and personally identifying characteristics of the victim or by distorting portions of the recording containing the victim's voice, provided that the redaction does not prevent a viewer from being able to fully and accurately perceive the events captured on the recording. The recording shall not otherwise be edited or altered.

This bill would require public agencies to permit a victim of a crime of rape, incest, sexual assault, domestic violence, or child abuse, who is a subject of a recording; the parent or legal guardian of a minor subject; a deceased subject's next of kin; or a subject's legally authorized designee, to inspect the recording and to obtain a copy of the recording. This bill would provide that disclosure pursuant to this provision does not constitute a waiver of any exemptions for other members of the public pursuant to Section 6254.5 of the Government Code.

This bill would provide that nothing therein can be construed to affect any other exemptions to the CPRA.

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

This bill would make findings required by the California Constitution.

COMMENTS

1. Need for This Bill

According to the author:

In the wake of high-profile use of force incidents in Ferguson, Staten Island, Baltimore and elsewhere, body-worn cameras (BWC) have been swiftly deployed by law enforcement agencies across the country. Body-worn cameras help promote transparency, accountability and credibility between law enforcement and the public.

However with rapid adoption of BWCs, concerns have emerged about the consistency of use, transparency and privacy. Eighteen states have legislated how body-worn camera data is treated under open record laws. In California, video and audio data held in law enforcement custody can be considered a public record under the California Public Records Act (CPRA).

The CRPA generally requires that public agencies make public records available to the public upon request, unless exempted by law. However, it also gives public agencies some flexibility to exempt some documents from disclosure in cases where "the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record". That decision must be made on a case by case basis by the disclosing agency.

Nevertheless, due to the unusually sensitive nature of audio and video recordings showing victims of sexual violence, domestic violence, and child abuse, often at one of the worst moments of the person's life, these individuals deserve greater assurance that their privacy will be protected. Public release of these images and sounds could cause further physical or mental harm to the victim and should be minimized.

AB 459 urges agencies to withhold video and audio files that were created during the commission of the crime or the subsequent investigation of the crimes of rape, incest, sexual assault, domestic violence, and child abuse from being subject to public disclosure. While the CPRA requires a balancing test between the public interest to disclose versus withhold, the individual right to privacy is considered during this test. Victims of sexual violence, domestic violence, and child abuse are placed in a particularly vulnerable situation and deserve strong privacy protections when agencies consider the balancing test. If it is deemed that the public interest warrants the release of the video or audio files, the agency shall consider redaction to prevent release of personally identifiable characteristics. Furthermore, AB 459 enhances the rights of the victim or victims of these crimes by permitting the inspection of the recording and the right to obtain a copy. This bill aims to enhance privacy protections and prevent further harm to the victims of sexual and domestic violence.

According to the National Conference on State Legislatures, 18 states and the District of Columbia have legislated how body-worn camera data is addressed under open record laws. In particular Oklahoma and Connecticut have passed laws that provide additional protection for victims of sexual or domestic violence. In Connecticut, HB 7103 (2015) requires that no data of a scene that involves a victim of domestic or sexual abuse shall be subject to public disclosure if it is an unwarranted invasion of personal privacy. In Oklahoma, footage can be redacted if it portrays a victim of sex crimes and domestic violence. In response to the increased use of body-worn cameras, other states have given extra protections to victims. Given the widespread adaption of body-worn cameras in police departments across the state, California should also protect the privacy of victims of sexual and domestic violence.

2. Recent Body Worn-Camera Legislative Efforts in California

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

The CPRA requires disclosure of public records upon a reasonably focused and specific request, except with respect to public records exempt from disclosure by express provisions of law. (Gov. Code Sec. 6253 (b).) When a record is not specifically exempt from disclosure, the CPRA provides a balancing test to be used when determining whether records should be released. (Gov. Code Sec. 6254.16 (f).) If the public interest in nondisclosure clearly outweighs the public interest in disclosure, the records will not be released. (*American Civil Liberties Union of Northern Cal. v. Superior Court* (2011) 202 Cal.App.4th 55, 62.) Currently, law enforcement investigative records are exempt from mandated disclosure under the CPRA. (Gov. Code Sec.

6254 (f.) This includes records of complaints, preliminary inquiries to determine if a crime has been committed, and full-scale investigations, as well as closure memoranda. (Gov. Code Sec. 6254.)

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

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

Similar to AB 1246 (Quirk, 2015); AB 1940 (Cooper, 2016), and AB 2611 (Low, 2016), which all sought to protect the privacy interests of persons depicted in recordings, this bill seeks specifically to protect the privacy of victims of serious crimes by specifying that the CPRA does not require the release of video or audio recordings created during the commission or investigation of the crimes of rape, incest, sexual assault, domestic violence, or child abuse that depict the face, intimate body part, or voice of a victim of the incident depicted in the recording. It also would require, consistent with current law, an agency that withholds such a recording to demonstrate that, on the facts of the particular case, the public interest served by not disclosing the recording clearly outweighs the public interest served by disclosing it. In balancing these interests, police departments must consider the victim's constitutional right to privacy, and whether the harm to the subject of the recording can be mitigated by redacting the recording to obscure sensitive images and/or distorting the victim's voice. It further authorizes a victim who

is the subject of such a recording, the parent or legal guardian of a minor subject, a deceased subject's next of kin, or a subject's legally authorized designee, to be permitted to inspect the recording and to obtain a copy of the recording. The bill also makes various legislative findings concerning the Constitutional interests involved in preventing the release of public records as required by the state constitution. (Cal. Const., art. 1, sec. 1.)

3. California Public Records Act and Specified Recordings

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

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

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

This bill would add another category of records exempt from disclosure requirements. This bill would provide that video or audio recordings that are created during the commission or investigation of the crimes of rape, incest, sexual assault, domestic violence, or child abuse are not required to be disclosed if they depict the face, intimate body part, or voice of a victim of the incident depicted in the recording.

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

However, the bill would add two specific factors that must be considered by an agency when balancing the competing public interests: "(1) The constitutional right to privacy of the person or persons depicted in the recording"; and, "(2) Whether the potential harm to the victim caused by disclosing the recording may be mitigated by redacting the recording to obscure images showing intimate body parts and personally identifying characteristics of the victim or by

distorting portions of the recording containing the victim's voice, provided that the redaction does not prevent a viewer from being able to fully and accurately perceive the events captured on the recording. The recording shall not otherwise be edited or altered." This provision of the bill would provide additional guidance to agencies when determining whether to disclose such recordings.

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

4. Enhancing the Rights of Victims

This bill would require public agencies to permit a victim of rape, incest, sexual assault, domestic violence, or child abuse, who is a subject of a recording; the parent or legal guardian of a minor subject; a deceased subject's next of kin; or a subject's legally authorized designee, to inspect the recording and to obtain a copy of the recording. Currently, requests from these persons for these recordings could be denied under the various provisions of the CPRA. This bill would therefore bar the application of any exemptions, or the balancing test laid out in Section 6255 of the Government Code, to requests made by victims, and the other persons specified, in relation to these video or audio recordings.

Section 6254.5 of the Government Code currently provides that if a state or local agency discloses a public record that is otherwise exempt, to a member of the public, the disclosure constitutes a waiver of the relevant exemptions, as specified. This bill would provide that disclosure to a victim of rape, incest, sexual assault, domestic violence, or child abuse, who is a subject of a recording; the parent or legal guardian of a minor subject; a deceased subject's next of kin; or a subject's legally authorized designee, pursuant to this bill, does not require that the record be made available to the public pursuant to Section 6254.5.

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