SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No:	SB 16	**Hearing Date:**	March 9, 2021
Author:	Skinner		
Version:	December 7, 2020		
Urgency:	No	**Fiscal:**	Yes
Consultant:	GC		

Subject: ***Peace officers: release of records***

HISTORY

Source: Author

Prior Legislation: SB 776 (Skinner), 2020, never heard on Senate concurrence
SB 1421 (Skinner), ch. 988, stats. of 2018
SB 1286 (Leno), 2016, held in Senate Appropriations
SB 1019 (Romero), 2007, failed Assembly Public Safety
AB 1648 (Leno), 2007 failed Assembly Public Safety

Support: Alameda County Public Defender's Office; American Civil Liberties Union of California; Asian Americans Advancing Justice of California; California Civil Liberties Advocacy; California New Publishers Association; California Nurses Association; California Public Defenders Association; Californians for Safety and Justice; Conference of California Bar Associations; County of Los Angeles Board of Supervisors; Drug Policy Alliance; Ella Baker Center for Human Rights; Equal Rights Advocates; Friends Committee on Legislation of California; National Association of Social Workers – California Chapter; National Nurses United; Oakland Privacy; Prosecutors Alliance of California; San Francisco Public Defender's Office; Smart Justice California; UC Berkeley's Underground Scholars Initiative (USI); Voices for Progress

Opposition: California Law Enforcement Association of Records Supervisors (CLEARS); California Narcotic Officers' Association; California Police Chiefs Association; California State Sheriffs' Association; League of California Cities

PURPOSE

The purpose of this bill is to expand the categories of police personnel records that are subject to disclosure under the California Public Records Act (CPRA); and modify existing provisions regarding the release of records subject to disclosure.

Existing law provides pursuant to the CPRA that all records maintained by local and state governmental agencies are open to public inspection unless specifically exempt. (Gov. Code, §§ 6250 et seq.) Defines "public records" to include any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. (Gov. Code, § 6252, subd. (e).)

Existing law requires an agency to justify withholding any record by demonstrating that the record in question is exempt under express provisions of the CPRA or that on the facts of the particular case, the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. (Gov. Code, § 6255, subd. (a).)

Existing law authorizes any person to 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 under this chapter. (Gov. Code, § 6258.) Provides that if the plaintiff prevails in an action under the CPRA, the judge must award court costs and reasonable attorneys' fees to the plaintiff. (Govt. Code, § 6259, subd. (d).)

Existing law requires the complaints and any reports or findings relating to these complaints shall be retained for a period of at least five years. (Pen. Code, § 832.5, subd. (b).)

Existing law provides that complaints by members of the public that are determined by the peace or custodial 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 CPRA. (Pen. Code, § 832.5, subd. (c).) Defines "frivolous" as "totally and completely without merit or for the sole purpose of harassing an opposing party." (Civ. Code, § 128.5, subd. (b)(2).) Defines "unfounded" as "mean[ing] that the investigation clearly established that the allegation is not true." (Pen. Code, § 832.5, subd. (d)(2).)

Existing law states that except as specified, peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to citizens' complaints against personnel are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery. This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or any agency or department that employ these officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office. (Pen. Code, § 832.7, subd. (a).)

Existing law provides that the following peace officer or custodial records maintained by their agencies shall not be confidential and shall be made available for public inspection pursuant to the CPRA:

- A record relating to the report, investigation, or findings of any of the following:
    - An incident involving the discharge of a firearm at a person by a peace officer or custodial officer; or
    - An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury;
- Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public; and,
- Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial

- officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence. (Pen. Code, *§ 832.7, subd. (b).)*

Existing law states that an agency shall redact a disclosed record for specified purposes, including anonymity of witnesses and complainants. (Pen. Code, § 832.7, subd. (b)(5)(A)-(D).)

Existing law provides also that an agency may redact a record disclosed "where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information." (Pen. Code, § 832.7, subd. (b)(6).) Allows an agency to temporarily withhold records of incidents involving an officer's discharge of a firearm or use of force resulting in death or great bodily injury by delaying disclosure when the incidents are the subject of an active criminal or administrative investigation. (Pen. Code, § 832.7, subd. (b)(7).)

This bill additionally makes, commencing July 1, 2022, personnel records related to the following categories of incidents subject to disclosure under the CPRA:

- Records of every incident involving the use of force to make a member of the public comply with an officer, unreasonable uses of force, or excessive uses of force.

- Records related to sustained findings of unlawful arrests and unlawful searches.

- Records related to sustained findings of officers engaged in conduct involving prejudice or discrimination on the basis of specified protected classes.

This bill permits the disclosure of records that would be otherwise subject to disclosure when they relate to an incident in which an officer resigned before an investigation is completed.

This bill requires that agencies retain all complaints and related report or findings currently in the possession of a department or agency.

This bill clarifies that the identity of victims may be redacted in addition to witnesses and complainants.

This bill codifies existing California Supreme Court case-law requiring law enforcement agencies to cover the costs of editing records.

This bill prohibits assertion of the attorney-client privilege to limit the disclosure of factual information provided by the public entity to its attorney, factual information discovered by any investigation done by the public entity's attorney, or billing records related to the work done by the attorney.

This bill requires records subject to disclosure be provided at the earliest possible time and no later than 45-days from the date of a request for their disclosure.

This bill imposes a civil fine not to exceed one-thousand-dollars per day for each day beyond 30-days that records subject to disclosure are not disclosed.

This bill entitles members of the public who successfully sue for the release of records to twice the party's reasonable costs and attorney's fees.

This bill eliminates the limitation on judges to only consider misconduct complaints against officers from the previous five years when determining relevancy for admissibility in criminal proceedings.

This bill requires that each law enforcement agency request and review the prior personnel files of any officer they hire.

This bill requires that every officer employed as a peace officer immediately report all uses of force by the officer to the officer's employing agency.

This bill delays the implementation of this law until July 1, 2022, to give law enforcement agencies time to review and prepare existing records made subject to disclosure by this bill. This delay does not limit the mandate to disclose all responsive records to records created prior to July 1, 2022.

COMMENTS

1. Need for This Bill

According to the author:

> For decades, California was an outlier banning all public access to records on law enforcement officers. In 2018, SB 1421 gave Californians, for the first time in 40 years, access to a limited set of records related to an officer's use of force, sexual misconduct, or on-the-job dishonesty.
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> While SB 1421 was an important breakthrough, it did not go far enough, leaving out many categories of officer conduct that the public has a legitimate right to know. For example, Californians would not have been able to access records about the past misconduct of Derek Chauvin, the Minneapolis officer who murdered George Floyd, unless his past use of force complaints were classified as 'causing great bodily injury' or 'deadly.'
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> SB 16 remedies this by opening access to additional records, bringing California much closer to states like New York, Florida, Georgia, Kentucky, Ohio, and Washington. Under SB 16, the public would have access to records on officers who have engaged in racist or biased behavior, regularly used excessive force, or have a history of unlawful arrests or searches. SB 16 also has provisions to ensure that officers with a history of misconduct can't just quit their jobs, keep their records secret, and move on to another jurisdiction with their past actions not disclosed. SB 16 also establishes civil penalties for agencies that fail to release records in a timely manner and mandates that agencies can only charge for the cost of duplication.

2. Overview of California Law Related to Police Personnel Records and their Secrecy

In 1974, in *Pitchess v. Superior Court* (1974) 11 Cal. 3d 531 the California Supreme Court allowed a criminal defendant access to certain kinds of information in citizen complaints against law enforcement officers. After *Pitchess* was decided, several law enforcement agencies launched record-destroying campaigns. As a result, the California legislature required law enforcement agencies to maintain such records for five years. In a natural response, law enforcement agencies began pushing for confidentiality measures, which are currently still in effect.

Prior to 2006, California Penal Code Section 832.7 prevented public access to citizen complaints held by a police officer's "employing agency." In practical terms, citizen complaints against a law enforcement officer that were held by that officer's employing law enforcement agency were confidential; however, certain specific records still remained open to the public, including both (1) administrative appeals to outside bodies, such as a civil service commission, and (2) in jurisdictions with independent civilian review boards, hearings on those complaints, which were considered separate and apart from police department hearings.

Before 2006, as a result of those specific and limited exemptions, law enforcement oversight agencies, including the San Francisco Police Commission, Oakland Citizen Police Review Board, Los Angeles Police Commission, and Los Angeles Sheriff's Office of Independent Review provided communities with some degree of transparency after officer-involved shootings and law enforcement scandals, including the Rampart investigation.

On August 29, 2006, the California Supreme Court re-interpreted California Penal Code Section 832.7 to hold that the record of a police officer's administrative disciplinary appeal from a sustained finding of misconduct was confidential and could not be disclosed to the public. The court held that San Diego Civil Service Commission records on administrative appeals by police officers were confidential because the Civil Service Commission performed a function similar to the police department disciplinary process and therefore functioned as the employing agency. As a result, the decision now (1) prevents the public from learning the extent to which police officers have been disciplined as a result of misconduct, and (2) closes to the public all independent oversight investigations, hearings and reports.

After 2006, California has become one of the most secretive states in the nation in terms of openness when it comes to officer misconduct and uses of force. Moreover, interpretation of our statutes have carved out a unique confidentiality exception for law enforcement that does not exist for public employees, doctors and lawyers, whose records on misconduct and resulting discipline are public records.

3. Background on SB 1421 Implementation and Factors Giving Rise to this Legislation

California law has long kept secret records held by law enforcement agencies after making police personnel records completely confidential in 1978 — a benefit provided only to this class of public employee. In 2018, the Legislature passed SB 1421 (Skinner, Chapter 988), which represented a paradigm shift in how local and state police agencies must disclose information when police use of force, or are subject to sustained findings of misconduct related to sexual assault and dishonesty.

When SB 1421 went into effect on January 1, 2019, every single law enforcement agency in California received a request for records made subject to disclosure by the new law. Many of the requests sought a comprehensive release of all existing and relevant records from the agencies. Despite changes to the law, agencies across the state have taken actions that have delayed or denied the public access to records for which disclosure should be mandated. For example, cities such as Downey, Inglewood, Fremont and Morgan Hill destroyed records before January 1, 2019, to avoid producing responsive documents.

Additional attempts to thwart disclosure have taken numerous forms. By March 2019, the Los Angeles Times reported that 170 agencies were in active litigation or refusing to disclose records arguing, among other things, that the law did not apply to records created before 2019. This litigation has created substantial delays in access, and has encouraged agencies to fight in court rather than invest in resources to disclose the records. Agencies are also setting up roadblocks to disclosure. For example, the City of Anaheim demanded a $3,000 deposit before it would begin the process to disclose records to a mother about the death of her unarmed son at the hands of police.

This bill seeks to respond to agencies flouting of the law by allowing a court to impose civil penalties on an agency for delaying disclosure of SB 1421 records, and increasing attorney's fees for litigation over those records to discourage violations of the law and increase compliance.

In the flurry of litigation over SB 1421, one court of appeal discussed an open legal question regarding interpretation of the law: whether the Public Record Act's discretionary (i.e. voluntary) exemptions can be asserted to withhold records that are mandated for disclosure by SB 1421. In *Bacerra v. Superior Court*, 44 Cal. App. 5th 897 (2020), the court recognized that the interest behind exemptions in the PRA could be asserted through the balancing test language in 832.7(b)(6). Through that exemption, an agency may redact records as necessary based on another law that protects that information from disclosure. However, the court also said the discretionary exemptions in the PRA do not swallow SB 1421's mandate to disclose specified documents and information. This bill clarifies the application of the attorney-client privilege to SB 1421 records. This provision specifically incorporates the privilege into the 832.7 disclosure scheme. The provision is intended to prevent the redaction of factual information that is uncovered in an investigation that is conducted by a public entity simply because they hire an attorney to conduct the investigation. The bill permits the redaction of legal opinions and the arguments or reasoning for these opinions. The purpose of this provision is prevent the prevention of disclosure of factual information that would otherwise be subject to disclosure if the agency hired an investigator that was not an attorney.

Even though California has radically shifted its confidential treatment of police records, it remains an outlier when it comes to the public's right to know about police misconduct and use of force. At least 20 other states have far more open access, including New York, which completely eliminated it statutory scheme for confidentiality in police personnel records this summer. California's law remains narrowly focused in disclosing only specified categories of misconduct and uses of force. By expanding the categories of disclosure, the bill adds on to SB 1421's structure of mandating disclosure about the most important incidents, including all uses of force, wrongful arrests and wrongful searches, and records related to an officer's biased or discriminatory actions.

Unlike the recent New York legislation, this bill takes a modest approach to broadening the categories of personnel records that become subject to disclosure under the public records act.

This bill expands the categories in three moderate ways. First it expands the use of force disclosures that are currently permissible to include uses of force by peace or custodial officers that are used to make a person comply, unreasonable force, and excessive force. Second, the bill allows for release of sustained findings of unlawful searches and unlawful arrests. Finally the bill permits the release of records that show racist or discriminatory conduct that has been sustained by the agency are also subject to disclosure. On top of all of this, the bill contains significant privacy protections that permit the redaction of the identifying information of victims, witnesses, and complainants. Had the New York approach been taken, this bill would have simply eliminated Penal Code Section 832.7 completely and all peace officer personnel records would be public records, with no limitations or protections. This bill is a modest expansion of existing law.

4. Lack of Privacy Interests Exist for Other Public Employees

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

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

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

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

5. Argument in Support

> On behalf of the Conference of California Bar Associations (CCBA) – and the lawyers and bar associations from across the state that comprise our members – we are writing in support of SB 16, which would provide access to records of law enforcement officers who have engaged in racist or biased behavior, regularly used excessive force, or have a history of unlawful arrests or searches.

> The CCBA seeks to promote justice through laws in California by bringing together attorney volunteers from around the State to identify, debate, and promote creative, non-partisan changes to the law for the benefit of all Californians. In 2015, the CCBA approved Resolution 07-02-2015, which sought to amend certain California laws to force disclosure of confidential police disciplinary records. The CCBA previously relied on Resolution 07-02-2015 to support SB 1421, from the 2017-2018 Regular Session. Because SB 16 is also germane to the goals of Resolution 07-02-2015, the CCBA similarly supports SB 16.
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> In 2018, SB 1421 gave Californians, for the first time in 40 years, access to a limited set of records related to an officer's use of force, sexual misconduct, or on-the-job dishonesty. However, under current law, Californians have no right to know about officers who use excessive, but non-deadly, force or have a history of engaging in racist or biased actions. Such public access to information on officer conduct is essential to build trust between law enforcement and the communities they serve.
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> While SB 1421 was an important breakthrough, it did not go far enough. For example, Californians would not have been able to access records about the past misconduct of Derek Chauvin, the Minneapolis officer who murdered George Floyd, unless his past use of force complaints were classified as "causing great bodily injury" or "deadly." SB 16 remedies this by opening access to additional records, bringing California much closer to states like New York, Florida, Georgia, Kentucky, Ohio, and Washington. Opening access to additional categories of officer conduct provides communities with the tools to identify officers with a history of misconduct and hold local police agencies accountable.
>
> SB 16 also includes provisions to ensure that officers with a history of misconduct can't just quit their jobs, keep their records secret, and move on to another jurisdiction with their past actions not disclosed.

6. Argument in Opposition

According to the League of California Cities:

> As written, SB 16 would unjustifiably expand SB 1421 by providing for the disclosure of police personnel records for every incident involving use of force, regardless of whether the officer was exonerated or if a complaint was not sustained. This provision is neither practical from an administrative standpoint nor helpful toward the objective of fostering trust between law enforcement and the communities they serve. In fact, the release of officer records for every single incident involving any use of force, especially those in which the officer is entirely within departmental policy, will generate the misperception that there was "something wrong" with the officer's conduct.
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> As a means of enforcing this far-reaching disclosure policy, SB 16 would impose a $1,000 civil fine per day, for each day beyond 30 days that records subject to disclosure are not disclosed. This provision is overly punitive, as it does not

account for the practical challenges of complying with the required timelines of this measure, particularly for smaller cities and police departments with limited personnel who are already facing the prospect of cutting services and staff in the wake of the COVID-19 pandemic.

Aside from the measure's proposed expansive disclosure requirements, SB 16 would additionally force local law enforcement agencies to retain, indefinitely, all complaints currently in their possession. Cities would have to pay for local police departments' additional data storage space, as well as hire additional staff to sort through the numerous complaints exempt from disclosure under the California Public Records Act, but mandated to be retained under SB 16 in order to respond to these requests. Such a change will only exacerbate the budget crisis facing cities as a result of the COVID-19 pandemic.

In order to encourage and facilitate compliance with new transparency and ethics requirements, state laws should be consistent, avoid redundancy, and be mindful of the practical challenges associated with implementation.

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