SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 16 (Skinner)
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AWM

SUBJECT

Peace officers: release of records

DIGEST

This bill expands the categories of police personnel records that are subject to disclosure under the California Public Records Act (CPRA) and imposes certain requirements regarding the time frame and costs associated with such CPRA requests.

EXECUTIVE SUMMARY

In 2018, the Legislature passed SB 1421 (Skinner, Ch. 988, Stats. 2018), which created a limited right of access for records of a law enforcement officer relating to certain incidents involving violence and certain sustained misconduct findings. According to the author, when SB 1421 went into effect, many law enforcement agencies took steps to delay or deny access to records that were properly subject to disclosure.

This bill expands on and strengthens SB 1421 in two main ways. First, it expands the types of records subject to disclosure to include records relating to officer intimidation through use of force, unlawful arrests and searches, and findings that an officer engaged in acts of bias or discrimination on the basis of protected characteristics. Second, it specifies the timing for producing records and what fees may be charged, and imposes penalties for disclosures that were unreasonably delayed or refused. The author has agreed to amendments to clarify the provisions relating to the release of information relating to additional officers involved in an incident and protections for whistleblowers.

This bill is sponsored by the author and supported by numerous entities, including the Prosecutors Alliance of California, the American Civil Liberties Union of California, the Conference of California Bar Associations, and the California News Publishers Association. The bill is opposed by numerous entities, including statewide and local law enforcement groups. This bill passed out of the Senate Committee on Public Safety with a 4-0 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes the CPRA, which provides that all records maintained by local and state governmental agencies are open to public inspection unless specifically exempt. (Gov. Code, §§ 6250 et seq.) The CPRA 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(e)

2) Requires an agency seeking to withhold a record to justify the withholding 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(a).)

3) Authorizes any person to institute proceedings for injunctive or declarative relief or writ of mandate under the CPRA in any court of competent jurisdiction to enforce their right to inspect or to receive a copy of any public record or class of public records under this chapter; and if the person seeking records prevails in the action, the judge must award them reasonable attorney fees and costs. (Gov. Code, §§ 6258-6259.)

4) Requires each department or agency in the state that employs law enforcement officers to establish a procedure to investigate complaints of the public against their personnel. (Gov. Code, § 832.5.(a).)

5) Requires the public's complaints and any reports or findings relating to those complaints to be retained for at least five years. (Pen. Code, § 832.5(b).)

6) Provides that complaints by members of the public, or portions of complaints, that the law enforcement officer's employing agency determines to be frivolous or unfounded, or for which the employing agency exonerates the officer, shall not be maintained in that officer's general personnel file. Instead, such complaints must be retained in separate files that are deemed personnel records for purposes of the CPRA. (Pen. Code, § 832.5(c).)
    a) For purposes of this section, "frivolous" is defined as "totally and completely without merit or for the sole purpose of harassing an opposing party." (Pen. Code, § 832.5(c); Civ. Code, § 128.5(b)(2).)
    b) For purposes of this section, "unfounded" is defined as "mean[ing] that the investigation clearly established that the allegation is not true." (Pen. Code, § 832.5(d)(2).)
    c) For purposes of this section "exonerated" is defined as "mean[ing] the investigation clearly established that the actions of the peace or custodial

officer that formed the basis for the complaint are not violations of law or department policy." (Pen. Code, § 832.5(d)(3).)

7) States that, except as specified, law enforcement 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 law enforcement 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 (a).)

8) Provides that these specified law enforcement officer records maintained by their agencies or departments shall not be confidential and shall be made available for public inspection pursuant to the CPRA:
    a) A record relating to the report, investigation, or findings of any of the following:
        i. An incident involving the discharge of a firearm at a person by a law enforcement officer; or
        ii. An incident in which the use of force by a law enforcement officer against a person resulted in death or great bodily injury.
    b) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a law enforcement officer engaged in sexual assault involving a member of the public; and
    c) Any record relating to an incident in which a sustained finding was made by any law enforcement agency of dishonesty by a law enforcement 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 law enforcement 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(b)(1).)

9) Provides that, notwithstanding the above, an agency or department may withhold records involving an incident in which a law enforcement officer is alleged to have discharged a firearm or used force that resulted in death or great bodily injury when the incident is the subject of an active criminal or administrative investigation, for at least 60 days, and for longer if an agency determines that disclosure could reasonably be expected to interfere with a criminal enforcement action against the officer who used force or a third party. If criminal charges relating to the incident in which force was used are filed, the records may be withheld until a verdict is returned or the time to withdraw a plea expires. If records are sought during an administrative investigation involving an incident in which a law enforcement officer is alleged to have discharged a firearm or used force that resulted in death or great bodily injury, the agency may delay disclosure until the agency reaches a determination, up to 180 days after the agency discovered the incident, or 30 days

after the close of any criminal investigation into the incident, whichever is shorter. (Pen. Code, § 832.7(b)(7).)

10) Requires an agency or department disclosing a record to redact the records as needed to avoid disclosure of information relating to the law enforcement officer's personal life, to protect the anonymity of complainants and witnesses, to protect certain confidential medical or financial information, to prevent disclosure of material that would pose a specific danger to the physical safety of the law enforcement officer or others, and where the public interest in not disclosing the information clearly outweighs the public interest in disclosing the information. (Pen. Code, § 832.7(5)-(6).)

11) Provides that, in any case in which discovery or disclosure of a law enforcement officer's personnel or related records are sought, the party seeking the records must apply for the information by motion and must be released where the court, in an in camera inspection, determines information contained in the records is relevant to the subject matter of the case. The court, in determining whether the records contain relevant information, must exclude from disclosure:
    a) 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;
    b) In a criminal proceeding, the conclusions of any officer investigating a complaint filed by a member of the public; and
    c) Facts that are so remote as to make disclosure of little or no practical benefit. (Evid. Code, §§ 1043, 1045.)

This bill:

1) Eliminates the five-year retention period for public complaints and related records, instead requiring that such records be "retained," including all complaints and reports currently in the possession of an agency or department.

2) Expands the categories of law enforcement officer records that are subject to disclosure under the CPRA, to include:
    a) Any record relating to the report, investigations, or findings of an incident involving the use of force to make a member of the public comply with an officer, force that is unreasonable, or excessive force against a person by a law enforcement officer (to take effect July 1, 2022);
    b) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a law enforcement officer engaged in conduct including, but not limited to, verbal statements, writings, online posts, recordings, and gestures, involving prejudice or discrimination against a person on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity,

gender expression, age, sexual orientation, or military and veteran status (to take effect July 1, 2022); and

c) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that the law enforcement officer made an unlawful arrest or conducted an unlawful search (to take effect July 1, 2022).

3) Provides that records subject to release include records where the law enforcement officer resigned before the law enforcement or oversight agency concluded its investigation into the alleged incident.

4) Permits disclosed records to be redacted to preserve the anonymity of victims.

5) Clarifies that agencies and departments may withhold records pending a criminal or administrative investigation or proceeding to include all records subject to approval, not merely those relating to the discharge of a firearm or use of force resulting in death or great bodily harm. In cases where an agency or department may withhold records pending an administrative investigation, this bill eliminates the option to withhold records until 30 days after the close of a criminal investigation relating to that incident.

6) Provides that the cost of copies of records subject to disclosure that may be charged to the requesting party under the CPRA does not include the cost of editing or redacting the records.

7) Provides that, except where records are permitted to be withheld for a longer period due to specified conditions involving ongoing investigations, records subject to disclosure must be provided as quickly as possible and no later than 45 days from the date of the request. If the agency or department does not disclose the records within a 30-day grace period following the 45-day deadline (for a total of 75 days to disclose without a penalty), the agency or department is subject to a civil penalty of $1,000 per day for every day the records are not disclosed.

8) Provides that, where a member of the public has to file a suit under the CPRA to enforce the disclosure requirements, and the court finds that the records were improperly withheld or improperly redacted, the requester is entitled to twice the party's reasonable costs and attorney fees.

9) Provides that, for purposes of releasing records pursuant to this subdivision, the attorney-client privilege shall not be asserted 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.

10) Requires any state department or agency to make a request for the records subject to disclosure, and the hiring agency or department to review those records, before hiring any peace officer.

11) Requires that every person employed as a peace officer to immediately report all uses of force by the officer to the officer's agency or department.

12) Modifies the evidentiary privilege relating to law enforcement records in court so that courts cannot automatically exclude from disclosure information consisting of complaints concerning conduct that took place more than five years before the event at issue in the case.

13) Makes certain nonsubstantive conforming changes to Penal Code section 832.7.

COMMENTS

1. Author's comment

According to the author:

> After forty years of prohibiting public access to any and all police records, SB 1421 [(Skinner, 2018)], passed in 2018, finally gave Californians the right to obtain a very limited set of records on police misconduct. While SB 1421 was a hard-fought breakthrough, California remains an outlier when it comes to the public's right to know about those who patrol our streets and enforce our laws. At least twenty other states have far more open access, with states like New York, Ohio, and others having essentially no limitations on what records are publicly available. This bill, SB 16, opens California's door further and would make public law enforcement records on all uses of force, wrongful arrests or wrongful searches, and for the first time, records related to an officer's biased or discriminatory actions. Additionally, SB 16 ensures that officers with a history of misconduct can't just quit their jobs, keep their records secret, and move on to continue bad behavior in another jurisdiction. 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. Background: California's slow recognition of the public right to access police misconduct records

In 1974, the California Supreme Court ruled that law enforcement records relating to allegations of officer misconduct could be discoverable in court.[1] In response, some police departments "began engaging in wholesale shredding of personnel files" to

[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 539.

evade their discovery obligations.[2] In response, the Legislature enacted a five-year retention period for law enforcement complaints and related reports and findings.[3] Four years later, however, the Legislature put in place Penal Code section 832.7, which rendered virtually all law enforcement records unavailable to the public and imposed heightened procedures for obtaining such records in civil actions.[4]

The confidentiality regime put in place in 1978 was further tightened in 2006, when the California Supreme Court held that Penal Code section 832.7 superseded the public's right to obtain records relating to officer misconduct under the CPRA.[5] With no public right of access to records, and a high bar for obtaining such records in court, California became one of the most secretive states in the country in terms of allowing the public to learn about officer misconduct.[6] Notably, this unprecedented level of secrecy granted to officers was unique; the personnel records of other public employees, and individuals in many other professions, remained public subject to disclosure.[7]

In 2018, the Legislature passed SB 1421, which required local and state police agencies to disclose records relating to when law enforcement officers' use forces or sustained findings of misconduct related to sexual assault and dishonesty.[8] The measure included provisions allowing the redaction of officers' personal information, along with the identities of confidential informants and other information that would constitute an unwarranted invasion into an affected person's privacy. Although the measure provided a modest degree of public access as compared to other states, SB 1421 represented a paradigm shift by providing Californians, for the first time, a right to know when law enforcement officers engaged in the most severe forms of force or misconduct.

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[2] *See, e.g.*, *San Francisco Police Officers' Assn v. Superior Court* (1988) 202 Cal.App.3d 183, 189. A judge found that the Los Angeles Police department shredded four tons of public complaints " 'with the specific intent…of depriving criminal defense attorneys potential evidence to which they were entitled.' " (Laird, *California relaxes one of the nation's most restrictive laws on police personnel records*, ABA Journal (March 2019) *available at* https://www.abajournal.com/magazine/article/california-police-personnel-records/ [last visited Apr. 7, 2021].)

[3] AB 1305 (Crown, Ch. 29, 1974).

[4] *See* SB 1436 (Cunningham, Ch. 630, Stats. 1978); *County of Los Angeles v. Superior Court* (1990) 219 Cal.App.3d 1605, 1609-1610 (quoting legislative history of SB 1436 discussing scope of records rendered completely confidential).

[5] *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284-1286.

[6] *See* Abel, Brady's *Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 Stan. L. Rev. 743, 761 (2015) (calling California the "poster child" for states with " 'no access' " regimes for police personnel records).

[7] *See* Gov. Code, § 6254(c) (personnel files cannot be disclosed only when "the disclosure of which would constitute an unwarranted invasion of personal privacy"). The strength of California's protection against disclosure of records of officer misconduct was made clear in *Long Beach Police Officers Association v. City of Long Beach* (2014) 59 Cal.4th 59. In that case, the California Supreme Court held that the Long Beach Police Department was required to disclose the names of two officers who were involved in an officer-involved shooting that killed a 35-year-old man, but cautioned that even the mere names of officers alleged to have used deadly force against a member of the public were not required to be disclosed in every case. (*Id.* at pp. 74-75.)

[8] SB 1421 (Skinner, Ch. 988, Stats. 2018).

SB 1421 went into effect on January 1, 2019, but agencies across the state took actions to deny or delay the public access to records made disclosable under the bill. Cities such as Downey, Inglewood, Fremont, and Morgan Hill destroyed records before January 1, 2019, to avoid producing responsive documents once the law went into effect.[9] Six months after the law took effect, the California Highway Patrol had not produced a single record, the San Francisco Police Department had released no disciplinary records, and the Los Angeles Police Department had released only a dozen files.[10] Some agencies charged exorbitant records fees: the City of Bakersfield sought $6,621.60 for audio and body-camera footage relating to a single incident, and West Sacramento estimated it would cost $25,000 to redact material from video of five shootings.[11] The general resistance to producing records, even at the state level, resulted in a slew of litigation.[12]

According to the author, this bill has two primary goals in the wake of the implementation of SB 1421: to expand the limited categories of police records made publicly accessible by SB 1421, so as to allow the public to access records of other officer conduct relevant to maintaining the public trust; and to implement procedural safeguards and concomitant penalties for failures to comply, in order to better ensure that the public right of access is not stymied by unwarranted delays or refusals.

3. <u>This bill makes three additional categories of law enforcement records accessible by the public</u>

Article I, section 3, of the California Constitution provides that "[t]he 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."[13] While this provision is not absolute, California's " 'strong public policy of the people's right to information concerning the people's business' " demands that limitations on the CPRA's right of access be narrow, and narrowly construed.[14]

As discussed above, police personnel records had previously been a wholesale exception to the constitutional public right of access to information concerning the

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[9] Lewis, et al., *California police are destroying files and charging high fees to release misconduct records*, Los Angeles Times (Jun. 30, 2019), https://www.latimes.com/local/lanow/la-me-police-records-california-20190630-story.html [last visited Apr. 7, 2021] (hereafter *California police are destroying files and charging high fees to release misconduct records*). Several superior courts and Courts of Appeal, across multiple districts, have held that SB 1421's disclosure requirement applies to events taking place before SB 1421 took effect.

[10] *California police are destroying files and charging high fees to release misconduct records*, *supra*, fn. 9.

[11] *Ibid.*

[12] *E.g.,* Becerra *v. Superior Court* (2020) 44 Cal.App.5th 897, 910-912, 919-920; *California police are destroying files and charging high fees to release misconduct records*, *supra*, fn. 10 (in March 2019, "more than 170 agencies were either in active litigation or refusing to produce records as they waited for direction from the courts").

[13] Cal. Const., art. I, § 3.

[14] *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 160.

people's business; then, in 2018, SB 1421 established a limited right of access to certain police records. Under current law as established by SB 1421, there are four categories of law enforcement records that must be provided to the public on request:

- Any record relating to the report, investigation, or findings arising from an incident in which an officer discharged a firearm at a person;
- Any record relating to the report, investigation, or findings arising from an officer's use of force that resulted in death or great bodily injury;
- Any record relating to an incident in which a sustained finding was made that an officer sexually assaulted a member of the public; and
- Any record relating to an incident in which a sustained finding was made that an officer committed an act of dishonesty related to the report, investigation, or prosecution of a crime or another officer's misconduct, including sustained findings of perjury, making false statements, and destroying evidence.[15]

Notably, the first two categories do not require a sustained finding of misconduct—for example, the public is entitled to any records relating to an officer's discharge of a firearm at a person (subject to certain privacy limitations),[16] unless the complaint is frivolous or unfounded, or if the officer is exonerated.[17] For the latter two categories, records are disclosable only if the agency determined that the complained-of sexual assault or act of dishonesty did occur.[18]

This bill would add three new categories of disclosable records, set to take effect July 1, 2022:

- Any record relating to the report, investigation, or findings arising from an officer's use of force to make a member of the public comply with the officer, an officer's use of unreasonable force, or an officer's use of excessive force. As with the existing use-of-force categories, these records would be disclosable regardless of whether there was a sustained finding of misconduct, unless the complaint is frivolous or unfounded or the officer is exonerated.[19]
- Any record relating to an incident in which a *sustained finding* was made that an officer engaged in acts of discrimination against a person on the basis of a protected characteristic, such as race, gender, or religion.
- Any record relating to an incident in which a *sustained finding* was made that an officer made an unlawful arrest or conducted an unlawful search.

The bill also adds a provision specifying that, for the records that are disclosable with or without a sustained finding—the "use of force" categories—those records remain disclosable even if the officer in question resigns from the agency before the investigation is concluded. This appears consistent with the intent of the original SB 1421, given that no findings were necessary to render these records disclosable in the

[15] Pen. Code, § 832.7(b)(1).
[16] *Id.*, § 832.7(b)(1)(A).
[17] *Id.*, § 832.5(c).
[18] *Id.*, § 832.7(b)(1)(B).
[19] *Id.*, § 832.5(c).

first place.[20] Additionally, the bill would require any agency or department hiring a law enforcement officer to request and review that officer's records prior to employing the officer, which appears to be a reasonable due diligence measure on the part of hiring departments.

"Police officer integrity is vital to effective law enforcement. Public trust and confidence in [police departments] as an institution and in individual officers do not exist otherwise."[21] The current categories of police records disclosable to the public represent only a limited category of police conduct that can diminish the public trust—for example, by excluding incidents where officers have been found by their agencies to have engaged in racial discrimination against the public.

The public interest in these records is not academic. Derek Chauvin, the Minneapolis police officer who killed George Floyd by kneeling on his neck for eight minutes in 2020 has at least eight incidents in which he used force against a member of the public—including alleged prior uses of the knee-hold that killed Floyd and striking a 14-year-old boy in the head with a flashlight.[22] Under current California law, the public would have no way to know about these incidents—in other words, no way to know which, if any, officers have a pattern and practice of using force that does not result in great bodily injury or death. This bill's limited expansion of public access to law enforcement records could provide the public with better information about their local law enforcement agencies and, by extension, lead to more trust between the police and the policed. At the same time, the bill's provisions for records relating to uses of force will not open the floodgates to releasing every complaint regarding the use of force, no matter how frivolous or maliciously motivated, because existing law protects from disclosure complaints that are frivolous or unfounded, or for which the officer was exonerated.[23]

This bill's expansion of the right of access to law enforcement records does not single out law enforcement officers for negative treatment. Law enforcement officers have long enjoyed a degree of privacy in their records not granted to any other category of public employee.[24] Given the unique role law enforcement officers play in society—with heightened power to carry weapons, use force, and, in the most extreme circumstances, injure or kill members of the public—the public interest in knowing when, and how

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[20] Relatedly, AB 718 (Cunningham, 2021), which is pending before the Assembly Public Safety Committee, would require agencies to complete investigations of certain types of officer uses of force, regardless of whether the officer separates from the agency prior to the completion of the investigation.
[21] *Haney v. City of Los Angeles* (2003) 109 Cal.App.4th 1, 12.
[22] Bailey, *Former Minneapolis police officer charged in George Floyd's death seeks to bar evidence of past neck and body restraints*, Washington Post (Nov, 17, 2020), https://www.washingtonpost.com/national/minneapolis-floyd-police-restraints/2020/11/17/e9a9ef1e-28ad-11eb-9b14-ad872157ebc9_story.html [last visited Apr. 7, 2021].
[23] Pen. Code, § 832.5.
[24] *See, e.g.*, *Chronicle Publishing v. Superior Court* (1960) 54 Cal.2d 548, 564, 574-575; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 758-759; *Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041, 1047; *AFSCME v. Regents* (1978) 80 Cal.App.913, 918.

often, officers have used force, engaged in discrimination, or committed acts of dishonesty is arguably higher than it is for other public employees. By creating a limited expansion of the existing right of public access to police records, this bill will bring the public's right to access law enforcement records closer to—though not as broad as—the public right to access the records of virtually every other type of public employee.

Finally, increasing public access to police records—thereby increasing the public's insight into how their law enforcement agencies and officers work, and what practices they engage in—could also help curtail the massive expense of judgments and settlements in police misconduct lawsuits. The Marshall Project and FiveThirtyEight reviewed available settlement records between 2010 and 2019 and determined that civil suits relating to officer misconduct cost Los Angeles $329,925,620, and San Francisco $27,873,298, in that period.[25] In 2020, a federal judge entered a $2 million default judgment against the Los Angeles County Sheriff's Department because it repeatedly defied the court's orders to produce a list of officers with histories of misconduct; the judge noted that the defendants "committed serious, inexcusable discovery abuses and have violated repeated court orders, thereby engaging in culpable conduct that led to their default."[26] Increasing public access to misconduct would, therefore, not only provide more information as to *why* these massive sums are being paid, but could also lead to solutions that do not require paying millions of taxpayer dollars in judgments and settlements.

The expanded categories of police records made accessible under this bill are not, by national standards, exceptional. To the contrary, this bill's expanded access would still leave Californians with less access to police records than in many states. Nevertheless,

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[25] Thomson-Devaux, et al., *Police Misconduct Costs Cities Millions Every Year. But That's Where Accountability Ends.*, The Marshall Project (Feb. 22, 2021), https://www.themarshallproject.org/2021/02/22/police-misconduct-costs-cities-millions-every-year-but-that-s-where-the-accountability-ends [last visited Apr. 7, 2021]. The study did not include other California cities, but other sources suggest other cities are paying similarly significant settlements for police misconduct. (*E.g.*, Payton & Jones, *San Diegans Paying Millions in Police Misconduct Settlements*, NBC San Diego (May 16, 2016), https://www.nbcsandiego.com/news/investigations/san-diegans-paying-millions-in-police-misconduct-settlements/2005003/ [last visited Apr. 7, 2021] (San Diego paid at least $25 million in police misconduct settlements between 2008 and 2016); McGough, *Sacramento County to pay $27 million settlement after 2017 crash involving sheriff SUV*, Sacramento Bee (Dec. 19, 2019; updated Dec. 21, 2019), https://www.sacbee.com/article238540143.html [last visited Apr. 7, 2021] (in 2019, Sacramento agreed to a $27 million settlement for a crash that left a 10-year-old girl with brain damage).) In 2019, Fresno's actual payouts for police misconduct lawsuits so exceeded their budget that city councilmembers were worried they would have to dip into the city's emergency fund to make the payments. (Hoggard, *Action News Investigation: Fresno police payouts could create fiscal emergency*, ABC News (Sep. 24, 2019), https://abc30.com/frenso-police-fresno-excessive-force-brutality-officers/5565765/ [last visited Apr. 7, 2021].

[26] *Williams v. L.A. Sheriff's Dep't* (C.D.Cal. Sept. 25, 2020) No. CV 17-05649-AB, 2020 LEXIS 250107. The Los Angeles Sheriff's Department ultimately released the list in response to a records request submitted under SB 1421, though not until the Los Angeles Times brought a lawsuit to compel compliance with the law. (Tchekmedyian and Poston, *What secret files on police officers tell us about law enforcement*, Los Angeles Times (Mar. 19, 2021), https://www.latimes.com/california/story/2021-03-19/sb-1421-sheriffs-department-disclosure [last visited Apr. 7, 2021].)

the expansion of access is consistent with the wider trend of opening access to law enforcement records. Last year, New York repealed its own statute making law enforcement records entirely confidential—one of the strictest in the nation—and replaced it with a statute making law enforcement records generally subject to public disclosure, with exceptions for certain private information such as social security numbers and medical information.[27] Similarly, Hawaii—which previously had, like California, a law-enforcement-officer-specific carve-out to their public disclosure requirements—last year revoked that carve-out and opened up public access to complaints about law enforcement, and also imposed a new requirement requiring each county police department to submit an annual report to the Legislature identifying misconduct incidents that resulted in suspension or discharge of a police officer.[28] At least 16 other states provide broad access to officer records, including public complaints.[29] Moreover, many other state legislatures are considering legislation this year to broaden access to law enforcement personnel records and complaints of misconduct.[30] The bill's opponents have not pointed to any evidence suggesting negative consequences in states with broader access to police records.

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[27] *See* N.Y. Civ. Rights L. § 50-A (2014), repealed by NY A10611 (O'Donnell, Ch. 96, § 2, L. 2020); N.Y. PO Law §§ 86, 87, 89.

[28] *See* Haw. HB285 (Ch. 47, L. 2020); Haw. Rev. Stats. §§ 52D-3.5, 92F-14.

[29] *See* Ala. Code, § 36-12-40 (Alabama); Ariz. Rev. Stat., §§38-1109, 39-121-128 (Arizona); Colo. Rev. Stat., § 24-31-903 (Colorado; in 2020, adopted requirement that law enforcement report a wide range of information regarding officer use of force and misconduct, to be published on a public website); Fla. Stat. §§ 112.533, 119.01, 119.071 (Florida; personnel records are available except for private personal information and records of an ongoing investigation); Ga. Code, §§ 50-18-71 & 15-18-72 (Georgia, with limited exception for ongoing investigations and private personal information); Ky. Rev. Stat., §§ 61.872, 61,872 (Kentucky, subject to a privacy balancing test); 17-A MR.S. § 7070, 30-A M.R.S§§ 503, 2702 (Maine, with limited exceptions for ongoing investigations and private personal information); Mass. Gen. Laws, ch. 4, § 7, ch. 66, § 10 (Massachusetts; 2020 legislation removed records related to law enforcement misconduct investigation from the definition of exempted records); Minn. Stat. § 13.43 (Minnesota); N.M. Stat., § 14-2-1 (New Mexico; complaints and facts uncovered in investigations are disclosable, but conclusions are not); N.D.C.C. § 44-04-19 (North Dakota); Ohio Rev. Code, § 149.43 (Ohio); Utah Code, §§ 63G-2-201 & 301 (Utah, with limited exceptions for ongoing investigations and private personal information); Rev. Code Wash. §§ 42.56.070, 42.53.240 (Washington); Wis. Stat. §§ 19.35-19.36 (Wisconsin, with limited exceptions for ongoing investigations and private personal information); *Perkins v. Freedom of Info. Comm'n* (Conn. 1993) 228 Conn. 158, 165-166 (Connecticut Supreme Court holding that public employment records are generally discoverable under Connecticut's Freedom of Information Act).

[30] *See, e.g.*, Md. SB 178 (Carter, 2021) (Maryland; would make law enforcement misconduct complaints and records disclosable subject to considerations relating to privacy and ongoing investigations, rather than per se private); N.H. SB 41 (French, 2021) (New Hampshire; would make police disciplinary hearings public, subject to certain privacy exceptions); N.J. S-2656 (Weinberg, 2021) (New Jersey; providing public access to law enforcement personnel complaints and disciplinary actions); Or. H.B. 3145 (Committee on Judiciary, 2021) (Oregon; would require creation of a public online database of complaints and disciplinary actions against law enforcement officers).

4 This bill imposes procedural requirements for record requests and penalties for failure to comply

Under current law, an agency producing records disclosable under the CPRA may charge the requestor the "direct cost" of duplicating the records.[31] As a general rule, the agency should make disclosable records "promptly available"; the agency has 10 days from the date of the request to determine if the request seeks disclosable records, subject to a potential 14-day extension for specified reasons.[32] SB 1421 also provides certain law-enforcement- specific bases for withholding records for longer, such as when the records relate to an incident that is the subject of an active criminal or misconduct investigation.[33] If a court determines that an agency's refusal to produce records is not justified, the requestor is awarded the court costs and reasonable attorney fees associated with enforcing the request, to be paid by the refusing agency; if the court determines that the request is "clearly frivolous," the court must award the court costs and reasonable attorney fees to the public agency refusing the request.[34]

This bill implements several changes to the procedural requirements for a law enforcement agency responding to a CPRA request:

- Clarifies that the costs of duplication awarded under the CPRA do not include the costs of editing and redacting records;
- Extends the standard 10-day disclosure window to give agencies 45 days to respond to a records request (subject to the same enumerated bases for an extension);
- Establishes a 30-day grace period following the 45-day deadline, after which a civil penalty of $1,000 per day for refusal to comply is imposed (so the penalty does not start running until 75 days after the request);
- Modifies the CPRA's attorney fee provision so that, if court determines that an agency improperly withheld records covered by Penal Code section 832.7, the requester shall be entitled to twice their reasonable costs and attorney fees; and
- States that, for purposes of releasing records under Penal Code section 832.7, the attorney-client privilege shall not be asserted by the agency 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.

With respect to the provision excluding the cost of redaction and editing from otherwise-disclosable documents, this provision merely codifies existing case law. Courts have long held that the CPRA's recoverable costs do not include redaction costs,

[31] Gov. Code, § 6253(b).
[32] *Id.* § 6253(b) & (c).
[33] Pen. Code, § 832.7(b)(7).
[34] Gov. Code, § 6259.

and the California Supreme Court recently held that the CPRA likewise does not permit an agency to recover the costs of editing or redacting electronic files.[35]

Regarding the modified timing for records production, the bill is both more generous and more severe than current law. To aid law enforcement agencies, the bill expands the default 10-day production period substantially, to 45 days. The bill then grants agencies an additional 30-day grace period during which they are technically out of compliance but can cure the violation with no penalty. Then, if after a full 75 days from the date of the request, a law enforcement agency still has not responded to a request for documents under Penal Code section 832.7, a $1,000-per-day civil penalty begins to run, and continues until the records are disclosed. According to the author, this penalty is necessary to discourage violations of the disclosure law. In light of the numerous agency efforts to evade compliance, discussed above, it appears the balance struck by the bill—giving law enforcement significantly more time than other agencies in which to respond to document requests, but imposing a penalty if the agency fails to respond within 75 days—is reasonable.

Similarly, with respect to the provision of double attorney fees and costs for requestors who had to go to court in order to enforce a valid record request, the author states that the frequency with which agencies refuse to comply with valid SB 1421 requests suggests that the CPRA's provision for attorney fees and costs is not an adequate incentive to encourage law enforcement agencies to comply with such requests. Given that there are no damages awardable in a suit to enforce a valid document request—compensatory or punitive—the addition of double attorney fees and costs would provide added incentive to reconsider improper refusals to produce records.

Finally, the provision that the attorney-client privilege cannot be asserted to prevent the disclosure of factual information provided by an agency's attorney, or factual information discovered by any attorney, or billing records relating to an investigation uncovered by an attorney, appears not to significantly exceed the bounds of existing case law on the scope of the attorney-client privilege.[36] Moreover, to the extent the bill represents a new exception to the attorney-client privilege, California's privilege is

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[35] *National Lawyers Guild v. City of Hayward* (2020) 9 Cal.5th 488, 492 (cost of redacting electronic records not recoverable under the CPRA); *North County Parents Organization v. Department of Education* (1994) 23 Cal.App.4th 144, 146-147 (cost of redacting paper records not recoverable under the CPRA).

[36] *Upjohn Co. v. United States* (1981) 449 U.S. 383, 395-396 (The " 'protection of privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing.' "); *Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 296-299 (documents "not made for the purpose of legal consultation…are not protected by the attorney-client privilege," so attorney billing records are not categorically privileged under the CPRA); *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 397-387 (holding that a party's transmission of statements to their attorney does not create an attorney-client privilege where none previously existed; "because the privilege tends to suppress otherwise relevant facts, it is to be strictly construed…[the privilege] does not extend to subject matter otherwise unprivileged merely because that subject matter was communicated to an attorney.")

established by the Legislature and can likewise be limited by the Legislature when the policy considerations weigh in favor of such a limitation.[37]

5. The author has pledged to continue work on the bill and develop a record retention policy that will not require law enforcement agencies to maintain records indefinitely

Under current law, law enforcement agencies and departments must retain law enforcement personnel records for at least five years.[38] As currently drafted, SB 16 removes the five-year retention period—making the retention period essentially indefinite—and clarifies that all complaints and related reports, including those currently in the possession of the agency or department, are subject to disclosure. According to the author, the current five-year period is too short to allow for meaningful public access to information—especially in the wake of certain agencies preemptively destroying records.[39] Understanding that an indefinite retention period could be overly burdensome to agencies, the author has informed Committee staff that she is continuing to work with stakeholders and administration to devise a record-retention period that properly balances the public's interest in disclosure with the administrative costs and burdens that record retention imposes on law enforcement agencies.

6. Amendments

The author has agreed to accept the following amendments, to clarify the provisions relating to the release of information relating to additional officers involved in an incident and add protections against disclosure for whistleblowers:

Amendment 1

On page 8, in line 28, after "a" insert "sustained"

Amendment 2

On page 9, in line 3, after "of" insert "whistleblowers,"

7. Arguments in Support

According to supporter California News Publishers Association:

> Courts have long recognized that activity of police officers is of the highest public concern, particularly when they use serious or deadly force. Law enforcement officials wield immense power. For that reason, they should be

[37] *E.g.*, *Roberts v. City of Palmdale* (2019) 5 Cal.4th 363, 373 (evidentiary privileges are available only as defined by statute); *see also* Evid. Code, § 911.
[38] Pen. Code, § 832.5(b).
[39] *California police are destroying files and charging high fees to release misconduct records*, supra, fn. 9.

> subject to at least the same level of scrutiny as all other public employees whose personnel records are disclosable in cases of heightened public concern. In the case of police shootings, the public interest in disclosure is at its zenith, even when there is no claim of misconduct and a use of force is "within policy."
>
> SB 16 provides a balanced framework for mandating the disclosure of records, while protecting investigatory and safety interests…
>
> A lack of transparency results in distrust. SB 16 mandates transparency to help cure the problems secrecy has shown over this category of public information in the last 40 years. SB 16 further peels back the veil of secrecy that has shrouded this information from public view while providing enough flexibility for agencies to protect the rights of the officers that serve the public.

According to supporter National Association of Social Workers – California Chapter:

> This bill would make every incident involving use of force to make a member of the public comply with an officer, force that is unreasonable, or excessive force subject to disclosure. The bill would also require records relating to sustained findings of unlawful arrests and unlawful searches to be subject to disclosure. Additionally, disclosure of records are required for incidents in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in conduct involving prejudice or discrimination on the basis of specified protected classes.
>
> SB 16 would require that records relating to an incident in which an officer resigned before an investigation is completed to also be subject to release. We believe that these protections significantly strengthen existing law and will lead to a more just police force.

According to supporter American Civil Liberties Union of California:

> Following the killings of George Floyd, Breonna Taylor, Ahmaud Arbery, Sean Monterrosa, Erik Salgado, Andres Guardado, and many others, people across the nation are asking elected officials to divest from police, increase accountability and oversight, and reinvest in communities. SB 16 is one of several attempts by the Legislature to strengthen accountability by expanding the law enforcement records available to the public.

According to supporter Oakland Privacy:

> In our own experience, the enforcement section of SB 16 will be valuable. We often file public records request[s] that are delayed and/or denied for no apparent reason, but a seeming calculation by the municipality that we won't go to court, or if we don, the attorneys' fees will be a manageable cost of doing

> business. While thanks to the services of several public interest attorneys, we have been able to file some public records lawsuits over disclosable documents that were not released (Sacramento County Sheriff 2020, Fresno County Sheriff 2020, Oakland Police Department 2020), we realize we are in a privileged position compared to many, including, most poignantly, impacted community members themselves whose interest lie beyond just public advocacy…
>
> We would like to see the calculus changed so that municipal authorities would perceive more severe consequences for failing to release disclosable records. This would be a service to California taxpayers who shouldn't be paying for unnecessary litigation.

8. Arguments in Opposition

According to opponent California Police Chiefs Association:

> Our primary concerns of SB 776 include:
>
> 1. **Expands to release of virtually all use of force incidents**. This is a major expansion of existing law, which currently only requires the release of the most serious cases. For many departments, "use of force" is defined so broadly it would apply to every instance someone was lawfully brought into custody. The amount of work and cost to agencies to release these files is exorbitant, especially given the fact many of these incidents are minor and non-controversial.
> 2. **Removes that qualification complaints must be sustained to trigger release**. Under SB 1421, personnel files related to specified misconduct are only releasable after a complaint is sustained – SB 16 removes this requirement and allows the release of unfounded and un-sustained complaints regarding minor use of force cases. This fails to meet a balancing test between an officer's privacy rights and the desire for public disclosure. Officers who are innocent should not be subject to public scrutiny over mere complaints alone.
> 3. **Retention and penalties will unduly cost millions.** SB 16 mandates all files be held indefinitely, which would cost local governments hundreds of thousand, if not millions in storage fees and server space. Additionally, the penalty structure for delayed release of requests, which fines agencies $1,000 per day, fails to consider the dramatic increase in workload and limited resources the legislation also creates.

According to opponent California State Sheriffs' Association:

> Until the enactment of SB 1421 from 2018, statute and case law provided enhanced and appropriate privacy protections for peace officer personnel records as well as methods and circumstances under which records could be accessed. SB 1421 made specified records available for public disclosure but

mainly limited the scope of what could be released to records relating to uses of force that resulted in death or great bodily injury or other situations in which a complaint of wrongdoing had been sustained. SB 16 eliminates the requirement that records be made available for release regarding use of force be limited to situations involving death or great bodily injury and instead makes nearly all records relative to nearly any use of force available to the public. The bill also adds to the types of complaints about which records would be public…

Additionally, we strongly object to the provisions that establish civil fines and the ability to seek costs and attorney's fees if an agency fails to disclose, timely disclose, or properly redact specified records. It often takes considerable time to appropriately redact and prepare records for release and this reality will be exacerbated by the increased number of records that are made available by the bill. Even a harmless mistake or an inadvertent delay in release could subject already cash-strapped local agencies to significant financial harm.

SUPPORT

Alameda County Public Defender
American Civil Liberties Union of California
Asian Americans Advancing Justice—California
Asian Solidarity Collective
California Attorneys for Criminal Justice
California Black Media
California Broadcasters Association
California Civil Liberties Advocacy
California Faculty Association
California Immigrant Policy Center
California Innocence Project
California News Publishers Association
California Nurses Association/National Nurses United
California Public Defenders Association
Californians for Safety and Justice
Conference of California Bar Associations
Drug Policy Alliance
Ella Baker Center for Human Rights
Equal Rights Advocates
Ethnic Media Services
First Amendment Coalition
Friends Committee on Legislation of California
Los Angeles County Board of Supervisors
Loyola Project for the Innocent
March for Our Lives – California
National Association of Social Workers, California Chapter
NextGen California

Northern California Innocence Project
Oakland Privacy
Pillars of the Community San Diego
Prosecutors Alliance of California
San Francisco Office of the District Attorney
San Francisco Public Defender
San Leandro for Accountability, Transparency and Equality
SEIU California
Showing Up for Racial Justice – North County San Diego
Showing Up for Racial Justice San Diego
Smart Justice California
Team Justice San Diego
Underground Scholars Initiative of UC Berkeley
Voices for Progress
We The People San Diego

OPPOSITION

Association of Probation Supervisors of LA County
California Association of Joint Powers Authorities
California Correctional Peace Officers Association
California Law Enforcement Association of Records Supervisors
California Narcotics Officers' Association
California Peace Officers' Association
California Police Chiefs Association
California State Sheriffs' Association
City of Thousand Oaks
Deputy Sheriffs Association of San Diego
El Segundo Police Officers Association
Hawthorne Police Officers Association
League of California Cities
Los Angeles Airport Peace Officers Association
Los Angeles County Sheriff's Professional Association
Los Angeles County Probation Managers Association AFSCME Local 1967
Los Angeles Police Protective League
Los Angeles School Police Management Association
Los Angeles School Police Officers Association
Newport Beach Police Association
Public Risk Innovation, Solutions, And Management
Riverside Police Officers Association
Sacramento County Probation Association
San Diego District Attorney Investigators Association
San Francisco Police Officers Association
Santa Ana Police Officers Association
Santa Monica Police Officers Association

Torrance Police Officers Association

RELATED LEGISLATION

Pending Legislation:

SB 2 (Bradford, 2021) empowers the Commission on Peace Officer Standards and Training to investigate and determine the fitness of any person to serve as a peace officer in the state; establishes the Peace Officer Accountability Division, which is tasked with review and investigate grounds for decertification and make findings as to whether grounds for action against an officer's certification exist; and adds circumstances in which police officer records are subject to public disclosure. SB 2 is pending before the Senate Public Safety Committee.

AB 718 (Cunningham, 2021) requires investigations into allegations that a law enforcement officer engaged in certain conduct, such as discharging a firearm or using force that resulted in death or great bodily injury, be completed regardless of whether the officer voluntarily separates from the agency before the investigation is completed. AB 718 is pending before the Assembly Committee on Public Safety.

AB 60 (Salas, 2021) adds criteria disqualifying individuals from serving as a peace officer; establish the Peace Officer Standards Accountability Board, which would provide recommendations to the Commission on Peace Officer Standards and Training relating to officer retention; expands the authority of the Commission on Peace Officer Standards and Training; and adds standards relating to the certification of officers and officer retirement/resignation. AB 60 is pending before the Assembly Public Safety Committee.

AB 17 (Cooper, 2021) establishes the Peace Officer Standards Accountability Board, which would provide recommendations to the Commission on Peace Officer Standards and Training relating to officer retention; expand the authority of the Commission on Peace Officer Standards and Training; and add standards relating to the certification of officers and officer retirement/resignation. AB 17 is pending before the Assembly Public Safety Committee.

Prior Legislation:

SB 1220 (Umberg, 2020) would have required prosecuting agencies to maintain a list of law enforcement officers who, in the last five years, had sustained findings of certain bad conduct, conduct of moral turpitude, or were convicted or had charges pending for certain crimes. SB 1220 was vetoed by Governor Newsom, who expressed concern about the costs associated with the bill.

SB 776 (Skinner, 2020) was substantially similar to this bill and would have expanded access to records in the same way. The bill was passed by the Assembly on August 31, 2020, but was not brought for a concurrence vote in the Senate before the end of session.

SB 731 (Bradford, 2020) would have established the Peace Officer Standards Accountability Board, which would develop and carry out procedures for revoking a law enforcement officer's certification under specified circumstances; added criteria prohibiting an individual from serving as a law enforcement officer; and added circumstances in which police officer records are subject to public disclosure. SB 731 was not brought up for a vote in the full Assembly.

AB 1599 (Cunningham, 2019) would have required investigations into allegations that a law enforcement officer engaged in certain conduct, such as discharging a firearm or using force that resulted in death or great bodily injury, be completed regardless of whether the officer voluntarily separates from the agency before the investigation is completed. AB 1599 was held in the Senate Appropriations Committee.

SB 1421 (Skinner, Ch. 988, Stats. 2018) provides a public right to access certain law enforcement officer personnel records, including records relating to the discharge of a firearm at a person, an incident where the use of force resulted in death or great bodily injury, and an incident in which a sustained finding was made that an office engaged in sexual assault involving a member of the public.

AB 2327 (Quirk, Ch. 966, 2018) requires any department or agency employing law enforcement officers to maintain a record of any investigations against an officer, and required officer permission before the record was disclosed to a hiring department.

AB 1428 (Low, 2018) would have required a district attorney's office make the results of investigations involving a law enforcement officer shooting a civilian publicly available on the internet, and require agencies that employ police officers to make certain data regarding serious uses of force by law enforcement officers on the internet. AB 1428 was held in the Senate Appropriations Committee.

SB 1286 (Leno, 2016) would have provided a public right to access certain law enforcement officer personnel records, including records relating to the discharge of a firearm at a person, an incident where the use of force resulted in death or great bodily injury, and an incident in which an officer engaged in discrimination or unequal treatment on the basis of protected characteristics. SB 1286 was held in the Senate Appropriations Committee.

PRIOR VOTES:

Senate Public Safety Committee (Ayes 4, Noes 0)

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