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by Alexander Brand and Christine N. Wood

OPENING SECRETS

With passage of SB 1421, the Penal Code now allows for disclosure of peace officer records when there are claims of use of force or sustained claims of sexual assault or dishonesty

In September 2018, Governor Jerry Brown signed Senate Bill 1421, amending sections of California's Penal Code to allow the public to obtain some peace and custodial officer (collectively, peace officer) records with a California Public Records Act (PRA) request. This represents a departure from the status quo and could have significant impact on policing, governance, and records retention.

Prior to the passage of SB 1421, most peace officer personnel records had been considered confidential and would only be disclosed in limited circumstances. In fact, California had been considered one of the most secretive states in the country when it came to the disclosure of peace officer personnel and disciplinary records. A party in a criminal or civil action seeking the disclosure of personnel files was required to follow the *Pitchess* motion procedure, named for *Pitchess v. Superior Court*.[1]

In *Pitchess*, the California Supreme Court held that a criminal defendant who is being prosecuted for battery on a peace officer is entitled to discovery of certain investigation records to show whether the officer had a history of using excessive force and that the defendant acted in self-defense. In 1978, the California Legislature enacted Penal Code Sections 832.7 and 832.8, as well as Evidence Code Sections 1043 and 1045, to codify "the privileges and procedures" for *Pitchess* motions.[2] Under this statutory framework, peace officer records could be obtained through a two-step process.

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SB 1421
POLICE
POLICE

In the first step, the requester must petition the court, showing good cause for release of the records or information sought and materiality to the subject matter of the pending litigation. Good cause must be presented in the form of an affidavit, in which the affiant must allege officer misconduct by providing a specific factual scenario establishing a plausible factual foundation for materiality.[3]

The second step commences if a judge believes the threshold issues of good cause and materiality are met. If so, a judge will hold an in camera hearing to review the pertinent documents and determine what information, if any, will be disclosed based on the statutorily defined standards of relevance defined in Evidence Code Section 915.[4]

If a judge determines that records shall be disclosed, the judge will release the records under a protective order that limits how the records may be used and attempt to balance the requester's need for disclosure and the officer's right to privacy.[5] For example, the judge may issue a protective order that protects the officer or agency from unnecessary annoyance, embarrassment, or oppression.[6]

Beginning January 1, 2019, with passage of SB 1421, peace officer personnel records are disclosable in response to a PRA request if the records relate to use of force, sustained claims of officer sexual assault, or sustained claims of officer dishonesty. No underlying lawsuit is needed nor will a *Pitchess* motion or in camera review be required.

Public Records Act

Adopted in 1968, the PRA is one of California's two sunshine laws enacted to hold public agencies accountable by allowing the public to inspect and copy records in the agency's care. This includes police agencies.

The PRA states that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."[7] After all, the purpose of the PRA was to create maximum disclosure of the government's conduct.[8] The California Legislature decided that the disclosure of records was necessary to help keep government accountable to the people,[9] and the right was later enshrined in the state constitution.[10] The people's right to disclosure under the PRA is broad and, when the government resists disclosure and is challenged, the courts err on the side of disclosure of records to the public.[11]

Inherent in the PRA is the tension between the public's right to access records and the privacy rights recognized by the statute. Recognizing the tension between the two sets of rights, the legislature inserted a number of exemptions in the act, including the personnel records exemption.[12] Some of the other exemptions within this section of the Government Code include the medical records exemption,[13] the pending litigation exemption,[14] the tax payer information exemption,[15] the voter information exemption,[16] the library record exemption,[17] and the public employee personal information exemption.[18]

Finally, the PRA provides for a "catch-all exemption" that can be invoked if no other exemption applies, but the agency must demonstrate that the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.[19] This is a high showing for the agency, but courts will sustain this exemption if there is a clear cause to protect confidentiality.[20]

Reverse PRA Action

Another tool that protects privacy rights is the reverse PRA action, a legal action allowing a party to seek judicial restraint of the disclosure of a public record by a public agency.[21] Admittedly, reverse-PRA actions do not arise from the PRA itself; these suits are a creature of judicial lawmaking. In essence, a private party must be notified of the public agency's decision to disclose the records in question and permitted an opportunity to seek judicial review. However, agencies must be careful because the "purposeful delay" in disclosure even for this reason could violate the agency's disclosure obligations under the PRA.[22]

Overall, the right to privacy is balanced against the public's right to know and will carry different weight based on two factors: whether the information in the agency's possession was voluntarily or involuntarily collected from the person holding the privacy interest. "If personal or intimate information is extracted from a person (e.g., a government employee or appointee, or an applicant for government employment/appointments a precondition for the employment or appointment), a privacy interest in such information is likely to be recognized."[23]

Information, for example, collected by the government for purposes of issuing a license is not disclosable.[24] However, if information is provided voluntarily in order to acquire a benefit—such as a public contract or a job with a public agency—a privacy right is less likely to be recognized. In essence, those who voluntarily enter the public sphere to obtain a public benefit—including public employees—should expect to lose some aspect of their individual privacy rights.[25]

SB 1421

As of January 1, 2019, SB 1421 makes a number of changes to Penal Code Section 832.7 to allow for the release of records that are related to three types of events: 1) use of force, 2) sustained claims of sexual assault, and 3) sustained claims of dishonesty. New Section 832.7 initially maintains the status quo by retaining the language that asserts that peace officer personnel records are confidential.[26] However, subdivision b of new Section 832.7 marks the beginning of a number of exceptions to this general rule.

With regard to the use of force, new Section 832.7(b) makes records relating to peace officer use of force disclosable under the follow circumstances:

> (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 peace officer or custodial officer.
> (ii) 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.[27]

New Section 832.7 also allows the disclosure of records related to a sustained finding that a peace officer sexually assaulted a member of the public.[28] For purposes of this section, both "sexual assault" and "member of the public" are specially defined. "Sexual assault" covers a broad range of acts including the initiation, or attempted initiation, of a sexual act by a peace officer, by force, under color of authority.[29] The definition of sexual assault is broad, such that even a peace officer's proposal to a member of the public to commit a sexual act will be considered sexual assault.[30] In order for a record of a sexual assault with a member of the public to be disclosable, the victim of the assault must be a member of the public that is not an employee of the peace officer's agency.[31] However, if the sexual assault victim is a member of a youth organization affiliated with the peace officer's agency, records related to such an incident will be disclosable.[32]

The final general category of peace officer records that can be obtained with a PRA request under SB 1421 are records related to sustained findings of peace officer dishonesty. New Penal Code Section 832.8(b) defines "sustained" as "a final determination by an investigating agency, commission, board, hearing officer, or arbitrator…following an investigation and

MCLE Test No. 285

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1. Prior to passage of Senate Bill 1421, California was considered one of the most secretive states regarding peace officer records.
True.
False.

2. SB 1421 gives the public a constitutional right to access all peace officer records.
True.
False.

3. When producing records under SB 1421, public agencies must release records or make them available for inspection pursuant to the Public Records Act (PRA).
True.
False.

4. Exemptions within the PRA attempt to strike a balance between the public's right to access and the private information in records.
True.
False.

5. Under the PRA, the "catch-all exemption" can be properly invoked if the agency demonstrates the public interest in the record is clearly outweighed by the public interest served by not disclosing the record.
True.
False.

6. The reverse PRA action is a legal mechanism codified within the PRA.
True.
False.

7. If a public agency refuses to disclose records requested pursuant to the PRA, the requester can bring an action seeking a writ of mandate, or injunctive or declaratory relief.
True.
False.

8. If a judge finds that the public agency's decision to refuse disclosure of a record pursuant to the PRA is not justified and determines that the requester is the prevailing party, the requester will be awarded court costs and attorneys' fees.
True.
False.

9. Prior to SB 1421, a *Pitchess* Motion was the only means to obtain peace officer records.
True.
False.

10. Records or information that is not disclosable under SB 1421 may still be disclosable with a *Pitchess* motion.
True.
False.

11. In order to get information related to an officer's conduct through a *Pitchess* motion, the petitioner must attest to the following:
A. Prior misconduct by the officer.
B. Materiality to the subject matter of the pending litigation.
C. Good cause for the release of the records or information requested.
D. B and C.
E. All of the above.

12. SB 1421 changes the Penal Code to allow for the release of peace officer records that are related to:
A. Use of force.
B. Sustained claims of sexual assault.
C. Sustained claims of dishonesty.
D. B and C.

13. SB 1421 allows the disclosure of records regarding claims of sexual assault, regardless of whether the claims are sustained.
True.
False.

14. Records relating to a sustained finding that a peace officer lied in a police report are disclosable under SB 1421.
True.
False.

15. After SB 1421, the Penal Code makes records relating to peace officer use of force disclosable when the following incidents occur:
A. A peace officer discharges a firearm at a person.
B. A peace officer uses force that resulted in death.
C. A peace officer uses force that resulted in great bodily injury.
D. All of the above.
E. None of the above.

16. After SB 1421, peace officers have no means to stop the disclosure of their records.
True.
False.

17. After SB 1421, peace officer records will be disclosed if a sustained finding of officer dishonesty is still under appeal.
True.
False.

18. When records are released pursuant to SB 1421, the following information must be redacted:
A. Witness and victim information.
B. A peace officer's personal identifying information.
C. Confidential medial or financial information.
D. All of the above.
E. None of the above.

19. After SB 1421, peace officer records will be disclosed if there are sustained findings that the officer sexually assaulted the following:
A. A member of the public.
B. A minor.
C. Another employee of the law enforcement agency.
D. Only (a) and (b).
E. All of the above.

20. SB 1421 specifically identifies instruments of force:
True.
False.

MCLE Answer Sheet #285

OPENING SECRETS

Name _____

Law Firm/Organization

_____

Address _____

City _____

State/Zip _____

E-mail _____

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State Bar # _____

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ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1.	☐ True	☐ False				
2.	☐ True	☐ False				
3.	☐ True	☐ False				
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11.	☐ A	☐ B	☐ C	☐ D	☐ E	
12.	☐ A	☐ B	☐ C	☐ D		
13.	☐ True	☐ False				
14.	☐ True	☐ False				
15.	☐ A	☐ B	☐ C	☐ D	☐ E	
16.	☐ True	☐ False				
17.	☐ True	☐ False				
18.	☐ A	☐ B	☐ C	☐ D	☐ E	
19.	☐ A	☐ B	☐ C	☐ D	☐ E	
20.	☐ True	☐ False				

opportunity for an administrative appeal… that the actions of the peace officer or custodial officer were found to violate law or department policy." When there has been a sustained finding that a peace officer was dishonest in the reporting, investigation, prosecution of a crime or the misconduct of a person or another peace officer, then any record relating to that incident of dishonesty is disclosable with a PRA request.[33]

The three events are the only events that trigger disclosure under the PRA. Once any of these three events occurs, a broad range of documents related to that event are disclosable under the PRA. If the records sought with a PRA request do not relate to one of these three events, the records are not disclosable under SB 1421 but may be disclosable through other means such as a *Pitchess* Motion.

Records and Production

The statute provides an exhaustive list of the types of records to be disclosed, including, but not limited to, all: investigative reports, photos, audio and video recordings, transcripts, documents presented to the district attorney for review, and copies of disciplinary records. A complete list can be found at new Penal Code Section 832.7(b)(2).

Prior to disclosing records pursuant to SB 1421, public entities must redact certain categories of information as authorized by the statute to protect the privacy interest of certain individuals. For example, while a peace officer's name is public, other personal identifying information for the peace officer or his or her family members must be redacted.[34] A public entity must also redact information to protect the identity of a complaining party, witness, or victim as well as confidential medial or financial information, and information protected by federal law.[35] Also, the statute provides a catch-all basis for redaction. Public entities must redact relevant information when there is an articulable risk of harm to the peace officer or another person that outweighs the public right to disclosure.[36]

Besides these mandatory redaction requirements, a public entity also has the discretion to redact other information. A public entity may redact information when the public interest in not disclosing the information clearly outweighs the public interest in disclosing the information.[37]

When producing records consistent with SB 1421, the public entity will need to comply with the production deadlines set out in the PRA. In addition to the options a public entity has under the PRA to extend the production deadline for a PRA request, SB 1421 provides additional options that allow a public entity to delay the disclosure of records. For example, a public entity may withhold records related to the incident that is the subject of an active criminal or administrative investigation.[38] Generally speaking, this delay is limited to 60-120 days, but how long the public entity can delay disclosure will be dictated by the facts of each case.

Preparing for SB 1421

Although SB 1421 only took effect on January 1, 2019, its impact will be felt for years to come. To prepare for an increase in PRA requests for peace officer records, public entities should develop disclosure procedures and standards for ambiguous terms and proactively develop a process for identifying and gathering potentially responsive documents.

One way to minimize liability under the PRA and ensure a complete production of records is to create a procedure for record disclosure. Another benefit of establishing a procedure for disclosure is to ensure that employee privacy rights are properly protected, especially since an employee's personnel file generally is not deemed a public record. Under SB 1421, the type of event that triggers the disclosure (use of force, sexual assault, or dishonesty) will dictate the procedures that the public entity needs to follow.

Triggering Event. When a public entity receives a PRA request for peace officer records, it is necessary to consider whether the records are related to an event of officer use of force, sexual assault, or dishonesty. If the records do not relate to one of these events, then they are not disclosable pursuant to SB 1421.

Reasonable Notice. Once a public agency has determined that one or more of the applicable events has been triggered, the public entity may consider providing notice to the office in which disciplinary records will be disclosed. The type of triggering event will dictate which procedure the public entity will follow:

- If the records sought include disciplinary records and relate to a peace officer's discharge of a firearm or use of force that results in great bodily injury, an agency could provide reasonable notice in order to allow the officer to seek a reverse PRA action. If the officer fails to block the disclosure after notice is provided, the public entity may proceed with disclosure pursuant to SB 1421.
- If the records sought relate to a claim of sexual assault or dishonesty by a peace officer, public entities can only disclose records if a commission, hearing, or other body finds that the officer's conduct violated agency policy or the law. The public entity may still need to apply these steps to give the employee notice; however, the public entity will first need to find a record demonstrating that there was a sustained finding that the misconduct occurred.

Record Identification. Once the notice procedures have been completed, the public entity will need to make a determination that all identified records are sufficiently related to the triggering event to justify disclosure.

Non-Responsive Information. The public entity must redact all sensitive information as required by the PRA and SB 1421 and produce the responsive records.

Establishing and following a procedure similar to the one outlined above will allow public entities to identify and produce all responsive records in a timely manner. It also recognizes the balance between the right of the public to the records requested and the privacy rights of the officers whose records are being sought and gives them notice that their records will be released unless they take action.

Standards for SB 1421 Terms

As part of the disclosure process, public entities will want to have their own standards for how to determine and apply the terms used in SB 1421 since certain terms and events will trigger disclosures. Developing standards to address the following key terms will aid a public agency in complying with the PRA and producing records in a timely manner.

Great Bodily Injury. When an officer uses force that results in death or great bodily injury of a person, disclosure of records is required. While death is likely self-evident, great bodily injury is ambiguous. When debating this bill, the state senate specifically changed the language in the statute from serious bodily injury to "great bodily injury" because there is a large body of cases and statutes defining that term.[39] By making this change it is likely that the legislature wanted the courts to interpret great bodily injury in SB 1421 consistently with existing case and statutory law.

Public entities should remember that what will constitute great bodily injury is fact-dependent. California statutes and cases have interpreted "great bodily injury" to mean "a significant or substantial injury."[40] "Great bodily injury" is more than a minor or trivial injury but does not require the victim to suffer a long-term or permanent injury.[41] Additionally, a series of minor injuries when viewed in the aggregate can amount to great bodily injury. For example, bruising over multiple body parts, or swelling and pain can be

considered great bodily injury.[42] Also, if there is a medical opinion that a particular injury is significant will also likely mean the injury suffered is a great bodily injury.[43]

Use of Force. Regarding "use of force," the legislative history originally discussed Taser™ and impact weapons the use of which would require disclosure of related records, but these sections were eliminated.[44] Nevertheless, if the use of such devices results in great bodily injury, the records will likely still need to be disclosed. The driving factor here is whether an officer's use of force results in great bodily injury and not necessarily whether a particular action was "force."

"Relates," "Relating to," and "Related to." An example of use of these terms is when the statute provides "[a] record relating to the report, investigation, or findings of any of the follow: (i) an incident involving the discharge of a firearm…."[45] "Relates," "relating to," and "related to" are very broad terms. In civil discovery, when attorneys seek the production of documents related to a particular event the term is defined as a record that "mentions, discusses, reviews, criticizes, amplifies, explains, describes, etc." a particular event. Use of this term, thus, is consistent with the PRA's purpose of disclosing government records. Therefore, in preparing productions, a public entity should define this term broadly so that in the production stage when the entity is identifying records, it over identifies records. Then, when reviewing the documents with counsel prior to producing the records, determinations about what is sufficiently related to be produced can be made.

Sustained Finding. This term is defined in SB 1421 but that definition differs from that found in Penal Code Section 832.7. The term is relevant for documents related to claims of sexual assault or dishonesty by the officer. In order for documents related to these events to be disclosable, there must be a sustained finding that the officer engaged in this conduct. In this context, a "sustained finding" means "a final determination by an investigating agency, commission, board, hearing officer, or arbitrator…that the action of the peace officer or custodial officer were found to violate law or department policy."[46]

Identify Responsive Documents. On January 1, public entities were able to begin receiving requests for officer records. The universe of records that are potentially disclosable must be related to one of three events, and public entities could start identifying where and how those types of records are retained within their current document retention practices. Taking proactive steps to identify the location of records before requests are made could speed up response times to requests and minimize the risk of litigation.

Implications of SB 1421

In passing SB 1421, the California Legislature makes some fairly substantial changes to the law and seems to have responded to the growing pressure for more transparency in law enforcement: "The public has a strong, compelling interest in law enforcement transparency because it is essential to having a just and democratic society."[47] However, even with this shift in the law governing law enforcement records, *Pitchess* motions will not disappear with the passage of SB 1421. Incidents triggering *Pitchess* motions are often broader than those that must be disclosed under SB 1421. If the records sought with a PRA request do not relate to one of the three trigger events enumerated under SB 1421, the records are not disclosable under SB 1421 but information may still be ordered disclosed through a *Pitchess* motion.

More importantly, by making this new legislation part of the PRA, the legislature has basically proclaimed that the public has a constitutional right to these records—a proclamation that has consequences. If a public agency refuses to disclose records and the requester disagrees with the determination, the requester can bring an action seeking mandamus, injunctive relief, or declaratory relief.[48] In the Los Angeles Superior Court, these matters are handled by the Writs and Receiver courts.[49] In these kinds of civil actions, the requester is asking a judge to enforce the right to receive a copy of the public record being sought—or seeking an order enjoining the agency from denying the requester access to the record. If a judge finds the public agency's decision to refuse disclosure is not justified and determines the requester is the prevailing party, the requester will be awarded court costs and attorneys' fees.[50]

The change in this law may have the potential to lead to a significant increase in PRA requests for law enforcement records. Therefore, it is incumbent upon public entities to establish procedures and standards to minimize a public agency's liability. When producing peace officer personnel records it is necessary to think in broad terms because the PRA favors the release of public records and courts will likely err on the side of disclosure when interpreting SB 1421. ■

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[1] Pitchess v. Superior Ct., 11 Cal. 3d 531 (1974).
[2] City of Santa Cruz v. Municipal Ct., 49 Cal. 3d 74, 81 (1989).
[3] Evid. Code §1043(b)(3).
[4] Evid. Code §1045(b).
[5] Evid. Code §1045(e).
[6] Evid. Code §1045(d).
[7] Gov't. Code §6250.
[8] CBS, Inc. v. Block, 42 Cal. 3d 646, 651 (1986).
[9] San Gabriel Tribune v. Superior Ct., 143 Cal. App. 3d 762, 771-72 (1983).
[10] Cal. Const. art. I, §3(b).
[11] Humane Soc'y v. Superior Ct., 214 Cal. App. 4th 1233, 1254 (2013) (stating that the statutory exemptions to the disclosure of records are construed narrowly).
[12] Gov't. Code §6254(c).
[13] *Id.*
[14] Gov't. Code §6254(b).
[15] Gov't. Code §6254(i).
[16] Gov't. Code §6254.4.
[17] Gov't. Code §6254(j).
[18] Gov't. Code §6254.3.
[19] Gov't. Code §6255.
[20] ACLU Found. v. Superior Ct., 3 Cal. 5th 1032, 1043 (2017) (holding that the catch-all provision contemplates a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality); *see also* Long Beach Police Officers Ass'n v. City of Long Beach, 172 Cal. 4th 59, 67 (2014); Michaelis, Montanari & Johnson v. Superior Ct., 38 Cal. 4th 1065, 1071 (2006).
[21] Marken v. Santa Monica-Malibu Unified Sch. Dist., 202 Cal. App. 4th 1250, 1254 (2012).
[22] Pasadena Police Officers Ass'n. v. City of Pasadena, 22 Cal. App. 5th 147, 152 n.3, (2018); Marken, 202 Cal. App. 4th at 1268 n.14.
[23] California Attorney General's Office, Summary of the California Public Records Act 2004 3 (citing Cal. Const. art. I, §1]; New York Times v. Superior Ct., 218 Cal. App. 3d 1579 (1990).
[24] Gov't. Code §6254(n).
[25] *See, e.g.*, San Gabriel Tribune v. Superior Ct., 143 Cal. App. 3d 775 (1983); *see also* Kapellas v. Kofman, 1 Cal. 3d 20, 36 (1969).
[26] Penal Code §832.7(a).
[27] Penal Code §832.7(b) (as amended 2018).
[28] Penal Code §832.7(b)(1)(B)(i) (as amended 2018).
[29] Penal Code §832.7(b)(1)(B)(ii) (as amended 2018).
[30] *Id.*
[31] Penal Code §8327(b)(1)(B)(iii) (as amended 2018).
[32] *Id.*
[33] Penal Code §832.7(b)(1)(C) (as amended 2018).
[34] Penal Code §832.7(b)(5)(A) (as amended 2018).
[35] Penal Code §832.7(b)(5)(B-C) (as amended 2018).
[36] Penal Code §832.7(b)(5)(D) (as amended 2018).
[37] Penal Code §832.7(b)(6) (as amended 2018).
[38] Penal Code §832.7(b)(7) (as amended 2018).
[39] S. Rules Comm., Office of S. Floor Analyses, SB 1421 as amended August 23, 2018, at 2.
[40] Penal Code §12022.7(f), People v. Cross, 45 Cal. 4th 58, 63-64 (2008).
[41] People v. Escobar, 3 Cal. 4th 740, 746 (1992); Cross, 45 Cal. 4th at 64.
[42] People v. Jaramillo, 98 Cal. App. 3d 830, 836 (1979).
[43] People v. Sanchez, 131 Cal. App. 3d 718, 734 (1982).
[44] S. Rules Comm., Office of S. Floor Analyses, SB 1421 as amended August 23, 2018, at 2.
[45] Penal Code §832.7(b)(1)(A).
[46] Penal Code §832.8.
[47] SB 1421 §4.
[48] Gov't. Code §6258.
[49] Cal. R. Ct. 2.7(b)(1)(G)
[50] Gov't. Code §6258(d).