
THIRD READING

Bill No: SB 16
Author: Skinner (D)
Amended: 5/20/21
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 4-0, 3/9/21
AYES: Bradford, Ochoa Bogh, Skinner, Wiener

SENATE JUDICIARY COMMITTEE: 8-1, 4/13/21
AYES: Umberg, Caballero, Durazo, Gonzalez, Hertzberg, Laird, Wieckowski,
Wiener
NOES: Borgeas
NO VOTE RECORDED: Jones, Stern

SENATE APPROPRIATIONS COMMITTEE: 5-2, 5/20/21
AYES: Portantino, Bradford, Kamlager, Laird, Wieckowski
NOES: Bates, Jones

SUBJECT: Peace officers: release of records

SOURCE: Author

DIGEST: This bill expands the categories of police personnel records that are subject to disclosure under the California Public Records Act (CPRA); and modifies existing provisions regarding the release of records subject to disclosure.

ANALYSIS:

Existing law:

- 1) 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).)
- 2) 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).)
 - 3) 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. (Gov. Code, § 6259, subd. (d).)
 - 4) 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).)
 - 5) 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).)
 - 6) 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).)

- 7) 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) 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; or
 - 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;
 - b) 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;
 - c) 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; and,
 - d) 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).)
- 8) 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).)
- 9) 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:

- 1) Makes personnel records related to the following categories of incidents subject to disclosure under the CPRA:
 - a) Records of every incident involving unreasonable uses of force, or excessive uses of force.
 - b) Records related to sustained findings that an officer failed to intervene against another officer using unreasonable or excessive force.
 - c) Records related to sustained findings of unlawful arrests and unlawful searches.
 - d) Records related to sustained findings of officers engaged in conduct involving prejudice or discrimination on the basis of specified protected classes.
- 2) 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.
- 3) Requires that agencies retain all complaints and related report or findings currently in the possession of a department or agency.
- 4) Clarifies that the identity of victims and whistleblowers may be redacted in addition to witnesses and complainants.
- 5) Codifies existing California Supreme Court case-law requiring law enforcement agencies to cover the costs of editing records.
- 6) 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.
- 7) 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.
- 8) 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.

- 9) Requires that each law enforcement agency request and review the prior personnel files of any officer they hire.
- 10) Requires that every officer employed as a peace officer immediately report all uses of force by the officer to the officer's employing agency.
- 11) Provides that phases-in implementation of this bill so that records relating to incidents that relate to the new categories of offenses added by this bill that occurred before January 1, 2022, shall not be required to be disclosed until January 1, 2023. However, records of incidents that occur after January 1, 2022, shall be subject to disclosure pursuant to the provisions of this bill.

Background

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 CPRA'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 CPRA 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 CPRA 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. This 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 its 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 this 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, this 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.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

According to the Senate Appropriations Committee, costs to individual state departments that employ officers vary, ranging from minor and absorbable to a significant increase in ongoing workload necessitating the hiring of additional personnel to respond to a greater number of CPRA requests and review and redact the records accordingly.

For example, the California Highway Patrol reports personnel costs of \$1.245 million annually for 2.0 Staff Services Managers (SSMs), 6.0 Associate Governmental Program Analysts (AGPAs), and 1.0 Office Technician in order to comply with this measure. The department anticipates that, depending on the number of requests it receives, it would be required to redirect resources and staff to its Public Records Unit from other units and likely would incur an unknown amount of overtime costs during the first year of implementation. (Special fund*)

The Department of Corrections and Rehabilitation report initial two-year costs of \$3.083 million for additional data storage costs, 19.0 AGPAs, and 4.0 SSMs I for retroactive redacting staffing costs and annual ongoing costs of \$1.340 million for additional data storage costs, 8.0 AGPAs, and 2.0 SSMs for ongoing redaction staffing costs. The Department of Insurance indicates that this bill will result in the following approximate costs related to an increased in redaction workload: \$8,000 in FY 2021-2022, \$59,000 in FY 2022-2023, and \$14,000 annually thereafter. (General Fund)

The University of California projects increase costs of \$150,000 annually across its system for the additional workload that SB 16 likely would produce. Costs to many state departments and entities that employ peace officers, such as the Department of Justice and the California State University, are unknown but could be significant. Actual costs would depend on a number of factors, including how many officers the entity employs, the frequency and types of interactions those

officers have with members of the public, and the actual number of officer personnel record requests under the CPRA that are actually made.

*Motor Vehicle Account

SUPPORT: (Verified 5/20/21)

Alameda County Public Defender's Office
American Association of Independent Music
American Civil Liberties Union/Northern California/Southern California/San Diego and Imperial Counties
Artist Rights Alliance
Asian Americans Advancing Justice - California
Asian Solidarity Collective
Black Music Action Coalition
California Attorneys for Criminal Justice
California Civil Liberties Advocacy
California Faculty Association
California Immigrant Policy Center
California Innocence Coalition: Northern California Innocence Project, California Innocence Project, Loyola Project for the Innocent
California News Publishers Association
California Nurses Association
California Public Defenders Association
Californians for Safety and Justice
City of Oakland
Community Advocates for Just and Moral Governance
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
League of Women Voters of California
Los Angeles County Chief Executive Office
Music Artists Coalition
National Association of Social Workers, California Chapter
Nextgen California
Oakland Privacy
Pillars of the Community
Prosecutors Alliance of California

Recording Industry Association of America
San Francisco District Attorney's Office
San Francisco Public Defender
San Leandro for Accountability, Transparency and Equity
Screen Actors Guild-American Federation of Television and Radio Artists
SEIU California
Showing Up for Racial Justice North County San Diego
Showing Up for Racial Justice San Diego
Smart Justice California
Songwriters of North America
Team Justice
Think Dignity
UC Berkeley's Underground Scholars Initiative
Uprise Theatre
Voices for Progress
We the People - San Diego

OPPOSITION: (Verified 5/20/21)

California Association of Joint Powers Authorities
California Law Enforcement Association of Records Supervisors
California Narcotic Officers' Association
California Peace Officers Association
California Police Chiefs Association
California State Sheriffs' Association
City of Fountain Valley
City of Thousand Oaks
League of California Cities
Los Angeles Professional Peace Officers Association
Public Risk Innovation, Solutions, and Management

ARGUMENTS IN SUPPORT: According to the Conference of California Bar Associations (CCBA):

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.

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.

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.

ARGUMENTS IN OPPOSITION: According to the California State Sheriffs' Association (CSSA):

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 made available for release regarding uses 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.

Further, the bill's language providing that the attorney-client privilege shall not be asserted to limit the disclosure of factual information is unnecessary and could undermine effective representation of local governments by their counsel. Under existing case law and generally speaking, information that is not otherwise privileged does not become privileged simply because it is communicated to an attorney. Additionally, permitting disclosure of billing records as litigation unfolds could allow plaintiffs to determine where the attorneys representing the municipality is focusing his or her efforts on defense, including what theories or defenses they intend to pursue.

Additionally, we strongly object to 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 to the public by the bill. Even a harmless mistake or an inadvertent delay in release could subject already cash-strapped local agencies to significant financial harm.

For these reasons, CSSA must respectfully oppose SB 16.

Prepared by: Gabe Caswell / PUB. S. /
5/25/21 10:03:07

**** END ****