Date of Hearing: June 29, 2021
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 16 (Skinner) – As Amended May 20, 2021

SUMMARY: Expands the categories of personnel records of peace officers and custodial officers that are subject to disclosure under the California Public Records Act (CPRA), imposes certain requirements regarding the time frames and costs associated with CPRA requests, and prohibits assertion of the attorney-client privilege to limit disclosure of factual information and billing records. Specifically, **this bill**:

1) Expands the use of force category subject to disclosure under the CPRA to include:

   a) A complaint alleging unreasonable or excessive force; and,

   b) A sustained finding that an officer failed to intervene against another officer who was using clearly unreasonable or excessive force.

2) Adds new categories of disclosure under the CPRA for:

   a) Records relating to an incident in which a sustained finding was made of conduct involving prejudice or discrimination 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; and,

   b) Records relating to sustained findings of unlawful arrests and unlawful searches.

3) Provides that records otherwise subject to disclosure shall be released when an officer resigned before the law enforcement agency or oversight agency concluded its investigation into the alleged incident.

4) States that the identity of victims and whistleblowers may be redacted, in addition to witnesses and complainants, to preserve anonymity.

5) Specifies that persons who request records subject to disclosure are responsible for the cost of duplication, but not the cost of editing and redacting the records.

6) Clarifies that agencies may withhold records pending criminal or administrative investigations or proceedings, as specified, to include all records of misconduct or use of force. Eliminates the option to withhold records until 30 days after the close of a criminal investigation relating to the incident.

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, except where records are permitted to be withheld for a longer period due to specified conditions involving ongoing investigations.

8) Provides that for purposes of releasing peace officer and custodial officer records under the CPRA, 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 work done by the attorney.

9) Makes the five-year minimum retention period for complaints against officers and any related reports and findings applicable to records in which there was not a sustained finding of misconduct. Requires retention for a minimum of 15 years for records where there was a sustained finding of misconduct. Provides that a record shall not be destroyed while a request related to that record is being processed or litigated.

10) Modifies the evidentiary limitation relating to law enforcement records in court proceedings so that courts cannot automatically exclude from discovery or disclosure information consisting of complaints concerning conduct that took place more than five years before the event that is the subject of the litigation.

11) Requires each department or agency to request and review a peace officer's personnel file prior to hiring the officer.

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

13) Provides a phased-in implementation of this bill so that records that relate to the new categories of misconduct added by this bill and occurred before January 1, 2022, shall not be required to be disclosed until January 1, 2023.

14) Makes other nonsubstantive changes.

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.)

2) 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).)

3) States that except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a

statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so. (Gov. Code, § 6253, subd. (b).)

4) States that, except as in other sections of the CPRA, disclosure of specified records is not required, which includes among other things: records of complaints to, or investigations conducted by specified agencies, including any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes. (Gov. Code, § 6254, subd. (f).)

5) Creates an exemption under the CPRA for personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy. (Gov. Code, § 6254, subd. (c).)

6) Creates an exemption under the CPRA for records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege. (Gov. Code, § 6254, subd. (k).)

7) 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).)

8) 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 the Act. (Gov. Code, § 6258.)

9) Provides that if the plaintiff prevails in an action under the CPRA, the judge must award court costs and reasonable attorneys' fees to the plaintiff. (Govt. Code, § 6259, subd. (d).)

10) *Requires a department or agency employing peace officers or custodial officers to establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies. (Pen. Code, § 832.5, subd. (a).)*

11) *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).)*

12) *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).)*

13) 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).)

14) Defines "unfounded" as "mean[ing] that the investigation clearly established that the allegation is not true." (Pen. Code, § 832.5, subd. (d)(2).)

15) 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).)

16) *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; and,

   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 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).)*

17) 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).)

18) 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).)

19) 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).)

20) States that a record of a civilian complaint, or the investigations, findings, or dispositions of that complaint, shall not be released if the complaint is frivolous or the complaint is unfounded. (Pen. Code, § 832.7, subd. (b)(8).)

21) States that "personnel records" include "complaints, or investigations of complaints, concerning an event or transaction in which the officer participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties." (Pen. Code, § 832.8.)

22) *Requires each department or agency in this state that employs peace officers to make a record of any investigations of misconduct involving a peace officer in their general personnel file or a separate file designated by the department or agency. A peace officer seeking employment with a department or agency in this state that employs peace officers shall give written permission for the hiring department or agency to view their general personnel file and any separate file designated by the department or agency. (Pen. Code, § 832.12.)*

23) Sets forth the procedure for obtaining peace officer personnel records or records of citizen complaints or information from these records. Specifically, in any case in which discovery or disclosure is sought of peace officer or custodial officer personnel records or records of citizen complaints against peace officers or custodial officers or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records, as specified. (Evid. Code, § 1043.)

24) *Limits the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of those investigations, concerning an event or transaction in which the peace officer or custodial officer participated, or which the officer perceived, and pertaining to the manner in which the officer performed, to information that is relevant to the subject matter involved in the pending litigation.* (Evid. Code, *§ 1045, subd. (a).)*

25) *Provides that in determining relevance, the court shall examine the information in chambers and exclude from disclosure: 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.* (Evid. Code, *§ 1045, subd. (b)(1).)*

26) Confers a privilege, generally and with specified exceptions, on the client to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer. (Evid. Code, § 950 et seq.)

27) Defines the term "confidential communication" to include information transmitted between a client and their lawyer in the course of that relationship and in confidence. (Evid. Code, § 952.)

28) Provides that if a confidential communication between client and lawyer exists, the client has a privilege protecting disclosure, and the attorney has an obligation to refuse disclosure unless otherwise instructed by the client (Evid. Code, §§ 954, 955).

29) States that attorney-client communications are presumed to be confidential and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential. (Evid. Code, § 917.)

30) Provides that it is the duty of an attorney to maintain inviolate the confidence, and at every peril to the attorney to preserve the secrets, of their client. However, an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual. (Bus. & Prof. Code, § 6068, subd. (e)(1) & (2); see also Cal. Rules of Court, Rule 3-100(A) & (B).)[i]

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "After forty years of prohibiting public access to any and all police records, SB 1421, 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 mandates that agencies can only charge for the cost of duplication."

2) **Background: The CPRA**: Under the CPRA, the public is granted access to public records held by state and local agencies. (Gov. Code, § 6250 et seq.) "Modeled after the federal Freedom of Information Act (5 U.S.C. § 552 et seq.), the [CPRA] was enacted for the purpose of increasing freedom of information by giving members of the public access to records in the possession of state and local agencies. [Citation.] Such 'access to information concerning the conduct of the people's business,' the Legislature declared, 'is a fundamental and necessary right of every person in this state.'" (*Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 290.) The purpose of the CPRA is to prevent secrecy in government and to contribute significantly to the public understanding of government activities. (*City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1016-1017.) That being said, this right of access is not absolute. In enacting the CPRA, the Legislature also declared it was "mindful of the right of individuals to privacy." (Gov. Code, § 6250.)

   In light of these dual concerns of privacy and disclosure, the CPRA includes a number of disclosure exemptions. (Govt. Code, § 6254-6255.) Agencies may refuse to disclose records that are exempted or prohibited from public disclosure pursuant to federal or state law. This includes Evidence Code provisions relating to privilege. (Gov. Code, § 6254, subd. (k).) But, even if a specific exception does not exist, an agency may refuse to disclose records if on balance, the interest of nondisclosure outweighs disclosure. (Govt. Code, § 6255.) "The

specific exceptions of section 6254 should be viewed with the general philosophy of section 6255 in mind; that is, that records should be withheld from disclosure only where the public interest served by not making a record public outweighs the public interest served by the general policy of disclosure." (53 Ops.Cal.Atty.Gen. 136 (1970).)

3) **Discovery of Police Records in Criminal and Civil Proceedings**: Notwithstanding the CPRA, until recently, both police investigatory records and police personnel records were generally protected from disclosure. (Gov. Code, § 6254, subd. (f); former Pen. Code, §§ 832.5 832.7, 832.8.) Before its amendment in 2018, Penal Code section 832.7 made specified peace officer records and information confidential and nondisclosable in any criminal or civil proceeding except pursuant to discovery under Evidence Code sections 1043 and 1046. (See Pen. Code, § 832.7, subd. (a), as amended by Stats. 2003, ch. 102, § 1, p. 809.) "The first category of confidential records pertained to '[p]eace officer or custodial officer personnel records,' which included among other things certain records that relate to employee discipline or certain complaints and to investigations of complaints pertaining to how the officer performed his or her duties. (*Ibid.*; see § 832.8) The second category consisted of 'records maintained by any state or local agency pursuant to section 832.5' (former § 832.7, subd. (a)), which required '[e]ach department or agency in [California] that employs peace officers [to] establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies' and further required such '[c]omplaints and any reports or findings relating' to them be retained for "at least five years" and "maintained either in the peace or custodial officer's general personnel file or in a separate file' (§ 832.5, subds. (a)(1), (b); see also § 832.5, subds. (c), (d)(1)). The third category extended confidentiality to 'information obtained from' the prior two types of records. (Former § 832.7, subd. (a).)" (*Becerra v. The Superior Court of the City of San Francisco* (2020) 44 Cal.App.5th 897, 914-915.)

These statutes, along with Evidence Code sections 1043-1047, codified *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). In *Pitchess,* the California Supreme Court held that under certain circumstances, and upon an adequate showing, a criminal defendant may discover information from an officer's otherwise-confidential personnel file that is relevant to their defense.

The *Pitchess* statutes require a criminal defendant to file a written motion that identifies and demonstrates good cause for the discovery sought. If such a showing is made, the trial court then reviews the law enforcement personnel records in camera with the custodian, and discloses to the defendant any relevant information from the personnel file. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.) Any records disclosed are subject to a mandatory order that they be used only for the purpose of the court proceeding for which they were sought. (*Id.* at p. 1042.)

The *Pitchess* statutes reflect the Legislature's attempt to balance the competing policy considerations of an officer's confidentiality interest and a litigant's interest in knowing about police misconduct. (*Assn. for Los Angeles Deputy Sheriffs v. Superior Court* (2019) 8 Cal.5th 41 (*ALADS*).) The California Supreme Court has stressed that weighing these competing policy interests is for the Legislature, not the courts, to make. (*Copley-Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1299.)

4) **Senate Bill 1421 and General Public Access to Peace Officer Records**: In 2018, again weighing these policy considerations, the Legislature passed SB 1421. This legislation amended Penal Code section 832.7 to loosen the protections afforded to specified peace officer records relating to certain use of force, sustained findings of sexual assault on a member of the public and pertaining to sustained findings of dishonesty in reporting, investigating, or prosecuting a crime. (Pen. Code, § 832.7, as amended by Stats. 2018, ch. 988, § 2, eff. Jan. 1, 2019.) Unlike the *Pitchess* statutes which addressed a litigant's discovery interest, SB 1421 gave the general public access to otherwise confidential police personnel records relating to serious police misconduct in an effort to increase transparency.

The California Supreme Court has found a policy favoring disclosure especially salient when the subject is law enforcement. (See *Long Beach Officers Association v. City of Long Beach* (2014) 59 Cal.4th 59, 74, see also *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 297.) In *Commission on Peace Officer Standards*, the Supreme Court observed:

> The public's legitimate interest in the identity and activities of peace officers is even greater than its interest in those of the average public servant. "Law enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the state. In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers." [Citation.] "It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an 'on the street' level than in the qualifications and conduct of other comparably low-ranking government employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm …."

(*Commission on Police Officer Standards*, at pp. 297–298, fn. omitted.) Release of the personnel records specified in SB 1421 was a step in furtherance of the Court's interpretation of the CPRA and was intended to promote public scrutiny of, and accountability for, law enforcement.

Again, in furtherance of the goal of public scrutiny of, and accountability for, law enforcement, this bill would expand the categories of personnel records of peace officers and custodial officers that are subject to disclosure under the CPRA. First, it would expand the use of force category subject to disclosure to include complaints alleging unreasonable or excessive force, as well as sustained findings that an officer failed to intervene against another officer who was using clearly unreasonable or excessive force. Second, it would add new categories of disclosure for records relating to sustained findings of prejudicial or discriminatory misconduct and sustained findings of unlawful arrests and unlawful searches.

This bill would also increase a defendant's access to discovery of otherwise-confidential peace officer records through the *Pitchess* process; it would remove the limitation prohibiting courts from disclosing complaints of officer misconduct that took place five years before the event at issue in the pending litigation. It would also require an agency to retain all sustained complaints currently in its possession for a minimum of 15 years (rather than allowing an agency to destroy them after five years).

Additionally, this bill would require officer's to immediately self-report all uses of force by the officer to the officer's department or agency. And it would require a department or agency, prior to hiring an officer, to obtain and review the officer's personnel or separate file containing records of any investigations of the officer's misconduct.

5) **Privacy**: For public employees generally, the CPRA exempts from disclosure "[p]ersonnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." (Govt. Code, § 6254, sub. (c).) There is an "inherent tension between the public's right to know and [the] society's interest in protecting private citizens (including public servants) from unwarranted invasions of privacy. [Citation.] One way to resolve this tension is to try to determine 'the extent to which disclosure of the requested item of information will shed light on the public agency's performance of its duty.'" (*Los Angeles Unified School Dist. v. Superior Court* (2014) 228 Cal.App.4th 222, 241 [175 Cal. Rptr. 3d 90].)

   Under current law, records related to two types of unsustained officer conduct are subject to disclosure – a record relating to an officer's discharge of a firearm at a person and a record relating to an incident involving the use of force by an officer against a person that resulted in death or great bodily injury. (Pen. Code, § 832.7, subd. (b)(1)(A)(i) & (ii).) The Legislature has determined that the public's right to discover such "egregious peace officer misconduct" generally overrides privacy concerns. (*Ventura County Deputy Sheriffs' Assn. v. County of Ventura* (2021) 61 Cal.App.5th 585, 593.) Additionally, the Legislature has enacted safeguards to protect the officer's privacy rights. An agency must redact a record to remove information if the disclosure would cause unwarranted invasion of privacy that clearly outweighs the strong public interest in records of misconduct by officers. An agency may also redact a record 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. (*Becerra v. The Superior Court of the City of San Francisco*, *supra*, 44 Cal.App.5th at pp. 923-929; *Ventura County Deputy Sheriffs' Assn. v. County of Ventura*, *supra*, 61 Cal.App.5th at pp. 592-593; Govt. Code, §§ 6254, subd. (c), 6255, subd. (a); Pen. Code, § 832.7, subd. (b)(5)(C) & (6).)

   This bill would require disclosure of additional records of unsustained officer conduct – records relating to an incident involving a complaint that alleges unreasonable or excessive force. However, as discussed, there are redaction safeguards in place to protect an officer's privacy rights when such protection is warranted.

6) **First Amendment**: The reach of this bill includes disclosure of sustained complaints of officer misconduct relating to an incident involving group prejudice or discrimination, including, but not limited to, verbal statements, writings, online posts, recordings, and gestures. Therefore, it raises first amendment issues.

   In *Garcetti v. Ceballos* (2006) 547 U.S. 410, the United States Supreme court set the current standard to trigger First Amendment protection for government employee speech. To be protected, the speech must clear three hurdles: [1] it must be about a matter of public concern; [2] it must be made as a private citizen and not as part of the employee's official duties; and [3] the interests of the employee in the speech must outweigh the interests of the employer in the safe, efficient, and effective accomplishment of its mission and purpose. (*City of San Diego v. Roe* (2004) 543 U.S. 77, 80 [there must be a sufficient nexus between

the officer's conduct and the impact of that conduct on the agency in order to discipline the officer without violating the officer's First Amendment rights].)

The latter hurdle is the most difficult for police officers to overcome in light of the public safety mission and purpose of a law enforcement agency:

> The effectiveness of a city's police department depends on the perception in the community that it enforces the law fairly, even-handedly, and without bias . . . If the department treats a segment of the population of any race, religion, gender, national origin, sexual preference, etc., with contempt, so that the particular minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in the community is impaired.

(*Papps v. Giuliani* (2nd Cir. 2002) 290 F.3d 143.)

As noted above, an officer's statements, writings, online posts, recordings, and gestures- all forms of speech- might be subject to disclosure if they involve group prejudice or discrimination. The bill's focus on sustained complaints may decrease the risk of increasing First Amendment litigation. Presumably, if the complaint is sustained, there was a sufficient nexus between the officer's prejudicial or discriminatory misconduct and the impact of it on the law enforcement agency.

To the extent that disclosure of records under this bill would be in tension with the First Amendment, the records are arguably subject to redaction under Penal Code section 832.7, subdivision (c)(5)(C), which exempts records from disclosure where such disclosure is "specifically prohibited by federal law." (See also Govt. Code, § 6254, subd. (k) [under the CPRA, records are exempt from disclosure if "exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege"]; see also U.S. Const., art. VI, cl. 2 [the Supremacy Clause of the United States Constitution].)

7) **Costs to Redact and Edit Police Records Subject to Disclosure under the CPRA**: Government Code section 6253, subdivision (b) provides that the person requesting the public records pay fees "covering direct costs of duplication, or a statutory fee if applicable." "As a general rule, a person who requests a copy of a government record under the act must pay only the costs of duplicating the record, and not other ancillary costs, such as the costs of redacting material that is statutorily exempt from public disclosure. ([Govt. Code,] § 6253, subd. (b); [], § 6253.9, subd. (a)(2); see *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1336 [89 Cal. Rptr. 3d 374] (*County of Santa Clara*).)" (See *National Lawyers Guild v. City of Hayword* (2020) 9 Cal.5th 488, 491.)

This bill would clarify that the person requesting a copy of records under the CPRA must pay only the costs of duplicating the record – "direct costs of duplication" – not costs of editing or redaction.

8) **Attorney-Client Privilege as Applied to Disclosure of Police Records under the CPRA**:

a) **Background**: "The attorney-client privilege incorporated into the [C]PRA by section 6254(k) [of the Government Code] is described in Evidence Code section 950 et seq., enacted in 1965. (See Evid. Code, div. 8, ch. 4, art. 3 ['Lawyer-Client Privilege'].) This privilege . . . holds a special place in the law of our state. (See *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599 [208 Cal.Rptr. 886, 691 P.2d 642] (*Mitchell*) ['The attorney-client privilege has been a hallmark of Anglo-American jurisprudence for almost 400 years.'].) And for good reason: its 'fundamental purpose … is to safeguard the confidential relationship between clients and their attorneys so as to promote full and [frank] discussion of the facts and tactics surrounding individual legal matters.' (*Ibid.* ['the public policy fostered by the privilege seeks to insure "the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense"'].)" (*Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 292 (*Los Angeles County*).)

There are several statutory exceptions to the attorney-client privilege. (See Evid. Code, §§ 956-962.) As the United States Supreme Court has noted: "The reasons for protecting the 'confidences of wrongdoers' 'ceas[e] to operate . . . where the desired advice refers not to prior wrongdoing, but to future wrongdoing.'" (*United States v. Zolin* (1989) 491 U.S. 554, 562–63.) Accordingly, California has two exceptions based on future wrongdoing -- communications involving an intent to do future harm (Evid. Code, § 956.5) and matters of fraud (Evid. Code, § 956). California also has statutory exceptions related to a deceased client (Evid. Code, §§ 957, 960, 961), communications relevant to breach of duty arising out of the attorney-client relationship (Evid. Code, § 958), where the attorney is an attesting witness regarding the intent of competence of a client executing an attested document (Evid. Code, § 959), and as to joint clients when the communication is offered in a civil proceeding, as specified (Evid. Code, § 962).

b) **Factual Investigation**: This bill would create another statutory exception to the attorney-client privilege. For purposes of releasing police records under the CPRA, the attorney-client privilege could not be asserted to limit the disclosure of factual information provided by the public entity to its attorney or factual information discovered by any investigation done by the public entity's attorney. This provision of the bill involves dual policy considerations of police transparency and public entities' need for confidential legal advice.

> [C]ourts recognize that public entities need confidential legal advice to the same extent as do private clients: "'Government should have no advantage in legal strife; neither should it be a second-class citizen. . . . "Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps. . . ." Settlement and avoidance of litigation are particularly sensitive activities, whose conduct would be grossly confounded, often made impossible, by undiscriminating insistence on open lawyer-client conferences.'" (*Sutter Sensible Planning*[(1981)] 122 Cal.App.3d [813,] 824-825.)

(*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 374.)

Importantly, 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.'" (*Upjohn Co. v. United States* (1981) 449 U.S. 383, 395-396.)

For this reason, hiring outside counsel to conduct a misconduct investigation doesn't necessarily make the investigation privileged. There are parameters to the privilege under California case law. In *City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, the California Court of Appeal held that a privileged relationship exists where the attorney is providing a legal service through the attorney's investigative expertise without providing any legal advice. (*City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1027.) There, the attorney rendered a legal service because she was "expected to use her legal expertise" to "identify the pertinent facts, synthesize the evidence, and come to a conclusion as to what actually happened."(*Id.* at p. 1035.) But not all attorney-led investigations amount to legal service. If the attorney engaged in "routine fact-finding" rather than "legal work," no legal service was provided. (*Ibid.*)

In light of the current body of case law addressing this issue, is it necessary to create a statutory exception to the attorney-client privilege for factual information? In particular, is it necessary to create a statutory exception which appears to exceed the bounds of existing case law? This new exception could undermine the effective representation of local governments by their counsel.

c) **Billing Records**: In a CPRA matter, the California Supreme Court held that billing statements are not "categorically privileged," but "[w]hen a legal matter remains pending and active, the privilege encompasses everything in an invoice, including the amount of aggregate fees." (*Los Angeles County, supra*, 2 Cal.5th at p. 297.) That is because, "[t]o the extent that billing information is conveyed 'for the purpose of legal representation'—perhaps to inform the client of the nature or amount of work occurring in connection with a pending legal issue—such information lies in the heartland of the attorney-client privilege. And even if the information is more general, such as aggregate figures describing the total amount spent on continuing litigation during a given quarter or year, it may come close enough to this heartland to threaten the confidentiality of information directly relevant to the attorney's distinctive professional role. The attorney-client privilege protects the confidentiality of information in both those categories, even if the information happens to be transmitted in a document that is not itself categorically privileged." (*Ibid.*; see also *County of Los Angeles Board of Supervisors v. Superior Court* (2017) 12 Cal.App.5th 1264 ["*Los Angeles County* teaches that invoices related to pending or ongoing litigation are privileged and are not subject to [C]PRA disclosure"].)

The Court noted "the same may not be true for fee totals in legal matters that concluded long ago. In contrast to information involving a pending case, a cumulative fee total for a long-completed matter does not always reveal the substance of legal consultation." (*Los Angeles County, supra*, 2 Cal.5th at p. 298.) Thus some portions of attorney fee invoices on matters that have been closed may not be protected by the attorney-client privilege.

The Court concluded it was not necessary to require "a categorical bar on disclosure of a government agency's expenditures for any legal matter, past or present, active or inactive, open or closed." (*Id.* at p. 300.) The Court explained that though the CPRA "carves out an exemption for privileged portions of government records, '[t]he fact that parts of a

requested document fall within the terms of an exemption does not justify withholding the entire document.' [Citation.] Instead, government agencies must disclose "[a]ny reasonably segregable portion" of a public record "after deletion of the portions that are exempted by law." ([Govt. Code,]§ 6253, subd. (a).) (*Los Angeles County, supra*, 2 Cal.5th at p. 297.)

In light of the current body of case law addressing this issue, is it necessary to create a statutory exception to the attorney-client privilege for billing records? Again, this could undermine effective representation of local governments by their counsel, and in particular if disclosure is required while litigation is pending.

(d) **Pending Litigation Exception under the CPRA**: In addition to incorporating the attorney-client privilege, the CPRA also provides an exemption for pending litigation to which a public agency is a party. (Govt. Code, § 6254, subd. (b).) It is not entirely clear whether the provision of this bill creating an exception to attorney-client privilege for factual information and billing records overrides this exemption. Arguably, it does not contradict the pending litigation exemption, and thus shouldn't trump it. (See *Becerra v. The Superior Court of the City of San Francisco*, *supra*, 44 Cal.App.5th at p. 925.)

9) **Argument in Support**: According to the *Conference of California Bar Associations*, "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."

10) **Argument in Opposition**: According to the *California Peace Officers Association*, "While a major impact of the proposed changes to PC 832.5 (b) would be fiscal (for record retention purposes), the legal policy impacts would center around agencies barely able to provide essential services to their communities by having to rearrange patrol personnel to oversee records management. This leads to less of a presence for the community policing that has helped drive down crime in California over the last several years.

"As written, SB 16 expands the already burdensome SB 1421 by unjustly providing for the disclosure of records of a complaint that alleges unreasonable or excessive force. This provision is neither practical from an administrative or judicial standpoint nor aiding in the effort to sustain trust between law enforcement and the communities they took an oath to serve. In fact, the release of officer records for every single incident involving any use of force, especially those in which the officer is entirely within departmental policy, will generate the misperception that there was 'something wrong' with the officer's conduct when the proper legal findings and investigations found otherwise. That would open the agency up to unfair and undeserved scrutiny as these records are made public.

"Additionally, other conditions in PC 832.7, retain 'sustained' findings that an officer failed to intervene against another officer using force that is clearly unreasonable or excessive. There is no definition of 'clearly unreasonable,' nor 'clearly excessive,' thereby leaving both open to vague interpretation."

11) **Related Legislation**:

a) SB 2 (Bradford) grants new powers to the Commission on Peace Officer Standards and Training (POST) to investigate and determine peace officer fitness and to decertify officers who engage in "serious misconduct;" makes changes to the Bane Civil Rights Act to limit immunity, as specified, makes all records related to the revocation of a peace officer's certification public, and requires that records of an investigation be retained for 30 years. SB 2 is set to be heard in the Assembly Public Safety Committee on June 29, 2021.

b) AB 718 (Cunningham) requires law enforcement agencies to complete initiated administrative investigations of officer misconduct as related to specified uses of force, sexual assault, and dishonesty regardless of whether an officer leaves the employment of the agency. AB 718 is pending before the Senate Committee on Appropriations.

12) **Prior Legislation**:

a) SB 776 (Skinner), of the 2019-2020 Legislative Session, was substantially similar to this bill. SB 776 was not brought for a concurrence vote in the Senate before the end of session.

b) SB 731 (Bradford), of the 2019-2021 Legislative Session, would have made all records related to the revocation of a police officer's certification a public record and required that investigation records be retained for 30 years, among other things. SB 731 was not brought up for a vote in the full Assembly.

c) AB 1599 (Cunningham), of the 2019-2020 Legislative Session, would have required law enforcement agencies to complete initiated administrative investigations of officer misconduct related to specified uses of force, sexual assault, and dishonesty regardless of whether an officer left the agency's employment. AB 1599 was held in the Senate Committee on Appropriations.

d) SB 1421 (Skinner), Chapter 988, Statutes of 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 officer engaged in sexual assault involving a member of the public.

e) AB 2327 (Quirk), Chapter 966, Statutes of 2018, requires any department or agency employing law enforcement officers to maintain a record of any investigations against an officer, and required an officer seeking employment with a department to give permission for the hiring department to view their file.

f) SB 1286 (Leno), of the 2015-2016 Legislative Session, would have provided greater public access to peace officer and custodial officer personnel records and other records maintained by a state or local agency related to complaints against those officers. SB 1286 was held in the Senate Appropriations Committee.

g) SB 1019 (Romero), of the 2007-2008 Legislative Session, would have abrogated the holding in *Copley Press*, *supra*, 39 Cal.4th 1272, for law enforcement agencies operating under a federal consent decree on the basis of police misconduct. SB 1019 failed passage in the Assembly Public Safety Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Advancement Project
Alameda County Public Defender's Office
American Association of Independent Music
American Civil Liberties Union
American Federation of Musicians
Artist Rights Alliance
Asian Americans Advancing Justice - California
Asian Solidarity Collective
Black Music Action Coalition
California Attorneys for Criminal Justice
California Black Media
California Broadcasters Association
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 Newspaper Publishers Association

California Nurses Association
California Police Chiefs Association
California Public Defenders Association (CPDA)
Californians for Safety and Justice
Change Begins With Me Indivisible Group
City of Alameda
City of Oakland
Community Advocates for Just and Moral Governance
Conference of California Bar Associations
County of Los Angeles Board of Supervisors
Del Cerro for Black Lives Matter
Disability Rights California
Drug Policy Alliance
Ella Baker Center for Human Rights
Equal Rights Advocates
Ethnic Media Services
First Amendment Coalition
Friends Committee on Legislation of California
Hillcrest Indivisible
League of Women Voters of California
Legal Services for Prisoners with Children
Los Angeles County District Attorney's Office
Mission Impact Philanthropy
Multi-faith Action Coalition
Music Artists Coalition (MAC)
National Association of Social Workers, California Chapter
Nextgen California
Oakland Privacy
Partnership for the Advancement of New Americans
Pillars of the Community
Prosecutors Alliance of California
Racial Justice Coalition of San Diego
Recording Industry Association of America
Riseup
San Diego Progressive Democratic Club
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
Sd-qtpoc Colectivo
Seiu California
Showing Up for Racial Justice (SURJ) San Diego
Showing Up for Racial Justice North County San Diego
Smart Justice
Social Workers for Equity & Leadership
Songwriters of North America
Team Justice
Think Dignity
UC Berkeley's Underground Scholars Initiative (USI)

University of California Student Association
Uprise Theatre
Voices for Progress
We the People - San Diego

Oppose

Association of Probation Supervisors of Los Angeles County
California Association of Joint Powers Authorities (CAJPA)
California Correctional Peace Officers Association
California Law Enforcement Association of Records Supervisors (CLEARS)
California Narcotic Officers' Association
California Peace Officers Association
California State Sheriffs' Association
City of Fountain Valley
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 Police Protective League
Los Angeles County Probation Managers Association Afscme Local 1967
Los Angeles County Sheriff's Professional Association
Los Angeles Professional Peace Officers Association
Los Angeles School Police Officers Association
Los Angeles School Police Management Association
Newport Beach Police Association
Public Risk Innovation, Solutions, and Management (PRISM)
Riverside Police Officers Association
Sacramento County Probation Association
San Diego District Attorney Investigator's Association
San Francisco Police Officers Association
Santa Ana Police Officers Association
Santa Monica Police Officers Association
Torrance Police Officers Association

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[i] According to the discussion of Rule 3-100, paragraph 13: "Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law. (Added by order of the Supreme Court, operative July 1, 2004.)"