Date of Hearing: July 6, 2021

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
SB 16 (Skinner) – As Amended May 20, 2021

As Proposed to be Amended

**SENATE VOTE**: 31-3

**SUBJECT**: PEACE OFFICERS: RELEASE OF RECORDS

**KEY ISSUE**: IN ORDER TO INCREASE THE TRANSPARENCY OF LAW ENFORCEMENT PERSONNEL RECORDS, AMONG OTHER REFORMS, SHOULD THE CATEGORIES OF RECORDS THAT ARE SUBJECT TO PUBLIC DISCLOSURE BE EXPANDED AND SHOULD NEW REQUIREMENTS REGARDING THE TIME FRAME AND COSTS FOR THE RELEASE OF RECORDS BE IMPOSED?

## SYNOPSIS

*In order to increase transparency of police personnel records, this bill, among other things, expands the categories of records that are subject to disclosure under the California Public Records Act (CPRA), imposes new requirements for record retention, specifies a timeline for a law enforcement agency to provide public records to the requester, and limits the costs that can be charged by a law enforcement agency for providing records in response to CPRA requests. Prior to 2019, law enforcement personnel records were largely exempt from disclosure pursuant to the CPRA, regardless of where they were maintained. In 2018, the Legislature approved and the governor signed SB 1421 (Skinner, Chap. 988, Stats. 2018), which amended Penal Code Section 832.7 to, "notwithstanding" the CPRA "and any other law," require disclosure of personnel records of peace officers and custodial officers in certain circumstances: specifically when they use force, or are subject to sustained findings of misconduct related to sexual assault and dishonesty. Many agencies resisted complying with the new law, especially to the extent that it required disclosure of records created before SB 1421 became law.*

*This bill builds and expands upon SB 1421, requiring that additional types of personnel records be disclosed. The most controversial records are those regarding complaints (from the public) about unreasonable or excessive force, even if not sustained by an investigation. These complaints are, according to the bill's supporters, important to the public. The bill also requires that records of sustained allegations of bias, sustained findings of unlawful arrest, and sustained findings of unlawful search must be disclosed. The analysis also reviews how the bill extends the time period for retention of records, prohibits destruction of records, and limits the costs that can be charged by an agency for compliance with a CPRA request. The author proposes to amend one provision in the bill that arguably interferes with a law enforcement agency's ability to communicate with its attorneys. While the current language limits an agency's ability to claim the lawyer-client privilege for confidential communications, the amended language will allow it in circumstances that have been recognized in case law. The amendments are incorporated into the summary of the bill and explained in the analysis. The bill is supported by the California Police Chiefs Association, social and criminal justice reform organizations, and open government advocates. It is opposed by the California Peace Officers Association, cities, and joint powers authorities. It is opposed, unless amended, by a number of law enforcement*

*organizations who say their primary objection to the bill is that it allows unsustained complaints of excessive force to be disclosed.*

**SUMMARY:** In order to increase transparency of police personnel records, expands the categories of records that are subject to disclosure under the California Public Records Act (CPRA), imposes new requirements for record retention, specifies a timeline for a law enforcement agency to provide public records to the requester, and limits the costs that can be charged by a law enforcement agency for providing records in response to CPRA requests. Specifically, **this bill**:

1) Eliminates the limitation on courts from considering "information consisting of complaints concerning conduct [of peace officers] occurring more than five years before the event or transaction that is the subject of the litigation" when determining relevancy of that information for admissibility in criminal or civil proceedings.

2) Requires that a department or agency retain all complaints and related reports or findings currently in the possession of the department or agency for a period of no less than five years for records where there is not a sustained finding of misconduct, and not less than 15 years where there is a sustained finding of misconduct; prohibits a record from being destroyed while a request related to that record is being processed or while any process or litigation to determine whether the record is subject to release is ongoing.

3) Makes personnel records relating to the following categories of incidents subject to disclosure under the CPRA:

   a) The report, investigation, or findings of an incident involving a complaint that alleges unreasonable or excessive force.

   b) The report, investigation, or findings of a sustained finding that an officer failed to intervene against another officer using force that is clearly unreasonable or excessive.

   c) 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 conduct including, but not limited to, verbal statements, writings, online posts, recordings, and gestures, involving prejudice or discrimination against a person on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.

   d) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that the peace officer made an unlawful arrest or conducted an unlawful search.

4) Requires the disclosure of records that would be otherwise subject to disclosure when they relate to an incident in which the peace officer or custodial officer resigned before the law enforcement agency or oversight agency concluded its investigation into the alleged incident.

5) Clarifies that information about the identity of victims and whistleblowers, in addition to witnesses and complainants, may be redacted from released reports.

6) Provides, for purposes of releasing records, that the lawyer-client privilege does not prohibit the disclosure of factual information provided by the public entity to its attorney, or factual information discovered by any investigation done by or on behalf of the public entity's attorney; and specifies that the lawyer-client privilege does not prohibit disclosure of billing records related to the work done by the attorney, so long as the records do not relate to active and ongoing litigation and do not disclose information for the purpose of legal consultation between the public entity and its attorney.

7) Clarifies that 6), above, does not prohibit the public entity or its attorney from asserting that a record or information within the record is exempted or prohibited from disclosure pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

8) Requires, except to the extent temporary withholding for a longer period is permitted because of an active criminal investigation, records subject to disclosure to be provided at the earliest possible time and no later than 45 days from the date of a request for their disclosure.

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 a phased-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 subject to the time limitations of the bill until January 1, 2023. However, records of incidents that occur after January 1, 2022, shall be subject to the time limitations of the bill.

**EXISTING LAW**:

1) Establishes the California Public Records Act (CPRA) and provides that the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Government Code Section 6250 *et seq*. All further statutory references are to this Code unless otherwise indicated.)

2) Defines "public records" as 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. (Section 6250 *et seq*.)

3) States that, except as specified in other sections of the CPRA, the disclosure of specified records, are not required to be disclosed, including records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the Office of the Attorney General and the Department of Justice, the Office of Emergency Services and 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 purpose. (Section 6254 (f).)

4) Exempts from disclosure under the CPRA records that are exempted or prohibited from disclosure pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege. (Section 6254 (k).)

5) Requires an agency seeking to withhold a record to justify the withholding by demonstrating that the record in question is exempt under express provisions of the CPRA or that, on the facts of the particular case, the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. (Section 6255 (a).)

6) Authorizes any person to institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce their right to inspect or to receive a copy of any public record or class of public records under this chapter. (Section 6258.)

7) Provides that specified peace officer or custodial officer personnel records and records retained or owned by any state or local agency, including any video or audio recording of a critical incident, shall not be confidential and shall be made available for public inspection pursuant to the CPRA. (Penal Code Section 832.7 (b)(i)(A)(i)-(ii).)

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

9) Requires the public's complaints and any reports or findings relating to those complaints to be retained for at least five years. (Penal Code Section 832.5 (b).)

10) Provides that complaints by members of the public, or portions of complaints, that the law enforcement officer's employing agency determines to be frivolous or unfounded, or for which the employing agency exonerates the officer, shall not be maintained in that officer's general personnel file. Instead, such complaints must be retained in separate files that are deemed personnel records for purposes of the CPRA. (Penal Code Section 832.5 (c).)

    a) For purposes of this section, "frivolous" is defined as "totally and completely without merit or for the sole purpose of harassing an opposing party." (Penal Code Section 832.5 (c); Civil Code Section 128.5 (b)(2).)

    b) For purposes of this section, "unfounded" is defined to "mean [that] the investigation clearly established that the allegation is not true." (Penal Code Section 832.5 (d)(2).)

    c) For purposes of this section "exonerated" is defined to "mean [that] the investigation clearly established that the actions of the peace or custodial officer that formed the basis for the complaint are not violations of law or department policy." (Penal Code Section 832.5 (d)(3).)

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

12) Provides that specified law enforcement officer records maintained by their agencies or departments shall not be confidential and shall be made available for public inspection pursuant to the CPRA:

    a) A record relating to the report, investigation, or findings of any of the following:

        i) An incident involving the discharge of a firearm at a person by a law enforcement officer; or

        ii) An incident in which the use of force by a law enforcement officer against a person resulted in death or great bodily injury.

    b) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a law enforcement officer engaged in sexual assault involving a member of the public; and

    c) Any record relating to an incident in which a sustained finding was made by any law enforcement agency of dishonesty by a law enforcement officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another law enforcement officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence. (Penal Code Section 832.7 (b)(1).)

13) Provides that, notwithstanding the above, an agency or department may withhold records involving an incident in which a law enforcement officer is alleged to have discharged a firearm or used force that resulted in death or great bodily injury under the following circumstances:

    a) When the incident is the subject of an active criminal or administrative investigation, for at least 60 days, and for longer if an agency determines that disclosure could reasonably be expected to interfere with a criminal enforcement action against the officer who used force or a third party.

    b) If criminal charges relating to the incident in which force was used are filed, the records may be withheld until a verdict is returned or the time to withdraw a plea expires.

    c) If records are sought during an administrative investigation involving an incident in which a law enforcement officer is alleged to have discharged a firearm or used force that resulted in death or great bodily injury, the agency may delay disclosure until the agency reaches a determination, up to 180 days after the agency discovered the incident, or 30 days after the close of any criminal investigation into the incident, whichever is shorter. (Penal Code Section 832.7 (b)(7).)

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

15) Provides that, in any case in which discovery or disclosure of a law enforcement officer's personnel or related records are sought, the party seeking the records must apply for the information by motion and must be released where the court, after an in camera inspection, determines information contained in the records is relevant to the subject matter of the case. The court, in determining whether the records contain relevant information, must exclude from disclosure the following:

    a) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought;

    b) In a criminal proceeding, the conclusions of any officer investigating a complaint filed by a member of the public; and

    c) Facts that are so remote as to make disclosure of little or no practical benefit. (Evid. Code Sections 1043, 1045.)

**FISCAL EFFECT**: As currently in print this bill is keyed fiscal.

**COMMENTS**: This bill responds to the pattern of law enforcement agencies refusing to comply with provisions of existing law that make specified law enforcement personnel records subject to public disclosure. Among other things, it expands the types of personnel records that are subject to public disclosure, imposes clear timelines for a law enforcement agency to comply with a request for public records, and limits the costs that can be charged by a law enforcement agency for providing records to a requester. According to the author:

> 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.

***Background – Police Personnel Records and the CPRA.*** The California Public Records Act makes all documents and "writings" of a public agency open to public inspection upon request, unless the records are otherwise exempt from public disclosure. The CPRA includes a number of specific exemptions from disclosure, such as investigatory records of law enforcement agencies (*See* Section 6254 (f)) and also a "catch-all exemption" for any record "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." (Section 6254 (k).)

Prior to 2019, law enforcement personnel records were largely exempt from disclosure pursuant to the CPRA, regardless of where they were maintained. The CPRA exempted from public disclosure records of "investigations conducted by. . . the office of the Attorney General and the Department of Justice . . . and any 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 purpose." (Section 6254 (f).) Furthermore, the Penal Code contained a specific

exemption for "the personnel records of peace officers and custodial officers and records maintained by any state or local agency" (Penal Code Section 832.7) that was incorporated by reference into the CPRA. (Section 6255 (k).)

However, other records related to police misconduct—that could ultimately be the basis for a personnel action—were subject to disclosure under numerous circumstances. In *Long Beach Police Officers Association v. City of Long Beach* (2015) 59 Cal.4th 59, a police union sought to prevent disclosure pursuant to exceptions in the CPRA of the names of Long Beach police officers who were involved in on-duty shootings. The California Supreme Court, in reviewing the statutes that make police personnel records confidential (Penal Code Sections 832.7 and 832.8), stated that the information contained in the initial incident report of an on-duty shooting are typically not "personnel records" although the information could result in an investigation by the employing agency and may lead to discipline.

> Only the records *generated* in connection with that appraisal or discipline would come within the statutory definition of personal records. (Penal Code 832.8, subd. (d).) We do not read the phrase "records relating to . . . employee . . . appraisal or discipline" so broadly to include every record that might be *considered* for purposes of an officer's appraisal or discipline, for such a broad reading of the statute would sweep virtually all law enforcement records into the protected category of "personnel records." (*Long Beach Police Officers Association, supra,* 59 Cal.4th at 71-72.)

The Court also analyzed the investigatory records exception within the CPRA (Section 6254 (f)) to support its conclusion that not all records pertaining to an on-duty shooting are confidential. The Court noted that paragraphs (1) and (2) of subdivision (f) require the disclosure of the officer's name when a shooting occurs by the officer during an arrest, or in the course of responding to a complaint or request for assistance, or when the officer's name is recorded as a factual circumstance of the incident. "It thus appears that the Legislature draws a distinction between (1) records of factual information about an incident (which generally must be disclosed) and (2) records generated as part of an internal investigation of an officer in connection with the incident (which generally are confidential)." (*Long Beach Police Officers Association, supra,* 59 Cal.4th at 72.) Likewise, the Court found that the exception against disclosure of personnel records if disclosure would constitute an unwarranted invasion of personal privacy, (Section 6254 (c)), would in most instances weigh in favor of disclosure. "The public's substantial interest in the conduct of its peace officers outweighs, in most cases, the officer's personal privacy interest." (*Id.* at 73.)

Finally, the Court considered the catchall exemption in the CPRA that allows a public agency to withhold any public record if the agency shows 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." (Section 6255.) The Court concluded that vague safety concerns that apply to all officers involved in shootings are insufficient to tip the balance against disclosure. (*Long Beach Officers Association*, *supra*, 59 Cal.4th at 74.) Thus, the Court rejected the blanket rule sought by the union preventing disclosure of officer names every time an officer is involved in a shooting, and stated that some circumstances may warrant the nondisclosure of names but the facts of that case did not warrant it. (*Id.* at 75.)

***SB 1421 (Skinner), Law Enforcement Agencies' Refusal to Provide Pre-2019 Records of Misconduct, and Litigation to Enforce its Requirements.*** In 2018, the Legislature approved and

the Governor signed SB 1421 (Skinner, Chap. 988, Stats. 2018), which amended Penal Code Section 832.7 to, "notwithstanding" the CPRA "and any other law," require disclosure of personnel records of peace officers and custodial officers in certain circumstances: specifically when they use 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 law enforcement agency in California received at least one request for records made public by the new law. Many of the requests sought a comprehensive release of all existing and relevant records from the agencies. Despite SB 1421's clear mandate that all such records in an agency's possession must be disclosed, agencies across the state delayed or denied public access to the records. For example, many cities destroyed records before January 1, 2019, to avoid having to disclosure them.

In March 2019, the Los Angeles Times reported that 170 agencies were in active litigation or had refused to disclose records arguing, among other things, that the law did not apply to records *created* before 2019. This litigation created substantial delays in public access, and encouraged agencies to fight in court rather than invest in resources to disclose the records. Agencies also set up other obstacles 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.

Numerous lower courts ruled that disclosure of pre-2019 records was required by the new law. In *Walnut Creek Police Officers' Assn. v. City of Walnut Creek* (2019) 33 Cal. App. $5^{th}$ 940, the First District Court of Appeal was the first appellate court to consider the issue. The court held that SB 1421 applies to records created prior to Jan. 1, 2019. In response, many agencies, as well as police unions representing San Francisco and Los Angeles police departments and the Los Angeles County Sheriff's sworn personnel, withdrew their lawsuits seeking to block the release of pre-2019 records. But the Office of the California Attorney General continued fighting disclosure, arguing that it would be unduly burdensome for it to review all of the records in its custody and that records should be sought from the agency that created them.

Finally, in January of 2020, the First District Court of Appeal ruled in *Becerra v. Superior Court* that Penal Code section 832.7 generally requires disclosure of all responsive records in the possession of the Department of Justice, regardless of whether the records pertain to officers employed by the Department of Justice or by another public agency and regardless of whether the Department of Justice or another public agency created the records. (*Becerra v. Superior Court* (2020) 44 Cal.App.5th 897, 910.) The appellate court also held that, "the so-called 'catchall exemption' of the CPRA, codified at section 6255, may apply to records that are subject to disclosure under section 832.7." (*Ibid.*) However, the appellate court concluded that, "the Department did not adequately demonstrate that the public interest served by nondisclosure of the records at issue clearly outweighs the public interest in their disclosure." (*Ibid.*) Shortly after AG Bonta was sworn in as AG, he announced that his office would review hundreds of thousands of use-of-force and misconduct records from its investigations of various law enforcement agencies across the state as part of an agreement with the real parties in interest in the case: the First Amendment Coalition and San Francisco's National Public Radio station, KQED. The office intends to complete its review as part of a court-approved agreement by Sept. 26, 2021 and will make the records public. (Solis, *California AG Will Comply with Court Deadline to Release Police Misconduct Records,* Courthouse News Service (May 7, 2021), available at https://www.courthousenews.com/california-ag-will-comply-with-court-deadline-to-release-police-misconduct-records/.)

***This bill.*** In order to provide greater transparency of law enforcement misconduct, this bill makes several changes to existing laws relating to police misconduct, including laws governing the release of police personnel records. Building on the provisions of SB 1421, this bill, among other things, makes additional types of law enforcement personnel records subject to disclosure in response to a CPRA request; clarifies that certain records are not protected from disclosure by the attorney-client privilege; and codifies case law that only costs of duplication can be charged to a requester of public records.

*More types of personnel records would be subject to disclosure under the bill.* The bill broadens the categories of personnel records that are subject to disclosure under the CPRA in three ways. First, it makes a report, investigation, or findings of two types of incidents subject to public disclosure: (1) An incident involving a *complaint* that alleges unreasonable or excessive force; and (2) A *sustained* finding that an officer failed to intervene against another officer using force that is clearly unreasonable or excessive. While the second category of records must be sustained in order to be subject to mandatory disclosure, the first category does not. The fact that a complaint alleging that an officer used excessive force may not be investigated or may not be sustained, yet would be subject to release, appears to concern some law enforcement stakeholders. For example, the California State Sheriffs Association states that it would remove its opposition if two provisions were removed, including the one making unsubstantiated or unsustained complaints subject to public disclosure. Arguably, complaints that are not sustained may nevertheless be of public value and interest, especially if there were multiple complaints about the same officer or involving the same type of conduct. Also, it should be noted that if a complaint were investigated and found to be unfounded, the complaint would not be subject to disclosure under the bill.

Second, the bill mandates disclosure of records relating to an officer's history of bias. It makes public 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 conduct including, but not limited to, verbal statements, writings, online posts, recordings, and gestures, involving prejudice or discrimination" on the basis of a protected characteristic, including race, national origin, and gender. While the basis of the "sustained finding" could be, under the bill, speech, or expressive conduct that would be protected by the 1st Amendment, and any potential discipline imposed for such protected expression would be subject to constitutional scrutiny, the bill itself does not raise 1st Amendment concerns by requiring disclosure of *records* of discipline related to such activity. Furthermore, these records are of obvious relevance to an officer's ability to perform their duties in an unbiased manner, and are also of keen public interest.

Finally, the bill makes public any record relating to an incident in which a sustained finding was made that the peace officer made an unlawful arrest or conducted an unlawful search, which is also extremely relevant to peace officer credibility. None of the newly public records described above would be subject to the bill's time limitations for disclosure until January 1, 2023.

*The bill extends the time period for agencies to retain some records.* Existing law requires an agency to retain: "Complaints and any reports or findings relating to these complaints" for "at least five years." (Penal Code Section 832.5 (b).) The bill extends the five-year retention period for some of these records. Specifically, it requires that records relating to a *sustained finding of misconduct* must be retained for not less than 15 years.

*The bill prohibits destruction of records that are subject to a CPRA request or litigation.* Existing law does not provide a specific prohibition on an agency destroying, rather than providing, public records that are subject to a CPRA request. The risk of an agency doing so is not unfounded or unrealistic. For example, it was widely reported that law enforcement agencies engaged in wholesale destruction of records prior to SB 1421 taking effect in January of 2019 in order to avoid complying with the new law. In order to address this risk, the bill prohibits an agency from destroying a record when a "request related to that record is being processed or any process or litigation to determine whether the record is subject to release is ongoing." However, it is unclear what the consequences would be to an agency if the agency violated the law and destroyed records nevertheless. A petitioner could recover costs and attorneys' fees if they are deemed the prevailing party in the writ action to enforce the CPRA, according to Section 6259 (d), but if the record were destroyed, that remedy would not be very helpful to the requester. *As the bill moves forward, the author may wish to consider whether a monetary penalty should be imposed on an agency that violates this provision and willfully destroys disclosable public records while a request for those records is pending.*

*The bill clarifies what costs a public agency may charge a requester of public records for complying with a CPRA request.* As a general rule, a person who requests a copy of a government record under the CPRA can only be charged by the agency for 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. (Sections 6253 (b), 6253.9 (a)(2); *See County of Santa Clara v. Superior Court* (2009) 170 Cal. App. 4th 1301, 1336.) This bill codifies that general rule by stating that, "The cost of copies of records . . . that are made available upon the payment of fees covering direct costs of duplication . . . shall not include the costs of editing or redacting the records." As explained below, the author will amend the bill to clarify, consistent with existing law, that the agency also may not charge the requester for the cost of "searching for" the records.

*Timelines for disclosure or records.* Current law provides that, "Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor." (Section 6253 (c).) Existing law also allows an agency, in unusual circumstances, to extend the time limit by written notice by the head of the agency or their designee of the new date, no more than 14 days hence, when the records will be made available. (*Ibid.*) However, the law is not specific about when records that are subject to disclosure must ultimately be provided to the requester.

This bill provides a timeline for providing records, at least for the law enforcement personnel records at issue in the bill, by requiring that "records subject to disclosure under this subdivision shall be provided at the earliest possible time and no later than 45 days from the date of a request for their disclosure." Although the bill's deadline is clear, a law enforcement agency may not be willing or able to comply with the deadline (just as many do not comply with the existing timelines specified in Section 6253 (c)). The only way for a requester to enforce the requirement for a law enforcement agency to provide the records would be to file a civil action pursuant to Section 6259 (see *No civil penalties for violation of the bill's mandates,* below.)

*The bill in print appears to limit the scope of, or create exceptions to, the attorney-client privilege.* This bill in print provides, for purposes of releasing police records under the CPRA,

that the attorney-client privilege cannot 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. It also prohibits the assertion of the attorney-client privilege over billing records.

The provision regarding factual information is apparently intended to prevent the redaction of facts that are uncovered in an investigation conducted by a public entity simply because they hire an attorney to conduct the investigation. However, as pointed out by the Assembly Public Safety Committee, this provision may not be necessary, given that, according to the U.S. Supreme Court, 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.)

Likewise, case law establishes that billing records of an attorney are not categorically protected from public disclosure under the attorney-client privilege even though they are communications between an attorney and a client. The California Supreme Court has held that "a cumulative fee total for a long-completed matter does not always reveal the substance of legal consultation." (*Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 298.) Rather, "the contents of an invoice are privileged only if they either *communicate information for the purpose of legal consultation* or risk exposing information that was communicated for such a purpose." (*Id.* at 300 [emphasis added].) The latter category "includes any invoice that reflects work in *active and ongoing litigation*." (*Ibid.* [emphasis added].) Therefore, 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." (*Ibid.*)

Unnecessary codification of case law, such as the general rule about factual information discovered by an attorney would not be a cause for concern (it is something that the Legislature routinely does when the Legislature agrees with the case law), but the bill's rules about factual information and billing records may go beyond the holdings of case law. They seem to establish that the attorney-client privilege can never be asserted in relation to factual information or billing records. While that is something the Legislature could do, a blanket prohibition on assertion of the attorney-client privilege may not be wise. For example, an attorney's billing statement may involve active litigation or be intertwined with the attorney's legal advice or work product, both of which are privileged. By not allowing an agency to assert the attorney-client privilege under any of these circumstances, the bill in print may exceed the bounds of existing case law and interfere with the ability of a law enforcement agency to communicate with its attorney.

***Author's amendments.*** In order to address problematic issues raised by the bill's attorney-client privilege provision, the author proposes the following clarifying amendments (on Page 12, at lines 21 – 26):

> (12) ***(A)*** For purposes of releasing records pursuant to this subdivision, the ~~attorney-client~~ ***lawyer-client*** privilege ~~shall not be asserted to limit~~ ***described in Section 950 et seq of the Evidence Code does not prohibit*** the disclosure of ***either of the following:***
> ***(i) F***actual information provided by the public entity to its attorney, ***or*** factual information discovered ~~by~~ ***in*** any investigation ~~done~~ ***conducted*** by ***or on behalf of*** the public entity's attorney. ~~, or~~

> *(ii)* ***B****illing records related to the work done by the attorney* ***so long as the records do not relate to active and ongoing litigation and do not disclose information for the purpose of legal consultation between the public entity and its attorney.***
> ***(B) This paragraph does not prohibit the public entity or its attorney from asserting that a record or information within the record is exempted or prohibited from disclosure pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege as described in subdivision (k) of Section 6254 of the Government Code.***

These amendments will allow an agency to assert relevant privileges when relevant. For example, they will be able to assert the lawyer-client privilege for billing records (or information within the records) related to active and ongoing litigation that disclose information for the purpose of legal consultation or that constitute work product.

Also, in order to clarify, consistent with existing statutory and case law, that an agency cannot charge a requester for its costs to search for records, the author proposes to insert the following clarifying amendment on page 12, at line 3, to read as follows:

> costs of ***searching for,*** editing or redacting the records.

*No civil penalties for violation of the bill's mandates.* A large number of groups in opposition continue to allege (as recently as July 1, 2021 in the case of a law enforcement coalition letter of opposition to the bill, unless amended, to the Assembly Committee on Public Safety) that they oppose the bill because of its civil penalties, even claiming that "LAW ENFORCEMENT AGENCIES WILL BE DEFUNDED UNDER THIS MEASURE**."** In fact, since it was amended on May 20, 2021, the bill has **no civil penalties** for violations of its mandates. The only remedy for violation would therefore be a civil action under Section 6258 to obtain injunctive or declaratory relief (i.e. a court order, requiring the agency to release records that are subject to disclosure), the records, and an award of costs and reasonable attorney fees if they prevail in the action. (Section 6259 (d).)

***ARGUMENTS IN SUPPORT:*** Supporters write in support of the bill because, among other reasons, they believe it will bring greater transparency and accountability to law enforcement. For example, the American Civil Liberties Union of California highlights the fact that the bill would require the release of records relating to investigations in the aforementioned categories where the peace officer resigned before the investigating agency concluded its investigation. "This is critically important because this is a major loophole that peace officers often use to avoid accountability. Officers in these circumstances usually quit their job and get hired by another law enforcement agency." Similarly, the California News Publishers Association writes that the bill, "mandates transparency to help cure the problems secrecy has shown over this category of public information in the last 40 years. SB 16 further peels back the veil of secrecy that has shrouded this information from public view while providing enough flexibility for agencies to protect the rights of the officers that serve the public."

The California Police Chiefs Association writes that it supports the bill because it welcomes transparency of law enforcement actions, investigations, and misconduct:

> As police chiefs, it is important we are transparent in our actions and investigations, especially regarding internal investigations into officer misconduct. In 2018, CPCA supported SB 1421 (Skinner), the landmark legislation to allow for the release of police

personnel files in specific cases. SB 16 builds upon that original legislation to add additional categories where the public can gain access to this information, including cases of excessive force, discrimination, failure to intervene, and unlawful searches/arrests.

***REQUESTS FOR AMENDMENTS BY GROUPS IN OPPOSITION UNLESS AMENDED:*** In a group letter, a large coalition of law enforcement organizations—signed by all of the agencies listed below—writes, "Our primary concern with this legislation is its requirement that departments release unfounded, unsubstantiated complaints to the public. . . We cannot fathom why false information should be released and amplified and further do not understand how this is supposed to improve the quality of policing in California." The group's secondary concern is the bill's "significant civil penalties," which are no longer in the bill, as explained above.

***ARGUMENTS IN OPPOSITION:*** Public Risk Innovation, Solutions, And Management and the California Association of Joint Powers Authorities write in a joint letter that, "Local governments and agencies across the state have already been working to comply with the increased records retention and disclosure requirements imposed under SB 1421 (Chapter 988, Statutes of 2018). SB 16 goes even further and unnecessarily expands upon those provisions, creating an excessive administrative burden and new costs for local agencies." They also allege that, "The timeline for fulfilling public records requests under this measure is impractical, particularly as local agencies are already operating at decreased staffing levels and facing potential cuts in both staffing and services." Many opposition groups focus on these pragmatic concerns. For example, the California Law Enforcement Association of Records Supervisors note that under the bill,"[L]aw enforcement agencies would be required to retain personnel records of a peace officer for 15 years for sustained findings of misconduct . . . without any thought to budgeting or logistics." The California Peace Officers Associations shares these practical and logistical concerns, but also argues that the records will bring unjustified scrutiny to law enforcement agencies and officers who may very well be acting in accordance with their policies: "[T]he 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."

**REGISTERED SUPPORT / OPPOSITION**:

**Support**

Advancement Project
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 Federation of Teachers AFL-CIO
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 Los Altos
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
Democratic Woman's Club of San Diego County
Disability Rights California
Drug Policy Alliance
Ella Baker Center for Human Rights
Equal Rights Advocates
Friends Committee on Legislation of California
Hillcrest Indivisible
League of Women Voters of California
Legal Services for Prisoners With Children
Los Angeles County
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
Oakland; City of
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
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

**Opposition**

California Association of Joint Powers Authorities (CAJPA)
California Law Enforcement Association of Records Supervisors (CLEARS)
California Peace Officers Association
City of Thousand Oaks
League of California Cities
Public Risk Innovation, Solutions, and Management (PRISM)

**Oppose Unless Amended**

Association of Probation Supervisors of Los Angeles County
California State Sheriffs' Association
Deputy Sheriffs Association of San Diego
Hawthorne Police Officers Association
Los Angeles Airport Peace Officers Association
Los Angeles County Probation Managers Association AFSCME Local 1967
Los Angeles County Professional Peace Officers Association
Los Angeles Police Protective League
Newport Beach Police Association
Riverside Police Officers Association
Sacramento County Probation Association
San Diego District Attorney Investigator's Association
San Diego Police Officers Association
San Francisco Police Officers Association
Santa Monica Police Officers Association
Torrance Police Officers Association

**Analysis Prepared by**: Alison Merrilees / JUD. / (916) 319-2334