Peace Officer Personnel Records and the California Public Records Act

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I. Introduction

The California Public Records Act ("CPRA" or "the Act") is found in Gov. Code section 6250, et seq. The general policy of the Act cuts in favor of disclosure; however, the Act contains numerous exemptions to the duty to disclose public records that practitioners and others charged with responding to CPRA requests must be aware of. At the same time, practitioners and those that are tasked with responding to CPRA requests must also be familiar with California law that has historically afforded a higher degree of confidentiality for peace officer personnel records, i.e., Penal Code section 832.7 and Evidence Code section 1043, et seq. ("the Pitchess statutes").[1]

Until recently, the exemptions that regulate responses to CPRA requests for personnel records were relatively easy to implement, i.e., peace officer records were deemed to be strictly confidential and an agency was obligated to advise the requester that the records could not be produced absent a court order following what is commonly referred to as a "Pitchess motion." However, since January 1, 2019, responding to CPRA requests for peace officer personnel records has become a bit more complex – and costly and time consuming – for public agencies. Senate Bill 1421 ("SB 1421")[2] was a response to calls for increased transparency for law enforcement departments in the wake of a number of high-profile police use of force and misconduct incidents, such as the 2014 shooting of Michael Brown that occurred in Ferguson, Missouri. More recently, Senate Bill 16 ("SB 16"), along with Senate Bill 2 ("SB 2")[3], were passed to assure more transparency and more oversight of the policing industry. While these new laws stripped away confidentially for records regarding certain types of police incidents (e.g., shootings at persons) and "serious misconduct" by officers, the CPRA's exemptions and

[1] The Pitchess statues were codified by the California Legislature following the California Supreme Court's decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

[2] The bill was signed into law by then-governor Jerry Brown on September 30, 2018 and took effect on January 1, 2019.

[3] SB 16 and SB 2 were both signed into law by Governor Gavin Newsom on September 30, 2021. SB 16 takes effect on January 1, 2022, but public agencies will have a one-year grace period — until January 1, 2023 — to make public the newly disclosable records for incidents that occurred before January 1, 2022.

Pitchess statutes still make some types of records confidential and subject only to disclosure through a court order, and these provisions require that certain information be redacted from those records that must be disclosed. Moreover, these new laws have altered the timing of an agency's obligation to respond to CPRA requests for law enforcement personnel records, i.e., agencies generally have less time to respond and they have duties to provide requesters with frequent status updates. This paper will discuss these issues and what we believe are some best practices for assisting agencies who are the custodians of these records.

II. CPRA Basics

While the general policy of the CPRA is to favor disclosure of records to the public, the Act does contain numerous statutory exemptions. Those exemptions are, generally speaking, narrowly construed and the public agency has the burden of establishing an exemption is applicable.

The exemptions germane to the issues raised in this paper are found in Government Code section 6254(c) [which exempts "Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy"] and section 6254(k) [which exempts "[r]ecords, 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."] The latter is the bridge to the Pitchess statutes discussed throughout this paper.

The CPRA also has a catchall or "general balancing" exemption, Government Code section 6255(a), that authorizes the nondisclosure of a record when a determination is made by the public agency (or the court if the agency's determination is challenged) 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." The catchall exemption can, in certain circumstances, allow for the non-production of public records based on fiscal and administrative concerns, including the expense and inconvenience involved in segregating nonexempt from exempt information. (*Bertoli v. City of Sebastopol* (2015) 233 Cal.App.4th 353, 372; *Becerra v. Superior Court of City and County of San Francisco (First Amendment Coalition, et al.* (2020) 44 Cal.App.5th 897, 928 [citations omitted].) The public agency will have the burden of establishing was amounts to an undue burden defense (through detailed declarations explaining

the time and expense agency employees must expend to search for, redact and produce responsive records), and generally speaking the courts set a high bar for public agencies to establish this defense. (See, e.g., *Getz v. Superior Court* (2021) 72 Cal.App.5th 637, 651-652 [holding a review of approximately 47,000 emails for privileges and exemptions was not unduly burdensome].)

III. Pitchess Basics

Under the Pitchess statutes, i.e., Penal Code sections 832.5, 832.7 and 832.8 and Evidence Code sections 1043 through 1047, each law enforcement department or agency is required to have a procedure to investigate complaints by members of the public and to make a written description of that procedure available to the public. Recognizing that peace officers are subject an unusually high number of complaints because they have to deal with members of the public under difficult or unpleasant circumstances, the Legislature made peace officer personnel records – and information contained therein – confidential and not subject to disclosure absent a court order. Such a court order is obtained through a Pitchess motion's two-step process, i.e., (1) a noticed motion must be brought, supported by affidavits, declarations and other evidence establishing "good cause" for discovery of the personnel records; and (2) if good cause is established, then only the documents and/or information that will be released are those that the court deems relevant or material to the underlying proceeding based on an *in camera* inspection of the records. The party opposing a Pitchess motion cannot ask the Court to identify documents not disclosed after the *in camera* inspection; the Court need only rule that the information not ordered produced was not subject to disclosure. (See *Herrera v. Superior Court* (1985) 172 Cal.App.3d 1159, 1060-1063.)

The Pitchess motion process was primarily developed for criminal cases, but it applies in State civil cases (*Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079) and administrative cases (*Riverside County Sheriff's Department v. Stiglitz* (2014) 60 Cal.4th 624) as well. The Pitchess motion process does not apply in federal litigation or as to federal agencies since it is based on a State statutory scheme, nor does it apply to investigations of an officer being conducted by entities such as the local district attorney's office, the California Attorney

General's office, a grand jury or California's peace officer regulatory agency — POST. (See Penal Code § 832.7(a).)

Penal Code section 832.8 broadly defines "personnel records," and usually the most sought after records are those relating to complaints against an officer, investigations of those complaints, and resulting discipline against officers or other corrective action taken. Discoverable personnel records can also include records relating to promotions or lack thereof (even of non-party officers) provided those records are material to a claim or defense at issue in litigation. (*Riske v. Superior Court* (2016) 6 Cal.App.5th 647, 662-664.) "Information" from confidential personnel records is likewise confidential, including seemingly innocuous information such as an officer's address, telephone number and similar contact information. (Penal Code § 8323.7(a).)

Evidence Code section 1045(e) provides that records disclosed pursuant to a Pitchess motion shall be subject a protective order, i.e., they cannot be used in a different case absent a court order.

IV. SB 1421 and SB 16

Under growing demand for accountability of law enforcement agencies, California enacted Senate Bill 1421, making several types of previously confidential peace officer personnel records publicly accessible effective January 1, 2019. The Legislature continued this trend in 2021with the passage of SB 16, which took effect January 1, 2022.

SB 1421 removed Pitchess protection from four types of peace officer records: (1) those pertaining to officer-involved shootings, (2) those pertaining to uses of force resulting in death or great bodily injury, (3) those pertaining to sustained findings of certain types of dishonesty, and (4) those pertaining to sustained findings of sexual assault against members of the public.[4] With the passage of SB 1421, these four categories of records now must be produced pursuant to a CPRA request, and the records that must be disclosed are broadly defined. The records that must be produced include all investigative reports; audio, photo and video evidence; interviews; autopsy reports; all materials presented to a prosecutor for review to determine whether to file

[4] The first two categories do not require "sustained" findings, whereas the second two categories do.

criminal charges against an officer; and documents concerning potential discipline, actual discipline or settlement of discipline relating to a disclosable incident.

The passage of SB 1421 led to a wave of CPRA requests by individuals, press organizations and public interest groups. Many California law enforcement agencies received requests for "all" SB 1421 records in their possession, and responding to these request was, and in some cases still is, extremely time consuming and burdensome. This is particularly true for larger agencies with thousands of officers/former officers and decades' of records for each.[5] These requests are more time consuming to process because (1) the universe of responsive records is vast, (2) legal and factual analysis is required to ascertain whether each record is actually subject to disclosure under SB 1421, and (3) redactions must be made to many responsive documents, which (particularly for video and audio) can take considerable time and resources. For example, while records regarding shootings at persons are relatively easy to locate, determining whether a use of force resulted in "great bodily harm" requires a close inspection of medical reports and perhaps photos of the injury. Further, Penal Code section 832.7(b)(6) states that agencies "shall" redact (1) personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace and custodial officers; (2) information necessary to preserve the anonymity of whistleblowers, complainants, victims, and witnesses; (3) information required to protect confidential medical, financial, or other information disclosure of which is prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about possible misconduct and use of force by peace officers and custodial officers; and (4) when there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer or another person. Such redactions are necessary, they require record-by-record analysis, and prolong record production.[6]

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[5] SB 1421 has been held to apply retroactively to peace officer records created prior to January 1, 2019. (*Ventura County Deputy Sheriffs' Association v. County of Ventura* (2021) 61 Cal.App.5th 585.) As a result, some agencies have been requested, and ordered, to produce decades' of personnel records.

[6] The CPRA provides that "[a]ny reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law." (Gov. Code § 6253(a).) That said, if segregating exempt from non-exempt materials and making appropriate redactions would be particularly burdensome, that can – in certain situations – support a claim that the balance of public interest favors non-disclosure under Government Code section 6255. (*American Civil Liberties Union Foundation v. Deukmejian* (1982)

SB 16, which took effect January 1, 2022, removes Pitchess protections from four additional categories peace officer records: (1) records of sustained findings involving complaints alleging unreasonable or excessive use of force, (2) records of sustained findings that an officer failed to intervene against another officer using force that was clearly unreasonable or excessive, (3) records of sustained findings that an officer engaged in conduct involving prejudice or discrimination on the basis of race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, genetic information, marital status, sex, gender, or gender identity, and (4) records of sustained findings that an officer made an unlawful arrest or conducted an unlawful search.[7] SB 16 also provides that agencies are required to release records relating to a covered incident even if the officer resigned before the agency concluded its investigation. (Penal Code § 832.7(b)(3).) Given that most of the covered categories of incidents require a "sustained" finding, which is defined as "a final determination . . . following an investigation and opportunity for an administrative appeal pursuant to Sections 3304 and 3304.5 of the Government Code," it is not clear how this provision will apply in practice. (Penal Code § 832.8(b).) For example, if an officer resigns before an internal affairs investigation is complete they will not be issued a notice of intent to terminate or a notice of termination, and in that situation they will not have been given the opportunity for an administratively appeal since the termination never occurred.

Agencies and CPRA practitioners should also be aware that SB 16 creates rigid timelines for the release of documents, which go into effect on January 1, 2023. Generally speaking, responsive records must be produced no later than 45 days from the date of a CPRA request; however, there are statutory exceptions for pending criminal and administrative investigations. (See Penal Code § 832.7(b)(8) and (11).)

SB 16 also disallows use of the attorney-client privilege to deny release of information provided to or discovered by lawyers in these investigations, and some legal billing records. (Penal Code § 832.7(b)(12).) SB 16 also establishes that if an officer committed misconduct

32 Cal.3d 440, 453, fn. 13; *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1321.) An agency should be prepared to establish undue burden with declarations and affidavits that describe, in detail, the time (in terms of employee hours) and effort (in terms of number of staff and hourly rate) needed to make the redactions and the methodology used to arrive at those numbers. In our experience, courts are reluctant to find undue burden given the Legislature's recent focus on peace officer personnel records transparency.

[7] All four categories require "sustained" findings to be subject to disclosure under the CPRA.

within Pitchess protection, information about those allegations would remain confidential; however, factual information about that officer relevant to a finding that is not Pitchess-protected against another officer must be released. (Penal Code § 832.7(b)(5).) Distinguishing the two may not always be easy.

Earlier law required agencies to establish procedures to investigate complaints by the public, and to keep any records of these complaints for five years, including related findings or reports regarding the complaints. SB 16 extends the records retention requirement for peace officer personnel records as well, i.e., complaints and any reports or findings relating to complaints of officer misconduct shall be retained for a period of no less than 5 years for records where there was not a sustained finding of misconduct and for not less than 15 years where there was a sustained finding of misconduct. (Penal Code § 832.5(b).) For records existing as of January 1, 2022, these five and 15-year clocks began running on that date, rather than when the records were created.

SB 16 also prohibits agencies from destroying any records while a request related to the record is pending, or while any process or litigation is ongoing to determine whether that record should be released. SB 16 also eliminates the previous Pitchess motion requirement that courts exclude evidence of complaints concerning conduct by officers that occurred more than five years before the event that is the subject of litigation.

Finally, SB 16 now obligates agencies, to request and review any lateral officer's personnel file from any previous employing agency before hiring him or her.

V. Important Points

There are a few somewhat unique issues that public agencies and the practitioners that represent them in connection with peace officer personnel records should note.

A. CPRA Requests Can Lead to Attorney's Fees

An agency's failure to comply with the CPRA, whether due to alleged non-disclosure because of a dispute about whether an exemption applies, due to perceived over-redaction of responsive documents, or due to allegations that the agency is simply taking too long to locate and produce documents, can lead to litigation (usually a Petition for Writ of Mandate under Code

of Civil Procedure section 1085.) While the remedy is usually in the form of injunctive relief (e.g., an order to produce public records, there is also a monetary cost to an agency – namely reasonable attorney's fees and costs plus the cost of defense. Attorney's fees are usually determined via the loadstar method, although attorneys representing CPRA requesters are sometimes awarded a multiplier.[8] (See *Galbiso v. Orosi Public Utility District* (2013) 167 Cal.App.4th 1063, 1088.)

B. Discovery in CPRA Litigation is Uniquely Limited

CPRA cases have a somewhat unique scope of discovery. In *City of Los Angeles v. Superior Court* ("*Anderson-Barker*") (2017) 9 Cal.App.5th 272, the Second District Court of Appeal held, as an issue of first impression, that the Civil Discovery Act applies to CPRA cases. However, *Anderson-Barker* held that a different standard applies for discovery conducted in CPRA actions, explaining that "the CPRA is intended to 'permit the expeditious determination' of a narrow issue: whether a public agency has an obligation to disclose the records that the petitioner has requested." (*Id.* at 289.) Therefore, the Court reasoned, when a party to CPRA litigation seeks to compel discovery, "the trial court must determine whether the discovery sought is necessary to resolve whether the agency has a duty to disclose, and to additionally consider whether the request is justified given the need for an expeditious resolution." (*Id.* at 289.)

C. An Agency Must Bring a Pitchess Motion to Use its Own Peace Officer Personnel Records in Litigation

In *Michael v. Gates* (1995) 38 Cal.App.4th 737, the Court of Appeal suggested (but did not directly hold) that an agency that wants to use in litigation (e.g., in the agency's defense of an employment law claim) peace officer personnel records of which it is the custodian must nevertheless file a Pitchess motion. More recently, in *Towner v. County of Ventura* (2021) 63 Cal.App.5th 761, the Court of Appeal held that an agency can violate an officer's privacy rights by using confidential personnel records in litigation without first bringing a Pitchess motion.

[8] A trial court has discretion to deny attorney fees under the CPRA. The minimal or insignificant standard is applicable when the requester obtains only partial relief under the CPRA. (*Riskin v. Downtown Los Angeles Prop. Owners Ass'n*, No. B309814, 2022 WL 805377, (Cal. Ct. App. Mar. 17, 2022.)

In *Towner,* the County of Ventura terminated a peace officer employee (Towner) who worked in the County's District Attorney's Office. Mr. Towner appealed the termination to the County's Civil Service Commission and, in response, the County filed a petition for writ of mandate requesting that the court enjoin the Commission from hearing the appeal due to an alleged conflict of interest. The County filed unsealed exhibits to its petition, including what were clearly peace officer personnel records (portions of an investigation report and notices of discipline). Towner then sued the County for negligence and violations of the Public Safety Officers Procedural Bill of Rights Act ("POBR"). As to the negligence claim, the employee alleged that the County violated Penal Code section 832.7 by publicly disclosing his confidential personnel records without appropriate judicial review (i.e., without bringing a Pitchess motion). As to the POBR claim, Towner alleged the County intentionally disclosed his confidential personnel records in violation of the statute.

The County moved to strike Towner's POBR and negligence claims under the anti-SLAPP statute, Code of Civil Procedure section 425.16, et seq., which allows for the early dismissal of a case that seeks to penalize constitutionally protected speech. The trial court granted the County's motion to strike, finding the County's writ petition and exhibits fell within the scope of the anti-SLAPP statute as a written statement submitted in a judicial proceeding. The Court of Appeal reversed, noting that Penal Code Section 832.7 states that confidential peace officer records may be disclosed only following a Pitchess motion. The Court of Appeal also noted that Government Code Section 1222 makes a public officer's "willful omission to perform any duty enjoined by law" a misdemeanor. The Court of Appeal held that the County willfully failed to treat the peace officer's personnel documents as confidential. Since the County's actions violated both Penal Code Section 832.7 and Government Code Section 1222, the Court of Appeal held that the peace officer employee adequately showed that the County's conduct was illegal as a matter of law and therefore was not protected activity under the anti-SLAPP statute.

In light of *Towner*, agencies and their attorneys should take great care before intentionally disclosing records which are clearly Pitchess protected. Public employers sued by peace officers for employment law violations, for example, should especially take care to bring Pitchess motions before publicly disclosing peace officer personnel records in court filings or the like (unless, of course, the records in question are no longer confidential because of SB 1421 or SB 16).

D. Strategies for Gray Area or "Wobbler" Records

Sometimes it is not clear whether or not an officer's records are confidential under the Pitchess statutes or public under SB 1421 or SB 16. In such cases, an agency is faced with a potential CPRA legal action by the requester, on the one hand, and the officer's potential legal action for privacy violations, on the other hand. One strategy is to advise the officer (and perhaps his or her union) of the agency's intent to disclose the record pursuant to the CPRA and invite the officer to bring a "reverse PRA" action. (See, e.g., *Pasadena Police Officers' Assn. v. Superior Court* (2015) 240 Cal.App.4th 268.) In such a case, the employee or their association intervene and litigate against the CPRA requester rather than the public agency having to take a position on whether the records must be disclosed.

Alternatively, if the agency decides not to invite a reverse-PRA action and the records are disclosed in good faith pursuant to a CPRA request, the agency can claim that the disclosure was protected activity under California's anti-SLAPP statute.[9] (See *Collondrez v. City of Rio Vista* (2021) 61 Cal.App.5th 1039 [reversing denial of SLAPP motion filed in defense of officer's action for wrongful disclosure of personnel records on media's CPRA request.)

VI. Non-Sworn Personnel Records

Law enforcement departments, of course, do not employ only sworn personnel. While the Pitchess statutes do not apply to non-sworn employees, these employees records can be exempt from disclosure pursuant to Government Code section 6254(c)[10], the provision that exempts

[9] Disclosing records pursuant to a CPRA request is different than the situation in *Towner v. County of Ventura* since the disclosure is per a legal duty vis-à-vis a voluntary disclosure to further the County's interests in litigation against an officer.

[10] Gov't Code § 6254, subd. (c)

"Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." However, this exemption does not automatically shield non-sworn employee personnel records from disclosure. Courts apply a balancing test to see to what records this exemption applies to—weighing public interest in disclosure against privacy interest of the employee. This exemption is highly dependent on the nature of the records sought and the facts and circumstances of a case, but successful assertion of the exemption will usually depend on whether (1) the agency can establish that the employee has a reasonable expectation of privacy; and (2) the public's interest in information about the particular employee's performance is not significant.

Examples of personnel records that usually must be disclosed include employee names, job titles, and salaries; pension amounts; and employment and severance agreements. While many agencies previously refused to disclose these records under Government Code section 6254(c), the courts have ruled that such records are subject to disclosure because they pertain to public expenditures. That is, taxes paid by the community pay for agency employees' salaries, and therefore courts have held that there is a strong presumption that the public should be able to see how tax dollars are spent. (See, e.g., *Sonoma County Employees' Retirement Ass'n v. Superior Court* (2011) 198 Cal.App.4th 986; *San Diego Employees Retirement Ass'n v. Superior Court* (2011) 196 Cal.App.4th 1228.)

A harder question is whether non-sworn-employee disciplinary records and/or misconduct investigation records must be disclosed. Generally speaking, these are public records that must be disclosed if they either (1) reflect allegations of a "substantial nature" and are "well-founded;" or (2) involve "high profile" public employees or officials. (See, e.g., *Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041 [ordering disclosure of records of "sexual type conduct, threats of violence and violence" by school district employee]; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742 [alleged misconduct by school superintendent]; *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250 [reverse PRA action as to finding that school teacher violated district's sexual harassment policy].)

In *Bakersfield City School Dist.,* for example, a newspaper sought the disciplinary records of a school district employee. The appellate court weighed an individual's privacy rights against the public's right to know of an alleged wrongdoing under Government Code section 6254 (c's personnel records exemption). The Court of Appeal held that disclosure of the requested records was warranted, explaining "disclosure of a complaint against a public employee is justified if the complaint is of a substantial nature and there is reasonable cause to believe the complaint or charge of misconduct is well-founded." (118 Cal.App.4th at p. 1044.) The court further held "neither the imposition of discipline nor a finding that the charge is true is a prerequisite to disclosure." (*Ibid*.) Although there is "a strong policy for disclosure of true charges," a court must also order disclosure of records relevant to charges of misconduct that have not been found true by the public agency if the documents "reveal sufficient indicia of reliability to support a reasonable conclusion that the complaint was well founded." (*Id.* at 1046-1047.)

In *BRV, Inc. v. Superior Court*, *supra*, 143 Cal.App.4th 742, a school district entered into a severance agreement with its superintendent after an investigation of allegations of verbal abuse of students and sexual harassment of female students. The investigator found that the allegations were not sufficiently reliable. As part of the agreement, the district agreed to seal the investigation report and related documents. A newspaper made a CPRA request for the report. The court considered the public concern that the district and the superintendent had entered into a "sweetheart deal," and concluded that the public's interest in judging how the elected board had acted "far outweighed" any privacy interest: "Because of [the superintendent's] position of authority as a public official and the public nature of the allegations, the public's interest in disclosure outweighed [his] interest in preventing disclosure of the [investigation] report." (*Id.* at p. 759.) In addition, the court noted that even though the allegations were deemed not sufficiently reliable, a lesser standard of reliability applied than would otherwise apply for disclosure of personnel records of a nonpublic official. The public had a right to know why the superintendent was exonerated and how the district dealt with the charges against him. (*Ibid*.)

In *Marken, supra*, 202 Cal.App.4th 1250, a parent of a high school student made a CPRA request for records concerning the District's investigation of a teacher and its findings that the teacher had violated the District's sexual harassment policy. The court determined that a high school teacher occupies a position of trust and responsibility, and therefore the public has a

legitimate interest in knowing whether and how a school district enforces its sexual harassment policy against him. In light of the investigator's findings that a number of the alleged acts had "more likely than not" occurred, and the District's conclusion that the teacher violated its sexual harassment policy, the court held that the public's right to know outweighed the teacher's privacy interest. (*Id.* at 1273-1276.)

VII. Conclusion

It is unclear whether the trend towards more transparency with respect to peace officer personnel records will continue, but the legislative changes made thus far have increased demand for these records and that is likely to continue. Public agencies would be well-served to update their retention policies and assure that the policies, procedures, staffing and necessary tools (e.g., document management platforms with redaction capabilities) are in place to assure timely compliance with these new breeds of CPRA requests.