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## An Advanced Look at Senate Bill 1421: Analyzing the Confidentiality of Certain Police Records

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California Senate Bill 1421 modifies Penal Code 832.7 by stripping the prior confidentiality of police personnel records related to 1) sustained findings of dishonesty, 2) investigations of Officer Involved Shootings and serious uses of force, and 3) sustained findings of sexual assault. The law takes effect January 1, 2019, at which time law enforcement agencies must be prepared to tackle issues arising from the reclassification of the aforementioned records and the new requirement of analyzing disclosure of personnel records under both the established Pitchess procedure as well as the Public Records Act (PRA).

### Processing Requests for Peace Officer Personnel Records

Beginning January 1, 2019, when a request for peace officer records comes in, agencies will have to evaluate and categorize the request as either a request pursuant to the PRA or one falling under the prior established Pitchess procedures. The request should be categorized as an inquiry for non-confidential records pursuant to the PRA (California Government Code §§ 6250 et seq.) if the request is for peace officer personnel records related to Officer Involved Shootings (OIS), uses of force that result in Great Bodily Injury (GBI) or Death, sustained allegations of sexual assault against a member of the public, or sustained allegations of dishonesty. For all other peace officer personnel records, the request should be categorized as an inquiry for confidential records pursuant to the procedures outlined in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, California Penal Code §§ 832.7(a) and 832.8, and California Evidence Code §§ 1043 and 1045.

### Public Records Act Analysis

When a record has been characterized as non-confidential because it is a record of a sustained allegation of dishonesty, a sustained allegation of sexual assault, an Officer Involved Shooting or a use of force that resulted in Great Bodily Injury or Death, the law enforcement agency must generally disclose all relevant documents and must generally do so within the timelines outlined in the PRA.

There is the ability to redact information in certain limited circumstances and also delay disclosure of some records during an active criminal investigation or active Internal Affairs investigation.

Importantly, there will no longer be a neutral arbiter reviewing the records prior to disclosure. Instead, agencies must themselves now determine what should be turned over. If there is a dispute about the disclosure, a local agency may not commence an action for declaratory relief to determine the agency's obligation to disclose records to a member of the public under the Act. *Filarsky v. Superior Court* (2002) 28 Cal.4th 419. On the other hand, the PRA allows a requestor to file a Verified petition for Writ of Mandate to Compel Compliance and Complaint for Injunctive and Declaratory Relief. In addition, if the plaintiff prevails in the litigation, the judge must award court costs and reasonable attorney fees to the plaintiff. Gov. Code, § 6259, subd. (d).

### **Pitchess Analysis**

Peace Officer personnel records not classified as Officer Involved Shootings (OIS), Uses of force that result in Great Bodily Injury (GBI) or Death, Sustained allegations of sexual assault against a member of the public, or Sustained allegations of dishonesty will continue to be evaluated pursuant to Pitchess.

Disclosure will continue to require a noticed motion, a hearing, and an in-camera review of records and any disputes regarding disclosure will still be handled by a neutral arbiter. In addition, as before, there is no entitlement to attorney fees.

### **Considerations**

SB 1421 expands the definition of sexual assault. The Bill defines "sexual assault" as the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or other official favor, or under the color of authority. It also includes as sexual assault "the propositioning for or commission of any sexual act while on duty." This broader definition encompasses on duty consensual relationships and contacts such that, theoretically, an officer who engages in sexual conduct with a spouse, while on duty, would have committed a sexual assault. While it is unclear if that was the intention of the legislature, the express language of the Bill requires law enforcement agencies to consider consensual sexual conduct a "sexual assault" if it occurs while the officer is on duty.

The "balancing test" for withholding documents is likely not as useful as it appears. Under SB 1421, a public agency may redact or delay a record disclosure if the public interest served by not disclosing the information clearly outweighs the public interest served by disclosing

the information. While the balance test reflects current law, this exemption is rarely, if ever, used. In addition, if this exemption is invoked, law enforcement agencies would have to contend with costly legal challenges and would not be able to recover their costs even if the agency prevailed. On the other hand, if agencies were unsuccessful, they would be on the hook for costs in addition to attorney fees. Ultimately, the burdens and risks are substantial and given the legislature's intent to make these documents public, the circumstances where records could be withheld or redacted are likely limited.

Agencies may change how they decide to punish misconduct. Assume, for example, that a police department investigates an officer for an on-duty motor vehicle accident and alleged false statements made by the officer to cover-up the accident. Prior to SB 1421, the entire investigation would remain confidential regardless of the findings. A police department who believed that its officer had been dishonest in reporting the accident might opt to impose a 30-day suspension on the officer, rather than terminating the officer. The officer, avoiding termination, might choose to accept that level of discipline, knowing that his career will continue. SB 1421 changes the analysis for both the department and the officer in this example. If the department concludes that the officer was dishonest, the entire Internal Affairs investigation will become public. This reality may make termination more common when an agency concludes that an officer was dishonest. As an alternative, a police department that does not want to terminate an officer may opt instead to sustain a finding for the underlying motor vehicle accident rather than for the alleged dishonesty because if the sustained finding were for the motor vehicle accident only, the investigation would remain confidential.

Attorneys representing law enforcement agencies must be prepared to educate the judiciary on the new changes and advise their clients about the treatment of requests going forward. It will likely take time for the criminal defense bar and the judiciary to adjust to the change in law. This is especially true because Pitchess is not dead, it's just been limited, so courts will have to distinguish between what process is appropriate for the specific types of documents being sought. Attorneys representing these agencies will have to advise regarding whether they will construe Pitchess motions to be PRA requests for those files that are no longer confidential, and then prepare formal opposition to the motions for other files that are not covered by SB 1421.