

CLIENT BULLETIN

NEW RULES ON DISCLOSURE OF LAW ENFORCEMENT RECORDS

Peace officer personnel records are subject to new disclosure requirements under amendments to Penal Code section 832.7 that took effect January 1, 2019. Senate Bill 1421, signed into law last year by Governor Brown, made significant changes to the confidentiality restrictions on peace officer records that make it easier for members of the public and the media to obtain information relating to peace officer conduct and discipline.

Before this year, nearly all peace officer records were deemed confidential and could not be disclosed in civil or criminal proceedings except through the *Pitchess* process. The California Public Records Act, with some recent exceptions such as peace officer names and salary information, also restricted disclosure of law enforcement personnel records.

SB 1421 Mandates Disclosure of Certain Discipline Records

The new law requires state and local law enforcement agencies to make available to the public any records relating to any incident involving (1) a peace officer's discharge of a firearm at another person; (2) a peace officer's use of force resulting in death or great bodily injury; (3) a sustained finding an officer engaged in sexual assault against a member of the public; and (4) a sustained finding of dishonesty, including perjury, false statements and destruction of evidence. The records to be made available include reports, photographs, audio and video recordings, transcripts and all disciplinary actions relating to the incident.

The statute allows agencies to redact records to remove personal data, preserve the anonymity of complainants and witnesses, and protect confidential medical and financial information. Agencies also may redact or withhold information if necessary to protect the physical safety of the officer or to preserve the integrity of an ongoing administrative or criminal investigation or proceeding.

Legal Challenges to Retroactivity Rejected by the Courts

Several California law enforcement associations have sought restraining orders and other judicial remedies to stop the application of SB 1421 to discipline records created before the effective date of the statute. None of these has resulted in a favorable ruling. On March 12, 2019, the First District Court of Appeal rejected the argument that applying SB 1421 to pre-2019 records is an improper retroactive application of the law. The court said, "[a]lthough the records may have been created prior to 2019, the event necessary to trigger application of the new law – a request for records maintained by an agency – necessarily occurs after the law's effective date." In other words, the law is prospective, not retroactive, even though it will require the release of records created before it was passed. The new law, the court wrote, does not affect pre-2019 records but "changes only the public's right to access peace officer records."

Attorney General Xavier Becerra recently stated he would continue to withhold any pre-2019 personnel records for peace officers employed by the state Department of

Justice pending a future court ruling compelling him to do so. He also noted other provisions of the California Public Records Act allow agencies to withhold records based on evidentiary privileges such as the attorney work product doctrine.

Nonetheless, any further litigation by local labor associations involving the new law is likely to be very expensive and ultimately futile. The better approach to dealing with this latest attack on California's peace officers is to meet and confer with the local agency over the effects of the law. Labor associations should ask such questions as: How does the agency intend to notice officers whose records have been requested? What redactions will be made to peace officer records before they are released? What types of information will the agency agree to withhold to protect officers' privacy interests? Can the parties agree to an appeal procedure that allows officers to challenge a decision to release records?

Most importantly, any peace officer who is notified that his or her records have been requested or are subject to disclosure should contact their respective union, labor association, law firm or FOP lodge immediately to decide how to respond to the notice.

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