SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	AB 2533	**Hearing Date:**	June 28, 2016
Author:	Santiago		
Version:	April 14, 2016		
Urgency:	No	**Fiscal:**	Yes
Consultant:	JRD		

Subject: ***Public Safety Officers: Recording Devices: Release of Recordings***

HISTORY

Source: Peace Officers Research Association of California

Prior Legislation: AB 1246 (Quirk)—2015, never heard in the Assembly
AB 66 (Weber)—2015, held in the Assembly Appropriations Committee

Support: Association for Los Angeles Deputy Sheriffs; Los Angeles Deputy Probation Officers Union, AFSCME Local 685; Los Angeles County Professional Peace Officers Association; Los Angeles Police Protective League; Riverside Sheriffs' Association

Opposition: American Civil Liberties Union of California; California State Sheriffs' Association; California Broadcasters Association; California Newspaper Publishers Association; California Police Chiefs Association; California Public Defenders Association; Legal Services for Prisoners with Children

Assembly Floor Vote: 71 - 1

PURPOSE

The purpose of this bill is to require a public safety officer be provided a minimum of three business days' notice before a public safety department or other public agency releases on the Internet any audio or video of the officer recorded by the officer.

Existing law specifies that no public safety officer shall be required as a condition of employment by his or her employing public safety department or other public agency to consent to the use of his or her photograph or identity as a public safety officer on the Internet for any purpose if that officer reasonably believes that the disclosure may result in a threat, harassment, intimidation, or harm to that officer or his or her family. (Government Code § 3307.5(a).)

Existing law states that based upon his or her reasonable belief that the disclosure of his or her photograph or identity as a public safety officer on the Internet may result in a threat, harassment, intimidation, or harm, the officer may notify the department or other public agency to cease and desist from that disclosure. (Government Code § 3307.5(b).)

Existing law states that after the notification to cease and desist, the officer, a district attorney, or a United States Attorney may seek an injunction prohibiting any official or unofficial use by the

department or other public agency on the Internet of his or her photograph or identity as a public safety officer. (Government Code § 3307.5(b).)

Existing law provides that the court may impose a civil penalty in an amount not to exceed five hundred dollars ($500) per day commencing two working days after the date of receipt of the notification to cease and desist. (Government Code § 3307.5(b).)

Existing law defines "public safety officer" as all peace officers, except as specified. (Government Code § 3301.)

Existing law specifies that no public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights under the Public Safety Officers Procedural Bill of Rights, or the exercise of any rights under any existing administrative grievance procedure. (Government Code § 3304.)

Existing law states that administrative appeal by a public safety officer Public Safety Officers Procedural Bill of Rights shall be conducted in conformance with rules and procedures adopted by the local public agency. (Government Code § 3304.5.)

Under existing law the California Public Records Act generally provides 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 § 6250 et. seq.)

Existing law provides that public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as provided. Any 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. (Government Code § 6253)

Under existing law California Public Records Act does not require disclosure of investigations conducted by 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 purposes. (Government Code § 6254(f).)

This bill requires a public safety officer be provided a minimum of three business days' notice before a public safety department or other public agency releases on the Internet any audio or video of the officer recorded by the officer.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.
On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, Coleman v. Brown, Plata v. Brown (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for Legislation

According to the author:

> When a public agency, such as a law enforcement department, decides or is ordered by a court to release audio or video from an officer-involved incident (Government Code § 2654, the California Public Records Act, clarifies when a law enforcement agency shall or shall not release information about an incident), the release of that information may result in heightened threats against the officer or his/her family.
>
> In most cases, it is the officer's responsibility to pursue legal action to prevent immediate disclosure of the audio and/or video (Government Code § 3307.5 allows an officer to file

an injunction to block the release of an audio or video recording if the officer believes there is a true threat to his/her safety). If the officer is receiving threats, this process can create a state of panic as the officer scrambles to find an attorney, complete all the necessary paperwork, and obtain an injunction. A judge then decides whether the information should be released based on the actual threat level and additional evidence provided by the officer.

AB 2533 ensures officers are provided with three business days' notice before the release of any audio or video recorded of the officer, allowing the officer to complete the necessary legal arrangements. This measure updates current law to be more appropriate for today's digital age, while continuing to provide an avenue of safety for threatened officers.

2. The California Public Records Act: Law Enforcement Exception

The California Public Records Act, provides generally that "every person has a right to inspect any public record," except as specified in that act. It is designed to give the public access to information in possession of public agencies: "public records are open to inspection at all times during the office hours of the…agency and every person has a right to inspect any public record, except as . . . provided, [and to receive] an exact copy" of an identifiable record unless impracticable. (Government Code § 6253.) There are a number of exceptions to disclosure, but to ensure maximum access, they are read narrowly. The agency always bears the burden of justifying nondisclosure, and "any reasonably segregable portion . . . shall be available for inspection…after deletion of the portions which are exempt." (*Id*.)

Law Enforcement investigative records are currently exempt under the CPRA. (Government Code § 6254.) Records of complaints, preliminary inquiries to determine if a crime has been committed, and full-scale investigations, as well as closure memoranda are investigative records. In addition, records that are not inherently investigatory may be covered by the exemption where they pertain to an enforcement proceeding that has become concrete and definite. Investigative and security records created for law enforcement, correctional or licensing purposes also are covered by the exemption from disclosure. The exemption is permanent and does not terminate once the investigation has been completed. Even though investigative records themselves may be withheld, CPRA mandates that law enforcement agencies disclose specified information about investigative activities. However, the agency's duty to disclose such information only applies if the request is made contemporaneously with the creation of the record in which the requested information is contained.

CPRA requires that basic information must be disclosed by law enforcement agencies in connection with calls for assistance or arrests, unless to do so would endanger the safety of an individual or interfere with an investigation. With respect to public disclosures concerning calls for assistance and the identification of arrestees, the law restricts disclosure of address information to specified persons. However, CPRA expressly permits agencies to withhold the analysis and conclusions of investigative personnel. Thus, specified facts may be disclosable pursuant to the statutory directive, but the analysis and recommendations of investigative personnel concerning such facts are exempt.

PORAC, which is the sponsor of this legislation, argues that this legislation does not expand law:

> AB 2533 does not expand any law; rather it builds in a procedure to provide predictability and civility to an existing law. Currently, the California Public Records Act covers when a law enforcement agency shall or shall not release information about a critical incident within their department. The courts, on a daily basis, also make decisions regarding the release of case information, including audio and video tapes of an incident. . .
>
> Officers currently have the right to go to court and file an injunction so that the department cannot release an audio or video recording if there is a true threat to their safety. These filings by officers are rare, and judicial approval of these injunctions are even more rare. Generally, a judge will decide whether or not the information should be released based on the threat level and evidence of an actual threat to the officer. In most cases, it is the officer's responsibility to bring legal action to stop the disclosure. If the officer is receiving death threats, this process, understandably, will create a state of panic as the officer rushes to get an attorney, do all the necessary paperwork and get a restraining order before it is released.
>
> In the past, it could take a department a couple of days to release any video/audio to the public or media; thereby, giving the officer a small window to file a court order if threatened. However, because of modern technology, the time frame in which this information can be released is a matter of minutes, instead of days. We are simply building in a reasonable time frame so the officer isn't forced to file an injunction after the release of a potentially threatening medium.

The California Newspaper Publishers Association, which is opposed to this legislation, disagrees:

> Seemingly innocuous at first glance, AB 2533 would allow a self-interested individual to have a stranglehold over information that the public has an overwhelming interest in obtaining and that a law enforcement agency, a city or county may want to disclose immediately for the good of the community.
>
> Under current law, the CPRA presumes that the public has a right of access to documents created, used or maintained in the course of the public's business unless an exemption applies. This presumption of access allows the public to obtain information in order to monitor government activities and there is no better tool for the public to use when trying to understand government's role and response to unfolding situations.
>
> When it first enacted the CPRA, the Legislature included a hallmark principle that nothing in the CPRA shall be construed to permit an agency to delay or obstruct the inspection or copying of public records.
>
> AB 2533 would be a radical departure from this principle.
>
> Requiring three business days' notice to an officer before releasing a record would delay and obstruct an agency's response for weeks or months irrespective of the 10 day period it would otherwise have to determine whether an exemption applies or whether the agency, in the best interests of the community wants to release it.

They go on to state:

> Worse, though, is the harm to the CPRA itself that AB 2533 would cause. The sole purpose in requiring an agency to provide three-business days' notice to an officer is to allow the officer to go to court to seek a court order preventing the agency from disclosing the footage. In the motion for an injunction, there is no requirement that the requester be notified of the officer's motion or that the court apply the CPRA as a standard for making its determination.
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> Moreover, this new process would create an additional delay in getting the information to the public that could take months or years depending how long it takes for the court to first hear the motion and any appeals. The expense could be devastating to both the agency and a requester.

Members may wish to consider what impact this legislation will have on the CPRA.

3. Peace Officer Bill of Rights

POBOR provides peace officers with procedural protections relating to investigation and interrogations of peace officers, self-incrimination, privacy, polygraph exams, searches, personnel files, and administrative appeals. When the Legislature enacted POBOR in 1976 it found and declared "that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern." The statute this bill seeks to amend, Government Code § 3307.5, was incorporated into POBOR in 1999.

As described above, under existing law no public safety officer can be required as a condition of employment to consent to the use of his or her photograph or identity as a public safety officer on the Internet for any purpose if that officer reasonably believes that the disclosure may result in a threat, harassment, intimidation, or harm to that officer or his or her family. And, existing law allows the officer to seek a cease and desist order if, based upon his or her reasonable belief that the disclosure of his or her photograph or identity as a public safety officer on the Internet may result in a threat, harassment, intimidation, or harm. This bill would require that a public safety officer be given at least three business days' notice before a public safety department or other public agency releases on the Internet any audio or video of the officer recorded by the officer. Public safety officers would, additionally, be able to seek a cease and desist order to prevent release of the video.

4. Argument in Support

The Los Angeles County Professional Peace Officers Association states:

> When a public agency, such as a law enforcement department, decides or is ordered by a court to release audio or video from an officer-involved incident, the release of that information may result in heightened threats against the officer or his/her family.
>
> Officers are currently able to file an injunction to block the release of an audio or video recording if there is a true threat to his/her safety (Government Code Section 3307.5). A judge then decides whether the information should be released based on the actual threat level and additional evidence provided by the officer. Additionally, the California Public

Records Act clarifies when a law enforcement agency shall or shall not release information about an incident (Government Code Section 2654).

AB 2533 ensures that officers are provided with a business days' notice before the release of any audio or video recorded of the officer, allowing the officer to complete the necessary legal arrangements. This measure updates current law to be more appropriate for today's digital age, while continuing to provide an avenue for safety for threatened officers.

5. Argument in Opposition

The American Civil Liberties Union of California states:

Government transparency and accountability are cornerstones of our democracy; without an informed public, the obligation of governments to be responsive to the people can never be fulfilled. Within the context of policing, BWC footage aligns with these principles by allowing the public to see police-community interactions, and determine whether officers or community members act appropriately.

We acknowledge that some recordings may appropriately be exempt from the general rule favoring release of public records in those limited situations involving an undue intrusion into personal privacy without an overriding public interest. However, this bill would create a peculiar new rule requiring advance notice to certain government officials who are the subject of a public record before the record can be posted on the Internet. Peace officers do not have the right to advance notice for any other release of public records under existing law – including the Internet posting of their photographs or other identifying documents – nor do any other public officials. While this bill is limited to Internet release, creating such an extraordinary new right of advance notice would be a dangerous and potentially unlimited precedent that could just as easily be applied to obstruct access to public records by any method in addition to posting on the Internet, and by any potential government wrongdoer.

By requiring that officers be given at least five business days' notice before BWC footage is posted on the Internet, AB 2533 poses a significant threat to transparency by permitting officers to unduly delay and/or obstruct the release of BWC footage. Public trust in law enforcement cannot be improved without true openness about how officers interact with community members. Footage of public importance (such as capturing a serious use of force, or potential misconduct) should be made available to the community, and law enforcement agencies should have the right to post BWC recordings when they determine it is appropriate to do so, in addition to releasing them under the Public Records Act.

Peace officers should have no legitimate concern that law enforcement management will post BWC recordings on the Internet when doing so would subject the officer to harm. However, to the extent that officers are concerned that their safety is not sufficiently protected with respect to BWC images or other audio or video recordings showing their identity, this concern could be addressed directly by revising the bill to amend Government Code section 3307.5 (a) so as to make clear that "identity" may include audio or video recordings by the officer that reveal his or her identity. Moreover, identity can virtually always be masked by anonymization or redaction, such as by video blurring and audio alteration.

As the LA Times recently pointed out, "The reason that the public has embraced body cameras — and supported the not-insignificant associated costs — is because of the transparency and accountability they would bring to high-profile use-of-force cases."[1] Addressing police secrecy is critical to improving the lack of community trust in our system of justice, especially in communities of color, where people are killed by police at alarming rates. As an example, a recent Pew Research Center poll found that only 30 percent of all Americans believe law enforcement agencies are doing a good or excellent job of holding officers accountable for misconduct and that number drops to a mere 10 percent when the same question is asked of black Americans specifically. Another poll shows that nearly 80 percent of Californians believe the public should have access to information about officer misconduct, and nearly two-thirds believe that the public should have access in all cases in which an officer is accused of misconduct.

-- END –

[1] Don't Hide Police Use-Of-Force Videos, Los Angeles Times Editorial, March 25, 2016. At e://www.latimes.com/opinion/editorials/la-ed-police-video-20160325-story.html