SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No:	AB 137	**Hearing Date:**	June 18, 2019
Author:	Cooper		
Version:	March 11, 2019		
Urgency:	No	**Fiscal:**	No
Consultant:	GC		

Subject: ***Public Safety Officers: Investigations and Interviews***

HISTORY

Source: Association of Orange County Deputy Sheriffs

Prior Legislation: AB 887 (Cooper), 2017, held in Senate Rules
AB 729 (Hernández), of the 2013-2014 Legislative Session, vetoed
SB 388 (Lieu), of the 2013-2014 Legislative Session, vetoed
SB 313 (De Leon), Chapter 779, Statutes of 2013
AB 955 (De Leon), Chapter 494, Statutes of 2009

Support: California Narcotic Officers' Association; California Statewide Law Enforcement Association; Fraternal Order of Police; Long Beach Peace Officers Association; Los Angeles Police Protective League; Peace Officers' Research Association of California (PORAC); Sacramento County Deputy Sheriffs' Association

Opposition: American Civil Liberties Union of California; California Civil Liberties Advocacy; California State Sheriffs' Association

Assembly Floor Vote: 63 - 3

PURPOSE

The purpose of this bill is to set forth what information must be provided to a peace officer prior to questioning in an administrative disciplinary proceeding and provide that specified communications between peace officers and their representative are confidential.

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

Existing law finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations between public safety employees and their employers. (Gov. Code, § 3301.)

Existing law provides that when any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action, the interrogation shall be conducted under the specified conditions. (Government Code, § 3303.)

Existing law states that, for purposes of the POBOR, "punitive action" means any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment. (Government Code, § 3303.)

Existing law specifies that when any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action, the interrogation shall be conducted under the following conditions:

- The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise; (Government Code, § 3303, subd. (a).)
- The public safety officer under investigation shall be informed prior to the interrogation of the rank, name, and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation; (Government Code, § 3303, subd. (b).)
- The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation; (Government Code, § 3303, subd. (c).)
- The interrogating session shall be for a reasonable period taking into consideration gravity and complexity of the issue being investigated. The person under interrogation shall be allowed to attend to his or her own personal physical necessities; (Government Code, § 3303, subd. (d).)
- The public safety officer under interrogation shall not be subjected to offensive language or threatened with punitive action, except that an officer refusing to respond to questions or submit to interrogations shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action; (Government Code, § 3303, subd. (e).)
- The employer shall not cause the public safety officer under interrogation to be subjected to visits by the press or news media without his or her express consent nor shall his or her home address or photograph be given to the press or news media without his or her express consent; (Government Code, § 3303, subd. (e).)
- No statement made during interrogation by a public safety officer under duress, coercion, or threat of punitive action shall be admissible in any subsequent civil proceeding, subject to certain qualifications; (Government Code, § 3303, subd. (f).)
- The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. No notes or reports that are deemed to be confidential may be entered in the officer's personnel file; (Government Code, § 3303, subd. (g).)
- If prior to or during the interrogation of a public safety officer it is deemed that he or she may be charged with a criminal offense, he or she shall be immediately informed of his or her constitutional rights; (Government Code, § 3303, subd. (h).)
- Upon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters that are likely to result in punitive action against any public safety officer, that officer, at his or her request, shall have the right to be represented by a representative of his or her choice who may be present at all times during the interrogation; and (Government Code, § 3303, subd. (i).)

- The representative shall not be a person subject to the same investigation. The representative shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information received from the officer under investigation for noncriminal matters. (Government Code, § 3303, subd. (i).)

Existing law states that the restrictions on interrogation shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer, nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities. (Government Code, § 3303, subd. (i).)

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. (Gov. 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. (Gov. Code, § 3304.5.)

Existing law no public employee shall be subject to punitive action or denied promotion, or threatened with any such treatment, for the exercise of lawful action as an elected, appointed, or recognized representative of any employee bargaining unit. (Gov. Code, § 3502.1.)

Existing law public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights to join unions. (Gov. Code, § 3506.)

Existing law provides that a public agency shall not do any of the following: (Gov. Code, § 3506.5.)

- Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter;
- Deny to employee organizations the rights guaranteed to them by this chapter;
- Refuse or fail to meet and negotiate in good faith with a recognized employee organization;
- Dominate or interfere with the formation or administration of any employee organization, contribute financial or other support to any employee organization, or in any way encourage employees to join any organization in preference to another; and
- Refuse to participate in good faith in an applicable impasse procedure.

This bill states that prior to an interrogation of a peace officer as part of an administrative disciplinary proceeding the officer shall be informed of the following, to the extent that the information is reasonably known to the agency:

1) The time and date of any incident at issue;
2) The location of any incident at issue; and

3) The title of any policies, orders, rules, procedures, or directives alleged to have been violated with a general characterization of the conduct events that are the basis of the allegation.

This bill specifies that for administrative investigations that have voluminous complaints for the same rule or policy violation, the agency may list the date, time, and location, and characterization for 10 events and, in addition, list the timeframe from the first to the last event and the total number of events within that timeframe.

This bill defines "voluminous complaints" as violations that have 25 or more incidents being investigated, for purposes of this bill.

This bill clarifies that this bill does not provide a right to full discovery of investigation reports and witness statements or a detailed description of the events that are the basis of the allegation before the officer's interrogation.

This bill states that the provisions of this bill do not preclude eliminating or adding other policy or rule citations as may be warranted by the discovery of new information or evidence during the course of an investigation nor does it limit the policies or rules the violation of which may form the basis of potential misconduct charges once the truth of a matter has been ascertained.

This bill specifies that a public safety officer shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information exchanged between the representative selected by the peace officer when noncriminal disciplinary action has been initiated, and the officer.

COMMENTS

1. Need for This Bill

According to the author:

> Existing law requires that when a peace officer is the subject of an internal administrative investigation (IA) that he/she must be notified of the nature of the investigation and that the communications between the peace officer and their chosen representative is confidential for non-criminal, administrative complaints.
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> AB 137 creates a minimum standard for the type of information provided to the officer prior to the IA and clarifies that the protected communication is guaranteed to the peace officer and their selected union representative for a non-criminal administrative investigation.
> Specifically, Government Code 3300 states that the rights and protections provided to peace officers constitute a matter of statewide concern and declare that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers.
>
> Law requires that when a peace officer is the subject of an IA they must be "informed of the nature of investigation prior to any interrogation". Furthermore, the law requires a peace officer be allowed to have representation during an IA interrogation. The law prohibits the peace officers representative from being

questioned regarding any communication between them or the peace officer(s) they represent in non-criminal, administrative investigations.

The problem is that some employers' have narrowly interpreted the "…nature of investigation…" to mean only the date, time, place of the interrogation and sometimes charge of the interrogation. The notice often omits date, time, location of incident, and policy violation against the officer. This has created delays in the IA process and unnecessarily stalled investigations. AB 137 will define the minimum amount of information provided to the peace officer and their representative so that IA investigations can be conducted more efficiently and conclude in a timely manner only in non-criminal, administrative investigations. AB 137 does not seek, nor require, to obtain the details of the administrative investigation such as witness statement(s), complainant statement(s), physical/video, audio evidence, etc. prior to the interrogation.

The law also protects the peace officers' union representative from being ordered by the employer to disclose any communications between them and the peace officer, regarding an IA. However, by statute, it does not prohibit the employer from questioning the peace officer about the communications he/she had with an official representative.

The problem is that even though most employers have traditionally respected the privilege of this communication both ways, more recently peace officers are being ordered to disclose that they talked to a union representative, and even the content of that communication. AB 137 will clarify that that communication is privileged for both the union representative and the employee.
AB 137 seeks to maintain the employer-employee relationship by providing the peace officer and their union representative with the minimum amount of information to respond to IA interrogations in a timely manner and to clarify the basic right of privileged communications between the union member and union representative in non-criminal, administrative investigations.

2. Public Safety Officers Bill of Rights (POBOR)

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." While the purpose of POBOR is to maintain stable employer-employee relations and thereby assure effective law enforcement, it also seeks to balance the competing interests of fair treatment to officers with the need for swift internal investigations to maintain public confidence in law enforcement agencies. (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564.)

3. Providing a Description of Events Before Interrogation of an Officer

Under POBOR, an interrogation is an investigatory interview of the public safety officer regarding a matter which would form the basis of an administrative disciplinary action. The rules under POBOR which pertain to "interrogations" do not apply when investigating actions of a police officer that are potentially criminal in nature. Existing law requires that the public

safety officer under investigation for disciplinary purposes be informed of the "nature" of the investigation prior to any interrogation (Government Code, § 3303, subd. (c).) Courts have not explicitly interpreted through any published opinions what exactly constitutes the "nature" of an investigation. Opponents to this legislation argue that this bill goes beyond the bounds of a reasonable disclosure by requiring that officers be provided a factual description of the incident in question. Stating the "nature" of an inquiry could be something as simple as stating the type of inquiry (i.e. a harassment complaint, allegations of making false statements, etc). Requiring a "factual description" could arguably provide the person being interviewed information that could color their testimony.

In interpreting POBOR, the court in *Ellins v. City of Sierra Madre* (2016) 244 Cal.App.4th 445, discussed the benefits of disclosing the "nature" of the investigation to the officer prior to the interrogation.

> Although the disclosure of *discovery* regarding misconduct in advance of an interrogation might 'frustrate the effectiveness of any investigation' by 'color[ing] the recollection of the person to be questioned or lead[ing] that person to confirm his or her version of an event to that given by witnesses' whose statements have been disclosed in discovery, advanced disclosure of *the nature of the investigation* has the opposite effect: It allows the officer and his or her representative to be 'well-positioned to aid in a full and cogent presentation of the [officer's] view of the matter, bringing to light justifications, explanations, extenuating circumstances, and other mitigating factors' and removes the incentive for uninformed representative[s] … to obstruct the interrogation 'as a precautionary means of protecting employees from unknown possibilities.' Thus, advance disclosure of the nature of the investigation serves *both* purposes of POBRA by contributing to the efficiency and thoroughness of the investigation while also safeguarding the officer's personal interest in fair treatment. (*Id.* at 454, citations omitted.)

The court in *Ellins* contrasted disclosure of the nature of the investigation prior to the interview to a requirement that the officer to be provided discovery prior to the interview. Discovery requires full disclosure of witness statements and any other evidence supporting an allegation of misconduct. The court pointed out that disclosure of the discovery prior to an interview is likely to diminish the effectiveness of the interview.

> . . . , to require disclosure of crucial information about an ongoing investigation to its subject before interrogation would be contrary to sound investigative practices. During an interrogation, investigators might want to use some of the information they have amassed to aid in eliciting truthful statements from the person they are questioning. Mandatory pre-interrogation discovery would deprive investigators of this potentially effective tool and impair the reliability of the investigation. This is true in any interrogation, whether its purpose is to ferret out criminal culpability or, as in this case, to determine if a peace officer used a mailing list in contravention of a direct order by his superiors. Pasadena Police Officers Assn. vs. City of Pasadena 51 Cal.3d 564.

This bill would require the following disclosures to the officer prior to the interrogation:

- The time and date of any incident at issue;
- The location of any incident at issue;
- The title of any policies, orders, rules, procedures, or directives alleged to have been violated with ***a general characterization of the conduct events*** that are the basis of the allegation.

While this bill does not call for providing a general description, it does call for the disclosure of a general characterization of the conduct events that are the basis of the allegation. One major policy question this bill poses is whether the general characterization discloses to much information to the officer to allow them to potentially fabricate or cover-up alleged conduct versus the officer not receiving enough information to adequately protect themselves by not knowing what they are being interrogated for. In AB 887 (Cooper) of 2017, a substantially similar bill to this bill was amended in this committee. That bill required a factual description of the underlying incident under investigation. The bill was amended to require only a general characterization as this bill does. That bill passed the Senate Public Safety Committee and was later held by the author in a later committee.

4. Relationship Between Employees and Union Representatives

California does not have an evidentiary privilege for communications between employees and their union representatives. AB 729 (Hernández), of the 2013-2014 Legislative Session, would have provided that a union agent and a represented employee or represented former employee have a privilege to refuse to disclose any confidential communication between the employee or former employee and the union agent while the union agent was acting in his or her representative capacity, except as specified. AB 729 was vetoed by the Governor.

This bill would create a right to confidentiality regarding communications between officers and union representatives. Under existing law, only the communications from the officer to their representative are explicitly considered confidential.

In the background information, the Author states that, "The problem is that even though most employers have traditionally respected the privilege of this communication both ways, more recently peace officers are being ordered to disclose that they talked to a union representative, and even the content of that communication."

There are policy reasons to protect communications between employees and their union representatives. *Peterson v. State* (2012) 280 P.3d 559, 565, decided by the Supreme Court of Alaska, discussed that fact that an expectation of confidentiality can allow a union member to be more open about issues involving working conditions. The court in *Peterson* stated that the expectation of confidentiality is critical because without it "union members would be hesitant to be fully forthcoming with their representatives, detrimentally impacting a union representative's ability to advise and represent union members with questions or problems."

> The *Peterson* court held that the union agent-represented worker privilege in the state of Alaska "extends to communications made: (1) in confidence; (2) in connection with representative services relating to anticipated or ongoing disciplinary or grievance proceedings; (3) between an employee (or the employee's attorney) and union

representatives; and (4) by union representatives acting in official representative capacity. The privilege may be asserted by the employee or by the union on behalf of the employee. Like the attorney-client privilege, the union-relations privilege extends only to communications, not to underlying facts." (*Id*.)

5. Argument in Support

According to the Fraternal Order of Police:

> Current law requires that when a peace officer is notified that they are subject of an internal investigation, that the communication between them and a chosen representative remain confidential for non-criminal, administrative complaints. Unfortunately, the law only protects union representatives and does not prohibit an employer from asking the peace officer if they have spoken with their union representative. AB 137 simply clarifies that communications for these types of internal investigations between the peace officer and their union representative is privileged communication.
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> AB 137 also seeks to provide the peace officer and their union representative with the appropriate level of notice to respond to the internal investigation. By clarifying the law, we can ensure our peace officers and union representatives are privy to the necessary information, treated fairly, and also ultimately saving our departments time and resources.

6. Argument in Opposition

According to the California State Sheriffs' Association:

> We are concerned that the level of detail required by this bill will open a course of disciplinary action to challenge if all of the information is not provided to the officer. Often, an agency may not have all of the specified information or have it to the level of detail required by the bill as the investigation or interview begins. It is not uncommon for some of that detail to be revealed in the interview. Requiring this level of detail, even if only to the extent that information is reasonably known to the agency, will call investigations into question and potentially make it more difficult to discipline officers as appropriate.
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> While we understand and appreciate the desire to provide more employment protections for peace officers facing disciplinary action, law enforcement agencies are routinely criticized for not addressing claims of employee misconduct in a manner befitting their serious nature. AB 137 complicates the existing employee discipline process and potentially makes it more difficult to discipline officers as appropriate.

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