
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No: AB 54 **Hearing Date:** June 11, 2019
Author: Ting
Version: December 3, 2018
Urgency: Yes **Fiscal:** Yes
Consultant: JK

Subject: *Peace Officers: Video and Audio Recording: Disclosure*

HISTORY

Source: American Civil Liberties Union of California; California News Publishers Association

Prior Legislation: AB 748 (Ting), Ch. 960, Stats. 2018
SB 1421 (Skinner), Ch. 998, Stats. 2018
AB 459 (Chau), Ch. 291, Stats. 2017
AB 2611 (Low), 2016, failed passage in Assembly Judiciary
AB 2533 (Santiago), 2016, failed passage in Senate Public Safety
AB 1957 (Quirk), 2016, failed passage on the Assembly floor
AB 66 (Weber), 2016, failed passage in Assembly Appropriations

Support: California Civil Liberties Advocacy

Opposition: None known

Assembly Floor Vote: 65 - 6

PURPOSE

The purpose of this bill is to clarify the procedure for a law enforcement agency to delay access to a video or audio recording that is otherwise required to disclose to certain individuals, as specified, under the California Public Records Act if release of the records would impede an ongoing law enforcement investigation.

Existing law establishes the California Public Records Act and provides that the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state. (Gov. Code, § 6250 et seq.)

Existing law defines “public records” as any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. (Gov. Code, § 6250 et seq.)

Existing law provides that commencing July 1, 2019, a video or audio recording retained or owned by an agency at the time of the request that relates to a “critical incident,” as defined,

must be disclosed unless the agency demonstrates that it is necessary to delay disclosure to ensure the successful completion of an investigation. (Gov. Code, § 6254 (f)(4).)

Existing law sets forth timing for disclosure of a video or audio recording that relates to a critical incident, allowing an agency to delay disclosure for 45 days from the date the agency knew or reasonably should have known about the incident, and allowing an agency to continue delaying access to the record for longer if the agency demonstrates that disclosure would substantially interfere with the investigation. (Gov. Code, § 6254 (f)(4)(A)-(B).)

Existing law defines a critical incident as (i) an incident involving the discharge of a firearm at a person by a peace officer or custodial officer; or (ii) an incident in which the use of force by a peace officer or custodial officer against a person resulted in death or in great bodily injury. (Gov. Code, § 6254 (f)(4)(c).)

Existing law specifies that after one year from the date the agency knew or reasonably should have known about a critical incident, the agency may continue to delay disclosure of a recording in its custody only if the agency demonstrates by clear and convincing evidence that disclosure would substantially interfere with the investigation. (Gov. Code, § 6254 (f)(4)(B).)

Existing law allows an agency to demonstrate, on the facts of the particular case, that the public interest in withholding a video or audio recording clearly outweighs the public interest in disclosure because the release of the recording would, based on the facts and circumstances depicted in the recording, violate the reasonable expectation of privacy of a subject depicted in the recording. In that case, the agency shall provide in writing to the requester the specific basis for the expectation of privacy and the public interest served by withholding the recording and may use redaction technology, including blurring or distorting images or audio, to obscure those specific portions of the recording that protect that interest. (Gov. Code, § 6254 (f)(4)(B)(i).)

Existing law provides that if the agency demonstrates that the reasonable expectation of privacy of a subject depicted in the recording cannot adequately be protected through redaction and that interest outweighs the public interest in disclosure, the agency may withhold the recording from the public, except that the recording, either redacted as provided in clause (i) or unredacted, shall be disclosed promptly, upon request, to any of the following:

- 1) The subject of the recording whose privacy is to be protected, or his or her authorized representative;
- 2) If the subject is a minor, the parent or legal guardian of the subject whose privacy is to be protected; and,
- 3) If the subject whose privacy is to be protected is deceased, an heir, beneficiary, designated immediate family member, or authorized legal representative of the deceased subject whose privacy is to be protected. (Gov. Code, § 6254 (f)(4)(B)(ii).)

Existing law states that if an agency withholds a record from a specified individual who has a special right to access a recording of a critical incident, the agency shall provide in writing to the requester the specific basis for its determination to delay access, on the basis that disclosure would substantially interfere with an investigation, and the agency should then “provide the video or audio recording.” (Gov. Code, § 6254 (f)(4)(B)(iii).)

Existing law provides that specified peace officer or custodial officer personnel records and records retained or owned by any state or local agency, including any video or audio recording of a critical incident, shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act. (Pen. Code, § 832.7 (b)(i)(A)(i)-(ii).)

Existing law authorizes any person to institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter. (Gov. Code, § 6258.)

This bill provides that a law enforcement agency may delay the disclosure of a video or audio recording to a person depicted in the record, or that person's authorized representative, as specified, after 45 days from the date of the incident, if release of the record would substantially interfere with an ongoing investigation.

This bill requires a law enforcement agency to provide specified individuals with the estimated date for disclosure of a video or audio recording if the agency delays access to the record after 45 days from the date of the incident because disclosure would substantially interfere with an ongoing investigation.

This bill contains an urgency clause to require that this bill take effect immediately so that an agency may properly delay disclosure of records of a critical incident, as specified, that are subject to disclosure as of July 1, 2019.

COMMENTS

1. Need for This Bill

According to the author of this bill:

AB 54 corrects a drafting error from last session's AB 748, which created the first statewide standard for disclosure of police recordings of critical incidents. Reading through the narrative of AB 748, especially in the context of the Public Records Act, it is otherwise very clear that the intent is not to require disclosure of footage in instances when doing so would interfere with an investigation. This bill will provide flexibility for law enforcement agencies while protecting the public's right to transparency in order to fully realize the intent of AB 748.

2. New Legislation Surrounding Law Enforcement Records

In 2018, two bills were passed by the Legislature opening law enforcement records to the public. AB 748 (Ting) and SB 1421 (Skinner) broadened the public's ability to see law enforcement records. Prior to the passage of these bills, law enforcement agencies had wide discretion to deny the public access to law enforcement record deemed "investigatory".

Specifically, AB 748, which becomes effective on July 1, 2019, provides a member of the public the right to request and access any video or audio related to a critical incident after 45 days from the date of the incident, unless access to that record by the public generally would invade a person depicted in the record's reasonable expectation of privacy. In that case, the agency is

required to redact or otherwise distort the record to protect that individual's privacy rights and produce the record to the requester. If the agency is unable to protect a person's reasonable expectation of privacy by redacting or otherwise distorting the record, the agency may deny access to the requester. However, AB 748 contains a separate provision that establishes a special right of access for an individual depicted in the recording, or that person's authorized representative, as specified.

AB 748 intended to permit an agency to delay producing a recording for longer than 45 days from the date of the incident, under the special right of access provision when disclosure would substantially interfere with an ongoing investigation. However, due to a drafting error, the law fails to recognize the agency's right to delay disclosure after 45 days, and instead requires the agency to produce the record immediately despite the agency's finding that disclosure would interfere with an ongoing investigation.

3. AB 748, 2018, Drafting Error

Assemblymember Ting wrote a letter to the Journal of the Assembly, stating that AB 748 contained a drafting error due to a missing, necessary clause, resulting in the law imposing conflicting instructions that an agency may delay disclosure of a record while also requiring it to immediately release the record.

Due to the legislative calendar, the author was unable to amend AB 748 to correct the drafting error last year. Accordingly, the author committed to fix this error in a letter to the Journal, printed on Friday, August 31, 2018. The letter states:

I am writing to clarify the wording of one sentence of my bill, AB 748. In Government Code 6254(f)(4)(B)(iii), the bill inadvertently states that a law enforcement agency would "provide the video or audio recording" if the agency determines that disclosure would substantially interfere with the investigation.

This part of the bill is intended to mirror Government Code 6254(f)(4)(A)(ii) added in an earlier section of the bill. As such, the following phrase—"the estimated date for the disclosure of"—was unintentionally omitted from this subparagraph and should instead be drafted accordingly:

If disclosure pursuant to clause (ii) would substantially interfere with an active criminal or administrative investigation, the agency shall provide in writing to the requester the specific basis for the agency's determination that disclosure would substantially interfere with the investigation, and provide the estimated date for the disclosure of the video or audio recording.

Thereafter, the recording may be withheld by the agency for 45 calendar days, subject to extensions as set forth in clause (ii) of subparagraph (A). Our intention in Government Code 6254(f)(4)(B)(iii) is to state that the agency would be able to withhold the recording if the disclosure would substantially interfere with an investigation, and that the agency shall provide the estimated date for the disclosure of the video or audio recording. Reading through the narrative of the bill, especially in the context of the Public Records Act, it is otherwise very clear that the intent is not to require disclosure of footage in instances when doing so would interfere with an investigation.

I commit to immediately introduce clean-up urgency legislation this year when the legislature reconvenes, and before AB 748 takes effect on July 1, 2019, which would reflect the specific

changes described in this letter. This clarification will provide flexibility for law enforcement agencies while protecting the public's right to transparency in order to fully realize the intent of AB 748.

4. Urgency Clause

This bill contains an urgency clause to ensure that existing law, as established by AB 748, is amended prior to its implementation on July 1, 2019 to remove the conflicting instructions that permit, delay, and require simultaneous disclosure. If this bill is not passed prior to July 1, the law will technically require the immediate disclosure of a record to a person with an investigation.

5. Argument in Support

According to the American Civil Liberties Union of California:

This bill fulfills your pledge to correct an inadvertent drafting error that went unnoticed in the enactment of your AB 748 last year, which provided important clarity in public access to law enforcement recordings, balancing transparency and privacy interests with the investigative needs of law enforcement. This follow-up bill is needed to avoid any potential misunderstanding. It is appropriate that this is an urgency measure to ensure that the error is corrected as soon as possible.

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