
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No: AB 718 **Hearing Date:** June 15, 2021
Author: Cunningham
Version: February 16, 2021
Urgency: No **Fiscal:** Yes
Consultant: GC

Subject: *Peace officers: investigations of misconduct*

HISTORY

Source: Author

Prior Legislation: SB 776 (Skinner), never heard on Senate Floor as Unfinished Business
AB 1599 (Cunningham), held in Senate Appropriations on Suspense
SB 1421 (Skinner), Ch. 988, Stats. of 2018
AB 2327 (Quirk), Ch. 966, Stats. of 2018
AB 1428 (Low), 2017, held on Senate Appropriations Suspense
AB 953 (Weber), Ch.466, Stats. 2015
AB 619 (Weber), 2015 held on Assm. Appropriations Suspense
SB 1286 (Leno), 2016, held in Senate Appropriations
AB 71 (Rodriguez), Ch. 462, Stats. 2015
SB 1019 (Romero), 2007, failed Assembly Public Safety
AB 1648 (Leno), 2007 failed Assembly Public Safety

Support: California Attorneys for Criminal Justice; California District Attorneys Association (CDAA); California News Publishers Association; California Public Defenders Association (CPDA); California State Sheriffs' Association; City of Carlsbad; City of Thousand Oaks; League of California Cities; League of Women Voters of California; National Association of Social Workers – California Chapter; Santa Barbara County District Attorney

Opposition: None known

Assembly Floor Vote: 77 - 0

PURPOSE

The purpose of this legislation is to require law enforcement agencies to complete initiated administrative investigations of officer misconduct as related to specified uses of force, sexual assault, and dishonesty regardless of whether an officer leaves the employment of the agency.

Existing law requires peace officers to meet all of the following minimum standards (Gov. Code, § 1031):

- Be a citizen of the United States or a permanent resident alien who is eligible for and has applied for citizenship, except as specified;

- Be at least 18 years of age;
- Be fingerprinted for purposes of search of local, state, and national fingerprint files to disclose a criminal record;
- Be of good moral character, as determined by a thorough background investigation;
- Be a high school graduate, pass the General Education Development Test or other high school equivalency test approved by the State Department of Education that indicates high school graduation level, pass the California High School Proficiency Examination, or have attained a two-year, four-year, or advanced degree from an accredited college or university; and
- Be found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer.
 - Physical condition shall be evaluated by a licensed physician and surgeon;
 - Emotional and mental condition shall be evaluated by either of the following:
 - A physician and surgeon who holds a valid California license to practice medicine, has successfully completed a postgraduate medical residency education program in psychiatry, and has a specified amount of experience; or
 - A psychologist licensed by the California Board of Psychology with a specified amount of experience.

Existing law states that the physician and surgeon or psychologist shall also have met any applicable education and training procedures set forth by the California Commission on Peace Officer Standards and Training designed for the conduct of pre-employment psychological screening of peace officers. (Gov. Code, § 1031)

Existing law specifies that the peace officer requirements do not preclude the adoption of additional or higher standards, including age. (Gov. Code, § 1031, subd. (g).)

Existing law states that for purposes of performing a thorough background investigation for applicants not currently employed as a peace officer, an employer shall disclose employment information relating to a current or former employee, upon request of a law enforcement agency, if all of the following conditions are met (Gov. Code, § 1031.1.):

- The request is made in writing;
- The request is accompanied by a notarized authorization by the applicant releasing the employer of liability; and
- The request and the authorization are presented to the employer by a sworn officer or other authorized representative of the employing law enforcement agency.

Existing law requires every peace officer candidate be the subject of employment history checks through contacts with all past and current employers over a period of at least ten years, as listed on the candidate's personal history statement. (Code of Regulations, Title 11, § 1953, subd. (e)(6).)

Existing law requires proof of the employment history check be documented by a written account of the information provided and source of that information for each place of employment

contacted. All information requests shall be documented. (Code of Regulations, Title 11, § 1953, subd. (e)(6).)

Existing law states that if a peace officer candidate was initially investigated in accordance with all current requirements and the results are available for review, a background investigation update, as opposed to a complete new background investigation, may be conducted for either of the following circumstances: (Code of Regulations, Title 11, § 1953, subd. (f)(a).)

- The peace officer candidate is being reappointed to the same POST-participating department. Per regulations, a background investigation update on a peace officer who is reappointed within 180 days of voluntary separation is at the discretion of the hiring authority; or
- The peace officer candidate is transferring, without a separation, to a different department; however, the new department is within the same city, county, state, or district that maintains a centralized personnel and background investigation support division.

Existing law requires each department or agency in this state that employs peace officers to establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies, and shall make a written description of the procedure available to the public. (Pen. Code, § 832.5, subd. (a)(1).)

Existing law requires complaints and any reports or findings relating to these complaints be retained for a period of at least five years. (Pen. Code, § 832.5, subd. (b).)

Existing law specifies prior to any official determination regarding promotion, transfer, or disciplinary action by an officer's employing department or agency, the complaints, as specified, shall be removed from the officer's general personnel file and placed in separate file designated by the department or agency, in accordance with all applicable requirements of law. (Pen. Code, § 832.5, subd. (b).)

Existing law states that each law enforcement agency shall annually furnish to the Department of Justice, a report of all instances when a peace officer employed by that agency is involved in any of the following: (Government Code, § 12525.2, subd. (a).)

- An incident involving the shooting of a civilian by a peace officer;
- An incident involving the shooting of a peace officer by a civilian;
- An incident in which the use of force by a peace officer against a civilian results in serious bodily injury or death; and
- An incident in which use of force by a civilian against a peace officer results in serious bodily injury or death.

Existing law specifies that each year, the Department of Justice (DOJ) shall include a summary of information contained in the use of force reports received through the department's OpenJustice Web portal. (Government Code, § 12525.2, subd. (c).)

Existing law includes within Department of Justice's annual reporting requirements the number of citizens' complaints received by law enforcement agencies which shall indicate the total

number of these complaints, the number alleging criminal conduct of either a felony or misdemeanor, and the number sustained in each category. (Pen. Code, § 13012, subd. (e).)

Existing law establishes the CPRA, and states 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; provides that, pursuant to the CPRA, all public records maintained by local and state governmental agencies are open to public inspection unless specifically exempt. (Gov. Code, §§ 6250 *et seq.*)

Existing law provides that specified peace officer or custodial officer personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act, including Reports, investigation, or findings of:

- Incidents involving the discharge of a firearm at a person by an officer;
- Incidents involving use of force by an officer which results in death or serious bodily injury;
- Any record relating to an incident where there was a sustained finding that an officer engaged in sexual assault of a member of the public; and,
- Any record relating to an incident where there was a sustained finding that an officer was dishonest relating to the reporting, investigation, or prosecution of a crime, or relating to the misconduct of another peace officer, including but not limited to perjury, false statements, filing false reports, destruction/falsifying/or concealing evidence, or any other dishonesty that undermines the integrity of the criminal justice system. (Penal Code, § 832.7, subd. (b)(1).)

Existing law defines “sexual assault for purposes of a CPRA request 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. Specifies that for purposes of this definition, the propositioning for or commission of any sexual act while on duty is considered a sexual assault. (Penal Code § 832.7, subd. (b)(1)(B)(ii).)

Existing law defines “member of the public” for purposes of a CPRA request as any person not employed by the officer’s employing agency and includes any participant in a cadet, explorer, or other youth program affiliated with the agency. (Penal Code § 832.7, subd. (b)(1)(B)(iii).)

Existing law specifies that records to be released shall include all investigative reports; photographic, audio, and video evidence; transcripts or recordings of interviews; autopsy reports; all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer’s action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take; documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action. (Penal Code § 832.7, subd. (b)(2).)

This bill provides, commencing January 1, 2022, if a law enforcement agency or oversight agency initiates an administrative investigation into an allegation of an incident involving the discharge of a firearm at a person by a peace officer or custodial officer, or an incident in which the use of force by a peace officer or custodial officer against a person resulted in death or great bodily injury, the agency shall complete its investigation and reach a finding, either sustained, not sustained, exonerated, or unfounded, regardless of whether the officer voluntarily separates from the agency before the investigation is completed.

This bill states, commencing January 1, 2022, if a law enforcement agency or oversight agency initiates an administrative investigation into an allegation of sexual assault as defined in this chapter, the agency shall complete its investigation and reach a finding, either sustained, not sustained, exonerated, or unfounded, regardless of whether the officer voluntarily separates from the agency before the investigation is completed.

This bill provides if a law enforcement agency or oversight agency initiates an administrative investigation into an allegation of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence, the agency shall complete its investigation and reach a finding, either sustained, not sustained, exonerated, or unfounded, regardless of whether the officer voluntarily separates from the agency before the investigation is completed.

This bill states if any agency other than an officer's employing agency conducts an investigation into any of the above misconduct, that agency shall disclose its findings with the employing agency no later than the conclusion of the investigation.

This bill defines "exonerated" to mean that the investigation clearly established that the actions of the peace officer or custodial officer that formed the basis of the complaint are not violations of law or department policy.

This bill defines "not sustained" to mean an investigation failed to produce sufficient evidence to prove or disprove the allegations the allegations made in the complaint.

COMMENTS

1. Need for This Bill

According to this author;

SB 1421 (Skinner) created Penal Code section 832.7 which outlined California's guiding system when it comes to personnel records of California's Peace Officers. This code mandates that only under very strict circumstances, investigative records of peace officers accused and found guilty of certain types of serious misconduct become eligible for public release under a Public Records Act request. A loophole exists in this code when it comes to an officer accused of sexually assaulting a member of the public. The records of this assault may only

become public if a law enforcement agency conducts an investigation and reaches a “sustained finding”. However, if an officer is fired or resigns before an investigation can begin or is completed a “sustained finding” is not reached. This means that investigative records relating to this assault are ineligible to be released pursuant to a public records request.

2. Peace Officer Records of Misconduct and Incomplete Investigations

Government Code § 1031 establishes the minimum standards needed to qualify as a peace officer. One of the requirements is that the individual be of good moral character, as determined by a thorough background investigation. (Gov. Code, § 1031, subd. (d).). That statute does not provide a further description of the requirements of that background check generally, nor does it specify what type of background check is required for an individual that is currently a peace officer and is applying for a job as a peace officer with a new law enforcement agency.

The California Code of Regulations, Title 11, § 1953 provides further specifications on the required background investigation for peace officers. Section 1953 mandates that every peace officer candidate shall be the subject of employment history checks through contacts with all past and current employers over a period of at least ten years, as listed on the candidate's personal history statement and requires that proof of the employment history check shall be documented by a written account of the information provided and source of that information for each place of employment contacted.

That section does allow for a background information update, as opposed to a complete new background investigation under limited circumstances for individuals that have already completed a peace officer background investigation. Section 1953 does not specify whether a current peace officer undergoing a new background check, or an updated background check must give the hiring agency access to personnel files for any law enforcement agency at which the officer has previously worked. Section 1953 does not specify whether an applicant must authorize the hiring agency access to personnel records that would otherwise be confidential under law.

AB 2327 (Quirk), 966, Stats. of 2018 codified that peace officers seeking employment with a law enforcement agency must give written permission for the hiring law enforcement agency to view his or her general personnel file and any separate disciplinary file. The new law also required that each law enforcement agency to make a record of any investigations of misconduct involving a peace officer in his or her general personnel file or a separate file designated by the department or agency. The bill did not, however, require law enforcement agencies to look at the prior personnel records of potential hires.

It has traditionally been common practice for hiring law enforcement agencies to require prospective applicants to sign authorizations for the hiring agency to access records from previous employers. It seems that the authorizations typically include permission to access an applicant’s disciplinary records if that applicant had previously been employed as a peace officer with another agency.

Given the liability risk of hiring an officer with a disciplinary record as a peace officer, one would expect that hiring agencies would be vigilant in checking on an applicant’s employment

background, particularly if that employment was with another law enforcement agency. Hiring law enforcement agencies have a strong incentive to require peace officer applicants to sign authorizations giving the hiring agency access to law enforcement personnel records that would ordinarily be confidential. To the extent an applicant who was a peace officer at another agency does not give authorization for the hiring agency to check his or her disciplinary record at the previous agency, such a refusal should set off alarm bells for the hiring agency. However, despite these incentives agencies are not required under state law to conduct these pre-employment checks of prior personnel records.

SB 1421 (Skinner), Ch. 988, Stats. of 2018 modified rules related to confidentiality of peace officer records in a limited manner. That bill specified that records related to discharge of a firearm or use of force that results in great bodily injury were subject to disclosure to the public whether the misconduct was substantiated or unsubstantiated. While records related to sexual assault of a member of the public by an officer or dishonesty in the course of an investigation or a prosecution were subject to disclosure if they were sustained. As a result of this, officers who resign or retire prior to a completed investigation into sexual assault or dishonesty will escape any disclosure of the investigation into their alleged misconduct. This bill would remedy that issue by requiring that those investigations be completed, and if they could be subject to disclosure under the provisions of Penal Code, § 832.7 as modified by SB 1421 (Skinner).

3. Argument in Support

According to the League of Women Voters:

The League of Women Voters of California writes to strongly support AB 718, which would build on the transparency of police misconduct records that was initiated with the passage of SB 1421 (Skinner) in 2018.

The League of Women Voters of California believes that democratic government depends on the informed and active participation of its citizens and requires that governmental bodies protect the citizen's right to know and to have access to information. The ability to monitor and act on information related to police misconduct informs our participation in the development of policies and procedures to address and prevent abuses.

Existing law requires personnel records of peace or custodial officers, and any records related to complaints against them, be open for public inspection for a limited set of the most serious police complaints. It simultaneously protects the privacy of personal information. Records regarding reports, investigations, or findings of incidents by an officer may be subject to disclosure if they involve discharge of a firearm, deadly force, or serious bodily injury. Records involving accusations of sexual assault or dishonesty, however, are available only if there are “sustained findings” that the conduct has occurred. Unfortunately, there have been situations in which an officer resigns prior to the completion of an investigation, thus nullifying the opportunity for the investigating body to “sustain” the allegation. This legislation addresses that problem by allowing public inspection of officers’ personnel records pertaining to accusations of sexual assault when an officer resigns.

The League has a long history of support for open government. Many other states require the disclosure of police reports, and a majority require openness of records about police misconduct. California should join that majority to promote transparency in government. The League of California Voters of California strongly supports AB 718 to further the transparency of police reports and to promote public safety.

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