
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: SB 288 **Hearing Date:** April 11, 2023
Author: Nguyen
Version: February 2, 2023
Urgency: No **Fiscal:** No
Consultant: SJ

Subject: *Public records: parole calculations and inmate release credits*

HISTORY

Source: Author

Prior Legislation: Proposition 57, as approved by the voters on November 8, 2016

Support: California State Sheriffs' Association

Opposition: California Attorneys for Criminal Justice; Initiate Justice; San Francisco Public Defender

PURPOSE

The purpose of this bill is to state that California Department of Corrections and Rehabilitation (CDCR) records pertaining to an incarcerated person's release date and what the person did to earn release credits are public records subject to disclosure under the California Public Records Act.

Existing law establishes the right to privacy. (Cal. Const., art. I, § 1.)

Existing law provides that the people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny. (Cal. Const., art. I, § 3, subd. (b)(1).)

Existing law defines "public records" to include 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, § 7920.530.)

Existing law declares 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, § 7921.000.)

Existing law provides that the inalienable right to privacy under the California Constitution may exempt certain records, or portions thereof, from disclosure under the California Public Records Act. (Gov. Code, § 7930.000.)

Existing law provides that Penal Code sections 11076 and 13202 may operate to exempt criminal offender record information, or portions thereof, from disclosure. (Gov. Code, § 7930.130.)

Existing law defines “criminal offender record information” as records and data compiled by criminal justice agencies for purposes of identifying criminal offenders and of maintaining as to each such offender a summary of arrests, pretrial proceedings, the nature and disposition of criminal charges, sentencing, incarceration, rehabilitation, and release. (Pen. Code, § 13102.)

Existing law requires an agency to justify withholding any record by demonstrating that the record in question is exempt under express provisions of the PRA, or that on the facts of a particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. (Gov. Code, § 7922.000.)

Existing law provides for a right of access to criminal offender record information by any person or public agency authorized by law. (Pen. Code, § 13200.)

Existing law provides that the right of access to criminal offender record information does not authorize access of any person or public agency to such information unless such access is otherwise authorized by law. (Pen. Code, § 13201.)

Existing law provides that every public agency or bona fide research institution concerned with the prevention or control of crime, the quality of criminal justice, or the custody or correction of offenders may be provided with criminal offender record information, including criminal court records, as required for the performance of its duties, including the conduct of research. (Pen. Code, § 13202.)

Existing law provides that criminal offender record information shall be disseminated, whether directly or through any intermediary, only to such agencies as are, or may subsequently be, authorized access to such records by statutes. (Pen. Code, § 11076.)

Existing law provides that any person may institute a proceeding for injunctive or declarative relief, or for a writ of mandate, in any court of competent jurisdiction, to enforce that person’s right to inspect or receive a copy of any public record or class of public records. (Gov. Code, § 7923.000.)

Existing law requires CDCR to establish written guidelines for accessibility of records. (Gov. Code, § 7922.635, subd. (a)(6).)

Existing law provides that an incarcerated individual, unless otherwise precluded, is eligible to receive good conduct, rehabilitation, and/or education credits to advance the individuals’ release date if sentenced to a determinate term or to advance the individual’s initial parole hearing date if sentenced to an indeterminate term with the possibility of parole. (Pen. Code, §§ 2931, 2933, 2933.05; see also Cal. Code Regs., tit. 15, §§ 3043-3043.6.)

Existing law provides that, in addition to other specified limitations, the only inmate or parolee data which may be released without a valid written authorization from the inmate or parolee to the media or to the public includes that inmate’s or parolee’s: name; age; race and/or ethnicity; birthplace; county of last legal residence; commitment offense; date of admission to CDCR and CDCR number; facility assignments and a general description of behavior; patient health condition given in short and general terms that do not communicate specific medical information

about the individual, such as good, fair, serious, critical, treated and released, or undetermined; manner of death as natural, homicide, suicide, accidental, or executed; and, sentencing and release actions, including month and year of current parole eligibility date. (Cal. Code Regs., tit. 15, § 3261.2(e)(1)-(11).)

This bill states that CDCR records pertaining to an inmate's release date and what the inmate did to earn any release credits are public records subject to disclosure under CPRA.

This bill requires disclosure to be sufficiently detailed and include the number of days of credit that were based on each of the following categories: good behavior; rehabilitation and education program participation; and, pretrial release credits.

This bill requires disclosure to include the types of rehabilitative and education programs that the inmate participated in and completed.

This bill provides that CDCR is not required to disclose records that are subject to the privacy protections of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

COMMENTS

1. Need For This Bill

According to the author:

As crime rates have risen across the State of California, many residents are scared and many more have grown tired and frustrated with the lack of answers and transparency surrounding early release credits of potentially dangerous and violent criminals back onto to our streets. A patchwork of laws and regulations has created a situation where someone can be sentenced to a certain amount of time and either have it doubled by the "Three Strikes" law or have a sentence cut down significantly because of Prop. 57.

County and district attorneys have been sounding the alarm over this issue for years now and we are seeing what happens when the seeds of bad policy begin to sprout and our streets and communities become unsafe.

2. Proposition 57

Proposition 57 was approved by the voters in 2016 and changed the rules governing parole and the granting of custody credits to inmates in state prison. Proposition 57 authorized CDCR to award credits earned for good behavior and approved rehabilitative or educational achievements. Prior to the passage of the initiative, the matter of conduct credits earned in prison was governed by statute. (See e.g., Pen. Code, §§ 2933 and 2933.1.)

Proposition 57 added section 32 to article I of the California Constitution which states, in pertinent part:

"32. (a) The following provisions are hereby added to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order, notwithstanding anything in this article or any other provision of law....

(2) Credit Earning: *The Department of Corrections and Rehabilitation shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements.*

(b) The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety.” (Cal. Const., art. I, § 32, emphasis added)

Effective May 1, 2021, CDCR increased the rate of Good Conduct Credits earned for individuals serving time under Penal Code 667.5(c) from 20% to 33.3%, and from 33.3% to 50% for nonviolent second and third strikers. (<https://www.cdcr.ca.gov/proposition57/>) Good Conduct Credits and other programming credits, such as Rehabilitative Achievement Credits, Milestone Completion Credits, and Educational Merit Credits, apply toward an incarcerated person’s Earliest Possible Release Date for determinate sentences and Minimum Eligible Parole Date for indeterminate sentences.

3. California Public Records Act

The PRA provides that every person or entity in California has a right to access information concerning the conduct of the people’s business. (Gov. Code, §7921.000; Cal. Const., art. I, § 3, subd. (b)(1).) Despite the public’s fundamental right to access public records, the California Constitution also provides the right to privacy. (Cal. Const., art. I, § 1.) The PRA provides that the inalienable right to privacy under the state Constitution may exempt certain records, or portions thereof, from disclosure under the Act. (Gov. Code, §7930.000.) It specifically states that Penal Code sections 11076 and 13202 may operate to exempt criminal offender record information, or portions thereof, from disclosure. (Gov. Code, § 7930.130.)

If an agency rejects a public records request, the PRA requires the agency to justify withholding any record by demonstrating that the record in question is exempt under express provisions of the PRA, or that on the facts of a particular case, the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. (Civ. Code, § 7922.000.) Any person may challenge an agency’s rejection of a PRA request by instituting proceedings for injunctive or declarative relief, or for a writ of mandate, in any court of competent jurisdiction, to enforce that person’s right to inspect or receive a copy of any public record or class of public records. (Gov. Code, § 7923.)

CDCR has issued regulations governing the disclosure of information relating to an incarcerated person. Specifically, CDCR regulations state, “[T]he only inmate or parolee data which may be released without a valid written authorization from the inmate or parolee to the media or to the public” includes the individual’s name, age, race and/or ethnicity, birthplace, county of last legal residence, commitment offense, date of admission, facility assignment, a general description of behavior, a short and general description of an inmate’s health or manner of death, and the month and year of their release. (Cal. Code Regs., tit. 15, § 3261.2(e)(1)-(11).)

4. Concerns About CDCR’s Credit Calculations

CDCR regulations implementing Proposition 57 have garnered significant interest since the passage of the initiative and been the subject of several legal challenges, including the exclusion of registered sex offenders in the initial set of regulations and the use of a “paper review” parole consideration process, among others. The regulations received additional attention following the

announcement of changes to credit earning in the spring of 2021, and several news outlets ran stories with headlines regarding the significant number of incarcerated individuals who would be eligible for early release as a result. (See Don Thompson, *76,000 California Prison Inmates Could Be Released Earlier With Good Behavior* (May 1, 2021) available at <<https://www.latimes.com/world-nation/story/2021-05-01/76-000-california-inmates-now-eligible-for-earlier-releases>>.) The department's credit calculations have been criticized for lacking transparency and being awarded in ways that are inconsistent with the voters' intent. (Julie Watts, *"Secret" Prop. 57 Prison Credits: Are Most Felons Really "Earning" Early Release?* (Oct. 11, 2022) available at <<https://www.cbsnews.com/sacramento/news/investigating-prop-57-credits-how-was-sacramento-shooting-suspect-smiley-martin-out-of-prison-early/>>.) CDCR maintains that credit earning information is confidential. (*Id.*)

5. Effect of This Bill

This bill would make "records pertaining to an inmate's release date and what the inmate did to earn any release credits...subject to disclosure" under the PRA. This bill provides no exceptions to or restrictions on disclosure, other than for records protected by HIPAA. Notably, this bill does not reference any applicable state privacy laws such as the Confidentiality of Medical Information Act which provides greater privacy protections than HIPAA. Additionally, this bill does not exempt from disclosure information related to an incarcerated person's credits before that person is released. Given that an incarcerated person may receive "up to twelve months of Extraordinary Conduct Credit" for "provid[ing] exceptional assistance in maintaining the safety and security of a prison," disclosure that an incarcerated person assisted staff may jeopardize gang investigations, institutional safety, and the safety of individual incarcerated persons. (Cal Code Regs., tit. 15, § 3043.6, subd. (a).)

This bill provides broad disclosure on what an incarcerated person did to earn release credits before that person has been released from CDCR's custody which may place that person at risk. Moreover, this bill requires disclosure of "the types of rehabilitative and education programs that the inmate participated in and completed." Although participation in some programs may be protected by HIPAA, information related to participation in all other types of self-help or rehabilitative programming would be subject to disclosure. Opponents of this bill have raised concerns that disclosure of a person's participation in programming may disincentivize participation.

Of note, the bill states that its provisions are declaratory of existing law. Based on CDCR's denial of PRA requests related to credit calculations for specific incarcerated persons due to the confidential nature of that information and the department's public statements on credit calculations, it appears that the department would disagree that the provisions of the bill are declaratory of existing law.

6. Argument in Support

According to the California State Sheriffs' Association:

California has been a leader in creating a more just criminal justice system. Through the expansion of rehabilitative programs, diversion opportunities, improved training, and various other reforms, our state has shown its commitment to giving offenders a second chance. That said, many victims and justice system

stakeholders have been surprised by the release of certain offenders, and many have expressed concerns about the lack of information when incarcerated individuals are released back into their communities.

SB 288 provides additional transparency in these release proceedings. By making clear this information is subject to disclosure under the PRA, communities and law enforcement will be better informed of offenders' releases and have a greater understanding of the credits that offenders have received to grant their release.

7. Argument in Opposition

California Attorneys for Criminal Justice writes:

SB 288 would strip incarcerated people of privacy protection for education and rehabilitation records, and other aspects of their private lives, enjoyed by nonincarcerated Californians without justification. Making such records public is likely to discourage incarcerated people from taking advantage of programming potentially viewed as stigmatizing, including drug and alcohol treatment, sex offender treatment, parenting classes, and mental health treatment, for fear such participation will become public and be used against the incarcerated person. Laws that discourage participation in rehabilitative programming hurt everyone.

As incarcerated people already have access to their own records for legal and other purposes, and prosecutors and law enforcement similarly have the tools to access such records for purposes such as resentencing and parole hearings, the purpose of this legislation appears to be to provide access to third parties with no legitimate interest in such records, such as victims wishing to argue against parole by arguing that the incarcerated person's programming was somehow inadequate. The use of these records in this fashion is grossly unfair as access to rehabilitative programming is severely limited and an individual's ability to complete such programming is a function of whether the individual is granted access to programming. Moreover, affording victims access to confidential documents pertaining to rehabilitation and progress of the person seeking parole or resentencing, that have nothing to do with the impact of crime on the victim, greatly enlarges the role of the victim at post-conviction and parole proceedings far beyond their legitimate role of addressing the impact of the crime on the victim. Concerns regarding the adequacy of programming undertaken for rehabilitation are properly addressed by adjudicative bodies and the People's elected representative, the prosecutor.

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