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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

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**Bill No:** SB 400                      **Hearing Date:** April 11, 2023  
**Author:** Wahab  
**Version:** February 9, 2023  
**Urgency:** No                                      **Fiscal:** No  
**Consultant:** AB

**Subject:** *Peace officers: confidentiality of records*

## HISTORY

**Source:** City of San Jose; San Jose Police Department

**Prior Legislation:** AB 2557 (Bonta, 2022), not heard in Assembly Judiciary  
SB 2 (Bradford), Ch. 409, Stats. of 2021  
SB 16 (Skinner), Ch. 402, Stats. of 2021  
SB 776 (Skinner), 2020, never heard on Senate concurrence  
SB 1421 (Skinner), Ch. 988, Stats. of 2018  
SB 1286 (Leno, 2016) held in Senate Appropriations  
AB 1106 (Horton), Ch. 102, Stats. of 2003  
AB 1873 (Koretz), Ch. 65, Stats. of 2002

**Support:** California Public Defenders Association, Council on American Islamic Relations, Oakland Privacy, San Francisco Public Defender, and Smart Justice California.

**Opposition:** Arcadia Police Officers Association, Burbank Police Officers Association, California Association of Highway Patrolmen, California Coalition of School Safety Professionals, Claremont Police Officers Association, Corona Police Officers Association, Culver City Police Officers Association, Deputy Sheriffs' Association of Monterey County, Fullerton Police Officers Association, Los Angeles School Police Officers Association, Murrieta Police Officers Association, Newport Beach Police Association, Palos Verdes Police Officers Association, Placer County Deputy Sheriffs Association, Pomona Police Officers Association, Riverside Police Officers Association, Riverside Sheriffs Association, Santa Ana Police Officers Association, Upland Police Officers Association.

## PURPOSE

*The purpose of this bill is to clarify that law enforcement agencies that formerly employed a peace officer are not prohibited from disclosing the termination for cause of that officer.*

*Existing law*, the California Constitution, declares the people's right to transparency in government. ("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, Sec. 3.)

*Existing law*, the California Public Records Act (CPRA), 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. (Gov. 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. (Gov. Code § 6253)

*Existing law* exempts from the California Public Records Act the 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. (Gov. Code § 6254(f).)

*Existing law* authorizes criminal defendants to file a motion requesting to inspect a law enforcement officer’s personnel file for evidence of police misconduct, also known as a “Pitchess motion.” (*Pitchess v. Superior Court* (1974), 11 Cal. 3d 531; Evid. Code §§1043, 1045, 1046.)

*Existing law* requires law enforcement agencies to establish a procedure to investigate complaints by members of the public against personnel of those agencies and make a written description of the procedure available to the public. (Pen. Code §832.5(a).)

*Existing law* specifies circumstances under which a peace officer shall have their certification revoke, and when a peace officer may have their certification suspended or revoked based on termination for cause or serious misconduct. (Penal Code § 13510.9.)

*Existing law* requires any agencies employing peace officers to report to the Commission on Peace Officers Standards and Training (POST) within 10 days, in a form specified by the Commission, the employment, appointment, or termination or separation from employment or appointment, by that agency, of any peace officer. Separation from employment or appointment includes any involuntary termination, resignation, or retirement. (Pen. Code § 13510.9(a)(1).)

*Existing law* sets forth a series of procedural protections for California peace officers facing punitive action, known as the Peace Officers’ Procedural Bill of Rights (POBOR). Gov’t Code §3300-3313.)

*Existing law* defines “personnel records” as any file maintained under that individual’s name by his or her employing agency and containing records relating to personal data, employee advancement, appraisal or discipline, complaints or investigations of complaints concerning specified events, and other specified topics. (Pen. Code §832.8(a).)

*Existing law* defines “sustained” as a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to specified provisions of the Peace Officer’s

Bill of Rights, that the actions of the peace officer or custodial officer were found to violate law or department policy. (Pen. Code §832.8(b).)

*Existing law* states that except as specified, peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to citizens' complaints against personnel are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery. This section does not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or any agency or department that employ these officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office. (Pen. Code, § 832.7(a).)

*Existing law* provides that the following peace officer or custodial records maintained by their agencies shall not be confidential and shall be made available for public inspection pursuant to the CPRA:

- A record relating to the report, investigation, or findings of any of the following:
  - 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 in great bodily injury;
  - A sustained finding involving a complaint that alleges unreasonable or excessive force.
  - A sustained finding that an officer failed to intervene against another officer using force that is clearly unreasonable or excessive.
- Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public;
- Any record relating to an incident in which a sustained finding was made by any law enforcement agency involving 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, as specified;
- Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in conduct including, but not limited to, verbal statements, writings, online posts, recordings, and gestures, involving prejudice or discrimination against a person on the basis of a specified protected class;
- Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that the peace officer made an unlawful arrest or conducted an unlawful search. (Pen. Code, § 832.7(b)(1)(A)-(E).)

*Existing law* specifies the purposes for which an agency shall redact a disclosed record, including the removal of personal information, the preservation of anonymity of witnesses, and where there is a reason to believe that disclosure would pose a significant danger to the physical safety of the peace officer, custodial officer or another person. (Pen. Code § 832.7(b)(6)(A)-(D).)

*Existing law* provides that an agency may withhold a record of an incident otherwise subject to disclosure if there is an active criminal or administrative investigation, as specified. (Pen. Code § 832.7(b)(8).)

*Existing law* provides that records subject to disclosure shall be provided at the earliest possible time and no later than 45 days from the date of a request for their disclosure, except as specified. (Pen. Code § 832.7(b)(11).)

*Existing law* provides that a department or agency that employs peace or custodial officers may disseminate data regarding the number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved. (Pen. Code § 832.7(d).)

*Existing law* provides that a department or agency that employs peace or custodial officers may release factual information concerning a disciplinary investigation if the officer who is the subject of the disciplinary investigation, or the officer's agent or representative, publicly makes a statement they know to be false concerning the investigation or the imposition of disciplinary action, as specified. (Pen. Code § 832.7(e).)

*This bill* provides that an agency that formerly employed a peace officer or custodial officer is not prohibited from disclosing to the public the termination for cause of that officer by that agency.

*This bill* specifies that any disclosure of an officer's termination for cause shall be limited to the name and rank of the officer, the date of termination, and a general description of the cause for termination.

## COMMENTS

### 1. Need for the Bill

According to the Author:

SB 400 is about building more public trust and transparency, and improving police-community relations and accountability. While there are increased public records disclosures for misconduct upon request, termination disclosure remains a specific area that has not been addressed through legislation. The passage of SB 400 will improve police accountability and rebuild trust between law enforcement agencies and the communities they serve.

### 2. Background on California Law Related to Police Personnel Records

In 1968, the Legislature passed the California Public Records Act (CPRA), declaring that "access to information concerning the conduct of the people's business is a fundamental and

necessary right of every person in the state.”<sup>1</sup> The purpose of the CPRA is to prevent secrecy in government and to contribute significantly to the public understanding of government activities.<sup>2</sup> Under the law, virtually all public records are open to public inspection unless expressly exempted in statute. However, even if a record is not expressly exempted, an agency may refuse to disclose records if on balance, the interest of nondisclosure outweighs disclosure. Generally, “records should be withheld from disclosure only where the public interest served by not making a record public outweighs the public interest served by the general policy of disclosure.”<sup>3</sup> In the context of peace officer records, the CPRA contains several relevant exemptions to the general policy requiring disclosure, namely 1) records of complaints to, or investigations conducted by any state or local police agency, 2) personnel records, if disclosure would constitute an unwarranted invasion of personal privacy, and 3) records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including records deemed confidential under state law.<sup>4</sup>

In 1974, the California Supreme Court decided *Pitchess v. Superior Court* (1974) 11 Cal. 3d 531, which allowed a criminal defendant to access to certain kinds of information in citizen complaints against law enforcement officers contained in the officers’ personnel records. After *Pitchess* was decided, several law enforcement agencies launched record-destroying campaigns, leading the Legislature to enact record retention laws and codify the privileges and discovery procedures related to *Pitchess* motions.<sup>5</sup> In a natural response, law enforcement agencies began pushing for stronger confidentiality measures, many of which are currently still in effect. The relevant Penal Code provisions define peace officer “personnel records” and, prior to 2018, provided that such records are confidential and subject to discovery only pursuant to the procedures set forth in the Evidence Code.

In 2006, the California Supreme Court re-interpreted a key Penal Code provision, Section 832.7, to hold that the record of a police officer’s administrative disciplinary appeal from a sustained finding of misconduct was confidential and could not be disclosed to the public.<sup>6</sup> This decision had the practical effect of preventing the public from learning the extent to which police officers had been disciplined as a result of misconduct, and closed to the public all independent oversight investigations, hearings and reports. This decision also rendered California one of the most secretive states in the nation in terms of transparency into peace officer misconduct, and carved out a unique confidentiality exception for law enforcement that does not exist for public employees, doctors and lawyers, whose records on misconduct and resulting discipline are public records.

### 3. Recent Legislation Requiring Increased Transparency

In 2018, the Legislature passed SB 1421 (Skinner, Ch. 988, Stats. of 2018), which represented a paradigm shift in the public’s ability to access previously confidential peace officer personnel records. SB 1421 removed *Pitchess* protection from records pertaining to officer-involved shootings, uses of force resulting in death or great bodily injury, and sustained findings of sexual assault or dishonesty. SB 1421 led to a surge in CPRA requests submitted to law enforcement agencies across the state, posing a logistical challenge of unprecedented proportions. Not only is

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<sup>1</sup> California Government Code §7921.000

<sup>2</sup> *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1016-1017.

<sup>3</sup> Gov. Code, § 7922.000

<sup>4</sup> Gov. Code, §§ 7923.600; 7927.700, 7927.705

<sup>5</sup> These were primarily codified in Penal Code §§ 832.7 and 832.8, and Evidence Code §§1043 through 1045.

<sup>6</sup> *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272

universe of responsive records massive, but determining whether a particular record is responsive can be a lengthy process. Moreover, SB 1421 required agencies to redact specified personal information, information the release of which “would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about possible misconduct,” and information that, if unredacted, would pose a significant danger to the physical safety of the peace officer or another person.<sup>7</sup>

In 2021, the Legislature passed SB 16 (Skinner, Ch. 402, Stats of 2021), building upon the transparency provisions enacted by SB 1421, and responding to widespread criticism that law enforcement agencies were flouting the law via litigation and other tactics to delay the release of records. SB 16 exempted four additional categories of peace officer records from the confidentiality requirement in Penal Code §832.7, including those pertaining to sustained findings of unreasonable or excessive use of force, sustained findings that an officer failed to intervene in another officer’s unreasonable or excessive use of force, sustained findings that an officer engaged in prejudice or discrimination on the basis of a protected characteristic, and sustained findings that an officer made an unlawful arrest or conducted an unlawful search.

#### **4. Termination of Peace Officers and Effect of This Bill**

The process for a peace officer to be terminated in California can be complex and varies depending on specific circumstances as well as the jurisdiction or agency in question. However, all peace officers in California enjoy a number of unique procedural protections when being investigated by their employing agency, known as the Peace Officer’s Procedural Bill of Rights (POBOR).<sup>8</sup> Those protections include notice of an interrogation, specific rules on the timing of interrogations, the right to be represented during the interrogation, the right to invoke the privilege against self-incrimination and be granted immunity for the responses to potentially incriminating statements, among others. Under existing law, before an agency can take punitive action against a peace officer, POBOR requires an administrative hearing, commonly referred to as a “Skelly hearing.” At a Skelly hearing, peace officers are entitled to the following: (1) notice of the intended disciplinary action; (2) a copy of all materials upon which the action is based, and, (3) an opportunity to respond orally or in writing to an impartial reviewer prior to the effective date of the disciplinary action.<sup>9</sup> Once the Skelly hearing and related proceedings have been completed, an agency may take punitive action against an officer, including termination.

This bill provides that, notwithstanding the confidentiality of peace officer records generally, an agency that formerly employed a peace officer may disclose the termination for cause of that officer by that agency, as long as the disclosure is limited to the name and rank of the officer, the date of termination and a general description of the cause for termination. Initial discussions between committee staff and stakeholders produced diverging interpretations of the bill’s scope and applicability. However, based on the bill’s plain language and its situation within the statute, it is apparent that it is not meant to supersede the general rule protecting the confidentiality of police records, and only applies to records related to terminations for cause that, under existing law, are subject to public inspection pursuant to the CPRA. Put another way, this bill only applies to terminations for cause for incidents that fall under one of the eight categories of disclosable peace officer records set forth in SB 1421 and SB 16: incidents involving the discharge of a firearm at a person or use of force against a person resulting in death or great

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<sup>7</sup> Penal Code §832.7(b)(6).

<sup>8</sup> Penal Code §3300-3313

<sup>9</sup> California Statewide Law Enforcement Association, Legal FAQ. <https://cslea.com/legal/legal-faq/>

bodily injury, and sustained findings involving excessive or unreasonable force, failure to intervene in another officer's excessive or unreasonable force, sexual assault, dishonesty, discrimination based on protected class, or an unlawful arrest or search. Given the confusion surrounding the bill's scope and applicability, the Author and Committee may wish to consider amending the bill to include a specific cross-reference to the categories of conduct to which the bill applies.<sup>10</sup>

In summary, whereas under current law it is unclear that disclosable information related to a termination for cause can be made public without the trigger of CPRA request, this bill allows for the *affirmative* disclosure of limited information related to a termination for cause based on specific conduct or sustained findings of specific conduct.

## 5. Argument in Support

According to the California Public Defenders Association:

SB 400 would make a much-needed clarification to Penal Code Section 832.7 to add the following language: *(13) Notwithstanding subdivision (a) or any other law, an agency that formerly employed a peace officer or custodial officer is not prohibited from disclosing to the public the termination for cause of that officer by that agency. Any such disclosure shall be limited to the name and rank of the officer, the date of termination, and a general description of the cause for termination.*

We agree that SB 400 provides an important clarification to ensure that confidentiality rules about peace officers do not prohibit a law enforcement agency that formerly employed a peace officer or custodial officer from disclosing the termination for cause of that officer, as specified. This bill allows, but does not require, law enforcement agencies to disclose critical information to their communities, which in turn builds trust and ensures more transparency and accountability in law enforcement.

## 6. Argument in Opposition

According to the California Association of Highway Patrolmen:

The California Public Records Act generally requires public records to be open for inspection by the public. Current law provides numerous exceptions to this requirement. Under current law, the personnel records of peace officers and custodial officers are confidential and not subject to public inspection. Current law provides certain exemptions to this confidentiality, including the reports, investigations, and findings of certain incidents involving the use of force by a peace officer. This bill would clarify that this confidentiality does not prohibit an agency that formerly employed a peace officer or custodial officer from disclosing the termination for cause of that officer, as specified.

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<sup>10</sup> It is important to note that under existing case law, peace officer names, employing departments, and hiring and termination dates are currently not exempt from disclosure under the CPRA. *Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278. Thus, given the bill's limitations on what may be disclosed, the only additional information that could be made public under the bill is the officer's rank, and a general description of the cause for termination.

Under current law, the department has the right to tell the public that a named officer no longer works for the department. They simply have to wait for the employee's due process rights to occur before they can disparage that employee's reputation by revealing what the department feels the officer did and why they were terminated. Often times, the officer is exonerated and ordered to be put back to work by the courts or a third party hearing officer and that officer can return to a job where their reputation has not been damaged because of the protections afforded them in current statute. SB 400 would bypass the important safeguards afforded all employees as to a right to due process and would supersede laws recently passed by the legislature regarding the release of information of incidents of serious misconduct, and police. This will seriously hurt innocent officers whose reputations have been damaged and cause barriers when they re-enter the workforce.

**-- END --**