
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: SB 505 **Hearing Date:** April 25, 2017
Author: Mendoza
Version: April 6, 2017
Urgency: No **Fiscal:** Yes
Consultant: NG

Subject: *Shared Gang Databases: Administration*

HISTORY

Source: California Police Chiefs Association

Prior Legislation: SB 458 (Wright) Chaptered 797, Statutes of 2013
AB 2298 (Weber) Chaptered 752, Statutes of 2016

Support: California District Attorneys Association; San Diego County District Attorney

Opposition: None known

PURPOSE

The purpose of this bill is to: 1) cease the oversight and administration of CalGang database system by the CalGang Executive Board; 2) create the California Gang Intelligence Executive Steering Committee, under the authority of the Department of Justice, as specified; and 3) authorize the administration, oversight, and development of regulations, as specified, of shared gang databases in the state, including CalGang, to the Committee, with the assistance of the Department of Justice.

Existing law defines a “criminal street gang” as any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more enumerated criminal offenses, having a common name or identifying sign or symbol, and whose members individually or collectively engage in a pattern of criminal gang activity. (Pen. Code §186.22, subd. (f).)

Existing law provides that any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity and who willfully promotes, furthers, or assists, in any felonious conduct by members of that gang, shall be punished by imprisonment in a country jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years. (Pen. Code §186.22, subd. (a).)

Existing law provides that any person who is convicted of a felony committed for the benefits of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction,

receive a sentence enhancement, as specified immediately below. (Pen. Code §186.22, subd. (b).)

- Felony (other than specified) 2, 3, or 4 years
- Serious felony 5 years
- Violent felony 10 years
- Home invasion life min., 15 years until parole eligibility
- Carjacking life min., 15 years until parole eligibility
- Shooting from vehicle life min., 15 years until parole eligibility
- Extortion or witness intimidation life min., 7 years until parole eligibility

Existing law defines “pattern of criminal gang activity” as the commission of, attempted commission of, conspiracy to commit, or solicitation of, or conviction of two or more enumerated offenses, provided at least one of the offenses occurred after the effective date of the statute and that the last of the offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons. (Pen. Code §186.22, subd. (e).)

Existing law requires the registration a shared gang database with the chief of police of the city in which he or she resides, or the sheriff of the county if he or she resides in an unincorporated area for any person described immediately below. (Pen. Code §186.30, subd. (a).)

- Any person who has who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity and who willfully promotes, furthers, or assists, in any felonious conduct by members of that gang. (Pen. Code §186.30, subd. (b)(1).)
- Any person who has been found convicted a crime which triggers a sentencing enhancement, as specified in Penal Code §186.22, subdivision (b). (Pen. Code §186.30, subd. (b)(2).)
- Any crime that the court finds is gang related at the time of sentencing or disposition. (Pen. Code §186.30, subd. (b)(2).)

Existing law qualifies the “CalGang system” as a “shared gang database.” (Pen. Code §186.34, subd. (c)(3).)

This bill creates the California Gang Intelligence Executive Steering Committee (Committee), under the authority of the Department of Justice (DOJ), and shift the administration and oversight of CalGang from the CalGang Executive Board to the Committee.

This bill requires that the Committee consist of nine members that, to the extent possible, reflect representation of northern, central, and southern California, as well as urban and rural areas.

This bill specifies that each of the Committee members demonstrate the following attributes, at minimum:

- Substantial prior knowledge of issues related to gang intervention, suppression, and prevention efforts.
- Decision making authority for, or direct access to, those who have decision making authority for the agency or constituency he or she represents
- A willingness to serve on the committee and a commitment to contribute to the Committee’s work.

This bill specifies that the membership of the Committee shall consist of the following persons, all of which shall serve without compensation:

- The Attorney General or his or her designee.
- A representative appointed by the California Police Chiefs Association.
- A representative appointed by the California State Sheriff's Association.
- A representative appointed by the California District Attorneys Association.
- A representative appointed by the CalGang Node Advisory Committee.
- A representative appointed by the California Gang Investigators Association.
- A representative appointed by the Speaker of the Assembly from an organization that specializes in privacy rights.
- A representative appointed by the Senate Committee on Rules from an organization that specializes in gang intervention and prevention.
- A representative appointed by the Governor with expertise in management and operations of database systems.

This bill requires the Committee to appoint a chairperson from among the appointed committee members, who shall serve in that capacity at the pleasure of the Committee.

This bill provides that if a Committee member is unable to adequately perform his or her duties, or is unable to attend more than three meetings in a single 12-month period, he or she is subject to removal from the committee by a majority vote of the full committee. A vacancy on the committee as a result of the removal of a member shall be filled by the appointing authority of the removed member within 30 days of the vacancy.

This bill provides that the Committee may create, at its discretion, subcommittees or task forces to address specific issues. These may include Committee members as well as invited experts and other participants.

This bill provides that staff support services for the Committee shall be provided by the staff of DOJ.

This bill requires the Committee to maintain a publicly accessible Internet Web site, which may be contained within the Internet Web site of DOJ.

This bill provides that the Committee shall meet at least quarterly and shall make public attachments for all future board and Committee meetings, as well as all other documents of significance such as letters, memoranda, and agreements, unless doing so would compromise criminal intelligence information or other information that must be shielded from public release.

This bill requires that the Committee, at least annually, conduct public hearing to provide opportunities for gathering information and receiving input regarding the work of the Committee from concerned stakeholders and the public.

This bill provides that DOJ shall, in consultation with the Committee and the California Gang Node Advisory Committee, issue regulations governing the use, operation, and oversight of any shared database that ensure, at a minimum, the following:

- The system integrity of a shared gang database.
- Shared gang databases shall be used and operated in compliance with applicable state and federal regulations, statutes, and guidelines.
- All law enforcement agency and criminal justice agency personnel who access a shared gang database shall undergo comprehensive and standardized training on the use of shared gang databases and related policies and procedures.
- Proper criteria are established for supervisory reviews of all databases and regular reviews of records entered into a shared gang database.
- Reasonable measures shall be taken to locate equipment related to the operation of a shared gang database in a secure area in order to preclude access by unauthorized personnel.
- Law enforcement agencies and criminal justice agencies shall notify DOJ of any missing equipment that could potentially compromise a shared gang database.
- Personnel authorized to access a shared gang database are limited to sworn law enforcement personnel, nonsworn law enforcement support personnel, or noncriminal justice technical or maintenance personnel, including information technology and information security staff and contract employees, who have been subject to character or security clearance and who have received approved training.
- Any records contained in a shared gang database shall not be disclosed for employment or military screening purposes.
- Any records contained in a shared gang database shall not be disclosed for purpose of enforcing federal immigration law, unless required by state or federal statute or regulation.

This bill requires that the regulations issued by DOJ shall, in consultation with the Committee and the California Gang Node Advisory Committee include requirements regarding the following:

- Entering and review of gang designations.
- Criteria for identifying criminal street gang members.
- Implementation of supervisory review procedures and periodic records review by law enforcement agencies and criminal justice agencies, and reporting of the results of those to DOJ.
- Standardize practices to ensure adherence to adult and juvenile notifications requirements.
- Retention periods for entries in a shared gang database.

This bill provides that DOJ shall be responsible for overseeing shared gang database system discipline and conformity with all applicable state and federal regulations, statutes, and guidelines. Further, DOJ may enforce a violation of a state or federal law or regulation with respect to a shared gang database, or a violation of regulation, policy, or procedure established by the DOJ pursuant to the provisions of this bill.

This bill requires DOJ to instruct all agencies that use shared gang databases to review the records of criminal street gang members entered into a shared gang database to ensure the existence of proper support for each criterion for entry in the shared gang database.

This bill requires DOJ to instruct all agencies which use shared gang databases to purge from a shared gang database any record for a criminal street gang member that does not meet criteria for entry.

This bill requires DOJ to conduct, or hire an external entity to conduct, periodic audits of shared gang databases to ensure the accuracy, reliability, and proper use of any shared gang database. DOJ shall post summary results from these audits to its publicly accessible Internet Web site, unless doing so would compromise criminal intelligence information or other information that must be shielded from public release.

This bill requires DOJ to publish and release a public annual report with key shared gang database statistics and summary results from periodic audits conducted by DOJ or an external entity. These annual reports shall invite and assess public comments on the report. Subsequent annual reports shall summarize any public comment DOJ received and any action taken by DOJ in response.

This bill states that the Legislature finds and declares that this bill legitimately imposes a limitation on the public's right of access to the meetings of public bodies, or the writing of public officials, and agencies in order to protect the safety of the public and of individuals engaged in the investigation of criminal gang activity.

This bill defines a "criminal street gang" as a group of three or more persons who have a common identifying sign, symbol, or name, and whose members individually or collectively engage in or have engaged in a pattern of definable criminal activity that creates an atmosphere of fear and intimidation within the community.

This bill defines a "shared gang database" as a database that satisfies all of the following:

- Allows access for any local law enforcement agency.
- Contains personal, identifying information in which a person may be designated as a suspected gang member, associate, or affiliate, or for which entry of a person in the database reflects a designation of that persons as a suspected gang member, associate, or affiliate.
- If federal funding supports an agency for the maintenance, support, or operation of a database, the database is subject to Part 23 of Title 28 of the Code of Federal Regulations.

This bill excludes from the definition of a "shared gang database" as a dispatch operator report, information used for the administration of jail or custodial facilities, criminal investigative reports, probations reports, or information required to be collected from persons required to register as gang members.

COMMENTS

1. Need for This Bill

According to the Author:

CalGang is a shared criminal intelligence system that law enforcement agencies use voluntarily. These law enforcement agencies enter information into the CalGang system regarding suspected gang members, including their names, associated gangs, and the information that led law enforcement officers to suspect they were gang members. Although this system has been helpful to law enforcement agencies, CalGang has not been consistently vetted to ensure the

information inputted is accurate. Further, the inaccurate data within CalGang may violate the privacy rights of individuals whose information appears in CalGang records but who do not actually meet the criteria for inclusion in the system. SB 505 will address these issues by establishing the California Gang Intelligence Executive Steering Committee in the Department of Justice for the purpose of overseeing and administering the CalGang system.

2. History of Shared Gang Databases

In 1987, the Los Angeles County Sheriff's Department developed the Gang Reporting, Evaluation and Tracking System (GREAT), the nation's first gang database. "Before GREAT existed, police departments collected information on gang members in locally maintained files, but could not access information that had been collected by other law enforcement agencies."¹ Using GREAT, local law enforcement could collect, store, centralize, analyze, and disperse information about alleged gang members.

In 1988, the Legislature passed the Street Terrorism Enforcement and Prevention (STEP) Act, asserting California to be "in a state of crisis... caused by violent street gangs whose members threaten, terrorize and commit a multitude of crimes against the peaceful citizens of their neighborhoods." (Pen. Code, § 186.21 (1988).) The STEP Act established the nation's first definitions of "criminal street gang," "pattern of criminal gang activity," and codified penalties for participation in a criminal street gang.

In 1997, less than a decade after the regional GREAT database was first created, the regional GREAT databases were integrated into a new unified statewide database, CalGang, with the goals of making the database easier to use and less expensive to access. CalGang operates pursuant to the 1968 Omnibus Crime Control and Safe Streets Act, which requires that "all criminal intelligence systems ... are utilized in conformance with the privacy and constitutional rights of individuals."

3. CalGang's Application

CalGang is a shared criminal intelligence system that law enforcement agencies use throughout California voluntarily. It is the primary shared gang database law enforcement uses throughout the state, with 92% of law enforcement agencies using its service statewide. As of November 2015, more than 150,000 individuals were registered in CalGang, and the average length of time within the system was 5.5 years. The demographics in terms of ethnicity and age of the 150,000 individuals within the CalGang are as follows: 64.9% Hispanic, 20.5% African-American, 8.2% Caucasian, 3.5% not identified, 2.3% Asian/Pacific Islander, and 0.6% Other; while 1.7% are under the age of 18 years of age, 57.3% are 18-30 years of age, 33.6% are 31-45 years of age, and 7.4% over 45 years of age.²

¹ Stacey Leyton, *The New Blacklists: The Threat to Civil Liberties Posed by Gang Databases* (a chapter in *Crime Control and Social Justice: The Delicate Balance*, edited by Darnell F. Hawkins, Samuel L. Myers Jr. and Randolph N. Stone, Westport, CT, 2003 *The African American Experience*, Greenwood Publishing Group, March 27, 2013)

² Elaine M. Howle, California State Auditor, "The CalGang Criminal Intelligence System: As the Result of Its Weak Oversight Structure, It Contains Questionable Information that May Violate Individuals' Privacy Rights," *California State Auditor*, August 11, 2016, p. 9, accessed April 6, 2017. <https://www.auditor.ca.gov/pdfs/reports/2015-130.pdf>

CalGang allows law enforcement to “collect, store, and share intelligence information about individuals suspected—but not necessarily convicted—of being involved in criminal activity.”³ This system also records documents outside of CalGang entries that include information about suspected gang members and their affiliates, “such as arrest reports, reports of interactions with law enforcements officers in the field, and booking photographs. Using those documents and in-person observation, law enforcement agency staffs... record in CalGang various data points about [gangs, and] gang members, including their names, birth dates, races, genders, known addresses, vehicles, physical descriptions, and personal markings such as tattoos.”⁴

Due to the content of the system, CalGang voluntarily subjects itself of Title 28, Code of Federal Regulations, Part 23—the national standards for protecting and handling criminal intelligence systems. These regulations state that such criminal intelligence entries must be supported by a “reasonable suspicion that an individual or organization is involved in criminal conduct or activity and that the information entered into the system must be relevant to that criminal conduct or activity.”⁵

4. Privacy Rights

The 4th Amendment to the United States Constitution provides that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...” The California Constitution, Article 1, Section 1, states “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.” These constitutional protections must be adhered to throughout the operations of CalGang and shared gang databases throughout the state.

The legal standard of a “reasonable suspicion” was established by *Terry v. Ohio* (1968). This standard falls short of probable cause, which may trigger an arrest. Reasonable suspicion must be grounded in articulable fact that “criminal activity may be afoot,” and must be more than an inarticulate hunch of criminal activity. (*Terry v. Ohio* (1968) 398 U.S. 1, 30; *Beck v. Ohio* (1964) U.S. 89; *Rios v. United States* (1960) 364 U.S. 253; *Henry v. United States* (1959) 361 U.S. 98.)

5. California State Auditor’s Report Finds CalGang Failing to Protect Individual’s Rights to Privacy

A. Structure of CalGang

DOJ funds CalGang, however, DOJ is not statutorily required to oversee the database. This has led the CalGang Executive Board to assume responsibility for administering and overseeing CalGang, while the California Gang Node Advisory Committee provides staff and technical support.⁶

Due to an inadequate leadership structure, the California State Auditor found that CalGang “has failed to comply with requirements designed to protect individual’s rights to privacy.”⁷ Further,

³ *Ibid*, p.12.

⁴ *Ibid*, p. 11.

⁵ *Ibid*, p. 9.

⁶ *Ibid*, p. 23.

⁷ *Ibid*, p. 23.

the CalGang Executive Board has acted “without statutory authority, transparency, or meaningful opportunities for public engagement.”⁸ Specifically, the CalGang Executive Board does not provide notice of their meetings, post agendas and minutes, or accept public testimony.

The leadership structure of CalGang also presents a lack of adequate accountability and oversight. The Executive Board and support Node Committee control the composition of their own members. Thus, no opportunities exist for public input through elections or elected bodies. This has allowed individuals to serve in multiple oversight roles. For example, “in the Sonoma County Sheriff’s Office (Sonoma), the sergeant who serves on the committee also acts as a node administrator and as a CalGang user. In fact, the sergeant stated that he enters approximately 95% of CalGang records for his agency, yet this same sergeant is also responsible for conducting any audits of CalGang records for the region because he is the node administrator.”⁹

B. CalGang Did Not Always Meet Constitutional Requirement of Reasonable Suspicion

Federal and state regulations require that law enforcement agencies analyze legally obtained information to establish a reasonable suspicion of an organization’s criminal activity before establishing such organizations are gang, and subsequently adding those organizations to criminal intelligence databases. The State Auditor found that “an individual’s right to privacy is jeopardized if a law enforcement agency justified collected personal information about that individual by stating that he or she is a gang member when the agency has not yet established that such a gang exists through a documented pattern of criminal activity.”¹⁰ The auditor found many instances in which these requirements were not met, thus violating individual’s constitutional rights. Regulations also require a periodic assessment to determine if gangs entered into CalGang continue to meet the criteria for establishing gangs within the system. The current review process was found unable to “confirm that reasonable suspicion exists for larger gangs, creating the risk that CalGang contains information on individuals who are alleged members of gangs that no longer meet the gang criteria.”¹¹

The State Auditor also found that in many instances, individuals were placed with CalGang with inaccurate or unsupported information. For example, the State Auditor found 42 individuals who were entered in CalGang which were under one year of age at the time of the entry.¹²

Individuals can be entered into CalGang if two of the following criteria are found:

- Subject has admitted to being a gang member.
- Subject has been arrested with known gang members for offenses consistent with gang activity.
- Subject has been identified as a gang member by a reliable informant/source.
- Subject has been identified as a gang member by an untested informant.
- Subject has been seen affiliating with documented gang members.
- Subject has been seen displaying gang symbols and/or hand signs.
- Subject has been seen frequenting gang areas
- Subject has been seen wearing gang dress.

⁸ *Ibid*, p. 23.

⁹ *Ibid*, p. 23.

¹⁰ *Ibid*, p. 28.

¹¹ *Ibid*, p. 31.

¹² *Ibid*, p. 3.

- Subject is known to have gang tattoos.
- In custody Classification interview. (All others require two criteria).¹³

Many of the individual entries in CalGang that claimed to meet two of the above criteria could not be substantiated throughout a variety of counties, a variety of entries, and a variety of criterion. The State Auditor found particular abuse of the criteria of which a “subject has been arrested with known gang members for offenses consistent with gang activity.”¹⁴ With these abuses, the State Auditor found that CalGang attempted to justify an entry with offenses that were beyond the established definition of “offenses consistent with gang activity” within Penal Code §186.22, subsection (e). Exacerbating the abuse of this criterion, the State Auditor found that some individual entries could not be substantiated because in fact no arrest existed. Other common criteria which has been abused were the criteria that the “subject has been seen associating with documented gang members [and] subject has been identified as a gang member by a reliable informant/source.”¹⁵

One example of an inaccurate data entry, according to the State Auditor, is as follows:

For example, Sonoma justified entering a person into CalGang in part because he supposedly admitted to being a gang member during a custody classification interview at the county jail. However, when we obtained a record of this interview, we found that the person said he was not currently a member of the gang to which he was later connected in CalGang. In fact, he specifically requested to not be housed with this gang. The only criterion for this individual’s inclusion in CalGang for which we found support was that he had been seen associating with documented gang members. However, even that circumstance consisted of no more than an officer’s observation that the individual was in the garage of a residence that a documented gang member had left.¹⁶

After five years, each individual entry must be purged from CalGang unless the entry is supported by new criminal activity information. The State Auditor found over 600 individuals with purge dates beyond the 5 year limit, including more than 250 individuals which were scheduled to be purged in more than 100 years into the future.

6. Effect of This Bill

This bill aims to address many of the issues raised by the California State Auditor’s 109 page report regarding CalGang, which have been discussed in detail above. This bill mirrors many of the recommendations of the report, particularly the recommendations to:

- “designate [the Department] of Justice as the state agency responsible for administering and overseeing CalGang or any equivalent statewide shared gang database;

¹³ California Gang Node Advisory Committee, “Policy and Procedures for the CalGang System,” *California Department of Justice, California Node Advisory Committee*, September 27, 2007, p. 7, accessed April 12, 2017. https://oag.ca.gov/sites/all/files/agweb/pdfs/calgang/policy_procedure.pdf

¹⁴ Elaine M. Howle, Cal. State Auditor, “The CalGang Criminal Intelligence System: As the Result of Its Weak Oversight Structure, It Contains Questionable Information that May Violate Individuals’ Privacy Rights,” p. 34.

¹⁵ *Ibid*, p. 35.

¹⁶ *Ibid*, p. 33.

- require that CalGang or any equivalent statewide shared gang database adhere to federal regulations and relevant safeguards from the state guidelines, including supervisory review of database;
- specify that the [Department of] Justice’s oversight responsibilities include developing and implementing standardized periodic training as well as conducting—or hiring an external entity to conduct—periodic audits of CalGang or any equivalent statewide shared gang database.”¹⁷

This bill also specifies the standards to which DOJ, in consultation with the proposed Committee, will regulate the use, operation, and oversight of any CalGang, and any shared database. These regulations will ensure, at a minimum, the following:

- The system integrity of a shared gang database.
- Shared gang databases shall be used and operated in compliance with applicable state and federal regulations, statutes, and guidelines.
- All law enforcement agency and criminal justice agency personnel who access a shared gang database shall undergo comprehensive and standardized training on the use of shared gang databases and related policies and procedures.
- Proper criteria are established for supervisory reviews of all databases and regular reviews of records entered into a shared gang database.
- Reasonable measures shall be taken to locate equipment related to the operation of a shared gang database in a secure area in order to preclude access by unauthorized personnel.
- Law enforcement agencies and criminal justice agencies shall notify the DOJ of any missing equipment that could potentially compromise a shared gang database.
- Personnel authorized to access a shared gang database are limited to sworn law enforcement personnel, nonsworn law enforcement support personnel, or noncriminal justice technical or maintenance personnel, including information technology and information security staff and contract employees, who have been subject to character or security clearance and who have received approved training.
- Any records contained in a shared gang database shall not be disclosed for employment or military screening purposes.
- Any records contained in a shared gang database shall not be disclosed for purpose of enforcing federal immigration law, unless required by state or federal statute or regulation.

This bill, if DOJ receives federal funding for CalGang, will codify CalGang’s subjection to Part 23 of Title 28 of the Code of Federal Regulations, which was previously adhered to by the CalGang Executive Board voluntarily.

7. Committee Make Up

Currently, the make up of the Committee includes five members from law enforcement, two members appointed from the Legislature, one member appointed from the Administration, and one member from DOJ. The specific members of the committee are as follows:

- The Attorney General or his or her designee.
- A representative appointed by the California Police Chiefs Association.

¹⁷ *Ibid*, p. 55.

- A representative appointed by the California State Sheriff's Association.
- A representative appointed by the California District Attorneys Association.
- A representative appointed by the CalGang Node Advisory Committee.
- A representative appointed by the California Gang Investigators Association.
- A representative appointed by the Speaker of the Assembly from an organization that specializes in privacy rights.
- A representative appointed by the Senate Committee on Rules from an organization that specializes in gang intervention and prevention.
- A representative appointed by the Governor with expertise in management and operations of database systems.

The Legislature may wish to consider if the composition of the Committee should include at least one member from the criminal defense bar.

8. Argument in Support

The California Police Chiefs Association sponsors this bill stating:

On August 11, 2016, the California State Auditor released a report entitled *The CalGang Criminal Intelligence System...* among a myriad of policy recommendations aimed at increasing transparency and system integrity, the report recommends that the legislature designate the DOJ as the state agency responsible for administering and overseeing CalGang or any equivalent statewide shared gang database. SB 505 codifies this recommendation, along with a number of other recommendations, and in doing so increases the oversight and accountability of the shared data system without compromising the value of the intelligence system. Additionally, SB 505 will strengthen the integrity of the CalGang system by ensuring that all personnel who access the system are properly trained and follow regulations promulgated by the DOJ.

9. Author's Amendment

This bill will be amended to:

- (1) Revise the definition of "criminal street gang" in §14320, subdivision (a)(3) to match the existing definition of "criminal street gang" in Penal Code §186.22, subdivision (f).

– END –