Everything You Need to Know about SB 1421 and AB 748

Thursday, October 17, 2019 General Session; 1:00 – 2:30 p.m.

Howard Jordan, Consultant, Management Strategies Group
Steven Shaw, Partner, Sloan Sakai Yeung & Wong LLP
Walter Tibbet, Consultant, Management Strategies Group

Notes:_____

EVERYTHING YOU NEED TO KNOW ABOUT SB 1421 AND AB 748

Prepared By:

Steven P. Shaw, Sloan Sakai Yeung & Wong LLP
Howard Jordan, Jordan Consulting
Walter Tibbet, Management Strategies Group
Jim Leal, Management Strategies Group

Effective January 1, 2019, a new California law dramatically altered the ability of the public (and the press) to obtain previously highly confidential police personnel records. Senate Bill 1421 amended Penal Code section 832.7 to broadly allow the release of records relating to officer use-of-force incidents, sexual assault and acts of dishonesty. Previously, such records were only available through a *Pitchess* motion and private review by a judge or arbitrator. Recently, cities, counties and state agencies have been inundated with SB 1421 Public Records Act requests. To complicate matters, there are significant disagreements between unions, public agencies and other affected parties concerning the scope of what is covered and whether the law applies to records pre-dating the statute.

In addition, another bill, Assembly Bill 748, went into effect on July 1, 2019. As with SB 1421, AB 748 contains new disclosure provisions, broadly allowing audio and video recordings of "critical incidents" to be released to the public.

This paper is intended to inform readers about the new laws, what they cover, how to respond to California Public Records Act requests for disclosable records, and how to deal with competing viewpoints regarding interpretation of the statutes.

1. Prior Law – *Pitchess* and Confidentiality

For more than 40 years, peace officer personnel records have been classified as confidential under the California Penal Code and associated statutory schemes. Following the seminal California Supreme Court decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, which held that a criminal defendant could discover information regarding a peace officer's personnel file upon an adequate showing, the Legislature enacted a statutory rubric under which a party to litigation must file a written motion and establish "good cause" for the discovery of otherwise confidential peace officer personnel records (otherwise known as a "*Pitchess* motion"). If a court finds good cause, it will conduct an *in camera* inspection of the requested records and disclose any relevant information to the requesting party.

Importantly, until the recent passage of SB 1421 and AB 748, the *Pitchess* scheme was generally the exclusive means by which a party could obtain access to peace officer personnel records. Notably, under Penal Code section 832.8, "personnel records" is given an expansive interpretation and includes files containing records relating to any of the following: "[p]ersonal

data, including marital status, family members, educational and employment history, home addresses or similar information," "[m]edical history," "[e]lection of employee benefits," "[e]mployee advancement, appraisal or discipline," "[c]omplaints, or investigations of complaints" regarding events in which an officer participated or performance of duties, and "[a]ny other information the disclosure of which would constitute an unwarranted invasion of personal privacy." (Penal Code § 832(a).)

Because the categories of information above are so broad, peace officers have possessed strong privacy rights in nearly every facet of their personnel files, which, until now, could only be intruded upon through a showing of good cause and relevance for specific information necessary to preserve a litigant's rights in a civil or criminal proceeding (including, for instance, where so-called "*Brady*" information existed implicating an officer's truthfulness). Under Evidence Code section 1043, a party to an action had to file a *Pitchess* motion to provide officers with notification that their confidential personnel records were being sought and to enable them to oppose the disclosure of such information. (Evid. Code § 1043(a); *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419.) Absent compliance with this motion procedure and a resulting court order, an agency was not permitted to produce such documents. (*See*, *e.g.*, *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1423-1424 ["It has repeatedly been held that Evidence Code sections 1043 *et seq*. constitute the exclusive means by which a litigant in a civil action may obtain discovery of records governed by those statutes."].)

In the current social and political environment, including a number of high-profile use-of-force and officer-involved shooting incidents, the protections and confidentiality surrounding peace officer personnel records have faced increasing scrutiny, with many advocates pushing to obtain access to complaints and investigative documents that may provide objective details as to these incidents. SB 1421 was introduced by State Senator Nancy Skinner, and sponsored by advocacy groups such as the ACLU of California, Anti-Police Terror Project, Black Lives Matter, California Faculty Association, California News Publishers Association and Youth Justice Coalition.

According to the proponents of the new legislation, SB 1421 was intended to "lift the veil of secrecy," and provide transparency and accountability with regard to law enforcement. Regarding its purpose, the bill states, in part, as follows:

> Section 1. The Legislature finds and declares all of the following:
>
> (a) Peace officers help to provide one of our state's most fundamental government services. To empower peace officers to fulfill their mission, the people of California vest them with extraordinary authority – the powers to detain, search, arrest, and use deadly force. Our society depends on peace officers' faithful exercise of that authority. Misuse of that authority can lead to grave constitutional violations, harms to liberty and the inherent sanctity of human life, as well as significant public unrest.
>
> (b) The public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force. Concealing crucial public safety matters such as officer violations of civilians' rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety.

Notwithstanding the rationale behind this legislation – regardless of whether one agrees or disagrees with the changes – there are significant issues with its application and enforcement, including vague and undefined terms, timelines that may be unrealistic and inconsistent, and the issue of whether or not the new law should be applied "retroactively," such as to require disclosure of records already in existence that were previously protected by rights of privacy and discoverable only pursuant to motion.

Effective January 1, 2019 and July 1, 2019, respectively, SB 1421 and AB 748 substantially changed the law with regard to the confidentiality of peace officer personnel records.[1] As discussed below, these statutes mandate that certain types of personnel records and files previously disclosable only pursuant to a court order, must be released subject to a routine request under the California Public Records Act. For readers who may not be entirely familiar, the Public Records Act is a law passed by the California State Legislature in 1968, requiring inspection or disclosure of governmental records to the public upon request, unless exempted by

[1] It bears noting that Penal Code section 832.7 applies only to the records of peace officers as defined in Penal Code section 830, *et seq*., and not to civilian or non-sworn employees.

law. The law is similar to the federal Freedom of Information Act enacted by the United States Congress in 1966.

2. Senate Bill 1421

SB 1421 amended Government Code section 832.7 to generally require the disclosure of records and information under the California Public Records Act (Government Code section 6250, *et seq*.) concerning the following types of incidents and investigations:

- Records relating to the report, investigation or findings of an incident involving the discharge of a firearm at a person by a peace officer or a custodial officer.

- Records relating to the report, investigation or findings of an incident in which the use of force by a peace officer or a custodial officer against a person results in death or great bodily injury.

- Records 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. "Sexual assault" under Section 832.7 includes 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 any other official favor, or under the color of authority. For purposes of this definition, the propositioning for or commission of any sexual act while on duty is considered a sexual assault.

- Records relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency 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 of evidence or falsifying or concealing of evidence.

(Penal Code 832.7(b).)

As indicated above, most of the documents under these categories would have previously fallen within the definition of peace officer personnel records under Penal Code section 832.8, and therefore, been protected from a Public Records Act disclosure by the *Pitchess* statutory scheme. However, the amended Penal Code section 832.7 provides that, where applicable, records to be released shall include:

> [A]ll 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(b)(2).)

In essence, the statute requires the full universe of investigation and disciplinary documents to be produced in response to a Public Records Act request for records falling within the four enumerated categories (i.e., discharge of a firearm at a person, use of force resulting in death or great bodily injury, an incident involving a "sustained" finding of sexual assault by an officer against a member of the public, and an incident involving a "sustained" finding of dishonesty).

Notably, the statute does *not* provide for the release of separate and prior investigations involving unrelated incidents, unless such records are "independently subject to disclosure" pursuant to the categories enumerated in the statute. (Penal Code § 832.7(b)(3).) Where this provision might come into play is an instance in which an officer is subjected to "progressive discipline" after misconduct stemming from an occurrence of one of the four types of incidents identified in the statute, but who has previously been disciplined for misconduct of a different variety. In such instances, a law enforcement agency might reference and attach the *prior* discipline to the discipline stemming from the current violation; however, if the prior discipline does not separately fall within the four categories in the new section 832.7, such documents would not be subject to release (and therefore should be redacted if the remainder of the file is disclosed in response to a Public Records Act request).

Another exception to disclosure under the amended statute relates to incidents or investigations involving multiple officers. The new section 832.7(b)(4) provides that, in such

situations, "information about allegations of misconduct by, or the analysis or disposition of an investigation of, an officer shall not be released pursuant to subparagraph (B) or (C) of paragraph 1, unless it relates to a sustained finding against that officer." (Gov. Code § 832.7(b)(4).) In other words, where there is an investigation of sexual assault by a peace officer against a member of the public, or of dishonesty by a peace officer, allegations or findings against *another* peace officer in the same investigation which do not relate to those categories is not disclosable. Nevertheless, the statute clarifies that, "factual information about that action of an officer during an incident, or the statements of an officer about an incident, shall be released if they are relevant to a sustained finding against another officer" under subparagraph (B) or (C). (*Id*.) Thus, while allegations or findings against a separate officer are not disclosable, purely factual information or statements relevant to the subject officer would be disclosable.

Significantly, the amended section 832.7 allows – and seemingly requires - law enforcement agencies to redact records it produces under the Public Records Act, under specified circumstances. These circumstances include: (a) to remove personal data or information, including home addresses, telephone numbers and the identities of family members; (b) to preserve the anonymity of complainants and witnesses; (c) to protect confidential medical, financial or other information protected by federal law or which would cause "an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct and serious use of force"; and (d) where there "is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer, custodial officer, or another person." (Penal Code § 832.7(b)(5).)

Additionally, the statute includes a "catch-all" provision, stating that, "an agency *may* redact a record disclosed pursuant to this section, including personal identifying information, where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information." (Penal Code § 832.7(6) [emphasis added].) As discussed further below, this provision is quite vague and appears particularly susceptible to subjective interpretation.

While we will not get into all of the details and timelines here, the statute permits agencies to temporarily withhold records of an incident involving the discharge of a firearm or use of force that is the subject of an active criminal or administrative investigation, and provides a litany of deadlines and requirements in such cases depending on the nature of the ongoing proceedings. (Penal Code § 832.7(b)(7).) It is important that agencies be aware of these provisions and review section 832.7(b)(7) carefully if one of these incidents is being actively investigated or prosecuted, before committing to produce any documents pursuant to a Public Records Act request.

Finally, the statute provides that, "[t]his section does not supersede or affect the criminal discovery process outlined [in relevant code sections] … or the admissibility of personnel records pursuant to subdivision (a), which codifies the court decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531." This provision is a reference to section 832.7(a), which reaffirms that for personnel records *not* falling within the four enumerated categories for which the new statute allows records to be disclosed in response to a Public Records Act request, the remainder of peace officer personnel records remain "confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to sections 1043 and 1046 of the Evidence Code." (Penal Code § 832.7(a).) Accordingly, the new section 832.7 is not intended to affect the previous statutory scheme for peace officer personnel records except for those records falling within the four categories of incidents identified. Also, as before, the statute clarifies that the confidentiality of such records does not apply to investigations of the conduct of police officers conducted by a grand jury, District Attorney's office or the Attorney General's office.

3. Assembly Bill 748

AB 748, which is seen as something of a companion statute to SB 1421, requires law enforcement agencies to produce, in response to Public Records Act requests, video and audio recordings of "critical incidents," which are defined as incidents 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. (Gov. Code § 6254(f)(4).)

The legislative preamble notes that, while existing Public Records Act laws required that public records be made available to the public for inspection, records of investigations conducted by state or local policies agencies were expressly exempt from such requirements. (See https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB748 [Legislative Counsel's Digest].) Existing law also required specified information regarding the investigation of crimes to be disclosed to the public unless disclosure would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation. (*Id*.) Such information generally included details regarding arrestees as well as typical information that would be found in a police blotter, such as the date and time of an incident, a narrative summary, a case number and the most serious arrest charge.

The Legislative Counsel's Digest concerning AB 748 provides that the statute was intended to modify the Public Records Act to "allow a video or audio recording that relates to a critical incident … to be withheld for *45 calendar days* if disclosure would *substantially interfer*e with an active investigation, subject to extensions, as specified." (*Id*. [emphasis added].) The Digest further indicates that the bill would allow the recording to be withheld if the public interest in doing so "*clearly outweighs* the public interest in disclosure because the release of the recording would … violate the reasonable expectation of privacy of a subject depicted in the recording, in which case the bill would allow the recording to be redacted to protect that interest." (*Id*. [emphasis added].) Accordingly, even where the interest in withholding a recording of a critical incident otherwise "clearly outweighs" the public interest, it still must be produced under the new law, with appropriate redactions.

One of the biggest imports of this new statute, which went into effect on July 1, 2019, is that the public will now have greater rights to obtain access to video footage from body worn cameras as well as other audio and video recordings obtained by any law enforcement agency or prosecutor's offices. Under AB 748, a public agency may delay disclosure for between 45 days and one year during an *active* criminal or administrative investigation if disclosure will "substantially interfere" with the investigation, including endangering a witness' or confidential source's safety. (Gov. Code § 6254(f)(4).) However, after one year, the agency may only continue to withhold the recording where it demonstrates, by clear and convincing evidence, the disclosure would still substantially interfere with an ongoing investigation. (*Id*.) Under the

statute, the public agency must also continually reassess the withholding of any recordings and notify the Public Records Act requester, in writing, every 30 days. (*Id.*)

Once the specific grounds for withholding the recording of the critical incident are resolved, the recording must be disclosed, subject to the potential for redactions where legitimate privacy interests are implicated.

4. Potential Pitfalls and Ambiguities in SB 1421

The implementation of these new statutes, as well as their application and enforcement has thus far resulted in a myriad of actual and potential challenges stemming from issues surrounding the legislation. In particular, with regard to SB 1421, these issues include vague and undefined terms, timelines that may be difficult to abide by and may be internally inconsistent, and confusion over whether or not the statute was intended to apply "retroactively" (i.e., whether it requires disclosure of records in existence prior to January 1, 2019).[2]

a. Vague or Non-Existent Definitions

One of the foremost issues with SB 1421 is that various terms embedded throughout the statute are either not defined or may be subject to differing interpretations. For example, section 832.7(b)(1)(C) mandates that records relating to incidents involving a "sustained" finding of "dishonesty" must be disclosed where the dishonesty by a peace officer is "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." (Gov. Code § 832.7(b)(1)(C).)

Although this section provides the above specific examples of "dishonesty," the definition is extremely broad and does not delineate circumstances beyond relatively obvious conduct that falls within these categories. For example, what about an instance where an officer is investigated and there is a sustained finding for failing to report certain information that he or she had a duty to report? Depending on the specific facts, such conduct could potentially be

[2] Insofar as AB 748 was more recently enacted into law, its ambiguities are still being discovered; however, as with SB 1421, it is likely that AB 748 will see its share of legal challenges.

encompassed within the definition of "dishonesty," but it may not always be the case in every circumstance. Similarly, the statute references sustained findings of dishonesty "relating to … a crime" or "relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer." (*Id*.) Although we are dealing with hypotheticals, it is not difficult to envision a scenario where there is a sustained finding of dishonesty, but the incident does not relate to criminal activity, but rather an internal matter within the agency, such as falsifying a time sheet, failing to report equipment damage or providing a false/misleading statement to a supervisor. While it seems likely that most dishonesty findings would still fall within the remainder of the category, i.e., "related to the reporting of, or investigation of misconduct by" a peace officer, terms such as "false statements" or "destruction … of evidence" are inherently subjective and do not automatically equate to dishonesty where an officer did not *intend* to make false statements or to remove evidence that perhaps the officer was not aware at the time needed to be maintained. Because of the latent vagueness in the statute, there can be substantive disagreements regarding when a finding amounts to dishonesty for purposes of the statute as opposed to more benign misconduct.

> ***Practice Tip***: These types of ambiguities existed even before these new statutes and could affect what level of discipline was warranted in a particular instance, insofar as "dishonesty" is generally seen as a terminable offense in law enforcement. However, given the introduction of SB 1421, Internal Affairs departments must take more care in crafting their decisions to alleviate these types of potential issues that may affect whether the agency ultimately has to make the findings (and reports) available publicly.

Additionally, while the term "sustained" *is* defined in section 832.8, the definition is not necessarily clear. (Gov. Code § 832.8(b).) According to the statute, "sustained" means "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 Sections 3304 and 3304.5 of the Government Code, that the actions of the peace officer or custodial officer were found to violate law or department policy." (*Id*.) This definition is critical as it essentially triggers when a matter is sufficiently "closed" such that records relating to the investigation or discipline in sexual assault or dishonesty cases must be released under the Public Records Act. (*Id*.; see also Gov. Code § 832.7(b)(1)(B)-(C).)

The term "opportunity for an administrative appeal" may be a potential source of dispute as is the one-year deadline for completing an investigation and issuing a notice of intent to discipline contained in section 3304. Should an agency fail to complete its investigation and issue its disciplinary notice within the one-year statutory time period, the discipline may be voided and it is arguable that there would be no "sustained" violation at that juncture even where there is no real dispute that a police officer committed an act of dishonesty or engaged in sexual assault within the meaning of section 832.7(b)(1)(B). In such cases, a Public Records Act requester may demand the records while the officer and/or department may contend that the finding was not "sustained" within the meaning of section 832.8.

Notably, there are also other possible controversies regarding the term "sustained." Often, a law enforcement agency accepts a peace officer's voluntary resignation where there are pending charges of dishonesty or other serious allegations currently under investigation. In other cases, an officer may resign in lieu of termination. If the investigation is concluded and results in sustained findings before the officer's resignation, it seems likely a court would determine such findings to be sufficiently "final" under section 832.8, such as to warrant disclosure. But, if the investigation is not completed, there may be a strong argument that the records are not disclosable even where there is near-certainty that the allegations would have been sustained. Other problems may arise where an officer is *charged* with dishonesty, but the actual findings come short of characterizing the misconduct as such (see examples above involving unintentional "false statements" or "destruction" of evidence).

While there are not necessarily universal answers to each of these hypotheticals, agencies must be aware that how sustained findings are ultimately categorized is significant insofar as it may determine whether or not such records are disclosable under a Public Records Act request or subject only to disclosure through the *Pitchess* process.

> ***Practice Tip***: More than ever, it will be important for law enforcement agencies to adhere to the one-year statute of limitations in Government Code section 3304 for completing investigations and issuing a notice of proposed disciplinary action. Not only do departments run the risk of potential discipline being voided, but now also face the possibility of disputes regarding whether records shall become public when an investigation is halted prior to its normal conclusion for whatever reason, including an officer's resignation.

The above examples are just some of uncertainties within the statute that are likely to be answered more concretely as cases involving the interpretation and application of this statute continue over the next several years.

b. Timing

As discussed further below, the Public Records Act requires that responsive records be produced "promptly." (Gov. Code § 6253.) An agency normally has 10 days from receipt of a request to determine whether the request seeks copies of disclosable public records in the agency's possession and to notify the requester accordingly. In "unusual circumstances" (discussed in Section 5, *infra*), this time period may be extended by an additional 14 days, where there is an extenuating need for more time to search for and collect records. Importantly, the notification to the requester does not need to include the actual records, but must indicate whether the agency has records to produce, whether any exemptions (see Gov. Code § 6254) apply and should provide a time estimate for the production.

Notwithstanding the requirements of the Public Records Act, SB 1421 provides additional timelines for the disclosure of records in various circumstances for records disclosable under the "discharge of a firearm" and "use of force" provisions. The additional time provisions apply only when there is an active criminal or administrative investigation or an active criminal prosecution. This additional time may be anywhere from an additional 60 days to additional 18 months depending on the specific facts and nature of the ongoing proceedings; however, once the proceedings are completed, records subject to Public Records Act disclosure must be produced "promptly." (See Gov. Code § 832.7(b)(7); Gov. Code § 6253(b).)

c. "Retroactivity"

Another major source of contention – the biggest so far – between proponents of the new law and some police departments and employee organizations is whether the statute was designed to apply "retroactively" to previously-existing records and investigations created prior to January 1, 2019, when SB 1421 took effect. As discussed at the outset, peace officers in California have long possessed privacy rights in their personnel records, which could generally be disclosed only through the *Pitchess* process and a court order. Even then, the records were

subject to *in camera* review in a court's chambers and only documents that were particularly relevant to the issues immediately before the court would be released.

The new legislation does not directly speak to whether it was intended to be applied on a "going-forward" basis only or whether it was meant to provide for the public release of records that were previously subject to *Pitchess*. While this issue has been a frequent battle over the past several months since the law first went into effect, courts so far have consistently taken the latter approach, meaning that *all* records falling within the categories enumerated in the statute have been treated as disclosable pursuant to a Public Records Act request regardless of when they came into existence. This issue is discussed in greater detail in Section 6, *infra*.

5. Responding to Public Records Act Requests

As mentioned above, under the Public Records Act, an agency generally has 10 days from receipt of a request to determine whether the request seeks copies of disclosable records in the agency's possession and to notify the requester of the determination and the reasons therefor. (Gov. Code § 6253(c).) In "unusual circumstances," the agency may extend this deadline by up to 14 days by providing written notice to the requesting party as to the reasons for the extension. (*Id*.) "Unusual circumstances" includes the following:

- The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.

- The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records demanded in a single request.

- The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

- The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

Although the Public Records Act does not set a specific deadline by which the records must actually be disclosed, it requires public agencies to make disclosable records available "promptly" upon payment of fees covering direct costs of duplication, or a statutory fee, if applicable. (Gov. Code § 6253(b).) The agency must also provide a direct copy of such records

unless "impracticable" to do so. (*Id*.) A reasonable time for responding to the request may depend, in part, upon how voluminous the requested records are, how long of a time period the records encompass and where the records may be stored (including the possibility that they may be stored off-site or in archives).

With regard to fees for copying, a local agency may require payment in advance, before providing the requested copies of documents; however, no payment can be required merely to look at a record where the requester does not seek copies. (*Id*.) Direct costs of duplication include the expense of running the copy machine and perhaps the expense of the employee operating it; however, it does not include related tasks associated with the retrieval, inspection and handling of the file from which the copy is extracted. (*North County Parents Organization v. Dept. of Education* (1994) 23 Cal.App.4th 144, 148.)[3] In other words, the agency cannot charge for hours of staff time that may be expended performing the search and review process. That said, where a particular request requires the production of electronic records that are otherwise produced only at regularly scheduled intervals, or production of the record would require data compilation, extraction, or programming, the agency can shift the burden of the costs onto the requester. (Gov. Code § 6253.9.) In such cases, the agency should usually insist that the fees are paid in advance given that they could be substantial. (See FN 1, *supra*, *The People's Business: A Guide to the California Public Records Act*," League of Cities, at p. 26.)

Notably, there is currently a case on review at the California Supreme Court – *National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward* – which will decide the issue of whether an agency may charge fees for the time to redact audio and video files. (See *National Lawyers Guild v. City of Hayward* (2018) 431 P.3d 1151 [granting review].) The California Court of Appeal ruled in favor of the city in allowing the collection of fees for time spent redacting body-worn camera footage. Numerous media organizations signed onto an *amicus* brief aimed at overturning the appellate decision, claiming that permitting agencies to collect "thousands of dollars" for redacting videos "threatens all electronic records, as the redaction process can apply not only to body-worn camera footage, but also to, for example, PDF

[3] For a terrific overview of all aspects of the CPRA, see "*The People's Business: A Guide to the California Public Records Act*," League of Cities, Revised April 2017: https://www.cacities.org/Resources/Open-Government/THE-PEOPLE%E2%80%99S-BUSINESS-A-Guide-to-the-California-Pu.aspx.

documents, audio files, or any other electronic records held by a government agency."[4] The California Supreme Court's decision will likely have a significant effect on the process for redacting and producing documents under SB 1421, and particularly, AB 748.

> ***Practice Tip***: Depending on the volume of records, scope of necessary redactions, and whether audio/video files are involved, there may be significant staff costs and time expended. Public agencies must be realistic and cannot automatically respond that a request will take "one year" or a similarly long period, but must understand and strive to accurately estimate the actual length of time needed to produce the records. Agencies should also be realistic as to potential costs and fees for the records, if applicable. Costs associated with copying, redactions and/or other recoverable expenses may conceivably be split between multiple requestors under certain circumstances.

6. Court Challenges

Since SB 1421 went into effect on January 1, 2019, there have already been a number of legal challenges to the statute. One of the earliest and most significant challenges involves whether or not the new statute applied to peace officer personnel records that were already in existence prior to January 1, 2019.

Nothing in SB 1421, or in the amended sections of the Penal Code, specifies whether it was intended to apply to records already in existence as of the statute took effect. Many police unions took the position that the law should only apply to new personnel records on a going-forward basis, particularly in light of the strict confidentiality and application of the *Pitchess* process that law enforcement officers have enjoyed in these records over the past several decades. Fundamentally, according to the challenging parties, the application of SB 1421 on a "retroactive" basis would take away privacy rights that the Legislature had already carefully bestowed upon such officers in their already-existing records, regardless of the Legislature's ability to modify such protections to personnel records created in the future.

In the first ruling on this issue, Judge Charles Treat on the Contra Costa County Superior Court issued a 32-page opinion in which it rejected petitions filed by six separate police unions seeking to limit SB 1421 to records created after January 1, 2019. The court reasoned that the dates of the underlying conduct at issue and the law enforcement agency's resulting investigation

[4] https://www.rcfp.org/wp-content/uploads/2019/05/2019-05-31-NLG-v-Hayward-CA-Supreme-Court.pdf (p. 3.)

were not relevant to the law's application on a prospective basis, stating that, "A law is not retroactive merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment." With respect to the unions' argument that the new law altered liability for acts occurring before enactment, the court ruled that SB 1421 did not change the legal consequences for the pre-2019 conduct of police officers nor violate any vested rights of privacy. The court found that the only change the new statute mandated was who could obtain access records, not the manner in which police misconduct is investigated, adjudicated or criminally prosecuted.

While recognizing that SB 1421 dramatically altered the legal landscape concerning the disclosure of peace officer personnel records, the court found that the Legislature's intent was clear: "Concealing crucial public safety matters such as officer violations of civilians' civil rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety." The court reasoned that it was inconceivable that the Legislature intended to require release of records created only after January 1, 2019. While the court denied the unions' application for a preliminary injunction to prevent the release of pre-2019 records, it stayed the ruling to allow the unions to take up the matter to the court of appeal. Following the Contra Costa decision, in a span of a few months, judges on several other trial courts (including San Francisco, Los Angeles, San Diego) reached similar conclusions, finding SB 1421 to apply "retroactively" to records in existence prior to January 1, 2019. While most of these suits sought to block the disclosure of pre-2019 records, one suit by the Downey Police Officers' Association sought permission to destroy such records.

However, one court, the Ventura County Superior Court, which was the second court to issue a ruling on the retroactivity question, held in favor of the Ventura County Deputy Sheriff's Association, issuing a preliminary injunction preventing the County from releasing records of pre-2019 incidents. That said, the court did not rule on the merits of the issue, but blocked the release of such records pending a ruling from a higher court.

On March 29, 2019, the first Court of Appeal decision was published concerning SB 1421, resulting from an appeal of the Contra Costa County opinion issued by Judge Treat.

(*Walnut Creek Police Officers' Association v. City of Walnut Creek* (2019) 33 Cal.App.5th 940.) As they had argued in the trial court, the six police unions claimed that the retroactive application of the new law to pre-2019 was improper. Unlike the 32-page decision authored by the trial court, the First District Court of Appeal issued a two-page opinion finding the unions' argument to be "without merit." The court stated, "[a]lthough the records may have been created prior to 2019, the event necessary to 'trigger application' of the new law – a request for records maintained by an agency – necessarily occurs after the law's effective date." (*Id.* at 941-42.) Accordingly, the date of the request, rather than the date of the records' creation, is the primary factor under SB 1421.

Although the Contra Costa County case is not currently on appeal, the California Supreme Court summarily denied an appeal in March 2019 of a Los Angeles County Superior Court decision rejecting the Los Angeles Deputy Sheriffs Association's efforts to prevent release of pre-2019 records. The California Supreme Court denied the appeal without comment, and did not rule on the merits insofar as it was not required to accept review of the case. It is expected that this issue will eventually reach the California Supreme Court, but in the meantime, the First District Court of Appeal's decision is binding on all trial courts throughout California, meaning all public agencies are required to fully comply with SB 1421.

While retroactivity is one issue involving SB 1421, there are numerous other challenges that could crop up over the next years involving public records act requests for police records, including what types of documents fall within the enumerated categories in the statute, what types of redactions may be appropriate to avoid unwarranted invasions of privacy, and how long potentially discoverable records must be maintained.

7. Practical Difficulties/Challenges for Public Agencies

The passage of SB 1421 and AB 748 present significant challenges for public agencies. Before SB 1421 went into effect at the beginning of 2019, it is reported that several media outlets throughout the state already had public records requests prepared and ready to distribute to cities, counties and other law enforcement agencies. Here is just a brief snapshot of the issues facing local and state agencies in light of these new laws:

- Dealing with a large volume of requests for records falling within the enumerated categories of SB 1421 by all peace officers in a particular agency

- Complying with the Public Records Act's mandate that the responsive records be produced "promptly," while balancing that requirement with ongoing investigations into use-of-force incidents and the discharge of a firearm

- Allocating staff time searching for, compiling, and redacting electronic/hard copy documents and video footage and audio recordings

- Addressing competing legal positions between unions and employees, media outlets, individual requesters and other stakeholders

- Determining which personnel records and investigative files are disclosable considering the possible ambiguities in the statutes

- Evaluating record retention policies in light of new disclosure requirements

- Absorbing costs associated with time spent reviewing and redacting electronic and hard copy files and potentially video/audio recordings depending on outcome of current litigation before the California Supreme Court

- Handling public relations issues associated with increased spotlight and scrutiny on officer/department misconduct, including the manner in which Internal Affairs investigations are conducted

Undoubtedly, there will be various other issues that creep up with regard to SB 1421 and AB 748. The above is just a sampling of the more obvious challenges that the new legislation presents in both the short and long term.

8. Closing Thoughts and Bottom Line

The amendments to the Penal Code section 832.7, as well as the passage of AB 748, represent a significant change to the landscape of which materials from law enforcement agencies will become publicly available. Police and sheriff's departments (and their parent cities or counties) should assume that anything that gets released under the Public Records Act is likely to get broadly disseminated and shared online through social media and otherwise. Accordingly, agencies need to be well prepared as to how to deal with the myriad of issues discussed above.

Here are some steps public agencies can take now to ready themselves for the challenges and inquiries that lie ahead (or which have already materialized):

- Have a specific team of personnel (both from the law enforcement agency and the wider organization) assigned to handle and respond to Public Records Act requests, including reviewing, compiling and redacting disclosable materials. This team should be trained regarding the specific requirements of SB 1421 and AB 748, including the files and documents required to be produced.[5]

- For any matters under investigation relating to the discharge of a firearm at a person or use-of-force resulting in great bodily injury, maintain a tracking system to ensure that any withholdings of otherwise disclosable files comply with the timelines and requirements of Penal Code section 832.7(b)(7), including a triggering mechanism when the investigation has been concluded so disclosable files may be produced "promptly" in accordance with the Public Records Act.

- Require that costs of copying records be paid in advance by Public Records Act requesters. This may have the ancillary benefit of dissuading requesters from issuing broad requests for all conceivable documents that may be disclosable throughout an agency. Pursuant to Government Code section 6253.9, for records that are otherwise produced only at regularly scheduled intervals, or where production of the record would require data compilation, extraction, or programming, the agency can shift the burden of costs onto the requester for any programming or computer services that may be necessary.

- Because there is a current California Court of Appeal decision allowing public agencies to charge for time spent redacting video/audio recordings (including body worn cameras), public agencies should keep track of staff time spent performing such work. However, the agency should keep in mind that – depending on the outcome of current litigation in the *City of Hayward* matter – such costs may or may not ultimately be recoverable.

- The agency's legal team (or outside counsel) must be aware of current legal requirements and changes as the interpretation of these laws continues to develop. Most notably, the prevailing issue thus far is that of "retroactivity" or whether the new disclosure requirements apply to personnel records and investigation files pre-dating January 1, 2019. The answer thus far has been "yes" in nearly all of the courts that have heard such challenges and the plain language of the statute does not appear to carve out any exemptions for files already in existence.

[5] Because there can be difficulty redacting audio recordings, some agencies are first having recordings transcribed before doing any redactions. Costs of the transcriptions can often be significant.

- The spokesperson or communications team for the agency *and* its law enforcement department should be apprised well in advance of the disclosure of any documents or video/audio files produced in response to SB 1421 or AB 748. Many of these materials are likely to be highly-sensitive and can be spread widely over the Internet and in news articles. Because the information will be public as soon as it is released, the public relations officials should be prepared to respond to inquiries promptly.

- An agency should, to the extent possible, attempt to minimize disputes over records that may be disclosable. In some cases, the agency may need to disclose materials over a union's and/or employee's objections where necessary to comply with the law. However, where the parties can agree on general practices in responding to Public Records Act requests affected by the new legislation, it may help avoid unnecessary disputes.

- For any questionable determinations as to whether materials are required to be disclosed under SB 1421 and/or AB 748, it is important that the agency consult with its legal team. As discussed herein, there are numerous ambiguities that may give rise to different interpretations depending on the precise facts and findings at issue. An agency must keep in mind both the risks of violating the Public Records Act and, at the same time, the risk of violating the peace officer's privacy rights when turning over documents publicly to Public Records Act requesters.

There are surely going to be other important aspects of which to be aware with regard to responding to requests under the new statutes, but these are a sampling of tasks agencies can work on immediately while these areas continue to develop. Each law enforcement agency in California is likely to be impacted in some way by these changes and will almost certainly see the number of Public Records Act requests increase as a result. However, with proper planning and care, agencies can comply with the new legislation and minimize the amount of disruption, legal risks and potentially adverse publicity upon its law enforcement officers and management.