

Everything You Need To Know About SB 1421 and AB 748

Steven P. Shaw, Sloan Sakai Yeung & Wong LLP

Howard Jordan, Jordan Consulting, Inc.

Walter Tibbet, Management Strategies Group

October 17, 2019

Agenda

- Prior Law – *Pitchess* and Confidentiality
- Senate Bill 1421 (amends Gov. Code section 832.7)
- Assembly Bill 748 (amends CA Public Records Act)
- Potential Pitfalls and Ambiguities in SB 1421
- Practical Difficulties for Public Agencies

Effects of SB 1421 and AB 748

- Law enforcement agencies have been inundated with CPRA requests since SB 1421 went into effect
- Many of the terms in SB 1421 are ambiguous or not defined
- Difficulties abound with respect to documents and information that may or may not fall within the ambit of the new section 832.7



***Pitchess* Law and Confidentiality**

Pitchess Law and Confidentiality

- For over 40 years, peace officer personnel records have been classified as confidential under the California Penal Code and related statutory schemes
- *Pitchess v. Superior Court* (1974) 11 Cal.3d 531
- *Pitchess* motions: If a court finds good cause, it will conduct an *in camera* review of the requested records and disclose only what is relevant to the requesting party

Penal Code Section 832.8 Definition of Personnel Records

- Personal data, including marital status
- Family members
- Educational and employment history
- Home addresses or similar information
- Medical history
- Election of employee benefits
- Employee advancement, appraisal or discipline
- Complaints, or investigations of complaints regarding events in which an officer participated or performance of duties
- Any other information the disclosure of which would constitute an unwarranted invasion of privacy

Effect of *Pitchess*

- Broad protections
- Only specific portions deemed relevant disclosed
- Statutes and case law provided that *Pitchess* was the “exclusive means” to obtain such documents

Recent Scrutiny of *Pitchess*

SB 1421 was sponsored by organizations including:

- ACLU of California
- Anti-Police Terror Project
- Black Lives Matter
- California Faculty Association
- California News Publishers Association
- Youth Justice Coalition

Purpose of SB 1421

- “lift the veil of secrecy”
- provide transparency and accountability with regard to law enforcement

***Pitchess* Law and Confidentiality**

- Notwithstanding the rationale behind the legislation, its application and enforcement poses multiple challenges, including:
 - Vague and undefined terms
 - Timelines that may be difficult for public agencies to abide by, and possible inconsistencies when investigations are ongoing
 - Disputes over whether SB 1421 was intended to be “retroactive,” or apply to personnel records already in existence

Senate Bill 1421

SB 1421 Adds Four Categories

- Statute requires disclosure of the full universe of documents within four enumerated categories:
 - Discharge of a firearm at a person
 - Use of force resulting in death or great bodily injury
 - Sustained finding of sexual assault by an officer against a member of the public
 - Sustained finding of dishonesty by an officer

Records to be Released

- All investigative reports, photographic, audio, and video evidence;
- Transcripts or recordings of interviews;
- Autopsy reports;
- All materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer;
- Documents setting forth findings or recommended findings;
- Copies of disciplinary records relating to the incident.

Other Aspects of SB 1421: Not Disclosable

- Unrelated incidents
 - This may come into play where an officer is subject to progressive discipline

- Separate officer
 - Exception: “Factual information” about another officer during an incident or the statements of another officer shall be released if “relevant to a sustained finding” involving an incident subject to disclosure

Other Aspects of SB 1421: Redaction

- Redaction required in certain circumstances:
 - Home addresses, phone numbers and identities of family members
 - Anonymity of complainants and witnesses
 - Confidential medical, financial or other information
 - Significant danger to the physical safety of the peace officer, custodial officer, or another person.

SB 1421: Catch-All Provision

“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].)

- This provision appears vague and appears particularly susceptible to subjective interpretation.

SB 1421: Active Investigation

- Agencies may temporarily withhold records of an incident involving the discharge of a firearm of use of force that is the subject of an active criminal or administrative investigation
 - Various deadlines and requirements apply

KEY PRACTICE POINTERS

Review section 832.7(b)(7) carefully if an incident is being actively investigated or prosecuted before committing to produce any documents under a CPRA request.

SB 1421: When *Pitchess* Still Applies

- In cases not involving one of the four enumerated categories in SB 1421, *Pitchess* otherwise applies as usual.

SB 1421: *Pitchess* Not Applicable

- *Pitchess* does NOT apply to:
 - Investigations of the conduct of police officers conducted by a grand jury, district attorney's offices or the Attorney General's office (Gov. Code section 832.7(a)).

Assembly Bill 748

AB 748

- AB 748 is viewed as a companion statute to SB 1421
- Law enforcement agencies must produce, in response to CPRA requests, video and audio recordings of “critical incidents”
- Definition of “critical incident” – (i) an incident involving the discharge of a firearm at a person; or (ii) an incident in which the use of force results in death or great bodily injury (Gov. Code section 6254(f)(4)(C).)

Prior Law

- Records of investigations conducted by state or local police agencies were expressly exempt from CPRA requirements
- Specified the types of information required to be disclosed to the public regarding the investigation of crimes unless disclosure would endanger the safety of a person involved in the investigation
- Such information typically included details regarding arrestees similar to what would be contained in a police blotter (e.g., date and time of incident, narrative summary, case number and most serious arrest charge)

Purpose of AB 748

- Modify the CPRA to: “allow a video or audio recording that relates to a critical incident ... to be withheld for *45 calendar days* if disclosure would *substantially interfere* with an active investigation, subject to extensions, as specified.”
- Balancing test for withholding documents
 - Notably, even in such cases, the recording must *still be produced* with appropriate redactions.

Practical Implications of AB 748

- Greater rights to obtain access to video footage from body worn cameras and other audio/video from any law enforcement agency or prosecutor's office.
- Delayed disclosure for *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).)
 - Showing required after one year

KEY PRACTICE POINTERS

- Even when there is an ongoing investigation, the public agency must continually reassess the withholding of any records and notify the CPRA requester, in writing, every 30 days
- Once the specific grounds for withholding of the recording are resolved, the recording must be disclosed, subject to potential redactions where privacy concerns are implicated



Potential Pitfalls and Ambiguities in SB 1421

Pitfalls in SB 1421

- There are three overriding pitfalls in SB 1421
 - Vague or Non-Existent Definitions of Key Terms
 - Timing Issues/Inconsistencies
 - “Retroactivity”

Pitfall 1: Vague or Non-Existent Definitions

- Dishonesty
- Sustained
 - Opportunity for an administrative appeal
 - Finality

KEY PRACTICE POINTERS

Internal Affairs departments must take more care in crafting their decisions to alleviate these types of potential issues, which may affect whether the agency ultimately has to make the findings (and reports) available publicly.

Pitfall 2: Timing

KEY PRACTICE POINTERS

- 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 in their response regarding both time and cost.
- Costs associated with copying, redactions and/or other recoverable expenses may conceivably be split between multiple requestors under certain circumstances.

Pitfall 2: Timing

Additional Time to Respond for:

- Discharge of a Firearm
- Use of Force

KEY PRACTICE POINTERS

These longer timelines only apply when there is an active criminal or administrative investigation or an active criminal prosecution. Once the proceedings are completed, records subject to Public Records Act disclosure must be produced “promptly.”

Pitfall 3: Retroactivity

Was SB 1421 designed to apply retroactively?

Pitfall 3: Retroactivity

- Numerous court challenges have been brought by police organizations concerning whether SB 1421 applies to personnel records and files pre-dating January 1, 2019
- Cases have been brought by police unions in the following jurisdictions:
 - Contra Costa County
 - San Francisco
 - Los Angeles
 - San Diego
 - Ventura County
- In March 2019, Court of Appeal in *Walnut Creek Police Officers' Association v. City of Walnut Creek* (2019) 33 Cal.App.5th 940, found that as long as a CPRA request is made after January 1, 2019, records pre-dating the effective date of the law are disclosable.

Summary: Practical Difficulties and Challenges

- Volume of Requests
- Producing records promptly
- Staff time
- Addressing competing legal positions of stakeholders
- Navigating the ambiguities in the statutes
- Record retention policies
- Costs
- Public Relations



Closing Thoughts/Tips

Closing Thoughts/Tips

- What can public agencies do to comply with SB 1421 and AB 748?
 - Maintain specific team of personnel (from agency and law enforcement department) to handle/respond to requests, including review, compiling and redaction of materials
 - For incidents involving discharge of a firearm or use of force under active investigation, keep tracking system with trigger when investigation is concluded
 - Require that costs be paid in advance by requesters; agency may shift burden onto requestors in some situations (e.g., records produced at regularly scheduled intervals or where production requires data compilation, extraction or programming)

Closing Thoughts/Tips (cont'd)

- Because there is litigation pending before CA Supreme Court, public agencies should track staff hours/time spent performing redacting video/audio recordings
- Agency's legal team must be aware of current legal requirements as they continue to develop (most significant issue are court holdings finding SB 1421 applies to disclosable records regardless of date)
- Spokesperson(s) or public relations team should be notified well in advance of production of documents and video/audio; many of these materials will be disseminated broadly by the public/press

Closing Thoughts/Tips (cont'd)

- Law enforcement departments and legal counsel should, to the extent possible, attempt to minimize disputes over disclosable records with employee organizations; where parties can agree on general practices, it may avoid unnecessary disputes
- Be aware of the numerous potential ambiguities and uncertainty in both pieces of legislation; keep in mind risks of violating CPRA as well as violating officer's privacy rights when disclosing records

Questions?



Steve Shaw

Sloan Sakai Yeung &
Wong, LLP

916-258-8809

sshaw@sloansakai.com

Sloan Sakai
ATTORNEYS AT LAW



Howard Jordan

Jordan
Consulting, Inc.

510-995-5800

howard@jordanci.com



Walter Tibbet

Management Strategies
Group

925-989-2829

wtibbet@mgmt.-strategies.com