

Webinars for Cities

August 30, 2024



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CITIES**

Strengthening California Cities
through Advocacy and Education

Essential Hour: Your First Peace Officer Personnel Records Request – *Pitchess* and Beyond

Speakers:

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- 11/15/24 Essential Hour: Code Enforcement

Agenda

- General Overview
- SB 1421 et al.
- *Pitchess* Motions
- *Brady*
- Public Safety Officers Procedural Bill of Rights (POBR)

“Personnel Records” Defined

- Penal Code § 832.8
 - Personal data (e.g., marital status, family members, educational and employment history, home address)
 - Medical history
 - Election of employee benefits
 - Employee advancement, appraisal, discipline
 - Complaints and investigations of complaints
 - Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy

“Personnel Records” Defined

- Does NOT include:
 - Officer's name, employing agencies, dates of employment
 - Salary information
 - Official service photograph
 - Materials related to officer's performance obtained from outside sources, e.g., court opinions or other public records
 - Names of officers in a shooting
 - Report by independent consultant about an officer-involved shooting

SB 1421 et al.

SB 1421, AB 748, SB 16, SB 2

Non-Confidential Personnel Records

- Penal Code § 832.7
 - Discharge of firearm at a person
 - Use of force resulting in death or great bodily injury
 - Unreasonable/excessive force
 - Failure to intervene in unreasonable/excessive force
 - Sexual assault
 - Dishonesty
 - Prejudice/discrimination
 - Unlawful arrest/search
- Accessible via Public Records Act request
- No *Pitchess* motion required

What does “great bodily injury” mean?

- “Great bodily injury” means:
 - Not defined by SB1421, AB748, SB16
 - But see Penal Code § 12022.7:
 - “a significant or substantial physical injury”
 - E.g., anyone who needs to go to the hospital for medical care
 - And consider Gov. Code § 12525.2:
 - “a substantial risk of death, unconsciousness, protracted or obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ”

What do “Sexual Assault” and “Member of the Public” mean?

- “Sexual assault” means:
 - 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 other official favor, or under the color of authority.
 - The propositioning for or commission of any sexual act while on duty.
- “Member of the public” means:
 - Any person not employed by officer’s employing agency
 - Participants in cadet, explorer, other youth program affiliated with agency are considered “members of the public” and not employees.

What does “dishonesty” mean?

- “Dishonesty” means:
 - 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.

What is a “sustained finding”?

- Penal Code § 832.8(b)
 - Final determination that the officer’s actions violated law or department policy following an investigation and opportunity for an administrative appeal pursuant to Gov. Code §§3304-3304.5.

SB 2 Reporting

- Agencies must report to POST within 10 days:
 - Any appointment or separation of a peace officer (includes involuntary termination, resignation, retirement)
 - Any allegation of conduct that could result in decertification
 - Findings by a civilian oversight entity or police chief that officer engaged in conduct that could result in decertification
 - Investigative findings of conduct that could result in decertification
 - Civil judgment or court finding against an officer (includes settlement of civil claim) based on conduct that could result in decertification

What conduct could result in decertification?

- Gov. Code § 1029 - disqualifying factors
- Penal Code § 13510.8 - “serious misconduct”
 - Dishonesty
 - Abuse of power
 - Physical abuse
 - Sexual assault
 - Bias
 - Violations of law
 - Law enforcement gang
 - Failure to cooperate with investigation into officer misconduct
 - Failure to intercede – excessive force

Pitchess Motions

A short history of *Pitchess*

- The seminal 1974 decision in *Pitchess v. Superior Court* (1974) 11 Cal 3d. 531 (*Pitchess*) was the catalyst for the current statutorily mandated discovery process and procedures set forth in the California Penal and Evidence Codes.
- Legislative response
 - Penal Code § 832.5

Requirements under *Pitchess*

- Noticing requirements
 - Evidence Code §1043
 - Cal. Civ. Proc. §1005
 - “No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section, except upon a showing by the moving party of good cause for non-compliance, or upon a waiver of the hearing by the government agency identified as having the records.” (Ev. Code §1043(c).)

Requirements under *Pitchess* (cont.)

- Allegations of excessive force
 - Motion must include a copy of the police report (Ev. Code §§ 1046)
- Service
 - The motion must be served on the agency having custody and control of the records and the officer must be given notice of the motion by his or her employer even if he no longer works for the agency. (*Abatti v. Superior Court* (2003) 112 Cal.App.4th 39.)

Structure of a *Pitchess* hearing

- Threshold showing
 - Arguments made in open court
 - Issue before the court
 - Parties present
- In camera review
 - Arguments made in private
 - Issue before the court
 - Parties present

Threshold – Affidavit requirements: Specific Factual Scenario

- *City of Santa Cruz v. Municipal Court* (1989) 49 Cal. 3d 74
 - the court held that the declaration in support of a motion for peace officer personnel files must demonstrate the relevance of the requested information by providing a "specific factual scenario' establishing a 'plausible factual foundation' for the alleged misconduct in order to establish the requisite 'materiality' of the disclosure to the pending litigation."

Threshold – Affidavit requirements: Plausibility

- *Warrick v. Superior Court* (2005) 35. Cal.4th 1011
 - “[A] showing of good cause requires a defendant seeking Pitchess discovery to establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer’s version of events.”
- *People v. Galan* (2009) 178 Cal.App.4th 6
 - Plausibility” is broadly construed as something that might or could have occurred. “A plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges.”
 - *People v. Hustead* (1999) 74 Cal.App.4th 410

Pitchess Motions under seal

- *Garcia v. Superior Court* (2007) 42 Cal.4th 63
 - Procedure mirrors Ev. Code § 915(b)
 - "in order to protect against revelation of privilege information"
 - Must be above a "naked assertion" that everything contained with the declaration is confidential
 - Court will weigh and "balance an accused interest in protecting privileged information against opposing counsel's right to effectively challenge the discovery motion."

In camera review

- How to prepare
- What to bring
- Ev. Code § 1045(b)
- Ev. Code § 1047
- *People v. Mooc* (2001) 26 Cal.4th 1216
- Protective order (if court determines relevant information is disclosable)
 - Ev. Code §1045(e)

Interplay between *Pitchess* and *Brady*

- Flavors of "materiality"
 - *People v. Gutierrez* (2004) 112 Cal.app.4th 1463
- Protective order (if court determines relevant information is disclosable)
 - Ev. Code §§1045(e)
- Prosecution access?
 - Remember who is your client

Practice notes

- Rapport with custodian of records
- Two step process
- What information is ultimately disclosable and what is not
- Protective order

The *Brady* Rule, Lists, and Alerts

"Materiality"

- *Brady* - evidence must be disclosed by the prosecution to the defense if it would be material to fairness of the trial
- *Pitchess* – defendant need show the information is material "to the subject matter involved in the pending litigation"

Brady and *Pitchess* operate in tandem

- *People v. Gutierrez* (2004) 112 Cal.App.4th 1463 at 1474
 - "[T]he *Pitchess* scheme does not unconstitutionally trump a defendant's right to exculpatory evidence as delineated in *Brady*. Instead, the two schemes operate in tandem...Because *Brady*'s constitutional materiality standard is narrower than the *Pitchess* requirements, any citizen complaint that meets *Brady*'s test of materiality necessary meets the relevance standard for disclosure under *Pitchess*."

Brady Lists and District Attorneys

- Blank requests for "*Brady* list" by DA
 - If under specific areas described in SB 1421, submit a PRA
 - If outside SB 1421, *Pitchess* process
 - Association for Los Angeles Deputy Sheriffs v. Superior Court (2019) 8 Cal. 5th 28
 - "First, the Department's *Brady* list is confidential to the extent it was derived from confidential records. Second, the Department does not violate that confidentiality by sharing with prosecutors the identity of potential witnesses on the *Brady* list."
 - "Because confidential records may contain *Brady* material, construing *Pitchess* statutes to permit *Brady* alerts best 'harmonizes *Brady* and *Pitchess*'"

Public Safety Officers Procedural Bill of Rights (POBR)

Gov. Code §§3300 *et seq.*

Officer's Access to Personnel Records

- Gov Code § 3306.5:
 - Must permit employee, upon their request, to inspect personnel files that are used or have been used to determine that employee's qualifications for employment, promotion, additional compensation, termination, or other disciplinary action.
 - Parameters of inspection:
 - At reasonable times and at reasonable intervals
 - During usual business hours
 - With no loss of compensation to employee
 - Scope of right to review:
 - Current employees only
 - Does not include internal investigative materials that were not used in making personnel determinations, e.g., unsustained allegations
 - Does not include info provided by a former employer (Gov Code § 1031.1)

Adverse Comments

- Gov Code §§ 3305-3306:
 - No comment adverse to a public safety employee's interest may be entered into their personnel file, or any other file used for any personnel purposes by their employer, without the employee having first read and signed the instrument containing the adverse comments
 - 30 days to respond
 - Response must be attached to the adverse comment

What does “adverse comment” mean?

- An observation or remark expressing an opinion or attitude in opposition to one’s interest, i.e., that might negatively impact an officer’s employment
- Cases:
 - *Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal.App.4th 916 (Internal Affairs index cards)
 - *Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378 (supervisory daily logs)

Interrogations

- Gov Code §3303(g):
 - If a tape recording is made of the interrogation of a public safety officer, then the officer “shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time.”
 - The officer “shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential. . .”

Competing Disclosure Obligations for §3303 Interrogations

- *Pasadena POA v. City of Pasadena* (1990) 51 Cal.3d 564
 - No pre-interrogation discovery
 - Officer entitled to access a recording of their prior interrogation before a subsequent interrogation
- *Santa Ana POA v. City of Santa Ana* (2017) 13 Cal.App.5th 317
 - Before a second (or third, etc.) interrogation, must provide a copy of recording of prior interview(s) and other witness statements, investigator notes, reports, complaints
- *Oakland POA v. City of Oakland* (2021) 63 Cal.App.5th 503
 - No disclosure of confidential reports/complaints before supplemental interrogations
 - Discretion to designate/de-designate confidential materials

THANK YOU

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