Senate Bill No. 978

CHAPTER 978

An act to add Title 4.7 (commencing with Section 13650) to Part 4 of the Penal Code, relating to law enforcement.

[Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 978, Bradford. Law enforcement agencies: public records.

Existing law establishes within the Department of Justice the Commission on Peace Officer Standards and Training and requires the commission to adopt rules establishing minimum standards regarding the recruitment and training of peace officers.

Existing law, the California Public Records Act, generally requires each state and local agency to make its public records available for inspection by a member of the public, unless the public record is specifically exempted from disclosure. The act further requires every state and local agency to duplicate disclosable public records, either on paper or in an electronic format, if so requested by a member of the public and he or she has paid certain costs of the duplication.

This bill would, commencing January 1, 2020, require the Commission on Peace Officer Standards and Training and each local law enforcement agency to conspicuously post on their Internet Web sites all current standards, policies, practices, operating procedures, and education and training materials that would otherwise be available to the public if a request was made pursuant to the California Public Records Act. By imposing this requirement on local law enforcement agencies, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:
(a) Law enforcement agencies, including the Commission on Peace Officer Standards and Training and local law enforcement agencies,
standards of physical, mental, and moral fitness for peace officers, develop and implement programs to increase the effectiveness of law enforcement by peace officers, and provide ongoing education and training for peace officers.

(b) Law enforcement agencies have numerous sets of regulations, including, but not limited to, educational materials, manuals, policies, practices, and procedures, that guide employees in their duties. Regulations should be based on best policing policies and practices, current legal standards, and community safety needs.

(c) Currently, across California and the country, many local law enforcement agencies conspicuously post their training, policies, practices, and operating procedures on their Internet Web sites.

(d) Making regulations of law enforcement agencies easily accessible to the public helps educate the public about law enforcement policies, practices, and procedures, increases communication and community trust, and enhances transparency, while saving costs and labor associated with responding to individual requests for this information.

SEC. 2. Title 4.7 (commencing with Section 13650) is added to Part 4 of the Penal Code, to read:

TITLE 4.7. LAW ENFORCEMENT AGENCY REGULATIONS

13650. Commencing January 1, 2020, the Commission on Peace Officer Standards and Training and each local law enforcement agency shall conspicuously post on their Internet Web sites all current standards, policies, practices, operating procedures, and education and training materials that would otherwise be available to the public if a request was made pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code).

SEC. 3. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.
Facial Recognition Technology: Where Will It Take Us?

Kristine Hamann and Rachel Smith

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Technology is expanding, evolving, and improving at an explosive rate. Society, including law enforcement, is struggling to keep pace with these seemingly daily developments. This paper addresses facial recognition technology used by law enforcement to enhance surveillance capabilities and the associated legal issues it raises. Facial recognition technology provides a sophisticated surveillance technique that can be more accurate than the human eye. The use of this technology to enhance public safety will only increase and improve. Nevertheless, the criminal justice system must grapple with the many novel legal issues it poses. The legal landscape is far from settled. This article is not intended to be an in-depth legal analysis; rather, the goal is to provide an overview of the technology and an explanation of the evolving legal issues that law enforcement and the legal community may confront.

How It Works

Generally, facial recognition technology (FRT) creates a “template” of the target’s facial image and compares the template to photographs of preexisting images of a face(s) (known). The known photographs are found in a variety of places, including driver’s license databases, government identification records, mugshots, or social media accounts, such as Facebook.

Facial recognition technology uses a software application to create a template by analyzing images of human faces in order to identify or verify a person’s identity. (Kevin Bonsor & Ryan Johnson, How Facial Recognition Systems Work, How Stuff Works (last visited Nov. 30, 2018).) FRT has the potential to be a useful tool in crime fighting by identifying criminals who are captured on surveillance footage, locating wanted fugitives in a crowd, or spotting terrorists as they enter the country. (Id.) FRT also can be used in other ways, such as to identify problem gamblers in casinos, greet hotel guests, connect people on matchmaking websites, help take attendance in schools, and identify drinkers who are underage (7 Surprising Ways Facial Recognition Is Used, CBS News (last visited Apr. 14, 2018).) FRT has effectively identified individuals in controlled
environments with relatively small populations, for example, where an individual's face is matched to a preexisting image on an internal file. (State v. Alvarez, No. A-5587-13T2, 2015 N.J. Super. LEXIS 1024, at *2 (N.J. Super. Ct. App. Div. May 4, 2015); Lucas D. Introna & Helen Nissenbaum, *Facial Recognition Technology: A Survey of Policy and Implementation Issues*, CTR. FOR CATASTROPHE PREPAREDNESS & RESPONSE, NYU (July 22, 2009).) On the other hand, FRT has not worked as well in more complex situations, such as finding an unknown face on a crowded street. (Id. at 3.) Nevertheless, while not yet being used as the sole basis for an arrest, FRT does aid police investigations and can be used to develop leads. (Alexander J. Martin & Tom Cheshire, *Legal Questions Surround Use of Police Facial Recognition Tech*, SKY NEWS (Aug. 23, 2017).)

Measuring the Face

A template for FRT is created by use of measurements. The face is measured through specific characteristics, such as the distance between the eyes, the width of the nose, and the length of the jaw line. (Bonsor & Johnson, *supra*.) The facial landmarks, known as nodal points (id.), are measured and translated into a template with a unique code. New technologies are emerging that are improving recognition rates, such as 3-D facial recognition and biometric facial recognition that uses the uniqueness of skin texture for more accurate results. (Id.) Once the face in question is analyzed, the software will compare the template of the target face with known images in a database in order to find a possible match. (Id.; Jenni Bergal, *States Use Facial Recognition Technology to Address License Fraud*, GOVERNING MAG. (July 15, 2015).)

Social Media and Technology Companies

Social media and technology companies have developed their own facial recognition software to use for “photo-tagging,” a system where a photograph is automatically associated with a known person. For example, Facebook and Shutterfly rely on FRT to identify individuals in uploaded photographs. (*In re Facebook Biometric Info. Privacy Litig.*, No. 15-cv-03747-JD, 2016 WL 2593853, at *1 (N.D. Cal. May 5, 2016); Norberg v. Shutterfly, Inc., 152 F. Supp. 3d 1103, 1106 (N.D. Ill. 2015).) Their facial recognition algorithm performs well as it is assisted and improved by its own users who tag themselves and fellow users in photos, many of which are taken at different angles and in different lighting. (Naomi Lachance, *Facebook’s Facial Recognition Software Is Different from the FBI’s. Here’s Why*, NPR (May 18, 2016); Yaniv Taigman et al., *DeepFace: Closing the Gap to Human-Level Performance in Face Verification*, FACEBOOK AI RESEARCH (June 24, 2014).)

Technological Limitations
FRT is an evolving scientific and diagnostic tool with enormous potential for law enforcement, but it does have limitations. When these images meet certain professional scientific standards, the accuracy rate when comparing each to one another is high. (See Introna & Nissenbaum, supra, at 3.) However, the accuracy of FRT decreases when there is no standardized photo for comparison or when the comparison comes from a photo from an uncontrolled environment. (Id.) Additionally, FRT works best when the picture is head-on and has no movement. (Lachance, supra. See David Nicklaus, Cops' Start-Up Uses Facial Recognition to Improve Security, St. Louis Post-Dispatch (Mar. 17, 2017).) Because faces change over time, unlike fingerprints or DNA (Richard Raysman & Peter Brown, How Has Facial Recognition Impacted the Law?, N.Y.L.J. (Feb. 9, 2016)), software can trigger incorrect results by changes in hairstyle, facial hair, body weight, and the effects of aging. (Id.) There is also some research indicating that FRT algorithms may not be as accurate in reading the faces of certain demographics, in particular African Americans. (Clare Garvie & Jonathan Frankel, Facial-Recognition Software Might Have a Racial Bias Problem, The Atl. (Apr. 7, 2016).)

Investigative Uses

General Surveillance

FRT has been used for general surveillance, yet, so far its results have been mixed. For example, FRT was used at the 2001 Super Bowl in Tampa, Florida, to screen for potential criminals and terrorists from the event. (Bonsor & Johnson, supra; Raysman & Brown, supra.) Law enforcement was able to identify 19 people with minor criminal records, although it was later admitted that the software only flagged petty criminals and resulted in some false positives. (Id.) More recently, facial recognition was used by Baltimore police to monitor protesters during the unrest and rioting after the death of Freddie Gray, leading to the apprehension and arrest of protesters that had outstanding warrants. (Benjamin Powers, Eyes over Baltimore: How Police Use Military Technology to Secretly Track You, Rolling Stone Mag. (Jan. 6, 2017). See also Kevin Rector & Alison Knezevich, Maryland's Use of Facial Recognition Software Questioned by Researchers, Civil Liberties Advocates, Balt. Sun (Oct. 18, 2016 12:01 AM).)

Targeted Photo Comparisons

Unlike the challenges with using FRT for general surveillance, FRT has been used effectively to identify thousands of suspects relating to identification fraud, with particular success in cases of driver's license fraud. (Bergal, supra.) For example, New York has identified over 10,000 people
with more than one driver's license with the help of FRT. (Id.) Similarly, New Jersey Department of Motor Vehicle officials have referred about 2,500 fraud cases to law enforcement since 2011. (Id.) Additionally, airports are using FRT to assist airlines by having passengers board planes based on photographic images they take instead of boarding passes. These photos are compared to previously stored photographs from passports and visas on file with the U.S. Customs and Border Patrol. (See Adam Vaccaro, At Logan, Your Face Could Be Your Next Boarding Pass, Bos. Globe (May 31, 2017).)

Active Criminal Case Investigations

The software also has been useful in investigations—not for conclusive identification of an individual, but in conjunction with other evidence. FRT has contributed to establishing probable cause for the arrest of suspected activity of assailants in videos of fights posted on YouTube (In re K.M., No. 2721 EDA 2014, 2015 WL 7354644, at *1 (Penn. Sup. Ct. Nov. 20, 2015)), for passport fraud (United States v. Roberts-Rahim, No. 15-CR-243 (DLI), 2015 WL 6438674, at *3 (E.D.N.Y. Oct. 22, 2015)), and in identity theft cases (United States v. Green, No. 08-44, 2011 WL 1877299, at *2 (E.D. Penn. May 16, 2011)). Facial recognition software also was used in an attempt to find the suspects of the Boston Marathon Bombings in 2013, though the use of the software was ultimately unhelpful, due in part to the uncontrolled environment in which the surveillance images were taken. (Brian Ross, Boston Bombing Day 3: Dead-End Rumors Run Wild and a $1B System Fails, ABC News (Apr. 20, 2016); Sean Gallagher, Why Facial Recognition Tech Failed in the Boston Bombing Manhunt, Ars Technica (May 7, 2013).) Recently, the NYPD arrested an individual related to a shooting after taking a surveillance image from a nightclub of the shooter and creating a full 3-D image of him, then running it through a facial recognition software program that revealed 200 likely matches. (Greg B. Smith, Behind the Smoking Guns: Inside the NYPD's 21st Century Arsenal, N.Y. Daily News (Aug. 20, 2017).) Officers then compared the images looking for similar physical characteristics between them, which enabled officers to narrow it down to a single image that was utilized in a photo array that was then shown to witnesses. (Id.)

Trial Evidence

With increasing reliability and use of FRT, at some point soon, prosecutors will seek to introduce the technology into evidence in court, either to establish probable cause or as evidence of an identification. At that time, the scientific reliability of FRT algorithms may have to be established by prosecutors under either the Frye or Daubert standard in court before the evidence is ultimately accepted. (See Daubert v. Merrell Dow Pharm., 509 U.S. 579, 580 (1993).)
Future Use

Progress and improvements in facial recognition are made daily and increased accuracy is foreseeable. (See Smith, supra.) Ultimately, it is expected that law enforcement will seek to use FRT for real-time analysis of faces and immediate identification. For example, it soon may be possible for an officer’s body-worn camera to use FRT to identify a person he or she observes on the street. (See Barak Ariel, Technology in Policing: The Case for Body-Worn Cameras and Digital Evidence, POLICECHIEF; Ava Kofman, Real-Time Face Recognition Threatens to Turn Cops’ Body Cameras into Surveillance Machines, The Intercept (Mar. 22, 2017)). Also, state and local governments are investing tremendous resources and increasingly relying on biometric and pattern recognition technologies to help thwart domestic terrorism and other crime, representing a shift in how such investigations are conducted. (Introna & Nissenbaum, supra, at 47.)

The federal government has invested approximately $1 billion in the FBI’s Next Generation Identification system (NGI) database. (Jose Pagliery, FBI Launches a Face Recognition System, CNN TECH (Sept. 16, 2014).) A component of the database, the Interstate Photo System, incorporates facial recognition and search capabilities into a photo database, consisting of photographs of different sources, including both criminal mugshots and noncriminal sources, such as employment records and background check databases. (Christopher De Lillo, Open Face: Striking the Balance Between Privacy and Security with the FBI’s Next Generation Identification System, 41 J. LEGIS. 264, 265 (2014–15).) However, when it released NGI, the FBI issued a caveat that the system was to be used for investigatory purposes only, and it could not serve as the sole basis for an arrest. (See Pagliery, supra.) Nevertheless, as the technology improves, FRT’s role in law enforcement investigations will undoubtedly continue to grow.

Legal Issues

Fourth Amendment Concerns Generally

The Fourth Amendment prohibits an unlawful search of a place where a person has a reasonable expectation of privacy. In Katz v. United States, the Supreme Court announced a two-part test to determine whether a person has a reasonable expectation of privacy, which assesses (1) whether the person exhibited an actual, subjective expectation of privacy and (2) whether that expectation is one that society recognizes as reasonable. (389 U.S. 347 (1967).) The Katz test provides a framework for analyzing Fourth Amendment issues.
On June 22, 2018, the US Supreme Court decided *Carpenter v. United States*. (138 S. Ct. 2206 (2018).) In *Carpenter*, the Court ruled on whether a person’s expectation of privacy covered the records of historical cell phone data (historical CSLI), which could reveal the person’s physical location or movements. Relying on *Katz*, *Carpenter* held that a person’s Fourth Amendment rights were violated when the government received historical CSLI from cell phone companies without first obtaining a search warrant. (*Id.*)

Before the *Carpenter* opinion, government agencies could obtain historical cell phone location records with only a court order by explaining to a judge that the information was necessary to an investigation and that the information was in the possession of a third party. However, *Carpenter* ruled that the government must be put to a higher standard and must obtain a judicial search warrant based on sworn facts that probable cause exists to search for the requested items. Thus, law enforcement agencies must now seek a search warrant for individual, personal historical CSLI from phone companies in these specific situations: where no exigent circumstances exist and for date ranges of more than six days.

The *Carpenter* decision was quite narrow, so many questions remain regarding how the Court will address the government’s access to other forms of technology that can track an individual’s physical location or movement. The Court, however, clearly outlined that as forms of technology develop and enhance the government’s ability to encroach on private areas, the courts will be required to work to preserve an individual’s privacy from the government intrusion. The *Carpenter* Court has found that an individual has an expectation of privacy in his or her personal information acquired in large quantities over an extended period of time even when possessed by third parties. This ruling will shape how courts view other forms of technology.

**Possible Legal Issues Raised by FRT Specifically**

In light of *Katz* and *Carpenter*, FRT that is used on a limited, short-term basis with strictly public systems should not implicate the Fourth Amendment because an individual’s face is open to the public. (*Katz*, 389 U.S. at 351–52; United States v. Dionisio, 410 U.S. 1, 14 (1973). *See, e.g.*, De Lillo, *supra*, at 282.) Nevertheless, legal arguments against the warrantless use of FRT can be made on a variety of issues, including that the technology can be used to track an individual’s movement over an extended period of time, First Amendment rights may be chilled, and the technology is not available for public use and may implicate the Fourth Amendment.

**Data Aggregation Issues**
When a suspect has been identified and law enforcement wishes to track the suspect’s movement, the use of FRT together with other technologies could also raise a Fourth Amendment issue. (Carpenter, 138 S. Ct. at 2212–21. See United States v. Jones, 564 U.S. 400 (2012) (Sotomayor, J., concurring).) As discussed, in Carpenter, the Court held that the government’s warrantless access to an extensive compilation of cell phone user data violated the Fourth Amendment. (138 S. Ct. at 2219.) The Supreme Court declined to address whether short-term, limited, or real-time access had equal concerns under the Fourth Amendment. (Id. at 2220.) As for FRT, Carpenter suggests that an individual’s public movements captured by FRT in an isolated incident do not implicate the Fourth Amendment. However, the same individual’s public movements viewed using FRT over an extended timeframe could reveal intimate details about the individual’s personal life that may be found to amount to a Fourth Amendment search, even though everything took place in public. (See, e.g., Riley v. California, 134 S. Ct. 2473 (2014); Jones, 565 U.S. 400; United States v. Maynard, 615 F.3d 544, 562 (D.C. Cir. 2010).) Furthermore, compiling data across various databases (whether public or private), throughout multiple locations over a long period, may also implicate the Fourth Amendment.

First Amendment Issues

Critics also have argued that FRT may implicate the First Amendment right to freedom of association and right to privacy. (The Perpetual Line-Up: Unregulated Police Face Recognition in America, Geo. L. Ctr. on Privacy & Tech. 42–44 (Oct. 18, 2016); Rector & Knezevich, supra.) Courts have upheld the right to anonymous speech and association. (NAACP v. Alabama, 357 U.S. 449, 466 (1958); see also McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 357 (1995); Talley v. California, 362 U.S. 60, 64 (1960).) These rights protect an individual’s ability to associate freely and advocate for minority positions. Without these protections, the use of FRT could have a chilling effect on individuals’ behaviors and lead to self-censorship. (See The Perpetual Line-Up, supra.) Nevertheless, some courts have considered law enforcement’s use of photography at public demonstrations as not violating the First Amendment right to freedom of association. (Laird v. Tatum, 408 U.S. 1 (1972); Phila. Yearly Meeting of Religious Soc’y of Friends v. Tate, 519 F.2d 1335, 1337–38 (3d Cir. 1974); Donohoe v. Duling, 465 F.2d 196, 202 (4th Cir. 1972).) On the other hand, specific, targeted surveillance of a group may cross the line and violate First Amendment association protections. For example, the Second Circuit in Hassan v. City of New York determined that the NYPD’s targeted use of pervasive video, photographic, and undercover surveillance of Muslim Americans may have caused those individuals “direct, ongoing, and immediate harm,” and it may have created a chilling effect. (See 804 F.3d 277, 292 (2d Cir. 2015).) Privacy advocates have been particularly critical of the use of FRT in widespread surveillance. The FRT program that was
used to monitor the protestors in Baltimore during the Freddie Gray protests were widely criticized for many reasons, including a fear that African Americans were overrepresented in the facial recognition repository. (Stephen Babcock, Report Raises Troubling Questions About Facial Recognition Technology in Maryland, TECHNICALLY (Oct. 19, 2016); Rector & Knezevich, supra; ACLU Letter to Principal Deputy Assistant Attorney General Vanita Gupta, LEADERSHIP CONFERENCE (Oct. 18, 2016.).)

**Use of Technology That Is Not in the General Public Use**

Under the *Katz* test, an individual would not have an automatic expectation of privacy with respect to his or her face because it is exposed to the public. (Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018) (quoting *Katz* v. United States, 389 U.S. 347, 351–352 (1967)), and United States v. Jones, 565 U.S. 400, 430 (2012)). In some instances, however, law enforcement’s use of FRT that is not yet available for use generally has been deemed a search. The theory is that such technology is “sense-enhancing” and enables law enforcement to do more than ordinary surveillance by a police officer. For example, in *Kyllo v. United States*, the Supreme Court determined that law enforcement’s use of thermal imaging technology to obtain information from the inside of a home constituted a search. (533 U.S. 27, 33 (2001).) Even though law enforcement was on a public street at the time, the use of the thermal imaging to obtain information that would otherwise have required law enforcement to enter the home concerned the Court. (*Id.* at 34.) In part because law enforcement in *Kyllo* relied on technology that was not in the general public use, the use of that technology constituted a search. (*Id.*) Though *Kyllo* addressed a technology that could reach into someone’s home, which (unlike FRT) is clearly a private area, some scholars have considered the application of *Kyllo* in terms of the limited availability of the technology to FRT. (See Nat’l Research Council, Biometric Recognition: Challenges and Opportunities 106–107 (Nat’l Acads. Press, 2010); *Kyllo*, 533 U.S. at 34.) How the courts will interpret privacy interests in light of FRT technology has yet to be seen and will turn on how the technology is used, how much data are sought, how many locations are requested, how long the tracking of the face continues, the exigency of the need, and the actual method used to “capture” the image. (Dept of Justice Policy Guidance: Use of Cell-Site Simulator Technology, Sept. 3, 2015, at 5.)

**Conclusion**

Technology permeates almost every aspect of our daily lives. For law enforcement, technology comes with many benefits, but also drawbacks and questions. On the positive side, technology has benefited law enforcement in innumerable ways, such as creating reliable evidence, enabling
efficient investigations, and helping to accumulate data that allow law enforcement to react quickly and effectively. On the other hand, this technology impacts peoples' privacy in many ways and will trigger many debates on the parameters of privacy.

It will be up to the courts and policymakers to strike the right balance between the need for information and the right to privacy. The debate about the proper balance between privacy and public safety will continue to play out in the courts, as well as in public discourse, for many years to come. Federal, state, and local law enforcement officials will have to be mindful of this debate when developing the rules and regulations that must ensure citizens' privacy protections, while still enabling law enforcement to make use of surveillance's tremendous investigatory and crime-fighting tools. In the meantime, technology will advance and evolve in ways that cannot be anticipated.

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Court of Appeal Issues First Published Decision on Senate Bill 1421 and Retroactivity

This Special Bulletin was authored by J. Scott Tiedemann & Lars T. Reed

Over the past three months, since California Senate Bill 1421 went into effect on January 1, 2019, numerous public agencies across California have been involved in litigation over whether the new law applies to records created before 2019. After conflicting decisions from various superior courts, some of which we discussed in a previous blog post, the California Court of Appeal has now issued the first published decision addressing this issue.

The ruling comes in Walnut Creek Police Officers’ Association v. City of Walnut Creek et al., which was a consolidated appeal of six different lawsuits brought by peace officer unions against various public agencies in Contra Costa County. The unions had each petitioned for injunctive relief limiting SB 1421 disclosures to records created after January 1, 2019. The superior court denied the petitions, and the unions challenged the ruling in the Court of Appeal.

In a decision published on March 29, 2019, the Court of Appeal, First Appellate District, upheld the superior court’s decision. The Court ruled that applying SB 1421 to older records does not make the law impermissibly retroactive: “Although 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.” The Court also explained that the new law “does not change the legal consequences for peace officer conduct described in pre-2019 records. ... Rather, the new law changes only the public’s right to access peace officer records.”

As a published appellate court decision, the Court’s ruling in this case is binding precedent in all superior court proceedings across California unless or until there is a contrary opinion published by a different Court of Appeal, or by the Supreme Court.
Tips for Responding to SB 1421 Requests

This post was authored by J. Scott Tiedemann & Lars T. Reed.

On January 1, 2019, California Senate Bill 1421 went into effect. The new law allows members of the public to obtain certain peace officer personnel records that were previously available only through the Pitchess procedure by making a request under the California Public Records Act (“CPRA”).

We described this legislation in detail in a previous Special Bulletin. In short, SB 1421 amends Government Code Section 832.7 to mandate disclosure of records and information related to certain high-profile categories of officer misconduct: officer-involved shootings, certain uses of force, sustained findings of sexual assault, and sustained findings of certain types of dishonesty.

Immediately after the new law went into effect on January 1, public agencies across California began receiving broad CPRA requests for records covered by SB 1421. Below are our answers to some frequently asked questions and general tips for how to respond to SB 1421 requests.

For case-specific questions, agencies should consult legal counsel to ensure compliance with all relevant laws. To that end, LCW has dedicated a team of lawyers to help clients deal with these time-sensitive and complex requests.

Does SB 1421 apply to records from before January 1, 2019?

SB 1421 does not explicitly state whether it applies to records created before the law’s effective date, January 1, 2019, and this question is the subject of some ongoing litigation.

In at least one case, a superior court judge has issued a temporary stay directing a public agency to refrain from retroactively enforcing SB 1421 pending a more detailed hearing. In addition, two police unions separately petitioned the California Supreme Court for a writ barring retroactive application of SB 1421 to records predating January 1, 2019. On January 2, 2019, the Supreme Court denied both of those writ petitions without commenting on the merits of their legal arguments. None of these cases have any binding effect as precedent, so the question whether SB 1421 applies retroactively remains unanswered for the moment. It seems likely that the courts will eventually provide some clarification as litigation continues, but the clarification likely will not come in time to help agencies with the first round of requests that they have already received.

In the meantime, pending guidance from the courts or clarifying legislation, we recommend that agencies seek case-specific legal advice to decide whether they will disclose records regardless of when the records were created, or only disclose responsive records that are created after
January 1, 2019. Recognizing that there may be some room for debate, we believe that it is more likely than not courts will interpret SB 1421 to require disclosure of at least some records that predate 2019.

Each approach carries with it some risk, so agencies should carefully weigh the risks and potential benefits. In mitigation of some of the risks associated with releasing personnel records predating 2019, agencies should consider providing advance notification to the affected peace officers and their labor unions to afford them the opportunity to seek judicial relief from the anticipated disclosure.

**How soon must an agency respond to a request for records?**

Under the CPRA, an agency generally has 10 days from the receipt of a request for public records to determine whether any part of the request seeks copies of disclosable records in the agency’s possession. However, in “unusual circumstances” the agency may extend this deadline by up to 14 days by providing a written notice to the requesting party. For purposes of the CPRA, “unusual circumstances” means any of 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 that are 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.

For “blanket” requests that seek a wide range of records or information covered by SB 1421, a public agency may have cause to invoke one or more of these grounds, but the determination should be made on a case-by-case basis.

If and when an agency determines that a CPRA request seeks disclosable records, it should “promptly” make those records available or provide copies of them. The CPRA does not set a specific time frame for the actual disclosure of records; this will vary depending on the circumstances of any given request, including the size and scope of the request and the possible need to redact nondisclosable information.

**Is SB 1421 limited to records of administrative investigations?**

No. SB 1421 applies to “peace officer or custodial officer personnel records" and all other “records maintained by any state or local agency” relating to a covered incident. This includes, but is not limited to, all of the following:
May an agency delay the disclosure of records relating to ongoing cases?

Possibly, depending on the nature of the case. SB 1421 sets out several circumstances in which agencies may delay the mandated disclosure of records.

**Internal investigations into sexual assault or dishonesty**

Records pertaining to alleged sexual assault or dishonesty by an officer are only subject to disclosure under SB 1421 if the allegations are sustained by a law enforcement or oversight agency. Under Penal Code section 832.8(b), “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.” Thus, if the investigation is ongoing, or an appeal from discipline is pending, then the allegations have not been sustained and the records are not yet subject to disclosure.

**Criminal investigations related to a use of force incident**

During an active criminal investigation related to an officer-involved shooting or the use of force resulting in death or great bodily injury, an agency may delay disclosure for up to 60 days from the date the force occurred or until the district attorney determines whether to file criminal charges related to the use of force, whichever is sooner. The agency may extend the delay further if disclosure could reasonably be expected to interfere with a criminal enforcement proceeding. If disclosure is delayed under one of these provisions, then the agency must comply with several requirements for specific written notice to the requesting party.
Criminal prosecutions related to a use of force incident

If criminal charges are filed related to a use of force incident, the agency may delay the disclosure of records or information until a verdict on those charges is returned at trial, or, if a plea of guilty or no contest is entered, the time to withdraw that plea has expired.

Administrative investigations related to a use of force incident

During an administrative investigation of a use of force incident, an agency may delay disclosure of records while the investigating agency determines whether the use of force violated a law or agency policy. The delay is limited to 180 days after the employing agency’s discovery of the use of force, or allegation of use of force, by a person authorized to initiate an investigation, or 30 days after the close of any criminal investigation related to the use of force, whichever is later.

May a public agency provide redacted versions of requested records?

Possibly, if the redactions are for one of a set of specific reasons outlined in SB 1421:

- To remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace and custodial officers.
- To preserve the anonymity of complainants and witnesses.
- To protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct and serious use of force by peace officers and custodial officers.
- 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.
- Other circumstances not listed above, 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. This language mirrors the catch-all provision of the CPRA, and courts will likely interpret the law similarly.

In particular, it is likely that many records within the scope of SB 1421 contain privileged documents, such as attorney-client communications. Given the high volume of anticipated records requests and the large amount of potentially disclosable files, responding agencies should take particular care in examining responsive records to avoid inadvertently giving away privileged materials.

SB 1421 dramatically increases public access to peace officer personnel records and other public records. But there are a number of issues left unclear and compliance with the new law will require a careful balancing of the public right to access public records against the privacy interests of officers, crime victims, complainants, witnesses and other third parties. Agencies
that receive CPRA requests pursuant to SB 1421 should work closely with trusted legal counsel to navigate successfully between these competing interests when responding to the requests.
USE OF FORCE: AN EVER-CHANGING LANDSCAPE
What Happened in California
2018: ASSEMBLY BILL 931 – WEBER/MCCARTY

2018 January - June

- Assembly bill 931 – Introduced via gut and amend in Senate
  - How the Bill would change Use of Force in California!
- Goal is redefine “necessary” to successfully prosecute law enforcement for use of deadly force
- “...may use deadly force only when such force is necessary to prevent imminent death or serious bodily injury to the officer or to another person.”
- Would require a laundry list of alternative tactics before using force to affect an arrest
- Mass liability to the agency and officers
"Necessary" v. "Reasonable"

How the Bill would change Use of Force in California!

ACLU promoted Dishonest Catch-Phrase: "Necessary" to prevent imminent death or serious bodily injury to the officer or to another person. "Reasonable" would require a laundry list of alternative tactics before using force to affect an arrest. Mass liability to the agency and officers.
WEBER/ACLU ASSEMBLY BILLS

GOALS:

- Amend Penal Code §§ 196 and 835a
- Objectively Reasonable Standard → Necessary Standard (i.e. exhaust all alternatives including “tactical repositioning”)
- Prioritize & require de-escalation tactics over use of force
- Ensure criminal liability for officers (“accountability”)
- Disincentivize proactive policing
- Create a “Ferguson Effect”
PRE-A.B. 931/392 STATE OF THE LAW

- Constitutional Right of Self-Defense
- Police use of Deadly Force Governed by:
  - Penal Code Sections 196 and 835a
- Fourth Amendment Limitations:
  - Graham v. Connor
  - Tennessee v. Garner
CONSTITUTIONAL RIGHT TO SELF-DEFENSE

Article I, Section 1 of the California Constitution

“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.”

U.S. Constitution

“Central to the rights guaranteed by the Second Amendment is ‘the inherent right of self-defense.’” (United States v. Torres (9th Cir. 2019), citing District of Columbia v. Heller (S.Ct. 2008).)
GRAHAM V. CONNER: “OBJECTIVE REASONABLENESS”

“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation.”

Graham Factors:

- Severity of the crime at issue
- Whether the suspect posed an immediate threat to the safety of officers or others
- Whether the suspect was actively resisting arrest
- Whether the suspect was attempting to evade arrest by flight
**TENNESSEE V. GARNER (1985): THE VIOLENT FLEEING FELON RULE**

- **Held:** Under the Fourth Amendment, deadly force may not be used to prevent the escape of an apparently unarmed suspected felon unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

- Based on California Supreme Court case restricting doctrine to circumstances involving forcible and atrocious felonies.
PROSECUTION DECISIONS BASED ON EVALUATION OF THE NECESSITY FOR USE OF DEADLY FORCE

California Criminal Jury Instruction 507

A killing or attempted killing by a public officer is justified, and therefore not unlawful, if:

- The [attempted] killing was committed while
  a) Taking back into custody a convicted felon who had escaped from prison or confinement; or
  b) Arresting a person charged with a felony who was resisting arrest or fleeing from justice; or
  c) Overcoming actual resistance to some legal process; or
  d) Performing any legal duty.

AND

- The [attempted] killing was necessary to accomplish (one of those/that) lawful purpose;

AND

- The defendant had probable cause to believe that (suspect/decedent) posed a threat of death or great bodily injury, either to the defendant or to others, OR that (suspect/decedent) had committed [a crime*], and that crime threatened the defendant or others with death or great bodily injury.
2018 JANUARY - JUNE

INTRODUCTION:

- AB 931 was introduced in the CA Senate via a gut and amend of a Suicide Prevention Bill (04/16/18)
- Used by the lower house (Assembly) to make it easier to pass
- Introduced publicly via a press conference (04/03/18)
- Took almost two weeks before we saw the actual language
- During this time, Dr. Weber, ACLU (Authors), along with other anti-police groups ramped up grassroots pressure on Senators
2018 JANUARY - JUNE

- California law enforcement was taken by surprise
- Law enforcement had to quickly decide on a strategy:
  - All out opposition
  - Negotiate with state holders and elected for a workable compromise
- Law Enforcement Coalition forms & works diligently together on a campaign

LAPPL  ALADS  PORAC  CAHP  CAL CHIEFS
2018 JANUARY - JUNE

• Legislatures were feeling the heat on both sides
• ACLU and Activist groups began targeted marketing campaign against certain Senators
• You find out quickly who your friends are in the Legislature & outside
  - Not with us: California Faculty Association; California Nurses Association; Service Employees International Union (SEIU) among others
  - Broader issue regarding other unions not supporting public safety unions
  - After Janus, social justice issues rise in union platforms
2018 JULY - NOVEMBER
CRUNCH TIME – LEGISLATIVE SESSION COMING TO AN END

➤ Weber holds a press conference to announce she is amending the Bill – late Friday night after news cycle. Provides amendments to LE Coalition very late
  ✔ Falsely claims LE Coalition offered no solutions
  ✔ Falsely claims to have removed criminal jeopardy for officers
➤ Never changed the heart of her Bill—just rearranged amendments btw PC 196 & 835a
  ✔ New definition of “Necessary” remains
  ✔ Criminal prosecution still included in the Bill
➤ Coalition goes door to door refuting her claims with the legislators
➤ Senator Pro Tem Atkins calls Brian Marvel to a private meeting
  ➤Lets Marvel know she will hold the Bill; effectively killing AB 931
  ➤Atkins wants a commitment to work collaboratively with Weber and ACLU during recess for a 2019 consensus Bill
2018 JULY - NOVEMBER

- PORAC & Cal Chiefs’ small group meet with the ACLU and Weber through the legislative recess in negotiations over seen by the Pro Tem
- After 4 months of lip service about common ground the ACLU refuses to put forth new compromise language
- LE Coalition submits an early draft of Senate Bill (SB) 230—ACLU told to come up with language of SB 230 will advance alone
- ACLU finally sets forth new UOF bill – essentially the same as the old Bill

Is anyone SHOCKED!

- LE Coalition is cleared by the Pro Tem to move forward independently with SB 230
2019 JANUARY - JUNE

• Assembly members Weber/McCarthey introduce AB 392 on 2/6/2019
  • Almost identical to AB 931 from 2018

• A.B. 392 as introduced would:
  • Amend Penal Code §§ 196 and 835a
  • Replace the Objectively Reasonable Standard for determining necessity → Newly defined Necessary Standard would require officers to exhaust all “reasonable alternatives” including “tactical repositioning” (i.e. retreating).
    • i.e. officers must use the least amount of force possible
    • Hindsight analysis to second guess officer’s decision-making
  • Create a duty to retreat in the face of resistance, if feasible
  • Strip officers of the right of self-defense if their tactics or decisions prior to the UOF are deemed negligent
THEN PENAL CODE §§ 196 AND 835A

Penal Code § 196 – Justifiable Homicide by Public Officers

• Enacted in 1872 to codify common law - statutory language never updated
  • e.g. authorized deadly force to apprehend any felon
• Courts have applied PC 196 consistent with Graham and Garner.

Penal Code § 835a – Reasonable Force by a Peace Officer

• Any peace officer who has reasonable cause to believe that the person to be
  arrested has committed a public offense may use reasonable force to effect the
  arrest, to prevent escape or to overcome resistance.
  • A peace officer who makes or attempts to make an arrest need not retreat or desist
    from his efforts by reason of the resistance or threatened resistance of the person
    being arrested; nor shall such officer be deemed an aggressor or lose his right to
    self-defense by the use of reasonable force to effect the arrest or to prevent escape
    or to overcome resistance.
LAW ENFORCEMENT'S PRIMARY OBJECTIONS TO AB 392

Redefines “Necessary” as the least intrusive amount of force, i.e. no reasonable alternatives to deadly force (as determined by a police practices expert after the fact)

➢ “Reasonable alternatives” mean tactics and methods, other than the use of deadly force, of apprehending a subject or addressing a situation that do not unreasonably increase the threat posed to the peace officer or another person.

➢ “Reasonable alternatives” may include, but are not limited to, verbal communications, warnings, de-escalation, and tactical repositioning, along with other tactics and techniques intended to stabilize the situation and reduce the immediacy of the threat so that more time, options, and resources can be called upon to resolve the situation without the use of deadly force.
LAW ENFORCEMENT'S PRIMARY OBJECTIONS TO AB 392

New “Necessary” definition similar to definition that has been held unconstitutional by the Ninth Circuit in *Scott v. Henrich* (9th Cir. 1994) 39 F.3d 912

- Officers are NOT required to determine the least intrusive alternatives to deadly force
- Would require superhuman judgment
- Officers must act within that range of conduct that is objectively reasonable with regard to the amount of force that is necessary in a particular situation
LAW ENFORCEMENT'S PRIMARY OBJECTIONS TO AB 392

Create a duty to retreat or desist

Revise PC 835a: A peace officer who makes or attempts to make an arrest need not retreat or abandon or desist from his efforts the arrest by reason of the resistance or threatened resistance of the person being arrested ... A peace officer shall, however, attempt to control an incident through sound tactics, including the use of time, distance, communications, tactical repositioning, and available resources, in an effort to reduce or avoid the need to use force whenever it is safe, feasible, and reasonable to do so.

Create a “Provocation Rule”

“Neither this section nor Section 197 provide a peace officer with a defense to manslaughter in violation of Section 192, if that person was killed due to the criminally negligent conduct of the officer, including situations in which the victim is a person other than the person that the peace officer was seeking to arrest, retain in custody, or defend against, or if the necessity for the use of deadly force was created by the peace officer’s criminal negligence.”

- Attempt to overturn US Supreme Court ruling rejecting the “Provocation Rule” that would render otherwise reasonable use of force unreasonable.
2019 JANUARY - PRESENT

SB 230

- Introduced on February 7, 2019 by Senator Anna Caballero (D) as an alternative bill to modernize Penal Code Sections 196 and 835a to match *Graham* and *Tennessee* UOF standards.
- Bill amends the Government Code to establish first-in-the-nation use of force policy requirements and standardized training on force scenarios, including de-escalation, intervention and medical aid.

**Ongoing Negotiations & Advocacy Force Amendments of Both Bills**

- To advance SB 230 amended to eliminate Penal Code sections and coupled to passage of AB 392 Aggressive behind the scenes lobbying against AB 392 to convince the Pro Tem and Governor of practical and Constitutional flaws with AB 392.
- ACLU initially refuses to make any substantive amendments ... But
- Public Safety Committee hearing goes badly for ACLU. Bill advances with harsh warning that it won’t advance on the floor without major amendments addressing Law Enforcement concerns.
TESTIMONY IN OPPOSITION TO AB 392
2019 JANUARY - PRESENT

- AB 392 signed on 8/19/2019
- The Governor and the Pro Tem step in force substantive amendments that resolve most of our concerns
  - Restores self-defense rights / duty to retreat removed
  - Amended version contains some old terminology (e.g. “necessary”) and vague language to allow ACLU/Weber to claim a victory
  - Eliminates unconstitutional requirement to exhaust all reasonable alternatives
- BLM and other anti-police groups drop support of AB 392 as a result
- AB 392 largely codifies *Graham v. Connor*, but has some vague intent language demanded by the Governor and Pro Tem for political reasons
  - Vague language used to reach deal may lead to future litigation
Black Lives Matter Global Network Withdraws Support from California’s AB 392

May 29, 2019

Unfortunately, as now written, AB 392 does not provide the kind of substantive change that we imagined when the process began. While we are aware that AB 392 will likely pass without us, we feel compelled to take a strong stance consistent with our commitment to our communities to ensure police accountability and divestment from the police. Despite
VAGUE INTENT LANGUAGE IN AB 392

Duty to utilize alternative tactics

- 835a(2): “As set forth below, it is the intent of the Legislature that peace officers use deadly force only when necessary in defense of human life. In determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer.”
  - Look to SB 230 definition of “feasible”

“Use force consistent with law and agency policies”

- 835a(3): “That the decision by a peace officer to use force shall be evaluated carefully and thoroughly, in a manner that reflects the gravity of that authority and the serious consequences of the use of force by peace officers, in order to ensure that officers use force consistent with law and agency policies.”
  - SB 230 states policies and training do not create a legal duty
  - When negotiating policies, avoid more restrictive than legal standards.

Totality of the circumstances

835a(e)(3): “means all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force.”

- Compromise language replacing ACLU’s “and includes the tactical conduct and decisions of the officer.”
2019 JANUARY – PRESENT

- SB 230 not signed concurrently as originally promised. ACLU demands new substantive changes to bill for the first time and successfully delays enactment.

- ACLU seeks a “do-over” disingenuously demands nearly 30 major, substantive amendments to SB 230 under the guise of conforming it to AB 392 as amended, such as banning shooting at vehicles and the carotid restraint.
  - Seeks to reinstate most of language gutted from AB 392

- Some minor amendments are made to conform the bills and the ACLU 3 biggest objections are rejected:
  - Elimination of all references to objectively reasonable force
  - Redefine “feasible” to require officers to refrain from deadly force even where doing increases the risk to officers
  - Elimination of the language stating the policies and training do not create a legal duty to adhere to them.

- During Assembly Public Safety Committee Hearings Director of police practices for the ACLU of California, testifies against SB 230, further damaging their credibility at the Capitol -- It goes badly for the ACLU.
During Assembly Public Safety Committee Hearings Director of police practices for the ACLU of California, testifies against SB 230, further damaging their credibility.
The ACLU's last minute objections were not well received.
2019 SEPTEMBER

➢ On 8/12/2019, Governor Newsom signed S.B. 230 into law. ACLU objections were rejected

➢ “Feasible” means reasonably capable of being done or carried out under the circumstances to successfully achieve the arrest or lawful objective without increasing risk to the officer or another person

➢ The policies and training shall not be considered as imposing a legal duty on the officer to act in accordance with such policies and training

➢ “Objectively reasonable” retained