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

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Wes Cheung, Deputy City Attorney, Pleasanton
Meishya Yang, Deputy City Attorney, Santa Monica

I. WHAT ARE PEACE OFFICER "PERSONNEL RECORDS"?

Understanding the universe of peace officer personnel records, and who can access what, begins with defining the term as provided by statute and interpreted by the courts. Penal Code section 832.8 provides that peace officer personnel records include any file, not necessarily labeled a "personnel" file, maintained under the officer's name by their employer and containing the following types of documents:

- 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, concerning an event or transaction in which an officer participated, or which the officer perceived, and pertaining to the manner in which the officer performed their duties; and
- Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.

For purposes of the recordkeeping requirements of complaints as outlined in Penal Code section 832.5, an officer's "general personnel file" includes "any file maintained by the agency containing the primary records specific to each peace or custodial officer's employment, including evaluations, assignments, status changes, and imposed discipline." (Pen. Code, §832.5, subd. (d)(1).) Meanwhile, California courts have interpreted such "personnel records" to <u>exclude</u> the following types of documents:

- The officer's name, employment agencies, or dates of employment (*Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278);
- The officer's salary information (*Internat. Federation of Prof. & Tech. Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319);
- The officer's official service photograph (unless disclosure would pose an unreasonable risk of harm to the officer) (*Ibarra v. Superior Court* (2013) 217 Cal.App.4th 695);
- Materials related to the officer's performance that are obtained from outside sources, such as court opinions or other public records (*California Science Center v. State Personnel Bd.* (2013) 218 Cal.App.4th 1302);
- Names of officers involved in a shooting (unless a particularized showing of threat of harm is made to prevent the disclosure of the names) (*Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59);
- A report compiled by an independent consultant regarding an officer-involved shooting, except for portions of the report culled from personnel information or an officer's statements made in the police department's administrative investigation of the shooting (*Pasadena Police Officers Assn. v. Superior Court* (2015) 240 Cal.App.4th 268); and
- Video captured by a dashboard camera (*City of Eureka v. Superior Court* (2016) 1 Cal.App.4th 755).

PRACTICE TIPS – Managing Peace Officer Personnel Records

☐ Keep in mind that peace officer personnel records are subject to the same confidentiality and disclosure requirements outlined below, regardless of whether the files are physically housed in the police department, the human resources/personnel department, or another location.

☐ Maintain records in a single location within the agency to limit access to select individuals.

☐ Periodically audit records and remove documents that as a matter of law should not be part of the officer's personnel file or are outside retention requirements by law or policy.

☐ Supervisors should not keep files on individual officers without your knowledge and full compliance with Government Code sections 3305 and 3306 (adverse comments), and 3306.5 (officer right to review personnel file) (see discussion on these statutory provisions below under POBR).

☐ Disciplinary records are part of the personnel file and subject to disclosure.

II. ACCESSING PEACE OFFICER PERSONNEL RECORDS

Peace officer personnel records and information obtained from these records are, with certain exceptions, confidential and privileged. Confidential peace officer personnel records may be disclosed in a state criminal, civil, or administrative proceeding, upon compliance with the two-step statutory procedure, i.e., a *Pitchess* motion. (Evid. Code, §§1043, 1046; Pen. Code, §§832.7-832.8; *People v Mooc* (2001) 26 Cal.4th 1216, 1226; *Pitchess v Superior Court* (1974) 11 Cal.3d 531; *Copley Press, Inc. v. Superior Court* 2006) 39 Cal.4th 1272 [records relating to a peace officer's administrative appeal from discipline are exempt from disclosure under the Public Records Act].)

A. Public Records

In recent years, amid high-profile cases of police misconduct and excessive use of force alongside growing demands for police accountability, the California Legislature has enacted a series of laws trending towards greater transparency in peace officer personnel records and oversight of law enforcement agencies. This wave of legislation includes Assembly Bill 748 (AB 748), Senate Bill 1421 (SB 1421), and Senate Bill 16 (SB 16), through which certain categories of peace officer personnel records are no longer considered confidential, do not require a *Pitchess* motion, and are now publicly accessible through a California Public Records Act (PRA) request (Gov. Code, §§7920.000-7931.000).[1] These now non-confidential records as outlined in Penal Code section 832.7(b) include records relating to:

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[1] For a thorough discussion of and guidance on the Public Records Act, see League of Cal. Cities, The People's Business: A Guide to the California Public Records Act (Sept 2022).

- An incident involving the discharge of a firearm at a person by a peace officer or custodial officer;
- An incident involving the use of force against a person by a peace officer or custodial officer that resulted in death or great bodily injury;
- A sustained finding involving a complaint that alleges unreasonable or excessive force;
- A sustained finding that an officer failed to intervene against another officer using force that is clearly unreasonable or excessive;
- A sustained finding that a peace officer or custodial officer engaged in sexual assault involving a member of the public;
- A sustained finding 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 officer, including false statements, filing false reports, destruction, falsifying, or concealing of evidence, or perjury;
- A sustained finding that a peace officer or custodial officer engaged in conduct involving prejudice or discrimination against a person based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status;
- A sustained finding that a peace officer made an unlawful arrest or conducted an unlawful search.

Key defined terms to be attentive to when determining what records are incidents that fall within the above categories include:

- "Sexual assault," which means 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 other official favor, or under the color of authority, or the propositioning for or commission of any sexual act while on duty (Pen. Code, §832.7, subd. (b)(1)(B)(ii));
- "Member of the public," which means any person not employed by the officer's employing agency and includes any participant in a cadet, explorer, or other youth program affiliated with the law enforcement agency (Pen. Code, §832.7, subd. (b)(1)(B)(ii));
- "Sustained finding," which means a final determination that the officer's actions violated law or department policy following an investigation and opportunity for an administrative appeal pursuant to Government Code sections 3304 and 3304.5. (Pen. Code, §832.8, subd. (b); see *Collondrez v. City of Rio Vista* (2021) 61 Cal.App.5th 1039 [officer had opportunity for administrative appeal but settled and withdrew the appeal; disciplinary decision subject to disclosure as final determination with sustained finding].)

Additionally, under AB 748, which amended the PRA, the documents that are disclosable to the public include audio and visual recordings of "critical incidents" resulting in either the discharge of a firearm at a person or use of force resulting in death or great bodily injury. (Gov.

Code, §7923.625.) The scope of documents disclosable under SB 1421 includes all investigative reports; photographic, audio, and video evidence; interview transcripts and recordings; autopsy reports; materials presented to a prosecutor for review to determine whether to file charges against an officer; and disciplinary documents, including settlement agreements. (Pen. Code, §832.7, subd. (b)(3).) Records related to a covered incident must be released even if the officer resigns before the agency concludes its investigation. (Pen. Code, §832.7, subd. (b)(3).)

Furthermore, an agency must disclose these records that are in its possession even if they were not created by that agency or involve officers not employed by that agency. (*Becerra v Superior Court* (2020) 44 Cal.App.5th 897.) The records may be redacted before release to remove certain protected information; generally, records must be disclosed no later than 45 days from the date of a request, but certain records may be subject to delayed disclosure for certain time periods if they pertain to an active criminal or administrative investigation. (Pen. Code, §832.7, subd. (b)(8) and (11); Gov. Code, §7923.625.) Records with no sustained findings must be retained for at least five years; records related to sustained misconduct must be retained for at least 15 years. (Pen. Code, §832.5, subd. (b).)

PRACTICE TIPS – Responding to SB 1421 / SB 16 PRA Requests

☐ Note that "great bodily injury" is not defined in reference to the required records to be disclosed under Penal Code section 832.7(b)(1)(A)(ii). However, Penal Code section 12022.7, in addressing an enhancement for felonies having great bodily harm as an element, defines "great bodily injury" as "a significant or substantial physical injury." Also consider case law interpreting section 12022.7 to help determine what constitutes "great bodily injury" for purposes of releasing SB 1421 records.

☐ State law also requires police agencies to report annually to the California Department of Justice specified use of force incidents, including those that result in serious bodily injury to a civilian. (Gov. Code, §12525.2, subd. (a).) That provision defines "serious bodily injury" as "bodily injury that involves a substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ." (Gov. Code, §12525.2, subd. (d).) This report may be a helpful tool in determining which use of force incidents are subject to release for purposes of SB 1421 in response to a PRA request.

☐ For any records falling in the gray area, consider giving notice to the officer and/or their union, so they can file a reverse PRA action. Given some of the ambiguities and differing interpretations depending on the facts and findings in each case, keep in mind both an agency's obligations under the PRA and maintaining an officer's privacy rights.

☐ Update retention policies and make sure policies, procedures, staffing, and necessary tools, like a tracking system and document management software with redaction capabilities, are in place to ensure timely compliance with these PRA requests.

B. Required Disclosures of Personnel Records to POST under SB 2

The series of legislation described above ensuring greater public transparency has been matched by greater regulatory oversight of peace officers and law enforcement agencies, most recently through enactment of Senate Bill 2 (SB 2), which bolsters agency reporting requirements to, and investigative powers by, the Commission on Peace Officer Standards and Training (POST). Specifically, SB 2 provides that law enforcement agencies may employ as peace officers only those persons who hold a current and valid Basic certificate from POST (except for provisional employment for up to 24 months of individuals awaiting certification). (Pen. Code, §13510.1, subd. (g).)

More significantly, SB 2 requires POST to revoke certification when an individual becomes ineligible to continue being a peace officer under Government Code section 1029, or when the individual has been terminated for cause for, or otherwise engaged in, "serious misconduct." Penal Code section 13510.8 sets forth the following categories of "serious misconduct":

1. Dishonesty relating to the reporting, investigation, or prosecution of a crime, or relating to the reporting of, or investigation of misconduct by, a peace officer or custodial officer, including making false statements, intentionally filing false reports, tampering with, falsifying, destroying, or concealing evidence, perjury, and tampering with data recorded by a body-worn camera or other recording device for purposes of concealing misconduct;
2. Abuse of power, including, but not limited to, intimidating witnesses, knowingly obtaining a false confession, and knowingly making a false arrest;
3. Physical abuse, including, but not limited to, the excessive or unreasonable use of force;
4. Sexual assault;
5. Demonstrating bias on the basis of race, national origin, religion, gender identity or expression, housing status, sexual orientation, mental or physical disability, or any other legally protected status, in violation of law or department policy, or inconsistent with a peace officer's obligation to carry out their duties in a fair and unbiased manner;
6. Acts that violate the law and are sufficiently egregious or repeated as to be inconsistent with a peace officer's obligation to uphold the law or respect the rights of members of the public, as determined by POST;
7. Participation in a law enforcement gang;
8. Failure to cooperate with an investigation into potential police misconduct, including an investigation conducted under SB 2; and
9. Failure to intercede when present and observing another officer using force that is clearly beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances.

See also 11 Cal. Code Regs., §1205 (POST regulation for complete definition of "serious misconduct").

SB 2 establishes an investigation and decertification process, through which POST has authority to conduct investigations of misconduct that could be grounds for suspending or revoking a peace officer's certification.[2] (Pen. Code, §§13510.8-13510.9.) SB 2 also entitles POST to access otherwise-confidential peace officer personnel records, without going through the *Pitchess* process. (Pen. Code, §832.7, subd. (a).)

And, more importantly for employers, SB 2 establishes an affirmative obligation on the part of law enforcement agencies to report to POST any time one of the following occurs, within 10 days of the event:

- The employment, appointment, termination, or separation from employment of any peace officer, including involuntary termination, resignation, or retirement;
- Any complaint, charge, or allegation of conduct that could result in decertification;
- Any finding or recommendation by a civilian oversight entity or police chief that a peace officer engaged in conduct that could result in decertification;
- Investigative findings that a peace officer engaged in conduct that could result in decertification, regardless of the discipline imposed, if any;
- Any civil judgment or court finding against an officer, including settlement of a civil claim, based on conduct that could result in decertification.

(Pen. Code, §13510.9; 11 Cal. Code Regs., §1207.)

Whenever an agency reports to POST any complaint, charge, or allegation of conduct that could result in decertification, the agency must retain its investigation records, including any physical or documentary evidence, witness statements, analysis, and conclusions, for at least two years after making the report. The agency must make these records available for inspection or duplication by POST. (Pen. Code, §13510.9, subd. (c).)

SB 2 also deems the following information public and disclosable under a PRA request:

- Disqualifying felony and misdemeanor conviction data for all persons known by the Department of Justice to be current or former peace officers, as received by POST (Gov. Code, §1029, subd. (f));
- POST's documentation of an officer's appointment, promotion, and demotion dates; certification or licensing status; and the reason or disposition for the person leaving service (Gov. Code, §1029, subd. (f)); and
- Records related to the denial, revocation, or suspension of a peace officer's certification (Pen. Code, §13510.85, subd. (b)).

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[2] For additional guidance from POST, refer to their Decertification webpage.

PRACTICE TIPS – SB 2 Reporting

☐ Implement a tracking system to ensure required reporting to POST is completed within the 10-day timeframe.

☐ Note that the reporting requirements are not necessarily conditioned on there being sustained findings as defined under SB 1421 and SB 16, nor do they require the reportable misconduct to be egregious enough to make it likely that POST would decertify the officer; some of the reportable events only require that an allegation is made that, if true, could subject the officer to decertification, even if the allegation is later proved to be untrue. Accordingly, the conservative approach for the agency is to broadly interpret the reporting requirements and defer to POST on whether the facts of any given case warrant initiating the decertification process. Reporting in good faith provides an agency with immunity from civil liability. (Pen. Code, §13510.9, subd. (d)(4).)

C. *Pitchess* Motions

At its core, a *Pitchess* motion is a discovery motion where a party seeks the disclosure of confidential information located in an officer's personnel file. As discussed above, information located in an officer's personnel file is typically confidential and privileged. (Pen. Code, §832.7.) However, in balancing the privacy interests of the officer with the interest towards disclosure, courts have recognized a need to obtain information from an officer's personnel file in civil or criminal litigation. The reason for this need can be as varied as what is relevant to the pending litigation. A *Pitchess* motion provides for a third party, a process to request confidential information from an officer's personnel file; for government attorneys, an opportunity to object to the discovery of privileged information; and for judges, the framework to determine what, if any, information should be disclosed.

1. *Pitchess v. Superior Court*

In *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, the defendant was charged with battery on four deputy sheriffs. To support a self-defense argument, the defendant sought discovery of the deputies' propensity for violence and moved for the production of the Sheriff's investigatory records relating to citizen complaints regarding the deputies' use of excessive force on previous occasions. The trial court granted the defendant's motion, and the defendant obtained a subpoena duces tecum for those records. After the Sheriff unsuccessfully moved to quash the subpoena at the trial court, the Sheriff petitioned for a writ of mandate to compel the trial court to quash the defendant's subpoena.

The California Supreme Court concluded that the trial court did not abuse its discretion in ordering discovery of the deputies' personnel information because the defendant demonstrated sufficient good cause to warrant the trial court to compel discovery. In recognizing that there are legitimate government interests against disclosure, the court found clear justification for the discovery of the deputies' personnel file because (1) the information could be relevant in the cross examination of the deputies, (2) the information could be admissible character evidence under Evidence Code section 1103, (3) the defendant could not readily obtain the information through his own efforts, and (4) the information was requested with adequate specificity to preclude the possibility that the defendant was engaged in a "fishing expedition." (*Pitchess* at 537-8.) However, the court also acknowledged limits to the defendant's right to discovery, stating in relevant part, "Even upon a showing of good cause, however, the right of an accused to obtain discovery is not absolute. 'In criminal cases, the court retains wide discretion to protect against the disclosure of information which might unduly hamper the prosecution or violate some other legitimate government interest." (*Pitchess* at 538 [citations omitted].)

The impact of *Pitchess* was immediate, with the enactment of Penal Code section 832.5 in 1974, Penal Code sections 832.7 and 832.8, and Evidence Code sections 1043 and 1045 in 1978. Regardless of changes in statutes or case law, *Pitchess* litigation always revolve around the same question: how does one balance the legitimate interests of both the government and the defendant or requesting party?

2. *Statutory Foundations*

Since the *Pitchess* decision in 1974, the shape of *Pitchess* litigation has changed as new statutes are enacted. Regardless of those changes, the statutory foundation of *Pitchess* litigation resides in the Penal Code and the Evidence Code.

<u>Penal Code Sections 832.7 - 832.8</u>

Penal Code sections 832.7 and 832.8 provide the "baseline" of *Pitchess* litigation. As discussed above, Penal Code section 832.7 begins with acknowledgement that personnel records of officers are confidential and shall not be disclosed except by discovery under the procedures detailed in Evidence Code sections 1043 through 1046. Penal Code section 832.8 defines "personnel records" as any file maintained under the individual's name by his or her employing agency and contains records relating any the employee's personal information such as: personal data such as marital status; medical history; election of employee benefits; employee appraisal, or discipline; complaints and investigations of complaints; and any other information the disclosure of which would constitute an unwarranted invasion of privacy.

<u>Evidence Code Sections 1043 to 1046</u>

The Evidence Code lays out the statutory requirements for *Pitchess* litigation. Where Penal Code section 832.7 provides the "baseline", Evidence Code sections 1043 to 1046 codify the balancing of governmental and defendants/third party interests.

Evidence Code section 1043(a) sets forth the noticing requirements for civil and criminal actions. For civil actions, "written notice shall be given at the times prescribed by subdivision (b) Section 1005 of the Code of Civil Procedure." (Evid. Code, §1043, subd. (a)(1).)

For criminal actions, "written notice shall be filed at least 10 court days before the hearing. All papers opposing a motion so noticed shall be filed with the court at least five court days, and all reply papers at least two court days, before the hearing. Proof of service of the notice shall be filed no later than five court days before the hearing. (Evid. Code, §1043, subd. (a)(2).) Unless the requestor is in full compliance with these noticing provisions, no hearing for discovery or disclosure shall be held. (Evid. Code, §1043, subd. (d).)

PRACTICE TIP – Proper Service Required

☐ Check to see if there is improper service in civil cases or improper notice in criminal cases. Though proper noticing is fairly simple to overcome, Evidence Code section 1043(d) clearly states that no hearing shall be held without full compliance with the notice provisions of Evidence Code section 1043.

Evidence Code section 1043(b) states that the following must be included in any *Pitchess* motion:

1. The identity of the proceeding, the party seeking discovery, the peace officer whose records are sought, the governmental agency that is the custodian of those records, and the time and place the motion;
2. A description of the type of records; and
3. An affidavit showing good cause for the discovery sought, that the discovery is material in the pending litigation, and that there is a reasonable belief that the governmental agency has the discovery sought.

PRACTICE TIP – Be Wary of Boilerplate Affidavits

☐ Though Evidence Code section 1043(b) can be a low hurdle for a moving party to clear, courts can and should deny intrusions into an officer's personnel file when the moving party does not meet these minimal requirements. Be wary of boilerplate affidavits that do not sufficiently describe the type of record sought or fail to show good cause. (Evid. Code, §1043, subd. (b)(2)-(3).)

Like the noticing requirement, the requirement that the affidavit show good cause is an element of *Pitchess* litigation that must be met in order to proceed to an in-chambers hearing. Unlike the noticing requirement, which is purely procedural, litigating whether this threshold showing is met requires more involvement in terms of both advocacy and judicial discretion.

Evidence Code section 1043(c) requires the agency to notify the peace officer of the request once the agency receives proper notice. Lastly, subsection (d) states that no hearing will be held without full compliance of the noticing requirements unless there is either good cause for noncompliance with the noticing requirements or the governmental agency waives the hearing.

Assuming the threshold showing has been met, Evidence Code section 1045 lays forth the framework of the in-chambers hearing of *Pitchess* motions. Evidence Code section 1045(b) provides:

> In determining relevance, the court shall examine the information in chambers and in conformity with Section 915, and shall exclude:
>
> 1. In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to Penal Code section 832.5.
> 2. Facts sought to be disclosed are so remote as to make disclosure of little or no practical benefit.

PRACTICE TIP – Specific Requirements for Certain Cases

☐ Although Evidence Code sections 1043 and 1045 provide the foundational guidance on *Pitchess* litigation, an agency attorney should be aware of Evidence Code section 1044, which concerns medical records, and Evidence Code section 1046, which states that a copy of the police report must be included for those motions seeking disclosure of alleged excessive force.

In determining relevance, Evidence Code section 1045(c) requires the court to consider whether the information sought can be obtained from other records without an intrusion into an officer's personnel records.

PRACTICE TIP – Statutory Two-Step Process

☐ Taken together, Evidence Code sections 1043 and 1045 generally establish the two-step process of *Pitchess* litigation:

- ☐ First, the party seeking confidential information from an officer's personnel file must properly notice and serve a written motion that establishes good cause for the discovery sought.
- ☐ Second, if such a showing is made, the trial court conducts an in-chambers review of the officer's personnel record with the custodian to determine what, if any, relevant information is discoverable.

3. ***Subsequent Case Law***

Where the Penal Code and Evidence Code provide the statutory foundations of *Pitchess* litigation, subsequent cases helped shape the form of *Pitchess* litigation.

Affidavit – Good Cause and Materiality

Evidence Code section 1043(a)(3) requires a *Pitchess* motion to be accompanied by an affidavit that shows good cause for the discovery sought, and that the discovery sought is material to the pending litigation. Cases interpreting Evidence Code section 1043(a)(3) recognize that a showing of good cause is a relatively relaxed standard.

In *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, the defendant was charged with resisting arrest and sought to discover all prior complaints of excessive force or violence involving the two arresting officers. The defendant sought the discovery of evidence related to complaints of the arresting officers using excessive force. The municipal court found for the defendant, that the defendant made a sufficient showing of good cause to warrant an in-chambers review. The city sought a writ of mandate which, when it came before the Court of Appeal, issued a peremptory writ to vacate the municipal court's order and denied the defendant's motion. In reversing, the California Supreme Court held that a declaration on information and belief is sufficient to show good cause, elaborating in relevant part:

> Section 1043 clearly requires a showing of "good cause" for discovery in two general categories: (1) the "materiality" of the information or records sought to the "subject matter involved in the pending litigation," and (2) a "reasonable belief" that the governmental agency has the "type" of information or records sought to be disclosed. (*City of Santa Cruz* at 83.)

In *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, the defendant was charged with possession of a controlled substance and sought a *Pitchess* motion for disclosure of any previous citizen complaints against the three arresting officers for making false arrests, reports, or planting evidence. The trial court initially found for the Los Angeles Police Department and declined to order the production of this information for in-chambers review. The defendant sought a petition for writ of mandate, which the Court of Appeals denied because, though the defendant presented a specific factual scenario of misconduct, the defendant's declaration did not articulate a plausible factual foundation for his misconduct claim. The California Supreme Court reversed, stating:

> To show good cause as required by section 1043, defense counsel's declaration in support of as *Pitchess* motion must propose a defense or defenses to the pending charges. The declaration must articulate how the discovery sought may lead to relevant evidence or may itself be admissible direct or impeachment evidence that would support those proposed defenses. These requirements ensure that only information "potentially relevant" to the defense need be brought by the custodian of records to the court for its examination in chambers. (*Warrick* at 1024 [internal citations omitted].)

In coming to its decision, the *Warrick* court provided guidance on the type of inquiry that trial courts should engage in when determining whether the defendant has established good cause for in-chambers review. Attorneys practicing *Pitchess* litigation should similarly inquire the following to determine whether the information sought is relevant:

1. Has the defense shown a logical connection between the charges and the proposed defense?
2. Is the defense request for *Pitchess* discovery factually specific and tailored to support its claim?
3. Will the requested *Pitchess* discovery support the proposed defense, or is it likely to lead to information that would support the proposed defense?
4. Under what theory would the requested information be admissible at trial?

(*Id.* at 1027-8.)

In-Chambers – Relevance

Once the threshold showing of good cause has been met, an in-camera hearing will occur. To protect confidentiality, a court typically limits those who will attend the in-camera hearing to the officer whose records are being sought and any other people the officer is willing to have present: this would typically be the custodian of records of the police department's personnel records and often includes the agency's attorney. (*People v. Woolman* (1974) 40 Cal.App.3d 652.)

As described in Evidence Code 1045, the purpose of the in-chambers hearing will be to determine what relevant information, if any, should be disclosed. This relevance determination is at the discretion of the court; however, statutory exemptions provide a bright-line rule of what is excluded from disclosure. Evidence Code section 1045(b) specifically excludes from disclosure: (1) in any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to 832.5 of the Penal Code, and (2) facts so remote as to make disclosure of little or no practical benefit. Similarly, Evidence Code section 1047 excludes records from peace officers who either were not present during the arrest, had no contact with the party, or who were not present at the time the conduct was alleged to have occurred.

In addition to statutory exclusions, Evidence Code section 1045(c) tasks the court to consider whether the information sought can be obtained from other records. If a court determines that there is disclosable information, discovery of that information is limited to the names, addresses, and telephone numbers of complainants and witnesses. (*Alford v Superior Court* (2003) 29 Cal.4th 1033, 1039.)

PRACTICE TIP – On Protective Orders

☐ Should the court determine information is discoverable, the agency attorney still has the responsibility to protect their client's confidentiality. Accordingly, it is important for an agency attorney to know when a court has discretion to grant a protective order and when a court does not. Evidence Code section 1045(d) gives the court discretion to issue a protective order over the discoverable information if the agency attorney can show good cause that such an order is necessary to protect the officer or agency from unnecessary annoyance, embarrassment or oppression. Evidence Code section 1045(e), on the other hand, requires the court to order that the record disclosed not be used for any other purpose other than a court proceeding. Because of subsection (e), an agency should always request a protective order to limit how disclosable information can be used.

At times, a party seeking discovery may request the court to file the required affidavit under seal. Local court rules typically require permission to file a document under seal and recognize that trial courts have discretion to decide whether to allow such a filing in order to protect against revelation of privileged information. (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 71-2 [the court should carefully weigh and "balance an accused's interest in protecting privileged information against opposing counsel's right to effectively challenge the discovery motion"].)

PRACTICE TIP – Issue Check

☐ To summarize, attorneys engaged in *Pitchess* litigation should ask themselves the following questions:

- ☐ Has the requesting party properly noticed and/or served a written motion?
- ☐ Has the requesting party's motion met the threshold requirement of good cause to warrant an intrusion into the officer's personnel file for an in camera review?
- ☐ If the requester has demonstrated good cause, is the information sought relevant to the pending litigation or otherwise excluded from disclosure?
- ☐ In addition to the required protective order, is the case appropriate for a discretionary protective order?

D. *Brady* v. *Pitchess*

In *Brady v. Maryland* (1963) 373 U.S. 83, the United States Supreme Court held that federal constitutional due process charges prosecutors with a duty to disclose potentially exculpatory evidence that is favorable to the accused and material to the outcome of the criminal case. This duty exists regardless of whether the defendant requests the information. (*United States* *v. Agurs* (1976) 427 US 97, 107.) Under *Brady*, evidence is favorable if it helps the defense or hurts the prosecution. (*Assn. for LA Deputy Sheriffs v. Superior Court* (2019) 8 Cal.5th 28, 39-41.) Evidence is material where there is a reasonable probability of a different result had the evidence been disclosed to the defense. (*Kyles v. Witley* (1995) 514 US 419, 433-4.)

This duty, however, belongs to the prosecutor and not the agency attorney. The prosecutor's duty in *Brady* intersects with the agency attorney's duty to their client by the nature of their shared subject: potentially exculpatory information located in or derived from an officer's personnel file.

In *Assn. for LA Deputy Sheriffs*, the issue at hand was whether *Brady* lists produced for a prosecutor in a criminal trial was compliant with the *Pitchess* process. The court concluded that: (1) *Brady* lists are confidential to the extent they are derived from confidential records, and (2) the sheriff's department did not violate confidentiality by sharing with prosecutors the identity of potential witnesses on the *Brady* list. In coming to these conclusions, the court affirmed the *Pitchess* process:

> The *Brady* list is a catalog of officers with a particular kind of discipline-related information in their personnel file. It follows that, barring the applicability of an exception, the *Pitchess* statutes render confidential the identities of officers on the *Brady* list. To hold otherwise would mean that section 832.7(a) affords the *Brady* list no protection at all. (*Assn. for LA Deputy Sheriffs* at 47.)

PRACTICE TIP – Be Wary of Changing Landscapes

☐ As seen in SB 1421, what is considered "confidential" can change through legislation. With the passage of SB 1421, categories of previously confidential records were made nonconfidential. The court in *Assn. for LA Deputy Sheriffs* stated that "[i]f records are not confidential, then information obtained from those records are not confidential. However, the court was unable to say that the *Brady* list was derived entirely from records rendered nonconfidential by SB 1421 due to the many grounds that could place an officer on a *Brady* list. (*Assn. for LA Deputy Sheriffs* at 48.) Accordingly, attorneys should keep appraised of legislative changes in assessing whether *Pitchess* continues to apply.

Courts have recognized that *Pitchess* and *Brady* operate in tandem. In *People v. Gutierrez* (2004) 112 Cal.App.4th 1463, 1474, the court describes the relationship between the *Pitchess* scheme and *Brady's* disclosure duty, stating "[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." This tandem operation can be seen in how *Pitchess* and *Brady* differ in the use of materiality. In *Pitchess*, materiality to the subject matter of the litigation is used to determine whether the threshold "good cause" showing was made. As the court in *Assn. for LA Deputy Sheriffs* found, this is a fairly relaxed standard:

> The standard of "good cause" required for *Pitchess* disclosure – materiality to the subject matter of the litigation and a reasonable belief that the noticed agency has the type of information sought – is relatively relaxed and guarantees inspection and production of all relevant documents. (*Assn. for LA Deputy Sheriffs* at 67-8 [internal citations omitted].)

In *Brady,* materiality is used to evaluate whether evidence favorable to the defense must be disclosed. Whether the evidence is material under *Brady* depends on whether there is a reasonable probability of a different result had the evidence been disclosed to the defense. A narrower standard:

> The *Brady* test of materiality is much narrower than that employed by *Pitchess*: under *Pitchess*, a defendant need only show that the information sought is material to the subject matter of the litigation, whereas *Brady* requires that information sought be material to the outcome of the litigation. Thus, any information that satisfies *Brady*'s test of materiality necessarily meets the standard required under *Pitchess*. *(Assn. for LA Deputy Sheriffs* at 67-8 [internal citations omitted].)

Ultimately, the party who is responsible for making a disclosure under *Brady* is the prosecutor, not the agency attorney. Whereas the prosecutor is charged with safeguarding the public, the responsibility of the agency attorney is to protect the confidentiality of their client's personnel information from those intrusions that do not comply with the proscribed statutory framework. This includes district attorneys. (98 Ops.Cal.Atty.Gen 54 (Oct. 13, 2015) [district attorney cannot directly review personnel files of peace officers who will or are expected to be prosecution witnesses to determine if there are any *Brady* issues]; see also *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696.)

E. Disclosure Obligations under the Public Safety Officers Procedural Bill of Rights (POBR)

1. *Peace Officers' Access to Personnel Files*

The Public Safety Officers Procedural Bill of Rights (POBR) (Gov. Code, §§3300-3313) entitles peace officers to review and comment on their own personnel records.[3] Current employees have the right, upon their request, to inspect personnel files that are used or have been used to determine that employee's qualification for employment, promotion, additional compensation, termination, or other disciplinary action. Such an inspection is to be conducted at reasonable times and at reasonable intervals, during usual business hours, with no loss of compensation to the employee. (Gov. Code, §3306.5.) Importantly, this right is limited to only those records "that are used or have been used for personnel purposes." Accordingly, for internal affairs investigations that are not used for any "personnel purposes," the officer can review only the complaint. (*McMahon v. City of Los Angeles* (2009) 172 Cal.App.4th 1324.)

[3] For the rights of employees not subject to POBR to access their own personnel files, see Labor Code §1198.5.

PRACTICE TIPS

☐ Consider the following checklist for employee personnel file inspection procedure:

1. Require the employee to provide a written request for access to their file.
2. Review the file to determine whether any statutory exemptions apply. If so, remove such documents from the file.
3. Determine whether any documents in the file are from individuals who have been given an assurance of confidentiality. If so, remove those documents from the file.
4. Record the date and time of the employee's inspection.
5. Obtain the employee's signed acknowledgment that the inspection occurred.

☐ Detailed records of personnel file inspections will help demonstrate the employer's compliance with its legal obligations for employees accessing their personnel files.

2. *Adverse Comments*

POBR also gives peace officers the right to inspect any "adverse comment" before it is entered into their personnel file. (Gov. Code, §3305.) An "adverse comment" means an observation or remark expressing an opinion or attitude that is in opposition to one's interest, in this context being that which might negatively impact an officer's employment. (See, e.g., *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793 [background investigation file]; *Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal.App.4th 916 [internal affairs index card listing all complaints against a named officer]; *Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378 [supervisory daily logs were not adverse comments].) Adverse comments include citizen complaints (*Aguilar v. Johnson* (1988) 202 Cal.App.3d 241, 249.) Any response must be made within 30 days and attached to the adverse comment. (Gov. Code, §3306.)

3. *Discovery Materials During Interrogations*

A peace officer who is the subject of an internal affairs investigation also has the right to access certain information related to the investigation in the course of being interrogated. Specifically, POBR provides that if a tape recording is made of the interrogation of an officer, the officer is entitled to access the tape if any further proceedings are contemplated or before any further interrogation at a subsequent time. Additionally, an officer has the right 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 deemed confidential by the agency. (Gov. Code, §3303, subd. (g).)

The California Supreme Court has ruled that POBR does not grant peace officers who are subject to an internal affairs investigation a right to review investigative reports or complaints before being interrogated, regardless of whether the interrogation is the first one or a subsequent one. (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564 (*Pasadena POA*).) The Fourth Appellate District has interpreted the "reports" and "complaints" that an officer is entitled to post-interrogation as including the investigators' raw notes and tape-recorded interviews of witnesses, and not limited to only the final report. (*San Diego Police Officers Assn. v. City of San Diego* (2002) 98 Cal.App.4th 779.) In contrast, the Sixth Appellate District disagreed with this interpretation, and narrowed the definition of "reports" and "complaints", finding that POBR does not require that <u>all</u> materials gathered or generated in the course of an investigation, such as raw notes, written communications, records obtained, and interviews, be provided to the officer following the officer's interrogation; in other words, the subject officer in an administrative investigation does not have broad discovery rights similar to those held by criminal defendants. (*Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264.)

Subsequently, the Fourth Appellate District in *Santa Ana Police Officers Assn. v. City of Santa Ana* (2017) 13 Cal.App.5th 317 (*Santa Ana POA*) determined that before a second interrogation, an employer must provide the subject officer with access to not only a copy of the recording of their prior interviews in the case, but also stenographer notes, reports, and complaints. In contrast, the most recent Court of Appeal decision interpreting Government Code section 3303, subdivision (g), *Oakland Police Officers Assn. v. City of Oakland* (2021) 63 Cal.App.5th 503 (*Oakland POA*), from the First Appellate District, rejects *Santa Ana POA*'s reading of Government Code section 3303, subdivision (g). The Court in *Oakland POA* concludes that "mandatory disclosure of complaints and reports prior to any subsequent interrogation of an officer suspected of misconduct is inconsistent with the plain language of the statute" and instead holds that "[w]hile confidential materials may be withheld pending the investigation—and may not be used as the basis for disciplinary proceedings absent disclosure—nonconfidential material should be disclosed upon request." (*Id.* at 508.) In finding confidentiality to be the touchstone for disclosure of Government Code section 3303, subdivision (g) discovery materials, the *Oakland POA* opinion creates a confidentiality process; specifically, the Court indicates that law enforcement agencies have the discretion to temporarily designate materials as confidential to protect the integrity of an active investigation and thereby withhold them, and then de-designate such materials afterwards if punitive action or other personnel action is initiated, or otherwise not use such withheld materials for any personnel purposes.

In light of these conflicting Court of Appeal decisions and considering the California Supreme Court's opinion in *Pasadena POA*, employers are faced with the challenge of which case authority to follow. The most conservative approach would be to strictly comply with the *Santa Ana POA* case, although this raises the risk of undermining the effectiveness of the investigation. Accordingly, agencies may consider structuring the investigative approach to limit the applicability of *Santa Ana POA*: for example, conducting only one interview of the subject officer near the completion of the investigation, if possible, to avoid any required pre-interrogation discovery, or delaying the creation of reports and complaints until after all interrogations are completed. Alternatively, given the clear split in appellate authority, agencies may take the risk of not following *Santa Ana POA* and abiding instead by the *Oakland POA* case, i.e. withholding materials designated as confidential during the course of the investigation and providing only nonconfidential materials upon request, or the *Pasadena POA* case, i.e., providing the officer access to materials only after <u>all</u> interrogations are completed and the investigation is concluded, without any added confidentiality designation/de-designation process.