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# LEAGUE OF CALIFORNIA CITIES 2022 CITY ATTORNEYS' SPRING CONFERENCE

## Peace Officer Personnel Records and the California Public Records Act

5/4/2022

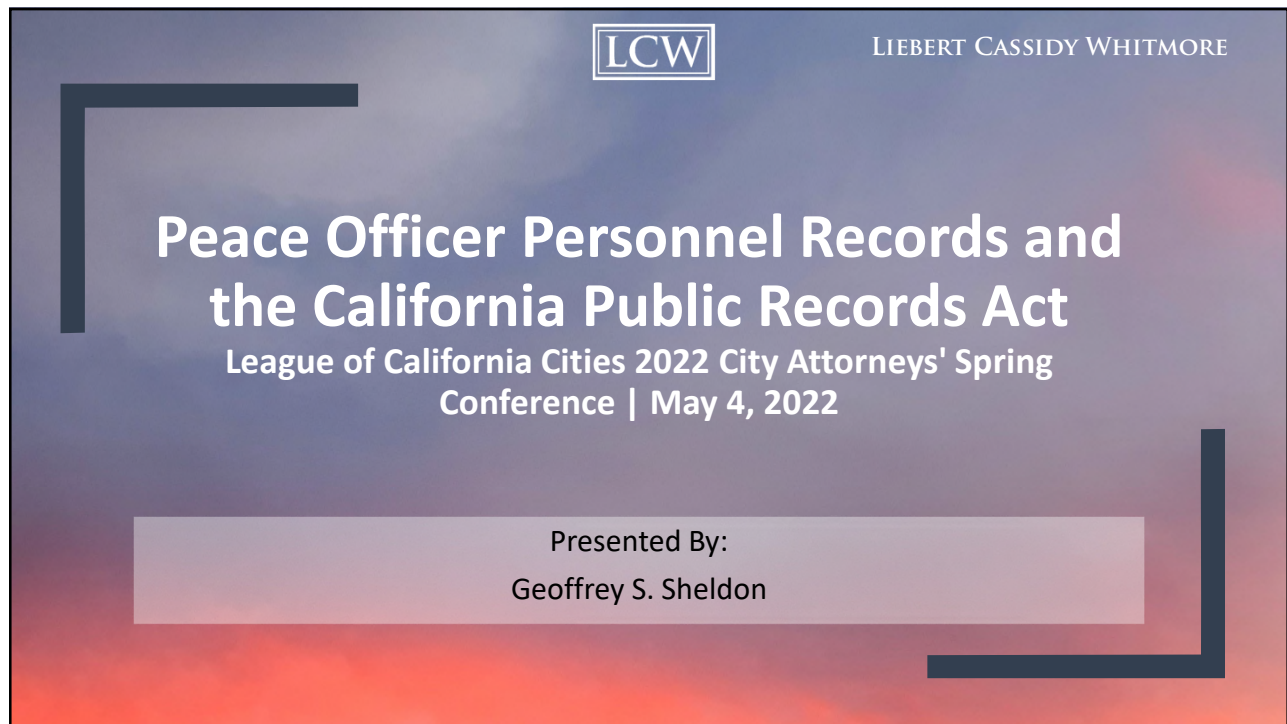
*PRESENTED BY:*

Geoffrey S. Sheldon

# Peace Officer Personnel Records and the California Public Records Act

League of California Cities 2022 City Attorneys' Spring Conference | May 4, 2022

*Presented by: Geoffrey S. Sheldon*



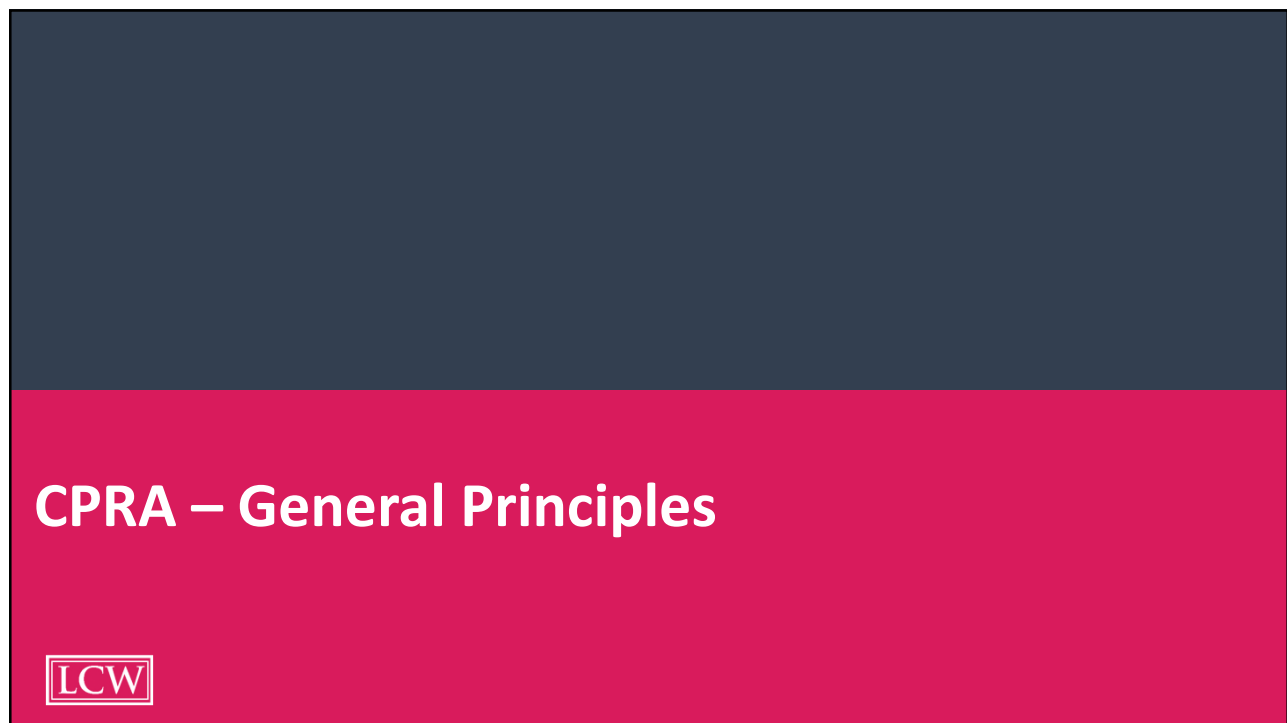
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## CPRA – General Principles

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## Public Records Act

- The California Public Records Act (“CPRA”) is found in Gov. Code § 6250, et seq.
- General policy of the Act is to favor disclosure
- The Act recognizes protection of privacy interests implicated for certain records – but exemptions narrowly construed



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## Undue Burden Defense

- Burden on public agency to establish; need detailed declarations describing time and effort to have chance of (full or partial) success.
  - See, e.g., *Becerra v. Superior Court* (2020) 44 Cal.App.5th 897
- Like a “meet and confer” over RFPs in litigation



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## Public Records Act – Know Who the Requester Is

- How likely is the requester to litigate?
- Who is entitled to request records?
  - All “persons”
  - Can be outside of California
  - Can be person with claim against agency
  - No “person” has stronger entitlement
  - Corporations, LLC’s, partnerships and even other public agencies covered as “persons”



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## Case Study

A citizen makes a PRA request for communications sent or received on council members and staff’s personal devices. The city agreed to produce records stored on its servers, but refused to produce records sent from personal devices and stored on personal servers.

***Did the city violate the Public Records Act?***



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## Emails, Text and Similar Messages

- Writings **concerning public business** are public records **even if they are sent, received, or stored on an official's or employee's personal email, phone, or computer**
  - *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608.



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## Emails, Text and Similar Messages

- Agencies can rely on employees' representations & affidavits
  - To search their own personal files, accounts, and devices
  - For responsive material
- Agencies can adopt policies requiring employees to:
  - Not use personal accounts for public business, or
  - Copy communications to their agency accounts when they do so



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## Attorney's Fees

Attorney's fees are the rule; loadstar is the norm but multipliers are within the court's discretion.

A trial court has discretion to deny attorney fees under the California Public Records Act; the minimal or insignificant standard is applicable when the requester obtains only partial relief under the CPRA.

*Riskin v. Downtown Los Angeles Prop. Owners Ass'n*, No. B309814, 2022 WL 805377, (Cal. Ct. App. Mar. 17, 2022)



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## The CPRA and Personnel Records



## Exemption: Personnel Records (Non-Peace Officers)

- Personnel records are only exempt from disclosure where the disclosure would subject the employee to an unwarranted invasion of privacy
  - Gov't Code § 6254, subd. (c)



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## Exemption: Personnel Records (Non-Peace Officers)

- Examples of personnel records that must be disclosed:
  - Names, job titles, and salaries of employees
  - Names and pension amounts
  - Employment and Severance agreements
  - Disciplinary and investigation records that reflect allegations of a substantial nature and are well-founded **OR** involve “high profile” public officials
    - See, e.g., *Marken v. Santa Monica-Malibu USD* (2012) 202 Cal.App.4th 1250



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## Exemption: Peace Officer Records

- Gov't Code § 6254, subd. (k) exempts “[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege
  - Applies to privileges like Attorney-Client privilege
  - Also applies to peace officer personnel records due to Pitchess statutes
    - Penal Code §§ 832.5, 832.7 and Evidence Code § 1043, et seq.



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## Pitchess Does Not Apply To...

- Criminal investigations of officers by DA, DOJ, etc.
- Federal agencies/federal court
- Officer who wants to see own general personnel file
  - What about IA investigations that are not used for “personnel purposes?”
    - Can see complaint only. (*McMahon v. City of Los Angeles* (2009) 172 Cal.App.4th 1324)



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## Personnel Records – *Pitchess* Motion

Court of Appeal confirms that an agency must file a *Pitchess* motion before it can disclose or use its own peace officer's personnel records in litigation.

- Court also held that Anti-SLAPP statute did not protect disclosure of confidential personnel records

*Towner v. County of Ventura, et al.*,  
63 Cal.App.5th 761 (Cal. Ct. App. 2021).



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## AB 748 & SB 1421



## AB 748 & SB 1421

- AB 748 (Gov. Code § 6254(f)(4).)
  - 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 must be produced within 45 days subject to limited exceptions
- SB 1421 (Penal Code 832.7(b))
  - Four categories no longer exempt as of 1/1/2019:
    - Discharge of firearm at a person
    - Use of force resulting in death or “great bodily injury”
    - Sustained finding of “sexual assault” involving public
    - Sustained finding of certain types of “dishonesty”



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## SB 1421 – Scope of Documents that Must Be Disclosed

- The kitchen sink
  - “All” investigation reports, audio, video, transcripts, autopsy reports, materials presented to DA; all discipline documents – including settlement agreements. (Penal Code § 832.7(b)(3).)



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## Grey Area/Wobbler Records

Consider giving notice to officer/union so they can file reverse-PRA action.

Anti-SLAPP option: Disclosing peace officer records related to dishonesty was protected activity under Anti-SLAPP statute.

- Court of Appeal also held that found that a “sustained finding” (for purposes of SB 1421 / Penal Code § 832.8) is established when an officer has had the opportunity to appeal, and not solely when an appeal is actually completed.

*Collondrez v. City of Rio Vista,*  
(2021) 61 Cal.App.5th 1039



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## Senate Bill 16



## SB 16: The Second Wave

- Four new categories of peace officer personnel records:
  - a) Sustained finding involving force that is unreasonable or excessive
  - b) Sustained findings that an officer failed to intervene against another officer using unreasonable or excessive force
  - c) Sustained findings of unlawful arrests and unlawful searches
  - d) Sustained findings that officer engaged in conduct involving prejudice or discrimination on the basis of specified protected classes



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## SB 16: The Second Wave

- Took effect January 1, 2022
- Public agencies should expect increased requests for records from the public, advocacy groups and the press
- Requires agencies hiring lateral officers to request and review records of misconduct investigations from prior employing agencies
- Increases record retention for sustained misconduct complaints from 5 to 15 years, and resets the retention "clock"
- Requires individual officers to immediately report their own use of force to the employing agency
- Expands use of *Pitchess* records in litigation, removing 5-year limitation



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## SB 16 – Officer Resignations

- Officer cannot avoid release of records by resigning
  - if officer resigns before investigation is complete, these records are subject to disclosures
  - Applies to the “sustained findings” SB 1421 categories as well



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## SB 16: New Timelines for Disclosure

- New Timelines for disclosure—some faster, some slower
- General Rule: Records must be disclosed no later than 45 days from the date of a request



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**SB 2**



## SB 2: Overview

- Changes to POST Commission's Role
- POST investigations and decertification process
- Grounds for decertification
- New local agency requirements
  - Reporting
  - Investigations
  - Background checks
- Elimination of Bane Act Immunity



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## SB 2: Reporting Requirements

Beginning January 1, 2023:

- Agencies must report to POST within 10 days any appointment or separation of a peace officer
  - Includes termination, resignation, and retirement



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## SB 2: Reporting Requirements

Agencies must also report **within 10 days\***:

- Any allegation of conduct that could result in decertification
- Investigative findings of conduct that could result in decertification
- Findings by civilian oversight entity or police chief that officer engaged in conduct that could result in decertification
- A civil judgment or court finding against an officer based on conduct that could result in decertification
- Settlement of a civil claim alleging conduct that could result in decertification

\*For events between 1/1/2020 and 1/1/2023, deadline is July 1, 2023



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## Thank You!

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