LEGAL DEFENSE TRUST

MICHAEL P. STONE, GENERAL COUNSEL

River Crest Drive, Suite A, Riverside, CA 92507
Phone (951) 653-0130 Fax (951) 656-0854

TRAINING BULLETIN

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NEW SENATE BILL WOULD STRIP PRIVACY PROTECTIONS FROM POLICE PERSONNEL RECORDS

SENATE BILL 1286 (LENO) PROPOSES TO TRANSFORM CONFIDENTIAL FILES INTO "PUBLIC RECORDS"

By: Michael P. Stone, Esq.

California Senator Mark Leno (D–San Francisco) introduced Senate Bill 1286 on February 19, 2016. Supported by the American Civil Liberties Union of California, the bill would drastically cut back on police personnel record privacy and confidentiality established under state statutory and decisional law, that has existed for nearly 40 years in the Penal Code and Evidence Code, and that in part, governs so-called "Pitchess Motions."

California has long respected the need for such confidentiality in order to protect police personnel records from random public access and disclosure. To this end, in 1978 the legislature passed into law new provisions following *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, which defined peace officer "personnel records" and declared them to be "confidential" and subject to discovery or disclosure only by resort to a defined motion procedure in court, under then–new Evidence Code §§1043–1045.

Essentially, Penal Code §832.8 defines "personnel records" to include all of the records maintained by an agency pertaining to peace and custodial officer employees, and in particular to "complaints or investigations of complaints," as well as disciplinary records. Penal Code §832.7 declares that such records are "confidential," and not subject to disclosure except by the motion procedure set out in Evidence Code §§1043 through 1047; a showing of good cause (relevancy and materiality to pending litigation) is required. Together, these statutes and appellate decisions applying them have fairly guaranteed peace officers and custodial officers that their employment records are effectively protected from public disclosure.

This bill would amend the Penal Code and Evidence Code sections mentioned above, to substantially weaken provisions that presently provide confidentiality for such personnel records of peace officers and custodial officers. For example, under the proposed amendments to Penal Code §832.5, a local government or agency may

hold hearings to adjudicate public complaints against officers and may make those hearings open to the public, whereas under judicial interpretations of existing law, disciplinary hearings and appeals are confidential and not open to the public or media. See, *Copley Press, Inc. v. Superior Court,* (2006) 39 Cal.4th 278. And, Penal Code § 832.7 would be amended to expand the list of entities that are exempt from the confidentiality provisions of that section to include (in addition to grand juries and prosecutors) civilian review agencies, inspectors general, personnel boards, police commissions, civil service commissions, city councils, boards of supervisors, and entities that are empowered to investigate officer misconduct and conduct audits on behalf of the agency, and entities that adjudicate complaints, entertain appeals of discipline, and set policies or funding for the agency.

In this writer's opinion, the most far-reaching proposed amendment to *Penal Code* §832.7 is the addition of new subpart (c)(1), which provides that the following personnel records are subject to public inspection: records related to any use of force likely to cause death or serious injury including, use of a firearm, electronic control weapon, or impact weapon strike to the head; records related to sexual assault, excessive force, unjustified search, detention or arrest, racial or identity profiling, discrimination or unequal treatment on the basis of protected classifications, or "any other violation of the legal rights of a member of the public," or records related to a finding of work-related dishonesty, such as perjury, false statements, false reports, or destruction or hiding of evidence. The amendment provides for disclosure of the complete complaint and investigation records, evidence gathered, findings, and discipline or action taken based on the findings. Under existing law, all of these records are confidential and not subject to public disclosure.

Of course, the impetus behind this bill is the so-called "need for transparency and accountability," born out of the public sentiment that police cannot be trusted to police their own, the current level of mistrust and suspicion surrounding police officers' character for truth, honesty, and veracity, and the unfortunate public perception that police are too quick to shoot, and tend to use excessive force much of the time.

The bill would also amend the Bill of Rights Act ("POBRA") provisions related to appeals of imposed disciplinary actions (which under the Supreme Court's Copley Press opinion are closed to the public and media), to provide that in establishing the procedures for such appeals, the employing entity may make the hearings open to public attendance. Government Code §3310 permits agencies to adopt their own procedures so long as they conform with the rights and protections granted by POBRA.

So far, the courts and the legislature have shown remarkable allegiance to the public policies favoring confidentiality of police personnel records and adjudicatory hearings. We hope that support of those policies endures to overcome the Leno bill and others that are sure to follow in the current environment of skepticism and distrust for the police in our communities.

Stay Safe!

Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 29 years, following 13 years as a police officer, supervisor and police attorney.