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SHINING A LIGHT ON THE POLICE

FOCUS COLUMN

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The objective of this article and self-study test is to familiarize bench officers and attorneys regarding law enforcement internal investigation practices concerning use of force incidents and the extent to which information regarding internal investigations are accessible to the public. Readers will learn about the different types of investigations that are undertaken; the chief method of access through the California Public Records Act, and privacy and privilege considerations. (Discovery by criminal defendants or in connection with pending civil litigation will not be dealt with in detail in this article.)

Investigation Types

Following a shooting or other significant use of force by law enforcement, there will be at least one if not multiple investigations conducted by the law enforcement agency. These investigations may be criminal in nature and be directed toward the person against whom force was used.

There may also be an investigation of the officer's actions to analyze potential criminal culpability, with the investigation being conducted by the agency's homicide division (even if the injuries were non-fatal), a special unit of the agency's internal affairs, or, in some locales, by the district attorney's office. Additionally, there will be an administrative review of the incident that frequently includes an assessment of whether the officer violated agency policy as well as whether the incident raises broader policy, tactical or training concerns.

In some agencies, this review can include the actions of everyone who interacted with the subject, including any involved supervisors. These reviews are often conducted by the agency's internal affairs unit, either immediately following an incident, or, alternatively, once any criminal investigation into the officer's actions has been completed. In some agencies, these administrative reviews may form the basis of a disciplinary investigation if a determination is made that the involved officer violated department policy, or, alternatively, if a complaint is filed by or on behalf of the victim. In some jurisdictions, a more in-depth analysis of whether any officer should face administrative sanctions will be conducted only if a broader preliminary review reveals the possibility of misconduct and/or a complaint is filed.

Public Access

The primary means by which a member of the public may seek internal police force investigation information in California is through a request pursuant to the California

Public Records Act, Government Code Section 6250, et seq. Under the act, any "person" (which includes a "natural person" as well as any "corporation, partnership, limited liability company, firm or association") may inspect or obtain copies (usually for a fee, unless the agency waives it) of any public record of a state or local government agency. Government Code Sections 6252(c), 6253. Federal agencies are covered by the federal Freedom of Information Act, 5 U.S.C. Section 522, et seq.

The act defines public records as "includ[ing] any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Government Code Section 6252(e). Law enforcement internal investigation records fall within this definition.

The statutory language evidences a clear intent that government records be made available to the public. Indeed, the act begins, "[t]he Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Government Code Section 6250. Further, Government Code Section 6253(a) provides, in pertinent part, "[p]ublic records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided."

Officer Privacy and Privilege

Notwithstanding the act's emphasis on the importance of public access to government records, it also recognizes the right of individual privacy. The California Constitution similarly recognizes the competing interests involved.

The California Constitution acknowledges that "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." California Constitution Article I Section 3(b)(1). But it also explicitly recognizes certain limitations on the public's right to obtain information relating to police operations. Indeed, Article I Section 3(b)(3) proclaims that "[n]othing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer."

The qualification to public access "except as hereafter provided" in Government Code Section 6253(a) refers to a series of enumerated exceptions to the government's obligation to produce records. One of the most frequently asserted exemptions to requests for police records is contained in Government Code Section 6254(k), which provides an exemption for "[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."

In turn, one of the most obvious statutory privileges a police agency can assert is the one that governs peace officer personnel records, as codified in California Penal Code Section 832.7, which in relevant part, provides that, "[p]eace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5 [involving public complaints], or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code," which refers to the procedure commonly known as a *Pitchess* motion, after *Pitchess v. Superior Court*, 11 Cal.3d 531 (1974).

Included among the Penal Code's definition of "personnel records" are those related to "[e]mployee advancement, appraisal, or discipline," Penal Code Section 832.8(d), "[c]omplaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties," Penal Code Section 832.8 (e), and "[a]ny other information the disclosure of which would constitute an unwarranted invasion of personal privacy," Penal Code Section 832.8(f).

Similarly, Government Code Section 6254(c) creates an exemption from public access to "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." According to the California Supreme Court in *Commission on Peace Officer Standards & Training v. Superior Court*, 42 Cal.4th 278 (2007), "[t]his exemption requires [the court] to balance the privacy interests of peace officers in the information at issue against the public interest in disclosure, in order to determine whether any invasion of personal privacy is 'unwarranted,'" with the burden of proof for justifying the exemption placed on the party asserting it.

Underlying Nature of the Information

The more closely the information requested resembles an appraisal of an individual officer's performance in connection with an incident (including any conclusions about the officer's actions), or the results of any disciplinary action against the officer, the more likely an agency could assert that the information sought is confidential personnel information exempted from disclosure under the California Public Records Act. Indeed, in contrast to "official information," described more fully below, an agency lacks discretion to waive an officer's right to the confidentiality of his or her personnel information. *Davis v. City of San Diego*, 106 Cal.App.4th 893 (2003).

In California, most agencies require an officer involved in an incident to provide a statement in connection with its administrative review. If the officer does not provide a statement, he or she can be subject to discipline, which can include termination. When an officer is "compelled" to give a statement for administrative purposes, if there is reason to believe that the officer may be also charged with a crime, the agency must advise the officer of his or her Fifth Amendment privilege against self-incrimination.

Assuming the employee does not waive this right, any compelled statement obtained thereafter may not be used against the officer in any criminal proceeding against that officer. *Lybarger v. City of Los Angeles*, 40 Cal.3d 822 (1985); *Spielbauer v. County of Santa Clara*, 2009 DJDAR 1851. In some law enforcement agencies, if there is no reason to believe any officer committed misconduct in connection with an incident, the common practice is for officers to provide voluntary administrative statements. In other agencies, most involved officers demand that the agency compel them to provide an administrative statement under penalty of disciplinary action.

If officer statements regarding an incident are sought pursuant to a California Public Records Act request, whether such statements are privileged as personnel information depends on the context in which the statements were made. Where such statements are provided during a misconduct investigation arising from or related to the incident, such statements are personnel records, exempt from public disclosure. However, where such statements are obtained in the context of a broader non-misconduct-related review of the incident, intended to assess existing policies and training - where there is no reason to believe any misconduct occurred - it will be more difficult for an agency to argue that such statements are entitled to strict confidentiality as personnel information.

When the requested information is not confidential "personnel information," an agency may still assert the official information privilege, as defined in Evidence Code Section 1040. This protects "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." This privilege can also be asserted as the underlying statutory privilege for the exemption under California Government Code Section 6254(k).

Unlike the disclosure of personnel information, an agency has discretion to voluntarily disclose official information. But once an agency voluntarily waives this privilege by disclosure, it cannot subsequently assert the privilege in response to a new request for the same information. See Government Code Section 6254.5.

The official information privilege also applies to the contents of any criminal investigation against a surviving subject, including witness statements and photographs. *County of Orange v. Superior Court*, 79 Cal.App.4th 759 (2000).

Weighing Whether to Disclose

If an agency asserts the official information privilege and this assertion is challenged, a reviewing court will engage in a balancing test. The court must determine whether the agency's interest in preserving the confidentiality of the information outweighs the public's need for disclosure "in the interest of justice." Evidence Code Section 1040(b)(2).

The California attorney general has opined that the names of officers involved in an incident must be disclosed in response to a public records request, "unless, on the facts of

the particular case, the public interest served by not disclosing the names clearly outweighs the public interest served by disclosing the names."

The opinion provides two examples of such an exception to public disclosure: where the officer is operating in an undercover capacity and where a gang member is involved and there may be retaliation against the involved officer by other gang members. In such instances, an agency might rely on Government Code Section 6255(a), which allows for the withholding of a requested record by "demonstrating that ... on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

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