

CLIENT NEWS BRIEF

New Laws Restrict Law Enforcement Agencies' Right to Withhold Recordings Relating to "Critical Incidents"

After years of failed attempts, the Legislature has passed, and Governor Brown has signed into law, two bills that remove the longstanding layers of protection and confidentiality for certain law enforcement records. Senate Bill (SB) 1421, which becomes effective January 1, 2019, increases public access to certain records relating to allegations of misconduct by law enforcement. Assembly Bill (AB) 748, effective July 1, 2019, subjects body camera footage to public records requests.

These laws will be applicable to all public entities employing peace officers or custodial officers, including cities, counties and school districts.

Background

For more than four decades, records relating to citizen complaints against law enforcement officers that are held by the officers' employing agency have only been made available in a civil or criminal matter, after a showing of cause established in a "Pitchess" motion or through an officer's voluntary waiver. The courts have supported the protection of peace officer personnel files over the years. In 2006, the California Supreme Court ruled that the record of an officer's administrative disciplinary appeal from a sustained finding of misconduct was confidential and could not be disclosed to the public. However, the confidential status of these records is about to change.

SB 1421 expands the public's right, through the California Public Records Act (CPRA), to request and receive records related to reports, investigations, or findings of:

- An incident involving an officer's discharge of a firearm at a person;
- An incident in which the use of force by an officer against a person resulted in death or great bodily injury;
- An incident in which a finding that an officer engaged in sexual assault involving a member of the public was sustained; and
- Any record relating to a sustained finding that an officer was dishonest relating to the reporting, investigation, or prosecution of a crime, or relating to the misconduct of another officer.

While SB 1421 permits the redaction of certain personal information and allows a public agency to withhold records when their release would create a reasonable safety concern, and also while an investigation into the use of force is ongoing, the new law will change who has access to information historically found to be confidential.

Separately, AB 748 will require law enforcement agencies to release, upon request, video or audio recording footage of a "critical incident" within 45 days of the incident. A critical incident is defined as a recording that depicts:

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- An incident involving an officer's discharge of a firearm at a person, or
- An incident in which the use of force by an officer against a person resulted in death or great bodily injury.

AB 748 provides limited exceptions to the requirement that such video or audio footage be released. In an effort to balance transparency with law enforcement's ability to conduct effective investigations and the right to privacy, a law enforcement agency may withhold such footage for up to one year if it can "demonstrate that disclosure would substantially interfere with the investigation." An agency may withhold such footage for longer than one year if it can establish by "clear and convincing" evidence that substantial interference would occur if the information is released.

The new law will also allow an agency, when it can demonstrate that release would violate the subject's reasonable expectation of privacy, to blur, obscure and redact the recordings, so long as the changes do not interfere with the public's ability to "fully, completely, and accurately comprehend the events captured in the recording."

Takeaways

As early as January 1, 2019, the right to obtain copies of law enforcement agency records pertaining to citizen complaints and recordings of "critical incidents" will be expanded under the CPRA, barring certain limited exceptions. It is not yet clear what facts may pass scrutiny for these exceptions to apply. Public agencies should review their current policies regarding CPRA, body camera footage, video and other recordings to determine what changes will be necessary to comply with these new laws.

For more information about SB 1421, AB 748 or about the CPRA in general, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).

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