

**PUBLIC CONFIDENCE IN LAW ENFORCEMENT
A MATTER OF STATEWIDE CONCERN**

by

**Russell Reinhart
Huntington Beach Police Department**

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The Command College Futures Study Project is a FUTURES study of a particular emerging issue of relevance to law enforcement. Its purpose is NOT to predict the future; rather, to project a variety of possible scenarios useful for strategic planning in anticipation of the emerging landscape facing policing organizations.

This journal article was created using the futures forecasting process of Command College and its outcomes. Defining the future differs from analyzing the past, because it has not yet happened. In this article, methodologies have been used to discern useful alternatives to enhance the success of planners and leaders in their response to a range of possible future environments.

Managing the future means influencing it—creating, constraining and adapting to emerging trends and events in a way that optimizes the opportunities and minimizes the threats of relevance to the profession.

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There is no rational argument why misconduct by a peace officer should be a private matter. Peace officers wield extensive authority in the exercise of their duties, including the ability to use force and deprive citizens of their Constitutional rights. To build community trust in law enforcement the investigation of citizen complaints should be treated as a public matter of statewide concern and not a private personnel issue. According to the National Institute of Justice (2005) lessons learned from studies on enhancing integrity of police departments to build public trust indicate disclosing the disciplinary process and resulting discipline to public scrutiny through Sunshine laws are a potent deterrent to both individual and organizational inclinations to conceal misconduct (National Institute of Justice, 2005).

The citizens of every community have a legitimate public concern to access information about police misconduct to be able to make enlightened decisions about that police department. Law enforcement leaders and the public need to come together to treat citizen complaints as a matter of statewide concern and remove them from the privacy of personnel files to enhance the credibility of policing, and also to ensure transparency and trust to the citizenry they serve.

Citizen Complaints in California

A citizen complaint is one or more allegations by any person that an employee of an agency, or the agency itself, has behaved inappropriately as defined by the person making the allegation (Office of Community Oriented Policing Services, 2005). In California, the State has further defined a citizen complaint as a private personnel matter for the involved officer. From an allegation of rudeness to one of excessive force, any person has the right to bring their

complaint forward and expect to have it thoroughly investigated. They do not, however, have any checks and balances to determine the quality or character of the investigation conducted. Instead, California laws governing the process for investigating allegations of peace officer misconduct are complex and interwoven with extensive protections for the peace officer's privacy (Marr, Marchant, Dammeier, & Kreisler, 2012).

This complex process is further complicated with considerable amount of local discretion by law enforcement agencies on how they will handle these investigations (Office of Community Oriented Policing Services, 2005). News media sources regularly cite the California's Public Safety Officers' Procedural Bill of Rights Act (POBR) as the shield to privacy of information regarding complaints of police misconduct (Stanton, 2013). To the contrary, POBR establishes a process for how investigations of peace officers are to be conducted and makes no reference to shielding the records from public oversight. The foundation for the protection of privacy for peace officers and shield against public review of citizen complaints lies in Penal Code Section 832.7, and not in the POBR, as is commonly thought.

History of the Police Personnel Records

In 1978, the California Legislature codified the privileges and discovery procedures comprising so-called "Pitchess motions" by enacting Penal Code Sections 832.7 and 832.8 and Evidence Code Sections 1043 through 1045. In Pitchess, the court held that a criminal defendant's fundamental right to a fair trial entitles a defendant who is asserting self-defense to a charge of battery on the police officer who arrested him to discovery of police personnel records. The Penal Code provisions define "personnel records" (Penal Code Section 832.8) and provide

that such records are confidential and subject to discovery only pursuant to the procedures set forth in the Evidence Code.

Evidence Code Sections 1043 and 1045 detail the discovery procedures. Evidence Code Section 1043 requires a written motion to the court upon written notice to the government agency which has custody of the records sought, supported by an affidavit showing good cause for the discovery including the materiality of the discovery sought to the subject matter involved in the pending litigation. Once good cause for discovery has been established, Evidence Code Section 1045 requires the court to examine the information *in camera* to determine its relevance to the case at issue. As part of this *in-camera* process, the court must exclude from disclosure certain categories of information. This includes complaints more than five years old, the conclusions of any officer investigating a complaint, and facts that are so remote as to make disclosure of little or no practical benefit. Evidence Code Section 1045 also establishes general criteria to guide the court's determination and ensure that the privacy interests of the officers subject to the motion are protected. Thus, the statutory scheme carefully balances two directly conflicting interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest to access all information pertinent to his or her defense (*Alt v. Superior Court of Shasta County*, 1999).

Beyond Pitchess, in California the complaining citizen has the right to know that agency's policy to investigate their complaint (Penal Code Section 832.5(a) (1)), the right to a copy of their initial complaint and statement to the agency (Penal Code Section 832.7(b)), and a final disposition letter within 30 days of the classification of the investigation (Penal Code Section 832.7(e)(1)). The citizen does not have the right to know who was interviewed, what evidence was collected or reviewed, the statement of the subject employee(s) of the complaint

and, most importantly, the rationale for the findings of that classification. These matters are all concealed from the complainant by being placed within a peace officers personnel file as a matter of law (Penal Code Section 832.8(e)).

Disclosure versus Release – A Delicate Balance

Personnel records for all employees, private and public, should be afforded reasonable protections from disclosure. An employee's marital status, family members, home address and medical conditions should be private and not subject to an unwarranted invasion of privacy. The laws in California, though, require a citizen complaint and the investigation of that complaint to be maintained in the same file as the employee's private information. The California Legislature has consistently taken a position that investigations and findings of police misconduct should not be matters open to public. Law enforcement leaders, however, are hampered by laws keeping citizen complaint investigations confidential when the community and media questions the integrity of the process (CBS Local Media, 2013). Furthermore, there is evidence that opening these records would not have the devastating effects asserted by those who advocate the status quo.

The legislative shield being used for citizen complaints is in question considering each state treats citizen complaint records differently (Wilson, 1994). The Florida Legislature, for example, has taken the opposite approach and treated citizen complaints of misconduct as open public records once the investigation is complete (The Office of Attorney General Pam Bondi, 2012). There is no indication law enforcement agencies function more or less effectively in either California or Florida despite this stark contrast in how citizen complaints are handled (Small, 2012). The obvious difference is the amount of information provided to the citizens of

each state after making a citizen complaint of police misconduct. Each state has a public records law patterned after the federal Freedom of Information Act and supported by numerous case decisions (Wilson, 1994). A review of all 50 states and the District of Columbia's public records laws regarding disciplinary reports and personnel matters shows Florida and Ohio the most open specific to peace officers. It also reflects that more states' laws place a value on openness rather than privacy of these records (Reporters Committee for Freedom of the Press, 2013).

The strong supporters of maintaining the status quo are peace officer labor unions. Peace officer labor unions are organized, well-funded and effective lobbyists in California (Walters, 2013). They have been successful lobbying for the complex structure of laws that currently protect the investigation of citizen complaints from public scrutiny and maintaining an aggressive front to anyone that challenges them. A recent letter from the President of the Los Angeles Police Protective League demanding an investigation into the accidental release of information of a file protected by Penal Code 832.7 states, "In our view, the unlawful disclosure of the confidential information regarding any officer by unscrupulous Police Department media sources and self-serving individuals has reached a level of indecency that we will not stand by and remain silent" (Izen, 2012). This is not an isolated sentiment, as evidenced by this statement posted in the website of a law firm whose primary practice is the defense of peace officer misconduct: "Generally the purpose behind forming political action committees (PAC) is to give employee associations political clout needed to promote their interests and ideas to whatever legislative body controls their employee wages and benefits" (Lackie, Dammeier, McGill & Ethir, APC, 2013)

The bottom line is a PAC fund creates power for the association in the community and with policy makers. When a city council, county board of supervisors, or state legislator knows the police association has thousands of dollars to spend on the next election, they think twice before making decisions that detrimentally impact the police association. Because of these and similar aggressive police labor positions, existing California laws are in need of significant improvement; as noted by groups such as the California Newspapers Publishers Association in a quote by their general counsel, Jim Ewert, “The public is unable to find out anything about how police investigate or discipline their staff. We are far and away the most secretive when it comes to allowing the public to see information about bad cops and whether an agency addresses malfeasance on the job. No other state has gone that far” (Richards, 2011). Lobbying by peace officer interest groups has had a substantial impact on the status quo.

Until August 29, 2006, the San Diego Civil Service Commission had the ability to hear appeals of police discipline in public. However, in a series of court actions ending in *Copley Press v. Superior Court*, the California Supreme Court ruled Penal Code 832.7 extended the confidentiality of the records beyond just the employing agency, but also to independent bodies that reviewed them similar to the employing agency. This case decision was supported by numerous amicus briefs by police unions supporting the expansion of Penal Code 832.7. The resulting action precluded citizen access to these reviews in many local governments across California, including Los Angeles, Berkley, Oakland and San Francisco. In response, Senator Gloria Romero introduced Senate Bill 1019 in 2007 to abrogate the court decision and allow the public access to review of appeals and citizen oversight of law enforcement agencies as it existed prior to the court decision. The result was an unprecedented law enforcement lobbying effort,

resulting in the Bill's failure to successfully move beyond the Assembly's Public Safety Committee on June 24, 2008 (Legislative Counsel Bureau, 2008).

As events such as those related to Rodney King, Oakland Riders, Rampart, Oscar Grant and most recently, Christopher Dorner become public discussions of the need for citizen oversight of law enforcement, the more likely the statewide interest of citizens will coordinate with their politicians to bring the issue of public scrutiny of citizen complaints to a public forum. Each of these incidents could have been openly discussed by law enforcement leaders of the affected agencies if the legislative restrictions had not existed regarding the investigations. Open discussions are the basis to establish and maintain public trust in any law enforcement agency.

Peace officers are human, and there will be mistakes and misconduct, just as society recognizes in every profession and vocation (e.g., lawyers, doctors, clergy, politicians, educators). Yet in California, only peace officers are granted this legislative shield prohibiting public scrutiny of the investigations of their misconduct. Peace officers law enforcement duties are public actions, not private actions. The public has a legitimate right know and understand the disciplinary processes of their law enforcement agency, and law enforcement leaders should be able to openly discuss the investigations to maintain the public trust. Only through that knowledge will the citizens be able to carry on enlightened discussion and make proper decisions about that agency (Wilson, 1994).

Conclusion

The California Legislature should embrace the citizen's right to know if their local peace officers are working professionally and being held accountable when they do not. If the California Legislature does not act, the citizens of this state could take it upon themselves to act

through the initiative process. Citizens of California should enjoy the same right to know how citizen complaints of police misconduct are handled as enjoyed by citizens of other states. The current system misplaces the importance of privacy for a peace officer over the citizen's right to know the business of their local law enforcement agency. Whether changed by the legislature or by the citizens through the initiative process, it is time to correct this misplaced privacy shield of citizen complaints, and remove them from peace officer files and place in the California Public Records Act and the full scrutiny of public review.

Law enforcement leaders should be able to openly discuss the findings and outcomes of citizen complaints to maintain the integrity of the department and secure the public trust for the community they serve. The current laws prevent this from happening, but the current laws are not necessary. Other states and the federal government have provided the examples of effective practices that California can embrace. This should not be seen as an attempt to turn peace officer personnel files into public records, but to keep citizen complaints out of the shield of personnel files, and allow the citizens to full disclosure into the investigations of police misconduct.

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