

THE PARADOX OF S.B. 1421: A NEW TOOL TO SHED LIGHT ON POLICE MISCONDUCT AND A PERVERSE INCENTIVE TO COVER IT UP

I. INTRODUCTION

Police forces across the country have found themselves under scrutiny in recent years, often because of incidents involving shootings and use of excessive force.¹ The media and the public often focus on whether prosecutors charge the officers involved. Lately, however, a related issue has received similar attention: the fact that privacy laws in many states severely restrict public access to police personnel records, including disciplinary records.² This lack of transparency on relevant aspects of the work of peace officers undermines the openness and accountability characteristic of democratic societies, weakens trust in law enforcement, and can harm individuals who require the information in police records to pursue civil cases or to defend themselves in criminal ones.³

1. The media has not just covered individual incidents of police shootings and excessive use of force but has also tried to find patterns. *See, e.g., Fatal Force*, WASH. POST (May 13, 2020, 7:39 PM), <https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/>; *see also* PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, OFFICE OF CMTY. ORIENTED POLICING SERV., FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING iii (May 2015) (citing “recent events around the country that have underscored the need for and importance of lasting collaborative relationships between local police and the public,” and that “exposed rifts in the relationships between local police and the communities they protect”).

2. *See, e.g.,* Claudia Lauer et al., *Police Disciplinary Records Are Largely Kept Secret in US*, STARTRIBUNE (June 12, 2020, 3:15 PM), <https://www.startribune.com/police-disciplinary-records-are-largely-kept-secret-in-us/571218022/>; Luis Ferré-Sadumi et al., *N.Y. Bans Chokeholds and Approves Other Measures to Restrict Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/nyregion/50a-repeal-police-floyd.html?smid=em-share> (reporting on New York’s repeal of Section 50-a of its civil rights law, which kept police disciplinary records secret, in the wake of persistent public protests against police violence and racism).

3. Unless otherwise specified, this Note will use the terms “police,” “police officers,” and “peace officers” interchangeably to refer to law enforcement agents.

Until very recently, California was among the states that most severely restricted access to peace officers' personnel records⁴ with laws that had serious consequences for the administration of justice.⁵ Laws protecting the confidentiality of police personnel records have required litigants to go through a time-consuming and often fruitless process in order to obtain information necessary for their cases.⁶ Prosecutors subject to the same restrictions have sometimes remained uninformed about relevant prior misconduct by officers who they call as witnesses, and have been deprived of exculpatory or impeachment information that they are legally obligated to share with the defense.⁷

In an effort to increase transparency on misconduct by peace officers, California enacted a law that created four significant exceptions to the confidentiality of their records.⁸ S.B. 1421 came into effect on January 1, 2019 and amended the state's Penal Code to make records available for public inspection pursuant to requests under the Public Records Act (PRA) when they relate to incidents involving the discharge of a firearm or use of force resulting in death or great bodily injury, sustained findings of sexual assault involving a member of the public, and sustained findings of certain acts of dishonesty.⁹ For situations other than these four, access to personnel records still requires a special motion showing good cause and a court order,¹⁰ but S.B. 1421 at least has created an opportunity for the public to learn about serious incidents involving peace officers, and gives litigants a new tool to obtain relevant information.

This Note assesses the impact of the law in since it became effective, and warns that in spite of its accomplishments the law falls short in important ways, especially because it creates some perverse incentives. On

4. See Robert Lewis et al., *Is Police Misconduct a Secret in Your State?*, WNYC NEWS (Oct. 15, 2015), <https://www.wnyc.org/story/police-misconduct-records>.

5. See *infra* Part II.

6. See, e.g., Benjamin J. Branson, Note, "Good Cop, Bad Cop?" *Anyone's Guess: A Review of the Pitchess Motion for Criminal Discovery in the State of California*, 31 WHITTIER L. REV. 279, 290–91 (2009); see also *infra* notes 23–40 and accompanying text.

7. See *infra* Part II.B.; see also Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 762–67 (2015). Writing before S.B. 1421 was passed, Abel describes California as "the poster child" of jurisdictions with legislation that bar prosecutors' access to police personnel files that may contain exculpatory or impeachment information. *Id.* at 762–63.

8. See S.B. 1421, Ch. 988, Reg. Sess. (Cal. 2018) (codified as amended at CAL. PENAL CODE §§ 832.7–8 (West 2008 & Supp. 2020)). S.B. 1421 section 1(b) contained a legislative finding that "[t]he public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force."

9. See CAL. PENAL CODE § 832.7 (West 2008 & Supp. 2020).

10. See *infra* notes 24–31 and accompanying text.

the one hand, the law increases transparency and promotes the public's right to know about police misconduct by allowing public scrutiny. Also, although S.B. 1421 did not seek to facilitate the production of peace officer records in litigation, it has already spurred new case law and new practices by prosecutors that will have that effect.

On the other hand, the heightened risk that misconduct will be exposed creates incentives for law enforcement to keep evidence of misconduct away from records in the first place. The response to these incentives could take the form of destruction of records whenever saving them is not strictly and unambiguously required by law, unfinished investigations, less candor by officers subject to investigations, and hesitation by those recommending or imparting discipline. The fact that some police departments destroyed personnel files around the time of the law's passage and that peace officer unions have vigorously challenged the new law in court since its passage suggest that the concern is not idle.¹¹

Part II of this Note provides legal and historical background for S.B. 1421 and explains the effect of laws that protect the confidentiality of peace officer records during litigation, including in criminal cases where the privacy of such records is in tension with prosecutors' duties under *Brady v. Maryland*¹² and its progeny. Part III examines the impact of S.B. 1421 during its first year and brings attention to the issues that are most likely to create problems in the future. The law has given Californians and the local media a powerful tool to lift the veil of secrecy on serious incidents involving peace officers. The success of this tool will raise the stakes of placing information in peace officers' personnel files subject to disclosure, however. Some "rogue departments" might try to avoid disclosing information on misconduct,¹³ and other departments might comply with the new law more readily, recognizing that transparency and accountability are good for law enforcement agencies themselves.¹⁴ The incentives to avoid the full impact of the law apply across the board, however, and it will be important to deal with them.¹⁵ The Note concludes with a reflection on the

11. See *infra* notes 140–41 and accompanying text.

12. See 373 U.S. 83 (1963).

13. See Liam Dillon, *California Police Unions Are Preparing to Battle New Transparency Law in the Courtroom*, L.A. TIMES (Jan. 9, 2019, 12:05 AM), <https://www.latimes.com/politics/la-pol-ca-police-records-law-challenges-20190109-story.html>. The term "rogue departments" was used by Peter Bibring, director of Police Practices at the American Civil Liberties Union of Southern California, to refer to agencies that destroyed records to avoid their disclosure. *Id.*

14. See *infra* note 63 and accompanying text.

15. The last available federal statistics use 2008 data and indicate that California had 509 state and local law enforcement agencies and over 126,500 personnel, including more than 79,400 sworn officers—more personnel than any other state. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE

law's impact during its first year and some steps that can mitigate its shortcomings.

II. THE CONFIDENTIALITY OF POLICE RECORDS AND ITS IMPACT ON LITIGATION

A. Confidentiality in State Legislation and Case Law Before S.B. 1421

The California Constitution broadly states that “the people have the right of access to information concerning the conduct of the people’s business,”¹⁶ and the state’s PRA declares that this right is “a fundamental and necessary right of every person” in the state.¹⁷ The PRA creates a regime of fairly easy access where “every person has a right to inspect any public record” and also may obtain copies of such records merely by paying a fee covering the cost of duplication.¹⁸ In the specific case of information about the work of law enforcement officers, however, the legislative framework undermined the broad pro-transparency mandate so significantly that access to such records was, until S.B. 1421, among the most difficult in the country.¹⁹

First, both the state constitution and the PRA contain significant exemptions that protect the confidentiality of public records on the official performance and qualifications of peace officers, including records of investigations conducted by state and local law enforcement agencies.²⁰ Second, and consistent with those exemptions, since 1978 California’s Penal Code has protected the confidentiality of peace officer personnel records in any criminal or civil proceeding except pursuant to a court order

BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES (2008).

16. CAL. CONST. art. I, § 3(b)(1).

17. CAL. GOV’T. CODE § 6250 (West 2019 & Supp. 2020).

18. *Id.* § 6253(a)–(b).

19. S.B. 1421’s legislative history describes California as “one of the most secretive states in the nation in terms of openness when it comes to officer misconduct and uses of force.” *See* S. RULES COMM., REP. ON PEACE OFFICERS: RELEASE OF RECORDS 8 (Comm. Print Cal. 2018) [hereinafter SENATE FLOOR ANALYSES]; *see also* Lewis et al., *supra* note 4, for a 2015 overview of the varying levels of confidentiality afforded to police records in all fifty states.

20. *See* CAL. CONST. art. I, § 3(b)(3), (5); GOV’T § 6254(f), (k).

granting a so-called “Pitchess” motion,²¹ as provided in sections 1043 and 1046 of the state’s Evidence Code.²²

The California Supreme Court has described the two-stage process for obtaining relevant information pursuant to a Pitchess motion as striking a fair balance between the interests of those who seek access to police records and officers’ “just claim to confidentiality.”²³ In the first stage, the party seeking discovery or disclosure must file a written motion identifying the officer whose records are sought with an affidavit showing good cause for the disclosure, including its materiality to the subject matter of the pending litigation, and stating upon reasonable belief that the agency subject to the motion has the records the party is looking for.²⁴ While the request has to be made with adequate specificity to avoid a “fishing expedition,”²⁵ this first stage of the process is not designed to be overly burdensome.²⁶

The second stage of the Pitchess process, however, introduces restrictions that keep important information secret. After the showing of good cause, the custodian of records provides the court with all the records that are potentially relevant,²⁷ including records of citizen complaints, investigations of those complaints, and discipline imposed as a result of those investigations. Next, the court examines the records in camera and determines which of them are actually relevant and thus subject to discovery.²⁸ The court must exclude records of complaints concerning conduct that occurred more than five years before the event subject to litigation.²⁹ The custodian of records is available for the review in camera, but neither counsel for the defense nor the prosecutor are allowed in.³⁰ If the court grants access to information from the records, it is normally

21. The motion is named after *Pitchess v. Super. Ct.*, 522 P.2d 305 (Cal. 1974). See *infra* notes 24–35 and accompanying text.

22. See 1978 Cal. Stat. 2081–2083 (enacting S.B. 1436, codified as amended at CAL. EVID. CODE §§ 1043–47 (West 2019 & Supp. 2020) and CAL. PENAL CODE §§ 832.5, .7–.8 (West 2008 & Supp. 2020)).

23. *City of Santa Cruz v. Mun. Ct.*, 776 P. 2d 222, 227 (Cal. 1989).

24. See EVID. § 1043(b)(3).

25. *Pitchess*, 522 P.2d. at 309.

26. See *People v. Super. Ct. (Johnson)*, 377 P.3d 847, 861–863 (Cal. 2015) (indicating that the Pitchess motion does not impose too high of a burden for defendants or for the courts).

27. EVID. § 1045(a).

28. *Id.* § 1045(b).

29. *Id.* § 1045(b)(1).

30. *Id.* § 1045(b).

subject to a protective order that restricts the use of that information to the case at hand.³¹

In practice, obtaining information from police personnel records with a Pitchess motion is difficult and often not very productive.³² Judges normally allow disclosure of only the name and contact information of individuals who made complaints against the officer in question within the previous five years, as well as of witnesses of the incident subject to the complaint.³³ Sometimes the motion will yield the name of an officer who witnessed the incident, and much more rarely, the name of an officer who made a complaint against another officer.³⁴ Then it is up to the attorneys to follow up and unearth what happened.³⁵ This is not easy because complainants cannot always be found, and if they are found, they often do not want to testify.³⁶ Also, police officers normally decline to be interviewed, in which case attorneys have to file supplemental Pitchess motions to have access to relevant information.³⁷ Since this process can take months, criminal defendants who are already in custody often prefer to forgo Pitchess motions and reach a plea deal quickly,³⁸ or choose to go to trial even when their attorneys advise that, without Pitchess information, they would not have a strong case.³⁹ In short, discovery of police records with the Pitchess motion often yields little information about an officer

31. *Id.* § 1045(e). Section 1045(d) of the California Evidence Code allows the agency that has custody or control of the records to obtain an order “to protect the officer or agency from unnecessary annoyance, embarrassment or oppression.”

32. See Corina Knoll et al., *An L.A. County Deputy Faked Evidence. Here's How His Misconduct Was Kept Secret in Court for Years*, L.A. TIMES: MUST READS (Aug. 9, 2018, 5:00 AM), <https://www.latimes.com/local/california/la-me-brady-list-secrecy-court-20180809-htmlstory.html>; telephone interview with Rourke Stacy, criminal defense attorney in Los Angeles County (Jan. 4, 2019).

33. See Knoll et al., *supra* note 32; interview with Rourke Stacy, *supra* note 32.

34. Telephone interview with Harvey Sherman, Deputy-in-Charge, L.A. Cty. Pub. Def. Off. (Jan. 4, 2019).

35. *Id.*; Knoll et al., *supra* note 32; interview with Rourke Stacy, *supra* note 32.

36. Interview with Rourke Stacy, *supra* note 32.

37. *Id.*; interview with Harvey Sherman, *supra* note 34. Supplemental Pitchess motions can also be used when complainants are found but do not remember the details of their complaints. Upon a proper showing, a court will grant the defense access to full statements of complainants and witnesses. LAURIE L. LEVENSON & ALEX RICCIARDULLI, CALIFORNIA CRIMINAL MOTIONS § 4:7 (2018).

38. Knoll et al., *supra* note 32 (explaining that “[f]ew [defendants] go through the trouble”); interview with Harvey Sherman, *supra* note 34 (similarly, noting that some defendants are reluctant to go through the Pitchess process and prefer a speedy trial or a plea deal).

39. Interview with Harvey Sherman, *supra* note 34.

purportedly involved in an incident, requires substantial follow-up, and is actually much more burdensome than similar discovery under federal law.⁴⁰

Ironically, the restrictive statutory framework that hinders disclosure of police records was created in response to a California Supreme Court decision that aimed at transparency. In 1974, the court in *Pitchess v. Superior Court* held that a criminal defendant “may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial.”⁴¹ But while the decision favored disclosure, it set off a reactionary backlash.⁴² In the aftermath of the ruling, the Los Angeles Police Department (LAPD) reportedly shredded four tons of personnel records,⁴³ and police unions lobbied heavily to change existing law and limit the extent of the discovery required from them.⁴⁴ The backlash resulted in the amendments to the state’s Penal and Evidence Codes that created the broad blanket of confidentiality that can only be lifted with the two-stage *Pitchess* process described above.⁴⁵

In the years since *Pitchess*, the California Supreme Court has not routinely expanded disclosure. In its 2006 decision in *Copley Press, Inc. v. Superior Court*, which involved a PRA request of records of an appeal of a disciplinary decision to a civil service commission, the court closed the door to police records even tighter by deeming those records protected.⁴⁶ The court held that Section 832.7 of the Penal Code created a “general condition of confidentiality” that did not just apply in civil and criminal proceedings, but also in administrative proceedings.⁴⁷

By contrast, in *Long Beach Police Officers Ass’n v. City of Long Beach* the court upheld a PRA disclosure of the names of officers involved in an on-duty shooting, although its holding is quite narrow.⁴⁸ The court decided that the incident report that contained the names was not a personnel record because it meant to provide factual information about the incident and was therefore different from the records of internal investigations used to

40. Telephone interview with Samuel Paz, Chief Exec. Officer, L. Off. of R. Samuel Paz (Dec. 28, 2018). For an explanation of the differences between discovery of police records under federal and states’ law, such as California’s law, see Abel, *supra* note 7, at 754–62.

41. *Pitchess v. Super. Ct.*, 522 P.2d 305, 309 (Cal. 1974).

42. See Katherine J. Bies, Note, *Let the Sunshine in: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL’Y REV. 109, 123–24 (2017); Dillon, *supra* note 13.

43. See Dillon, *supra* note 13.

44. See Bies, *supra* note 42, at 126–31 for an account on the backlash from police unions and the arguments they made at the time in favor of the confidentiality of personnel files.

45. See *supra* notes 23–31 and accompanying text.

46. 141 P.3d 288, 308 (Cal. 2006).

47. *Id.* at 294–95.

48. 325 P.3d 460, 470 (Cal. 2014).

evaluate an officer's action or to impose discipline.⁴⁹ And although an exception in the PRA allows public agencies to withhold records in cases where the public interest is best served by *not* disclosing the information, disclosure should be favored—especially in cases of officer-involved shootings.⁵⁰ The burden is thus on the agency to show a “clear overbalance” in favor of keeping the information secret and protecting the privacy interest of the peace officer involved.⁵¹

B. A Clash with Federal Law?

California's laws that protect the confidentiality of peace officer personnel records do not just affect private litigants and the public at large—they have a special impact on state prosecutors. Although prosecutors enjoy direct access to personnel records when they investigate officers, they otherwise need to use Pitchess motions to obtain information from those records.⁵² This requirement creates a constitutional problem to the extent that it hides from prosecutors impeachment or exculpatory information that they must share with criminal defendants under federal law.⁵³ And because Pitchess motions only allow discovery of information directly relevant to the facts of the case under litigation,⁵⁴ requiring this motion can be a hindrance when an officer's misconduct is “collateral”—that is, when a peace officer with a record of misconduct or dishonesty is called to testify against a defendant in a case where the officer was not directly involved.⁵⁵ S.B. 1421 was not enacted to solve this problem, but S.B. 1421 and the subsequent California Supreme Court decision in *Ass'n for Los Angeles Deputy Sheriffs v. Superior Court* (“ALADS”) have mitigated it, even if they have not fully solved it.⁵⁶

49. *Id.* at 467. The court thus distinguished the case from *Copley*, which involved records of a disciplinary appeal. *See id.* at 468.

50. *Id.* at 469.

51. *Id.* at 464.

52. *See People v. Super. Ct. (Johnson)*, 377 P.3d 847, 856–57 (Cal. 2015); *Alford v. Super. Ct.*, 63 P.3d 228, 236 (Cal. 2003). The Penal Code makes an exception when it provides that the requirement of a Pitchess motion “shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office.” CAL. PENAL CODE § 832.7(a) (West 2008 & Supp. 2020).

53. *See infra* notes 57–60 and accompanying text. Impeachment evidence refers to evidence that would allow defendants to challenge the credibility or otherwise put the testimony of a police officer in question. Exculpatory evidence is evidence that is favorable to defendants and would help exonerate them from guilt.

54. *See supra* notes 27–28 and accompanying text.

55. *See Abel, supra* note 7, at 748–49.

56. *See* 52 P.3d 129 (2019); *see also infra* notes 95–108.

Under *Brady v. Maryland* and *Giglio v. United States*, prosecutors have a duty to share with criminal defendants material exculpatory evidence as well as impeachment evidence that would allow defendants to question the credibility of witnesses testifying against them.⁵⁷ Evidence is material when there is a reasonable probability that its disclosure could change the outcome of a trial.⁵⁸ When the information is clearly exculpatory, prosecutors have a duty to volunteer it even if the defense does not request it.⁵⁹ Prosecutors also have a duty to learn about and share *Brady* evidence that other members of the prosecutorial team might have, which could include law enforcement.⁶⁰ Under federal law, then, a prosecutor who calls a peace officer to testify against a defendant must learn about and disclose evidence pertaining to relevant past acts of misconduct and dishonesty by this officer that could be material to the defense—even collateral evidence, such as impeachment evidence showing that the officer committed perjury in a prior unrelated trial or planted evidence in an unrelated case. The constitutional duty to disclose *Brady* information to the defense exists independently from the Pitchess process, and it exists even if local law enforcement has the information but the prosecutor's office does not.

There are some ways of mitigating the conflict between the Pitchess requirement and the federal duty under *Brady*, but they do not completely solve it. The California Supreme Court has held that during the in camera review to determine which records are discoverable pursuant to a Pitchess motion, a trial court must allow the discovery of information that would be excludable under Pitchess (for example, because it is older than five years) but that should be disclosed to the defense under *Brady*.⁶¹ Also, some law enforcement agencies share with prosecutors so-called *Brady* alerts or *Brady* lists, or otherwise inform prosecutors about officers who have sustained findings of dishonesty or other types of relevant misconduct.⁶² The District Attorney Offices in Santa Clara, San Francisco, Alameda, and Ventura counties, for example, have memorandums of understanding with many chiefs of local agencies that give district attorneys routine access to

57. *Brady v. Maryland*, 373 U.S. 83, 86–87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972).

58. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

59. *United States v. Agurs*, 427 U.S. 97, 107 (1976).

60. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

61. *People v. Super. Ct. (Johnson)*, 377 P.3d 847, 862 (Cal. 2015) (citing *City of L.A. v. Super. Ct.*, 52 P.3d 129, 137 (Cal. 2002)) (reasoning that any information material under *Brady* would also be material for the case under litigation).

62. *Brady* lists compile the names of officers who have engaged in acts of dishonesty and other misconduct that a prosecutor would need to disclose to the defense under federal law.

relevant information on misconduct.⁶³ Prior to S.B. 1421, however, not all District Attorney Offices had either sought or even accepted that information. For example, until late 2019 the position of the District Attorney's Office in Los Angeles County was that it was not permitted by law to receive lists or information that could be part of an officer's personnel file.⁶⁴ Its position changed only when the California Supreme Court expressly upheld the lawfulness of those lists in light of the changes introduced by S.B. 1421.⁶⁵ And although law enforcement agencies must notify district attorneys of conduct by their officers that may amount to a crime for prosecutors to decide whether to bring charges, and also have an obligation to share *Brady* materials with prosecutors, as of late 2020 the latter duty did not have a statutory basis and had less clear contours.⁶⁶

Prosecutors who fail to learn about prior misconduct by officers whose testimony they rely on to obtain convictions risk doing irreparable damage both to defendants and to their own cases. The lack of timely access to information on police misconduct has contributed to defendants pleading guilty or being convicted with the help of testimony from corrupt officers, when defendants might have otherwise used the information to question the

63. Telephone interview with David Angel, Assistant Dist. Attorney for Santa Clara Cty. (Nov. 15, 2019). The arrangements allow prosecutors to be notified when there are sustained findings in disciplinary proceedings involving offenses that could be relevant to impeachment, and when officers are arrested for any reason. *See also* Adam F. Hutton, *Santa Clara County DA Applauds High Court Ruling Giving Prosecutors Access to Police Misconduct Records*, SAN JOSE SPOTLIGHT (Sept. 5, 2019), <https://sanjosespotlight.com/santa-clara-county-da-applauds-high-court-ruling-giving-prosecutors-access-to-police-misconduct-records/>.

64. *See* Declaration of Jason Lustig at 2, *Ass'n for L.A. Deputy Sheriffs v. Super. Ct.*, 447 P.3d 234 (Cal. 2019) (No. BS 166063) ("ALADS") in *Declaration of the L.A. Prosecutor in the Legal Fight Over the L.A. Sheriff's Brady List* (Feb. 18, 2017), L.A. TIMES, Feb. 18, 2017, <https://documents.latimes.com/declaration-prosecutor-brady-list/> (last visited July 26, 2020); e-mail from Jacob Yim, Deputy-in-Charge, L.A. Cty. Dist. Attorney's Office, Discovery Compliance Unit (Jan. 8, 2020, 11:08 PST) (on file with the author).

65. The change in policy came with *ALADS*, 447 P.3d 234 (Cal. 2019), *see infra* notes 95–108 and accompanying text.

66. *See ALADS*, 447 P.3d at 249 (recognizing that the Fourteenth Amendment imposes obligations on states and their agents, that "[l]aw enforcement personnel are required to share Brady material with the prosecution," and that "[t]he harder it is for prosecutors to access that material, the greater the need for deputies to volunteer it."). Although it is very clear that law enforcement has discovery obligations under the Constitution and the case law, the contours are less clear and the lack of a statutory duty hinders a consistent effectuation of those legal duties; e-mail from David Angel, Assistant Dist. Attorney for Santa Clara Cty. (Jan. 22, 2020, 15:12 PST) (on file with the author). In 2020, a bill sought to obligate law enforcement agencies to provide prosecuting agencies the names and badge numbers of officers involved in misconduct including sexual assaults involving members of the public and acts of dishonesty as described in SB 1421, as well as acts of moral turpitude and group bias. The bill was vetoed by the Governor, however, S.B. 1220, 2019–2020 Reg. Sess. (Cal. 2020).

officers' credibility or motives in court.⁶⁷ When the information has come to light, prosecutors have had to dismiss charges and have seen convictions overturned—including in cases of dangerous criminals who then went on to violate the law again.⁶⁸ In short, "bad cops," who take the stand without either the prosecution or the defense knowing about their prior misconduct, can place defendants' liberties at risk, threaten the integrity of the justice system, and imperil public safety.

The California Supreme Court has maintained that the requirement for Pitchess motions is not incompatible with *Brady*, but S.B. 1421 has likely made this position more difficult.⁶⁹ In 2002, the court reasoned that the materiality standards for Pitchess motions and *Brady* disclosures are different.⁷⁰ In 2015, it insisted that, despite their *Brady* duties, prosecutors must use Pitchess motions and do not have direct access to police personnel records to search for information about a potential witness,⁷¹ though it also praised the practice of providing *Brady* alerts.⁷² In 2019, however, the

67. See Knoll et al., *supra* note 32; Kevin Rector et al, *Hundreds of Cases Involving LAPD Officers Accused of Corruption Now Under Review*, L.A. TIMES (Jul. 28, 2020, 12:13 PM) (reporting that the L.A. County District Attorney was reviewing more than 620 pending and past cases involving three police officers who had recently been charged with falsifying evidence), <https://www.latimes.com/california/story/2020-07-28/lacey-flags-hundreds-of-cases-linked-to-charged-lapd-officers-for-possible-review>; Ben Poston, *For Years, L.A. Prosecutors Failed to Disclose Misconduct by Police Witnesses. Now the D.A.'s Office Is Trying to Change That*, L.A. TIMES (Dec. 29, 2018, 4:00 AM), <https://www.latimes.com/local/lanow/la-me-ln-prosecutors-police-witnesses-20180228-story.html>; Matthias Gafni, *Pittsburg: 15 Convictions Dismissed After Police Fail to Turn Over Cop Misconduct Files*, EAST BAY TIMES (Dec. 14, 2016, 12:20 PM), <https://www.eastbaytimes.com/2016/12/14/pittsburg-15-convictions-dismissed-after-police-fail-to-turn-over-cop-misconduct-files/>.

68. Knoll et al., *supra* note 32 (describing a case where a judge overturned a conviction, and cases where prosecutors offered repeat offenders charged with serious crimes generous plea deals or dropped charges once the misconduct of an officer became known and his credibility was questioned); Gafni, *supra* note 67 (reporting on fifteen convictions dismissed after a lieutenant in the Pittsburg Police Department in Contra Costa County revealed that the Department had not turned over records establishing misconduct by two officers).

69. This is despite S.B. 1421 explicitly stating that the law did not affect discovery or disclosures pursuant to Pitchess motions. See *infra* note 74 and accompanying text.

70. *City of L.A. v. Super. Ct.*, 52 P.3d 129, 133, 134 (Cal. 2002) (finding that evidence is material under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" whereas Pitchess requires materiality to the subject matter of the litigation). In practice, however, the very requirement for prosecutors to use Pitchess motions has made compliance with *Brady* more difficult, and in some cases, it meant that prosecutors would lack necessary information altogether. See Miguel A. Neri, *Pitchess v. Brady: The Need for Legislative Reform of California's Confidentiality Protection for Peace-Officer Personnel Information*, 43 MCGEORGE L. REV. 301, 304 (2012) (arguing that Pitchess motions conflict with a Prosecutor's obligations under *Brady* and that some state case law is problematic in light of federal case law).

71. *People v. Super. Ct. (Johnson)*, 377 P. 3d 847, 856 (Cal. 2015).

72. *Id.* at 862.

court acknowledged the tension in *ALADS*, finding that S.B. 1421 had created a new legal context, and resolved some of the tension in favor of allowing law enforcement agencies to make limited disclosures to prosecutors of even confidential information to facilitate compliance with *Brady*.⁷³ As will be seen below, though, the court insisted that its holding is very narrow and it left important questions unanswered.

III. ASSESSING S.B. 1421'S ACCOMPLISHMENTS AND WEAKNESSES SINCE ITS ENTRY INTO EFFECT

S.B. 1421 was not drafted with the needs of criminal defendants as its primary concern, but rather to increase the transparency of law enforcement, and the law still limits disclosures in important ways. First, it explicitly provides that the new section creating exceptions to confidentiality “does not affect the discovery or disclosure of information contained in a peace or custodial personnel file pursuant to [Pitchess motions].”⁷⁴ The text thus does not liberalize the Pitchess motion requirements, even for records on the four types of incidents that may now be made public with a PRA request. Neither does S.B. 1421 ensure that prosecutors will have access to all collateral information that could be significant under *Brady*. In fact, it explicitly provides that a record from “a separate and prior investigation or assessment of a separate incident shall not be released unless it is independently subject to disclosure pursuant to [one of the four exceptions provided for in the new law].”⁷⁵

Still, the law has had two significant positive effects. First, it has created a legal context more conducive to prosecutors' compliance with *Brady* duties.⁷⁶ Second, and more generally, it has created a new tool under the PRA, different from Pitchess motions and from *Brady* disclosures, to obtain information about certain types of police misconduct.⁷⁷ This information will be especially useful to litigants, but it is available to the public at large, and crucially, to the media. The law is an undeniable accomplishment in terms of transparency, accountability, and democratic values. At the same time, the fact that information that used to be hidden will now have to be disclosed has raised concern in some law enforcement

73. See *infra* notes 97-98 and accompanying text.

74. CAL. PENAL CODE § 832.7(g) (West 2008 & Supp. 2020). Pitchess motions are required in both civil and criminal proceedings.

75. *Id.* § 832.7(b)(3). This means that there will be other *Brady* information from collateral or unrelated cases still subject to the privacy statutes.

76. See *supra* notes 64-65 and *infra* note 108 and accompanying text on the Los Angeles County District Attorney's Office.

77. See *infra* Part III.A.

circles⁷⁸ and even reactions⁷⁹ reminiscent of the backlash that followed the pro-transparency California Supreme Court decision in *Pitchess v. Superior Court*.⁸⁰ The paradox of S.B. 1421 is that, by creating a duty to disclose certain records, it may have also created a perverse incentive to not create those records in the first place.

A. A Limited but Useful Tool to Find out About Peace Officer Misconduct

The legislative history of S.B. 1421 recognizes that, for many years, the misconduct of peace officers has enjoyed a degree of secrecy exceptional among public sector employees.⁸¹ The bill aims at building trust in law enforcement by making certain types of records available to the public, elected officials, and journalists pursuant to the PRA.⁸² By making it easier to shed light on misconduct, the new law seeks to “make sure that good officers and the public have the information they need to address and prevent abuses and to weed out the bad actors.”⁸³ This should be beneficial to law enforcement agencies as well, since secrecy over violations of citizens’ rights and the use of deadly force erodes public trust in the legitimacy of law enforcement, undermines public safety, and complicates the work of tens of thousands of law abiding and hardworking officers.⁸⁴

S.B. 1421 preserves the general principle of confidentiality of peace officer personnel records⁸⁵ but, as noted earlier, it creates exceptions to require disclosures pursuant to the state’s PRA in four situations. In the first two situations, S.B. 1421 requires the release of “record[s] relating to the report, investigation, or findings” in (1) incidents involving the discharge of a firearm;⁸⁶ and (2) incidents involving use of force resulting in death or great bodily injury.⁸⁷ In the third and fourth situations, the law requires the

78. Among the most immediate reactions were several court challenges alleging that the law did not require the disclosure of existing records shedding light on past officer conduct, but rather only of post-S.B. 1421 records. Most courts have rejected these arguments impugning the so-called “retroactivity” of the law. See STEVEN P. SHAW ET AL., EVERYTHING YOU NEED TO KNOW ABOUT SB 1421 AND AB 748 10 (2019).

79. See *infra* notes 140–42 and accompanying text.

80. See *supra* notes 42–43 and accompanying text.

81. SENATE FLOOR ANALYSES, *supra* note 19, at 8. The analysis notes that information about discipline imposed on lawyers and physicians is also available to the public.

82. See S. COMM. ON PUB. SAFETY, THIRD READING OF S.B. 1421, 5 (Comm. Print Cal. 2018).

83. *Id.* (discussing comments by S.B. 1421 author, Senator Nancy Skinner).

84. See S.B. 1421 § 1(b), Ch. 988, Reg. Sess. (Cal. 2018) (codified as amended at CAL. PENAL CODE §§ 832.7–.8 (West 2008 & Supp. 2020)).

85. CAL. PENAL CODE § 832.7(a) (West 2008 & Supp. 2020).

86. *Id.* § 832.7(b)(1)(A)(i).

87. *Id.* § 832.7(b)(1)(A)(ii).

release of “any records” related to incidents leading to (3) a sustained finding of sexual assault by a police officer involving a member of the public;⁸⁸ and (4) a sustained finding of dishonesty relating to the reporting of, investigation, or prosecution of a crime, or of misconduct by another law enforcement officer, including perjury, false statements, filing false reports, and destruction, falsifying, or concealing of evidence.⁸⁹ Sustained findings are final determinations, made after an investigation and an opportunity for an administrative appeal, that the violation of the law or department policy did occur.⁹⁰

S.B. 1421 represents a very substantial step forward in terms of transparency. First, the law helps to shed light on four types of extremely serious incidents. In the cases of sexual assaults and acts of dishonesty, the information disclosed refers to allegations that were found to be true (“sustained” findings), which should raise especially grave doubt that the officers involved are worthy of public trust and qualified for positions of authority. Second, by making it possible to obtain information about sustained findings of dishonesty related to the investigation or prosecution of a crime, the new law should help plaintiffs, criminal defendants, and prosecutors learn of facts relevant to the credibility of a particular officer’s testimony in court. This should provide prosecutors easier access to at least some collateral *Brady* information.⁹¹

Third, the law requires the public release of a very wide range of records and investigative reports. A request for public records about an officer involved in one of the four types of contemplated incidents could potentially yield:

[A]ll investigative reports; photographic, audio, and video evidence; transcripts or recordings of interviews; autopsy reports; all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer’s action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take; documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating

88. *Id.* § 832.7(b)(1)(B)(i). Subsection (iii) defines “member of the public” as “any person not employed by the officer’s employing agency and includes any participant in a cadet, explorer, or other youth program affiliated with the agency.”

89. *Id.* § 832.7(b)(1)(C).

90. *Id.* § 832.8(b).

91. *See supra* Part II.B.

final imposition of discipline or other documentation reflecting implementation of corrective action.⁹²

Not only is the law very liberal regarding the types of records subject to disclosure, but unlike the information disclosed pursuant to a Pitchess motion,⁹³ public records can be shared freely. This should make it much easier to spot repeat offenders, at least regarding the four types of incidents singled out by S.B. 1421. Prior to S.B. 1421, the Penal Code allowed law enforcement agencies to issue data about the “number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded),” but the data could not identify the individual officers involved.⁹⁴ Now that this information is publicly available, attorneys should be able to collect and use materials generated by other attorneys and the media, and one can expect that prosecutors will similarly add this information to their databases for *Brady* purposes.

S.B. 1421 has also already led to case law creating more favorable conditions for prosecutors’ compliance with *Brady*. The new law was instrumental in the California Supreme Court’s revisiting of the tension between Pitchess statutes and *Brady* in *ALADS*, a ruling that gave *Brady* obligations and defendants’ rights increased weight.⁹⁵ *ALADS* involved an attempt by the Los Angeles County Sheriff to provide prosecutors a *Brady* list with the names of some 300 deputy sheriffs after the Sheriff determined that their personnel records contained evidence of misconduct, including acts of moral turpitude—an attempt that was vigorously challenged by the deputy sheriff’s union.⁹⁶ The court noted that S.B. 1421 allows an agency to disclose records that would reveal the identity of officers engaged in some types of misconduct, and that names obtained from such non-confidential information would also be non-confidential.⁹⁷ The court

92. PENAL § 832.7(b)(1)(C). A “Skelly” hearing is a pre-disciplinary due process conference where the employee is informed of allegations against them and can refute the allegations before disciplinary action is taken.

93. See *supra* note 31 and accompanying text. The information is normally issued under a protective order and may only be used in the case at hand.

94. CAL. PENAL CODE § 832.7(c) (West 2008) (current version at CAL. PENAL CODE § 832.7(d) (West 2008 & Supp. 2020)). In the case of the Los Angeles Police Commission, the civilian body charged with overseeing the LAPD, for example, this meant that commissioners were able to identify trends and evaluate the agency’s performance based on aggregate data, but were rarely able to identify repeat offenders based on it. Telephone interview with Robert Saltzman, Former Comm’r, L.A. Police Comm’n (Oct. 27, 2018).

95. See *Ass’n for L.A. Deputy Sheriffs v. Super. Ct.*, 447 P.3d 234, 249 (Cal. 2019).

96. *Id.* at 239–40; see also Maya Lau, *A Court Is Blocking L.A. County Sheriff from Handing Over a List of 300 Problem Deputies*, L.A. TIMES (Feb. 20, 2017, 8:50 AM), <https://www.latimes.com/local/california/la-me-sheriff-deputies-misconduct-list-20170219-story.html>.

97. *ALADS*, 447 P.3d at 244, 247.

further held that law enforcement agencies may share with prosecutors the names of officers who may have been placed on the list based on confidential information (that is, information still protected under S.B. 1421) when those officers are witnesses in a pending case.⁹⁸ The court reasoned that the text of Pitchess statutes does not make prosecutors “outsiders” forbidden from receiving this confidential information,⁹⁹ and that the passage of S.B. 1421 itself suggested that confidentiality was aimed at keeping records away from the public rather than away from prosecutors who might need such information to comply with a constitutional duty.¹⁰⁰ Noting that defendants’ Due Process rights were at stake, the court also found that releasing only to prosecutors otherwise-confidential names associated with discipline in the context of pending criminal prosecution was a limited disclosure that raised fewer significant privacy issues than allowing prosecutors access to the records themselves.¹⁰¹

The court acknowledged that it did not fully resolve the tension between privacy statutes and *Brady*.¹⁰² It also took pains to emphasize that it was ruling on fairly narrow grounds. For example, the disclosures at stake were not of whole records but only of the names and identifying numbers of the officers.¹⁰³ The court clarified that it was ruling only on whether a law enforcement agency could share a confidential *Brady* alert and not on whether a prosecutor would be allowed to share a *Brady* alert with the defense,¹⁰⁴ whether S.B. 1421 expanded the type of information that criminal defendants are entitled to by using Pitchess motions,¹⁰⁵ or whether the new law applied to records that existed prior to the law coming into effect.¹⁰⁶ *ALADS* may not have changed much in jurisdictions where law enforcement agencies already regularly shared *Brady* information with prosecutors, though it did provide a more solid legal footing to the practice.¹⁰⁷ In other jurisdictions, however, the decision has become a

98. *Id.* at 248-49.

99. *Id.* at 248.

100. *Id.* at 248 n.5.

101. *Id.* at 252.

102. *Id.* at 250.

103. *Id.* at 239.

104. *Id.* at 252.

105. *Id.* at 246.

106. *Id.* at 247 n.4.

107. *See, e.g.,* Hutton, *supra* note 63 and accompanying text. *See also* OFFICE OF THE DIST. ATT’Y, CTY OF VENTURA, PITCHESS/BRADY PROCEDURE FOR DISCLOSURE OF MATERIAL FROM LAW ENFORCEMENT PERSONNEL RECORDS (EXTERNAL POLICY) 2-3, 11 (Jan. 31, 2020) (revising previous policy in light of S.B. 1421 and citing to *ALADS*, to emphasize that law enforcement, like prosecutors, has a duty to disclose exculpatory *Brady* evidence. The new policy also provides

catalyst for prosecutors to more closely collaborate with law enforcement for *Brady* compliance.¹⁰⁸

Today, then, Californians have three tools to obtain information about peace officers: Pitchess motions, *Brady* disclosures, and the PRA. The information available with each of these tools could overlap, but it could also be different. The Pitchess standard of materiality will generally limit disclosures to what is narrowly relevant to the case under litigation.¹⁰⁹ In criminal cases, however, material exculpatory evidence will be disclosed under *Brady*, whether directly pertaining to the case at hand or not.¹¹⁰ Disclosures under the PRA, in turn, are by law available to the general public.¹¹¹ Like *Brady* materials, information obtained through a PRA request could refer to incidents older than five years. Disclosures under the PRA do not need to meet a good cause or materiality requirement. They can also include a much wider range and more detailed records than normally obtained with a Pitchess motion,¹¹² and there are no limits to how the information can be used or shared. In a criminal case, documents released pursuant to a PRA request that showed that relevant information was not turned over pursuant to a Pitchess motion or *Brady* during trial could help defense counsel challenge a conviction.¹¹³ In short, by allowing the media and the general public to access information on certain serious incidents involving peace officers, S.B. 1421 has given attorneys a new litigation tool. The benefits of this tool are limited but nicely complement Pitchess

that law enforcement agencies will notify the District Attorney's Office when they provide S.B. 1421 information to the defense regarding prior conduct by a peace officer).

108. See E-mail from Jacob Yim, *supra* note 64, and accompanying text. See also Joseph Esposito, Chief Deputy Dist. Att'y, SPECIAL DIRECTIVE 20-01 2-3 (FEB. 27, 2020) (granting deputies discretion to make PRA requests pursuant to S.B. 1421, and providing that the Discovery Compliance Unit will collect that information and will routinely make PRA requests of its own); Los Angeles County District Attorney's Office and City of Glendale, MEMORANDUM OF UNDERSTANDING REGARDING INFORMATION TO BE RELEASED PURSUANT TO A THIRD PARTY PUBLIC RECORDS ACT REQUEST 2 (Feb. 2020) (agreeing that the Glendale Police Department will provide the District Attorney's Office copies of S.B. 1421 records provided to third parties pursuant to a PRA request. Similar agreements were reached with law enforcement in cities including Irwindale, Alhambra, Bell Gardens and Downey).

109. See *supra* note 28 and accompanying text.

110. See cases cited *supra* note 61 and accompanying text.

111. CAL. PENAL CODE § 832.7(b)(1) (West 2008 & Supp. 2020) (emphasis added) (providing that notwithstanding any other laws (including exceptions under the Public Records Act), "peace officer or custodial officer personnel records and records maintained by any state or local agency shall not be confidential and shall be made *available for public inspection* pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code)" for the four types of situations exempted from confidentiality).

112. See *supra* notes 28–29 and accompanying text.

113. Interview with Samuel Paz, *supra* note 40.

motions and *Brady* disclosures. An attorney who does not resort to all three tools when all of them are relevant could be liable for ineffective assistance of counsel.¹¹⁴

B. S.B. 1421's Limitations

While S.B. 1421's accomplishments are undeniable, the release of information via PRA requests has several limitations. Public agencies are allowed to charge for the direct costs of making copies of public records, and in cases with voluminous files or involving multiple officers, this could create a considerable expense, particularly for small firms or non-profits. In an initiative that leverages their human and financial resources, forty news organizations from across the state are collaborating in a massive effort to request previously undisclosed law enforcement records and to systematize, analyze, and make the information publicly available.¹¹⁵ Some law enforcement agencies have already started placing records disclosed pursuant to S.B. 1421 online, and over time, this should also facilitate access.¹¹⁶ The Supreme Court of California held that a requester of public records could not be charged for the cost of redacting protected information from digital police camera footage.¹¹⁷ Cost remains an issue, however, when records to be disclosed are kept in electronic form and require heavy "data compilation, extraction, or programming" other than redactions.¹¹⁸

The release of public records could take a long time as well. Unlike Pitchess motions, which take a predictable period that the moving attorney can fairly control, public record requests can take much longer. The timing has to be reasonable, but it is ultimately up to the agency that searches for, collects, and prepares the records.¹¹⁹ Many agencies have been criticized for being unduly unresponsive.¹²⁰ Moreover, S.B. 1421 allows an agency to

114. Interview with Harvey Sherman, *supra* note 34.

115. See *Shining a Light*, CAL. REP. PROJECT, <https://projects.scpr.org/california-reporting-project> (last visited Nov. 21, 2020).

116. See, e.g., *LAPD Disclosable Documents: SB 1421*, L.A. POLICE DEP'T, <http://lapdonline.org/lapdsb1421> (last visited July 26, 2020); *LBPD SB 1421/AB 748*, LONG BEACH POLICE DEP'T, <http://www.longbeach.gov/police/about-the-lbpd/lbpd-1421748/> (last visited July 26, 2020).

117. *Nat'l Lawyers Guild v. City of Hayward*, 9 Cal. 5th 488, 506 (2020).

118. See CAL. GOV'T. CODE § 6253.9 (West 2019 & Supp. 2020).

119. Section 6253(c) of the California Government Code allows ten days for the agency to "promptly" notify the person who made the request whether the agency has the records, and the time can be extended for up to fourteen days. Subsection (d) prohibits agencies from obstructing or delaying the inspection or copying of records, but there is only an expectation that records will be produced within a reasonable time.

120. See, e.g., Alene Tchekmedyan, *Times Sues L.A. County Sheriff Over Withholding Records on Deputy Misconduct*, L.A. TIMES (July 1, 2020, 12:06 PM), <https://www.latimes.com>

withhold a record of an incident involving the discharge of a firearm or use of force resulting in death or great bodily injury “that is the subject of an active criminal or administrative investigation.”¹²¹ Depending on the circumstances, the release of these records could be delayed for up to eighteen months,¹²² or, if criminal charges are filed related to the incident, until a verdict has been reached or until the time to withdraw a plea of guilty or no contest.¹²³

Ambiguity and vagueness in the text of the new law will likely be a source of delays and legal wrangling about the scope of required disclosures. For example, S.B. 1421 requires the disclosure of public records relating to incidents of use of force resulting “in death, or in great bodily injury.”¹²⁴ S.B. 1421 does not define great bodily injury, however. Who determines what it means for the purpose of the new law, or, for example, whether a concussion would fit the definition, is not established as of this writing.¹²⁵ Until courts decide the issue, the lack of a uniform standard could have important practical consequences because it would allow agencies to adopt narrow definitions that make certain disclosures unnecessary, and people receiving information through a PRA request might not even be aware of any omissions.

The scope of disclosures under S.B. 1421 is limited in other ways as well. Information about the large majority of incidents that are subject to citizen complaints and disciplinary action will still be confidential, since these incidents escape the scope of the four exceptions.¹²⁶ They include cases where officers engage in systemic racial or ethnic bias, for

/california/story/2020-06-30/la-times-lawsuit-deputy-misconduct-records; Sukey Lewis et al., *California Police Are Destroying Files and Charging High Fees to Release Misconduct Records*, L.A. TIMES (June 30, 2019, 5:00 AM), <https://www.latimes.com/local/lanow/la-me-police-records-california-20190630-story.html>; Thomas Peele & Robert Salonga, *San Jose Police Say It Will Take Nearly Five Years to Provide All Shooting and Use of Force Records Required Under State Transparency Law*, MERCURY NEWS (Nov. 19, 2019, 6:00 AM), <https://www.mercurynews.com/2019/11/19/san-jose-police-say-it-will-take-nearly-five-years-to-provide-all-shooting-and-use-of-force-records-required-under-state-transparency-law/>.

121. CAL. PENAL CODE § 832.7(b)(7) (West 2008 & Supp. 2020).

122. *Id.* § 832.7(b)(7)(A)(ii)–(iii).

123. *Id.* § 832.7(b)(7)(B).

124. *Id.* § 832.7(b)(1)(A)(ii).

125. Interview with Rourke Stacy, *supra* note 32; see also *Use of Force*, LONG BEACH POLICE DEP’T, <http://www.longbeach.gov/police/about-the-lbpd/lbpd-1421748/use-of-force/> (last visited July 26, 2020) (explaining that its definition of the term includes “broken bones” and “[a]ll head injuries,” but that other agencies may follow less inclusive definitions).

126. See E-mail from James Queally, Reporter, L.A. Times (Nov. 13, 2018, 13:21 PST) (on file with author).

example.¹²⁷ In the case of acts of moral turpitude, moreover, the law limits disclosures to “dishonesty . . . directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer.”¹²⁸ This could be interpreted to leave out not only acts of fraud or perjury that officers might carry out in the course of their personal lives, but also, for example, other intentional dishonest acts such as misreporting their own hours at work.

C. Could S.B. 1421 Backfire?

Even more problematic than the limitations discussed above, the new law also creates perverse incentives. By requiring the disclosure of records showing peace officers involved in serious incidents and misconduct, the law paradoxically creates incentives to keep police involvement in problematic situations out of public records in the first place. Fear of disclosure could lead to law enforcement agents being less forthcoming about revealing misconduct, or to more lenient internal investigations, or to investigations that do not reach sustained findings because implicated officers resign first.

Proponents of the law have argued that giving the public access to a wide range of records that have so far remained largely hidden should contribute to better investigations, because any problems would become apparent.¹²⁹ Especially in the case of incidents involving the discharge of a firearm or use of force resulting in death or great bodily injury, where sustained findings are not necessary, the release of records of an investigation will create opportunities to assess their quality and

127. See Bob Egelko, *SFPD Can Seek Discipline of Officers for Racist Texts*, S.F. CHRON. (Sept. 12, 2018, 7:42 PM), <https://www.sfchronicle.com/bayarea/article/SFPD-can-seek-discipline-of-officers-for-racist-13225294.php> (reporting on a group of San Francisco police officers who exchanged racist, sexist, and homophobic text messages in 2011 and 2012); Maura Dolan & Joel Rubin, *Claims of Racial Profiling on 5 Freeway Echo Findings Against Sheriff's Deputies in Antelope Valley*, L.A. TIMES (Nov. 7, 2018, 2:00 AM), <https://www.latimes.com/local/lanow/la-me-sheriff-racial-profiling-investigation-20181107-story.html> (reporting on a group of sheriff deputies from Los Angeles County who targeted Latinos for stops on a local freeway to search their cars for drugs; the deputies pulled over thousands of innocent Latino drivers); Andrew Sheeler, *Black Drivers in California Stopped and Searched More Than Others, State Study Shows*, SACRAMENTO BEE (Jan. 2, 2020, 5:11 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article238915598.html> (reporting on the results of a State Department of Justice study quantifying racial profiling among eight large law enforcement agencies).

128. CAL. PENAL CODE § 832.7(b)(1)(C) (West 2008 & Supp. 2020).

129. Telephone interview with Gabriel Caswell, Counsel, Cal. State Senate Pub. Safety Comm. (Dec. 4, 2018).

thoroughness.¹³⁰ It is as if the law were telling law enforcement agencies: “Show your work!”¹³¹

Showing their work can be very costly for agencies, however. Satisfying public records requests has a cost in time, staff, and financial resources, and just as important, in freedom of action regarding how an agency may follow up on citizens’ complaints and how it carries out internal investigations. Admittedly, California’s Penal Code requires law enforcement agencies to establish procedures to investigate complaints by members of the public against their personnel.¹³² And although some practitioners and activists have described investigations carried out by internal affairs units as inherently biased in favor of peace officers,¹³³ agencies risk being sued if they do not carry out investigations according to established law and agency policy.¹³⁴ Still, past journalistic investigations have found that law enforcement agencies regularly determine citizen complaints unwarranted and even drop them without explanation.¹³⁵ One investigation found that California law enforcement agencies upheld fewer than nine percent of complaints by members of the public from 2008 to 2017, with percentages varying widely across agencies.¹³⁶ The aggregate data by itself does not prove that legitimate complaints were dismissed for unwarranted reasons.¹³⁷ Nevertheless, the very low rates of upheld complaints and especially the fact that some have been dismissed without an explanation is noticeable and should raise attention.

130. *See id.*

131. *See id.*

132. PENAL § 832.5(a).

133. Interview with Samuel Paz, *supra* note 40; Nat’l Police Accountability Project, *NPAP Manual*, PRISON LEGAL NEWS, 10–11, <https://www.prisonlegalnews.org/media/publications/Manual%20for%20Victims%20of%20Police%20Misconduct%20NLG%20-%20NPAP.pdf> (explaining that “the inherent pro-police bias of the [Internal Affairs] investigators often prevents them from conducting an independent and thorough investigation. As a result, internal affairs often protects officers rather than hold them accountable”).

134. Interview with Samuel Paz, *supra* note 40.

135. *See* Kate Mather, *LAPD Found No Bias in All 1,356 Complaints Filed Against Officers*, L.A. TIMES (Dec. 15, 2015, 5:17 PM), <http://www.latimes.com/local/lanow/la-me-ln-lapd-biased-policing-report-20151215-story.html> (reporting on findings by the L.A. Police Commission, the civilian body that oversees the Los Angeles Police Department, based on complaints of bias made between 2012 and 2014); James Queally, *California Police Uphold Few Complaints of Officer Misconduct and Investigations Stay Secret*, L.A. TIMES (Sept. 23, 2018, 4:00 AM), <http://www.latimes.com/local/lanow/la-me-police-misconduct-complaints-20180923-story.html> (reporting that most complaints in the state end “with police rejecting [them] without saying why”).

136. Queally, *supra* note 135.

137. *Id.*

These warnings may sound alarmist; after all, the last decade has generally seen increased public awareness and governmental concern about good policing and transparency, and S.B. 1421 is evidence of that.¹³⁸ And yet the trend is neither inevitable nor irreversible,¹³⁹ and the perverse incentives exist, nonetheless. Within a few days of S.B. 1421 taking effect, for example, the media reported that the police departments in the cities of Inglewood and Long Beach had stealthily destroyed long-held records—including records that would likely have been subject to disclosure under the PRA.¹⁴⁰ Authorities in both departments insisted that the timing of the destruction of records was wholly unrelated to the new law,¹⁴¹ but the actions were reminiscent of the destruction of records that followed the pro-disclosure decision in *Pitchess* in the mid-1970s. Indeed, the risk that other agencies would follow suit must have been high enough that, two days after the law came into effect, the California Department of Justice instructed all law enforcement agencies to preserve all records that might be subject to disclosure pursuant to S.B. 1421.¹⁴² Whether or not this directive has eliminated the risk of further destruction of pertinent records, it still shows that the mandate to reveal records with sensitive information has raised the stakes of such disclosures and created an incentive to avoid them.

Courts have considered the possibility that mandatory disclosures might have negative side effects on investigations. In *City of San Jose v. Superior Court*, for example, the California Supreme Court considered a police officer union's argument that disclosing prior discipline would undermine internal investigations.¹⁴³ The court rejected the argument and reasoned that “[b]ecause only the outcome of the investigation,¹⁴⁴ rather than verbatim reports or records of investigations, [was] subject to disclosure, there should be no inhibition of officers’ candor in responding to

138. See *supra* note 1 and accompanying text; see also *infra* notes 153–54 and accompanying text on recently passed legislation that also promotes transparency and accountability.

139. See *infra* notes 166–74 and accompanying text.

140. Dillon, *supra* note 13. Public records may be lawfully destroyed when in compliance with retention policies that only require agencies to keep them for a limited number of years.

141. *Id.*

142. CAL. DEP’T OF JUSTICE, DIV. OF LAW ENF’T, INFORMATION BULLETIN NO. 2019-DLE-01 (2019), <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/2019-dle-01-preserve-recs.pdf>.

143. 850 P.2d 621 (Cal. 1993). The case involved a juvenile defendant who had been charged with resisting arrest and assaulting a police officer, and who claimed that he had used force only to respond to the wrongful force of the arresting officers. His *Pitchess* motion revealed records of multiple complaints alleging excessive force and racial prejudice by two of the arresting officers. *Id.* at 622.

144. *Id.* at 626–27. That is, whether the complaints had been sustained or been deemed unfounded.

interrogation by a department's internal affairs division."¹⁴⁵ This decision dates from before S.B. 1421 however. The law today requires an extremely broad array of detailed records to come to light,¹⁴⁶ so the stakes involved in disclosure of records today are much higher.

It is hard to gauge to what extent the potential hazards created by S.B. 1421 could become real. There are hundreds of law enforcement agencies in the state, encompassing tens of thousands of sworn personnel,¹⁴⁷ and differences in size, the quality of leadership, and the extent of civilian oversight, make it impossible to generalize.¹⁴⁸ To the extent that civilian oversight ensures that all citizen complaints are properly investigated, the risk might be low in a large agency with well-organized civilian supervision and a strong inspector general, and higher in small police departments with little civilian oversight.¹⁴⁹ The risk would also be higher in agencies where the leadership is not inclined to take complaints seriously.¹⁵⁰ But there is no need to ascribe bad faith to law enforcement agencies to think that S.B. 1421's well-intended emphasis on transparency could backfire by adding pressure in situations where factors other than intentional disregard make a thorough inquiry difficult. Investigations might be naturally harder in small agencies, whether because a small staff means that people are closer to each other—which makes the setting less conducive to unbiased internal inquiries¹⁵¹—or simply because even dedicated internal affairs units might just have a couple of officers who can go out in the field to investigate.¹⁵²

Aside from the degree of oversight, the priorities of the leadership, and agency size, the type of incident could matter as well. Several factors suggest that the negative side effects from the law will be felt more strongly in the case of incidents of sexual assault involving members of the public,

145. *Id.* at 627.

146. *See supra* note 92 and accompanying text.

147. *See supra* note 15.

148. Interview with Robert Saltzman, *supra* note 94 (acknowledging before S.B. 1421 went into effect the possibility that the law might create an incentive for less thorough investigations was plausible but finding that agencies are too different to predict effects).

149. *Id.* Saltzman believed that the risk would be very low at the LAPD, where there is strong civilian oversight and where the benefits of providing access to records far exceeded the risks. Telephone interview with Peter Bibring, Dir. of Police Practices, Am. Civil Liberties Union of S. Cal. (Dec. 19, 2019) (Bibring considered that civilian oversight could be important to ensure the quality of investigations, particularly in the case of incidents of sexual assault and dishonesty).

150. Interview with Robert Saltzman, *supra* note 94.

151. Telephone interview with Sukey Lewis, Reporter, KQED (Dec. 19, 2019).

152. Telephone interview with Joseph Gordon, Assoc. Attorney, Carpenter, Rothans & Dumont LLP (Dec. 4, 2018). A former police officer in the Santa Monica, CA Police Department, he emphasized that internal affairs investigators are chosen for their positions because they will make exhaustive investigations. In his view, the effectiveness or rigor of an investigation depends on having enough resources and personnel.

and incidents involving dishonesty in investigations, than in the case of shootings and incidents of excessive force. First, cases that involve shootings and the use of excessive force tend to raise more public attention and the threat of more lawsuits. Second, video recordings of these incidents, whether from officers' body cameras or from citizens who use their own phones, should contribute to better investigations as well.¹⁵³ Third, new legislation from the fall of 2019 requiring law enforcement agencies to establish detailed and specific guidelines for using force and for evaluating use of force incidents, should also promote improved investigations.¹⁵⁴ The new law is not foolproof.¹⁵⁵ However, by putting in place new requirements for the review and monitoring of incidents, it could help mitigate some of the risks created by S.B. 1421 in incidents of shootings and excessive force.

On the other hand, nothing mitigates the perverse incentives that exist for incidents involving sexual assaults and acts of dishonesty—if anything, the requirement that findings in investigations of those incidents be “sustained” (that is, confirmed following an investigation and opportunity for an administrative appeal) might encourage cutting investigations short or otherwise not reaching a “sustained” determination. An agency’s internal policy may allow for investigations to be inactivated when an officer resigns or retires,¹⁵⁶ and this would prevent a sustained finding. There may

153. See A.B. 748, Ch. 960, Reg. Sess. (Cal. 2019) (complementing S.B. 1421 by requiring law enforcement agencies to produce video and audio recordings of “critical incidents” involving the discharge of a firearm, or incidents of use of force leading to death or great bodily injury, pursuant to PRA requests); see also SHAW ET AL., *supra* note 78, at 7–9.

154. S.B. 230, Ch. 285, Reg. Sess. (Cal. 2020). The statute amends the Government Code. Its main goal is improved officer training, and it specifically requires a thorough case-by-case review of all incidents involving discharged firearms; § 1 (h). By January 2021, policies on use of force should include a requirement that officers report potential excessive force by colleagues to their superiors; CAL. GOV'T CODE § 7286(b)(3) (West 2019 & Supp. 2020). They should also include procedures for filing, investigating, and reporting of citizen complaints about use of force incidents; *id.* § 7286(b)(7). Agencies must put in place “comprehensive and detailed requirements for prompt internal reporting and notification” of use of force incidents, including reporting to the Department of Justice (a currently existing duty). *Id.* § 7286(b)(12). Finally, the law also requires agencies to have procedures for disclosing public records pursuant to S.B. 1421. GOV'T § 7286(b)(6).

155. Interview with Sukey Lewis, *supra* note 151 (pointing out that the law does not involve the California Commission on Peace Officer Standards and Training (POST) to issue new guidelines, but rather leaves the task up to each agency). Also, the law calls for “review” of incidents of use of force, which in some agencies might just amount to a sergeant signing off a paper.

156. See, e.g., L.A. CTY. OFFICE OF THE INSPECTOR GENERAL, REPORT-BACK ON LASD INTERNAL ADMINISTRATIVE INVESTIGATIONS AND DISPOSITIONS OF DISCIPLINARY ACTION FOR JUNE, JULY AND AUGUST 2019, at 1 (2019) (explaining that the Los Angeles County Sheriff's Administrative Investigations Handbook allows for inactivation of investigations in cases when a subject of an investigation resigns or retires); see also SHAW ET AL., *supra* note 78, at 11 (explaining that “[o]ften, a law enforcement agency accepts a peace officer's voluntary

be cases where agencies, officers, or both, could find that they are better off if the officers leave the force before any inquiries into misconduct are appealed and final, and this would come at the expense of transparency.¹⁵⁷

Finally, S.B. 1421 will likely generate resistance in the law enforcement rank-and-file.¹⁵⁸ Although law enforcement agencies often seem monolithic to outsiders, the rank-and-file and management (the heads of the agencies) have distinct and to some extent conflicting interests and concerns regarding investigations and discipline.¹⁵⁹ Good management will worry about misconduct among its forces and may seek to get rid of officers who engage in *Brady*-worthy misbehavior—not least because those officers are extremely limited in the tasks they can carry out.¹⁶⁰ By contrast, the rank-and-file and their unions are more concerned about the possibility that a public airing of misconduct or a *Brady* list may brand officers as rotten apples and put their employment at risk.¹⁶¹ They especially worry about unfair discipline and about management misusing discipline or information in personnel files for punitive purposes.¹⁶² These concerns can make the rank-and-file wary of transparency in general, and S.B. 1421 specifically.

Few events illustrate the internal struggles within agencies and the potential impact of the rank-and-file's concerns on the implementation of S.B. 1421 better than the 2018 elections for L.A. County Sheriff and its aftermath. Incumbent Sheriff Jim McDonnell had developed a reputation as

resignation where there are pending charges of dishonesty or other serious allegations currently under investigation. In other cases, an officer may resign in lieu of termination”).

157. See, e.g., Sukey Lewis, *Probe into Rohnert Park Cannabis and Cash Seizures Will Stay Secret, Despite Transparency Law*, KQED.ORG (Mar. 27, 2019), <https://www.kqed.org/news/11735983/probe-into-rohnert-park-cannabis-and-cash-seizures-will-stay-secret-despite-transparency-%20law> (reporting that public records of a police officer of the City of Rohnert Park who was fired from the force would not be released, after he indicated he would appeal and the city decided to reach a settlement that included his separation from the police force).

158. See, e.g., Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712 (2017); Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191 (2017); Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officer's Bills of Rights*, 14 B.U. PUB. INT. L.J. 185 (2005).

159. Fisk & Richardson, *supra* note 158, especially Parts I and II.

160. Abel, *supra* note 7, at 746 (explaining that such officers should not make arrests, investigate cases, or carry out other duties that might generate a need to testify). See also Cindy Chang, *LAPD Chief Michel Moore Wants More Power to Fire Officers*, L.A. TIMES (July 16, 2020, 6:47 PM), <https://www.latimes.com/california/story/2020-07-16/lapd-chief-michel-moore-wants-more-power-to-fire-officers>.

161. *Id.* at 746, 779–84.

162. *Id.* (“Not without justification, officers suspect prosecutors of using the Brady designation to aid police chiefs in punishing disfavored officers”); see also Fisk & Richardson, *supra* note 158, at 724 (asserting that “[r]ank-and-file officers in many departments do not trust management to mete out discipline fairly”).

a reformer.¹⁶³ Among the Sheriff's most eyebrow-raising measures was his attempt to provide local prosecutors a *Brady* list with the names of some 300 deputy sheriffs—a move that ALADS, the deputy sheriffs union, swiftly challenged in court.¹⁶⁴ ALADS maintained that the Sheriff Department's (LASD) list was the product of a flawed disciplinary process and that any disclosures had to be made pursuant to a Pitchess motion.¹⁶⁵

ALADS eventually lost the case, as explained above,¹⁶⁶ but the confrontation over department discipline became a prominent issue in the November 2018 elections that pitted McDonnell against his challenger, retired Lt. Sheriff Alex Villanueva. Championing the concerns of the rank-and-file, Villanueva emphasized in his campaign that McDonnell's *Brady* list included officers out of unfair and retaliatory motives.¹⁶⁷ After Villanueva won, he promptly got rid of most of the Department's executive leadership and transferred two constitutional policing advisors to other jobs, including the advisor who had recommended sharing the *Brady* list with prosecutors.¹⁶⁸ The Department reviewed prior discipline and dropped investigations at rates that alarmed civilian monitors, many times without the detailed explanation required by Department policy.¹⁶⁹ More than a year after the California Supreme Court held in *ALADS* that sharing *Brady* lists with the names of officers who are potential witnesses in pending criminal cases does not violate privacy statutes,¹⁷⁰ LASD had not turned in

163. Maya Lau, *Challenger Alex Villanueva Widens Lead over Incumbent Jim McDonnell in Race for L.A. County Sheriff*, L.A. TIMES (Nov. 13, 2018, 6:40 PM), <https://www.latimes.com/local/lanow/la-me-sheriff-election-follow-20181113-story.html>. McDonnell advocated severe sanctions for officers who lied on the job, including firing deputies who made false statements and challenging decisions by a Civil Service Commission to reinstate them. Cindy Chang, *L.A. County Sheriff's Deputies Who Lied Continue to Draw Paychecks*, L.A. TIMES (Mar. 8, 2016, 4:00 AM), <https://www.latimes.com/local/california/la-me-deputies-false-statements-20160308-snap-htmlstory.html>.

164. Lau, *supra* note 163.

165. ALADS Board of Directors, *LA Sheriff and His Deputies Remain at War over So-Called 'Brady List'*, CITY WATCH (Oct. 19, 2017), <https://www.citywatchla.com/index.php/los-angeles-for-rss/14217-la-sheriff-and-his-deputies-remain-at-war-over-so-called-brady-list>.

166. See *supra* notes 95–101 and accompanying text.

167. Maya Lau, *Recent Sheriff Reforms Feared at Risk*, L.A. TIMES, Nov. 28, 2018, at A1.

168. *Id.*; Maya Lau, *New Sheriff Vows Era of Change*, L.A. TIMES, Dec. 4, 2018, at B1.

169. See, e.g., L.A. CTY. OFFICE OF THE INSPECTOR GENERAL, REPORT-BACK ON LASD INTERNAL ADMINISTRATIVE INVESTIGATIONS AND DISPOSITIONS OF DISCIPLINARY ACTION 2-3 (Apr. 11 2019); Alene Tchekmeyer, *Was Deputy Lying, or Merely 'Sloppy'?*, L.A. TIMES (Jan. 13, 2021, 6:00 AM), <https://www.latimes.com/california/story/2021-01-13/honea-case-shows-la-sheriff-department-dishonesty-issue>.

170. See *supra* notes 97-98 and accompanying text.

a new list which would not include the names of officers in error.¹⁷¹ The Department's website has a link that allows the public to make PRA requests pursuant to S.B. 1421,¹⁷² according to media reports and the LASD's own data, however, for well over a year LASD released barely any documents.¹⁷³ During the second half of 2020, the Department slowly released more records and started posting them online; however, as LASD has strongly clashed with civilian supervisory bodies over discipline, internal investigations, and the civilian bodies' oversight authority and access to LASD internal records, it has become clear that "dangerous incentives" created by S.B. 1421 are likely contributing to LASD's lack of transparency.¹⁷⁴ If the experience at the LASD teaches anything, it is that in agencies where management aligns with, rather than balances, the self-protective instincts of the rank-and-file, transparency and S.B.1421 will likely take a back seat to the rank-and-file's concerns.

Pushback to S.B. 1421 from unions is natural and to be expected. For example, the contract between the city of Long Beach and its police union now requires that officers be notified when their personnel records are about to be disclosed and receive at least five days to view the records prior

171. Leila Miller, *Sheriff Department Defied Court Orders to Name Deputies with Histories of Misconduct*, L.A. TIMES (Oct. 17, 2020, 11:58 AM), <https://www.latimes.com/california/story/2020-10-17/court-orders-sheriff-refuses-to-name-deputies-misconduct>.

172. See L.A. COUNTY SHERIFF'S DEP'T, <https://lasd.org> (last visited July 26, 2020).

173. In 2019, the agency received 3,581 S.B.1421 requests for public records and was also honoring seventeen requests received on December 31, 2018. By the end of 2019 it had responded to 241 requests but had disclosed documents for only three requests. According to an LASD official, one of these three requests involved data for 335 sworn personnel. As of January 2020, LASD had released only nine documents. See E-mails from Alise Norman, Lieutenant Sheriff, L.A. Sheriff's Dep't Discovery Unit, (Jan. 9, 13:09 PST and Jan. 15, 2020, 13:09 PST) (on file with the author); see also *Johnson v. L.A. Sheriff's Department*, ACLU OF S. CAL. (Oct. 29, 2019), <https://www.aclusocal.org/en/cases/johnson-v-la-sheriffs-department>; Alene Tchekmedyan, *Times Sues L.A. County Sheriff over Withholding Records on Deputy Misconduct*, L.A. TIMES (June 30, 2020, 8:22 PM), <https://www.latimes.com/california/story/2020-06-30/la-times-lawsuit-deputy-misconduct-records>.

174. See Tchekmedyan, *supra* note 169 (reporting that Inspector General Max Huntsman had commented on a "dangerous incentive to police agencies to water down charges as a means of maintaining secrecy" around deputy misconduct); see also L.A. Cty. Office of the Inspector General Cty., LOS ANGELES COUNTY SHERIFF'S DEPARTMENT COMPLIANCE WITH TRANSPARENCY LAW (2019), https://oig.lacounty.gov/Portals/OIG/Reports/LASD_Compliance_with_Transparency_Law.pdf?ver=2019-08-16-183357-927; Maya Lau, *L.A. County Sheriff's Top Watchdog Is Under Investigation by the L.A. County Sheriff*, L.A. TIMES (Aug. 14, 2019, 12:34 PM), <https://www.latimes.com/california/story/2019-08-14/la-county-sheriffs-department-launches-investigation-against-its-chief-watchdog>; Alene Tchekmedyan, *L.A. County Supervisors Approve Subpoena Authority in Power Struggle with Sheriff*, L.A. TIMES (Jan. 21, 2020, 7:21 PM), <https://www.latimes.com/california/story/2020-01-21/supervisors-consider-subpoena-power-in-truggle-with-sheriff>.

to their release.¹⁷⁵ While it may be reasonable for the contract to take into account officers' apprehension about sudden disclosures, the contract also generally allows officers to learn the requestor's name or organization—a stipulation that made many members of the public uneasy.¹⁷⁶ Ultimately these public concerns were considered by the city council, and in response the police department made it much easier to request public records anonymously online.¹⁷⁷ But the fact that the city had to make such a concession to the unions in the contract shows how concerned officers felt about S.B. 1421. Notably, the Long Beach Police Department was one of the agencies that destroyed records as S.B. 1421 was coming into force¹⁷⁸ and its unorthodox reviews of shooting incidents had raised questions about the quality of its records.¹⁷⁹ And yet, it is an agency where reportedly there has been a strong push from the top to change the culture in favor of more transparency.¹⁸⁰ If anything, the experience at the Long Beach Police Department confirms that the impact of S.B. 1421 will be *both* openness and resistance and that, even as the law's accomplishments are celebrated, all parties interested in accountability must remain vigilant.

IV. CONCLUDING REFLECTIONS

S.B.1421 is an important departure from a legal regime that until recently emphasized the protection of peace officers' personnel records. The law represents a very positive change in attitude because it explicitly places value on transparency as a legislative goal. It also gives the public a new tool to find out key information about public officials, information that could also make a difference to litigants in civil cases and to both

175. Jason Ruiz, *Council Approves Police Contract That Includes Notifying Officers of Public Records Requests*, LONG BEACH POST (Sept. 17, 2019, 9:45 PM), <https://lbpost.com/new/leaders-approve-police-contract-that-allows-officers-to-be-notified-of-public-records-requests>.

176. *Id.*

177. Telephone interview with Jeremiah Dobruck, Reporter, Long Beach Post (Dec. 17, 2019). Mr. Dobruck explained that it was possible to make an anonymous PRA request before, but in response to the City Council the Department made this option easily available online.

178. See *supra* notes 140–41 and accompanying text.

179. Jeremiah Dobruck, *'It Can Easily be Perceived as a Cover-up: ' Long Beach's 'Odd' Way of Handling Police Shootings*, LONG BEACH POST (Oct. 16, 2018, 5:58 AM), <https://lbpost.com/news/police-shooting-long-beach-coverup-interview/> (describing the agency's practice of not interviewing their officers after they have been involved in a shooting, and instead having them write reports on the incidents that are later reviewed by detectives and supervisors who make suggestions to improve the reports. While the suggestions are presumably only for completeness and better reading, some have criticized the process for resulting in inauthentic, "glossed-up," and inaccurate reports).

180. Interview with Jeremiah Dobruck, *supra* note 177 (pointing out that there has been an enormous change at the agency in 2019, in terms of increased transparency).

prosecutors and defendants in criminal cases. At the same time, the promise of more information *both* makes the law valuable and could cause trouble ahead by raising the stakes of creating records of disciplinary action and findings of misconduct.

Making sure that the law works to maximize openness will depend on multiple parties—starting, of course, with law enforcement agencies themselves. Courts will have a key role as well. Since the law came into effect, courts have generally decided cases in ways that promoted the law’s interest in transparency, including by rejecting claims that S.B. 1421 could not apply “retroactively” to force the release of records created prior to 2019.¹⁸¹ By mid-2020, a court of appeal had also ruled that California’s Department of Justice, and not just law enforcement agencies, may be required to provide the records that S.B. 1421 makes available if the Department possesses them,¹⁸² and the Supreme Court had held that agencies and not requesters should pay for the cost of necessary but expensive redactions of electronic public records.¹⁸³ Courts will surely be called on to speak to new issues, whether they arise from lack of clarity in the law¹⁸⁴ or the demands of litigation.¹⁸⁵

Ensuring that the law works as intended and does not inadvertently undermine the quality of internal investigations could also involve giving a strong role to citizen commissions and other bodies that exercise oversight over the agencies. This could require creating new such bodies, or at the very least, assessing existing ones to ensure that they are effective. Citizen commissions vary in their functions—some have independent investigatory powers, others review completed internal affairs investigations, others focus on identifying and addressing more systemic problems rather than individual investigations, and still others are hybrid.¹⁸⁶ No single model guarantees effectiveness; instead, each model has potential strengths and weaknesses, from the extent of resources they need, to the level of expertise

181. See SHAW ET AL. *supra* note 78, at 15–17, for a discussion of how courts decided challenges to the so-called “retroactive” application of the law.

182. *Becerra v. Super. Ct.*, 257 Cal. Rptr. 3d 897, 918 (Ct. App. 2020).

183. See *supra* note 117 and accompanying text.

184. See *supra* notes 124–25 and accompanying text.

185. For example, courts might be asked to decide whether records subject to the PRA can be subpoenaed. Subpoenas could greatly speed up the discovery process and allow litigants requesting records to obtain control of the timing of disclosures, but they would be an extraordinary departure from the current process. Interview with Harvey Sherman, *supra* note 34.

186. NAT’L ASS’N FOR CIVILIAN OVERSIGHT OF LAW ENFORCEMENT, CIVILIAN OVERSIGHT OF LAW ENF’T: ASSESSING THE EVIDENCE, 22–32 (2016), https://d3n8a8pro7vnm.cloudfront.net/nacole/pages/161/attachments/original/1481727974/NACOLE_AccessingtheEvidence_Final.pdf?1481727974.

required to make them work, and the results they seek to obtain.¹⁸⁷ Successful oversight cannot rest on confrontation with law enforcement, however; any model requires not only independence and authority but also full collaboration.¹⁸⁸

Last but not least, the impact of the law will be in the hands of an attentive media, watchdog groups, and Californians at large. S.B. 1421 acknowledges that “the public has a strong, compelling interest in law enforcement transparency because it is essential to having a just and democratic society.”¹⁸⁹ S.B. 1421 has finally unlocked a window into the work of the state’s law enforcement agencies. It is now up to the state’s citizens to open the window and see what is behind it.

*By: Carina Miller**

187. *Id.*

188. *Id.* at 36, 38, 40.

189. See S.B. 1421, Ch. 988, Reg. Sess. (Cal. 2018) (codified as amended at CAL. PENAL CODE §§ 832.7–8 (West 2008 & Supp. 2020)).

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