

February 2019 President Letter

SB230 PORAC Legislation

I have attached the below two bills for all you to review. Late 2018 PORAC was able to defeat AB930. Many of you remember the bill from my *August 2018* newsletter. The intent of this bill was taking the use of force decision making away from cops throughout the State of California. Assemblywoman Shirley Weber (San Diego) essentially wants a free society – meaning no law enforcement unless it is needed by the People of the State. Her bill then named AB931 reflected a substantial change to PC 835a.

After PORAC was able to defeat the bill at the Capital, the clock was ticking to introduce our own bill to fix some outdated statutes and remain solvent with the citizens of California. Law enforcement must get in front and take an offensive position in order to essentially maintain peace officer status in regards to protecting PC 835a.

California law enforcement is engaging in an important effort to deal with the issue of our law enforcement officers ability to use appropriate force when facing dangerous encounters. PORAC, along with nearly every law enforcement association in California, have introduced Senate Bill 230 by Senator Anna Caballero (D-Salinas). In addition to Senator Caballero, we have 17 legislators who have signed on to co-author our measure. You will see these names on the attached bill.

At the same time, Assembly member Shirley Weber (D-San Diego) has re-introduced her use-of-force bill from last year, which would criminalize an officer's split-second decisions if a judge or jury later deems the force was unwarranted or excessive. Assembly member Weber's bill is AB 392 and poses a serious threat to both our officers and the public. There is not a shadow of a doubt – Weber and all her co-authors are here to turn law enforcement officers into criminals. You will read in her introduced bill I have attached.

To begin this effort, PORAC is creating a Chapter Outreach Program for the month of March, wherein, all 14 chapter and association leaders set meetings with their legislative representatives to discuss these very important issues. Our team, which includes PORAC staff, Aaron Read & Associates, and our communications consultants, Fiona Hutton & Associates, will put together packets that will include the bills, our talking points, and position letters. Furthermore, if associations feel they need additional support with meetings, contact information, or materials, members of our team may be able to assist.

Fresno DSA is taking a position to conduct a full court press on our local delegation, and taking it a step further to assist other jurisdictions who need the support we can

lend them. As I receive the materials from PORAC, I will be disseminating it out to the FDSA membership.

Update to SB1421

Fresno DSA filed a stay order (Temporary Restraining Order essentially) to block the many Public Records Request (PRA) being submitted since Jan 1, 2019. Again, as I mentioned in my previous newsletter, the bill was silent to the retroactivity of the information being requested. Many agencies were, along with the Sheriff's Office, being asked for documents relating to many employees who are no longer working here. As long as they were meeting the criteria set forth in the bill, the information was being asked for.

After consulting with our firm, Messing, Adam, and Jasmine – the decision was made to move forward with language requesting a stay order from Fresno Superior Court. The motion was filed on Friday, February 22, 2019. The court hearing was Thursday, February 28, 2019. At this hearing the stay order was granted by Judge J Hamilton. This is a glimpse of good news for the DSA and the agency itself.

As of the 28th, no records pre-Jan 1, 2019 can be released related to personnel in regards to use of force, dishonesty, sex harassment, and officer involved shootings. As we get more information in the future, I will pass on the information to the membership so everyone is updated to potential changes. The stay order is effect until September of 2019.

Please see the attachments below for SB230 and AB 392. I have also attached the petition for the TRO and order under the SB 1421 issue.

Thank you and please stay safe.

-Eric



SB-230 Law enforcement: use of deadly force: training: policies. (2019-2020)

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CALIFORNIA LEGISLATURE— 2019–2020 REGULAR SESSION

SENATE BILL

No. 230

Introduced by Senator Caballero
(Coauthors: Senators Archuleta, Dodd, Galgiani, Glazer, and Hill)
(Coauthors: Assembly Members Cooper, Frazier, Gray, Grayson, Low, O'Donnell, Quirk-Silva, Ramos, Robert Rivas, Rodriguez, Blanca Rubio, and Salas)

February 07, 2019

An act to add Chapter 17.4 (commencing with Section 7286) to Division 7 of Title 1 of the Government Code, and to amend Section 196 of, and to add Section 13519.10 to, the Penal Code, relating to law enforcement.

LEGISLATIVE COUNSEL'S DIGEST

SB 230, as introduced, Caballero. Law enforcement: use of deadly force: training: policies.

(1) Existing law requires each law enforcement agency to annually furnish specified information to the Department of Justice regarding the use of force by a peace officer. Existing law requires the Department of Justice, once per year, to update a summary of information contained in the reports received on its internet website. Existing law requires a department or agency that employs peace officers or custodial officers to establish a procedure to investigate complaints by members of the public against those officers.

This bill would require each law enforcement agency to maintain a policy that provides guidelines on the use of force, utilizing deescalation techniques and other alternatives to force when feasible, specific guidelines for the application of deadly force, and factors for evaluating and reviewing all use of force incidents, among other things. The bill would require each agency to make their use of force policy accessible to the public. By imposing additional duties on local agencies, this bill would create a state-mandated local program.

(2) Under existing law, the use of deadly force resulting in the death of a person is justified if it was necessarily committed in overcoming actual resistance to an arrest, if it was necessarily committed in apprehending a felon who had escaped from custody, or if it was necessarily committed in arresting a person charged with a felony and who was fleeing from justice or resisting arrest.

Existing case law prohibits the use of deadly force by a peace officer unless, among other criteria, there is a reasonable fear of death or serious physical harm to the officer or another.

This bill would refine the circumstances under which a homicide by a peace officer is justifiable to those situations in which the officer reasonably believes the suspect poses an imminent threat of death or serious physical injury to the officer or others or when a fleeing suspect has committed a forcible and atrocious felony.

By changing the circumstances under which a peace officer may be charged and convicted of a homicide, this bill would impose a state-mandated local program.

(3) Existing law establishes the Commission on Peace Officer Standards and Training in the Department of Justice and requires the commission to adopt rules establishing minimum standards regarding the recruitment of peace officers. Existing law requires the commission to develop guidelines and implement courses of instruction regarding racial profiling, domestic violence, hate crimes, vehicle pursuits, and human trafficking, among others.

This bill would require the commission to implement a course or courses of instruction for the regular and periodic training of law enforcement officers in the use of force. The bill would require the commission to develop uniform, minimum guidelines for adoption and promulgation by California law enforcement agencies for the use of force, as specified. The bill would encourage law enforcement agencies to adopt and promulgate a use of force policy and would state the intent of the Legislature that each law enforcement agency adopt, promulgate, and require regular and periodic training consistent with the agency's policy that complies with the guidelines developed under this bill.

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares:

(a) The highest priority of California law enforcement is safeguarding the life, dignity, and liberty of all persons, without prejudice to anyone.

(b) Law enforcement officers shall be guided by the principle of reverence for human life in all investigative, enforcement, and other contacts between officers and members of the public. When officers are called upon to detain or arrest a suspect who is uncooperative or actively resisting, may attempt to flee, poses a danger to others, or poses a danger to themselves, they should consider tactics and techniques that may persuade the suspect to voluntarily comply or may mitigate the need to use a higher level of force to resolve the situation safely.

(c) Vesting officers with the authority to use reasonable force and to protect the public welfare requires monitoring, evaluation, and a careful balancing of all interests.

(d) The authority to use force is a serious responsibility given to peace officers by the people who expect them to exercise that authority judiciously and with respect for human rights, dignity, and life.

(e) The intent of this act is to establish the minimum standard for policies and reporting procedures regarding California law enforcement agencies' use of force. The purpose of these use of force policies is to provide law enforcement agencies with guidance regarding the use and application of force to ensure such applications are used only to effect arrests or lawful detentions, overcome resistance, or bring a situation under legitimate control.

(f) The legal standard used to determine the lawfulness of a use of force is the Fourth Amendment to the United States Constitution. The decision of the United States Supreme Court in *Graham v. Connor* (1989) 490 U.S. 386 states in part, "[t]he reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second

judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation" and "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."

(g) No policy can anticipate every conceivable situation or exceptional circumstance which officers may face. In all circumstances, officers are expected to exercise sound judgment and critical decision making when using force options.

(h) Every instance in which a firearm is discharged, including exceptional circumstances, shall be reviewed by the department on a case-by-case basis to evaluate all facts and to determine if the incident is within policy and in accordance with training.

SEC. 2. Chapter 17.4 (commencing with Section 7286) is added to Division 7 of Title 1 of the Government Code, to read:

CHAPTER 17.4. Law Enforcement Use of Force Policies

7286. (a) For the purposes of this section:

(1) "Deadly force" means force reasonably anticipated and intended to create a substantial likelihood of causing death or great bodily injury.

(2) "Feasible" means capable of being done or carried out to successfully achieve the arrest or lawful objective without increasing risk to the officer or another person.

(3) "Imminent" does not mean immediate or instantaneous, but shall include an officer's objectively reasonable belief that a danger of injury or death may occur if force is not applied.

(4) "Law enforcement agency" means any police department, sheriff's department, district attorney, county probation department, transit agency police department, school district police department, the police department of any campus of the University of California, the California State University, or community college, the Department of the California Highway Patrol, and the Department of Justice.

(b) Each law enforcement agency shall maintain a policy that provides guidelines on the use of force, and the following:

(1) Utilizing deescalation techniques, crisis intervention teams, and other alternatives to force when feasible.

(2) Balancing the amount of force with the seriousness of the suspected offense and the reasonably perceived level of actual or threatened resistance.

(3) An officer's duty to report potential excessive force to a superior officer when present and observing another officer using force that the officer believes to be beyond that which is objectively reasonable under the circumstances based upon the totality of information actually known to the officer.

(4) Taking into account the possibility that other officers may have additional information regarding the threat posed by a subject, an officer's duty to intercede when present and observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances.

(5) Approved methods and devices available for the application of force with corresponding guidelines for each.

(6) The officer's responsibility to carry out duties, including use of force, in a manner that is fair and unbiased.

(7) Specific guidelines for the application of deadly force.

(8) Prompt internal reporting and notification requirements regarding a use of force incident, including reporting use of force incidents to the Department of Justice in compliance with Section 12525.2.

(9) The role of supervisors in the review of use of force applications.

(10) Ensuring medical assistance is procured, when reasonable and safe to do so, for persons following a use of force incident.

(11) Training standards and requirements relating to an officer's demonstrated knowledge and understanding of their law enforcement agency's use of force policy.

(12) Training and guidelines regarding vulnerable populations, including, but not limited to, children, elderly persons, people who are pregnant, and people with physical and developmental disabilities.

(13) Situations under which the discharge of a firearm at a moving vehicle may or may not be permitted.

(14) Factors for evaluating and reviewing all use of force incidents.

(15) Minimum entry level and annual hourly training and course titles required to meet the objectives in the use of force policy.

(c) Each law enforcement agency shall make their use of force policy accessible to the public.

(d) This section does not supersede the collective bargaining procedures established pursuant to the Myers-Milias-Brown Act (Chapter 10 (commencing with Section 3500) of Division 4), The Ralph C. Dills Act (Chapter 10.3 (commencing with Section 3512) of Division 4), or the Higher Education Employer-Employee Relations Act (Chapter 12 (commencing with Section 3560) of Division 4).

SEC. 3. Section 196 of the Penal Code is amended to read:

196. Homicide is justifiable ~~when~~ *if* committed by ~~public officers and those acting by their command in their aid and assistance, either a peace officer or by an individual acting under the command of a peace officer in the peace officer's aid and assistance,~~ *under any of the following circumstances:*

~~(1.)~~

(a) In obedience to any judgment of a competent ~~Court; or, court.~~

~~(2.)~~

(b) When necessarily committed in overcoming actual resistance to the ~~execution of some legal process, or in the discharge of any other legal duty; or,~~ discharge of a legal duty if the officer reasonably believes the suspect poses an imminent threat of death or serious physical injury to the officer or others.

~~(3.)~~

(c) When necessarily committed in retaking felons who have been rescued or have ~~escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest; escaped.~~

(d) When necessarily committed in arresting a suspect who is fleeing from justice or resisting arrest if the officer reasonably believes that the suspect poses a significant threat of death or serious physical injury to the officer or others.

(e) When necessarily committed in arresting a suspect who is fleeing if the officer reasonably believes the fleeing suspect has committed a forcible or atrocious felony.

SEC. 4. Section 13519.10 is added to the Penal Code, immediately following Section 13519.9, to read:

13519.10. (a) (1) The commission shall implement a course or courses of instruction for the regular and periodic training of law enforcement officers in the use of force and shall also develop uniform, minimum guidelines for adoption and promulgation by California law enforcement agencies for use of force. The guidelines and course of instruction shall stress that the use of force by law enforcement personnel is of important concern to the community and law enforcement and that law enforcement should safeguard life, dignity, and liberty of all persons, without prejudice to anyone. These guidelines shall be a resource for each agency executive to use in the creation of a use of force policy that the agency is encouraged to adopt and promulgate, and that reflects the needs of the agency, the jurisdiction it serves, and the law.

(2) As used in this section, "law enforcement officer" includes any peace officer of a local police or sheriff's department or the California Highway Patrol, or of any other law enforcement agency authorized by law to use force to effectuate an arrest.

(b) The course or courses of basic training for law enforcement officers and the guidelines shall include adequate consideration of each of the following subjects:

(1) Legal standards for use of force.

- (2) Duty to intercede.
- (3) The reasonable force doctrine.
- (4) Deescalation.
- (5) Tactical communications.
- (6) Use of force options.
- (7) Rendering medical aid.
- (8) Supervisory responsibilities.
- (9) Use of force review and analysis.
- (10) Dealing with vulnerable populations.
- (11) Guidelines for the use of deadly force.
- (12) State required reporting.
- (13) Reasonable alternatives to use of force.

(c) Law enforcement agencies are encouraged to include, as part of their advanced officer training program, periodic updates and training on use of force. The commission shall assist where possible.

(d) (1) The course or courses of instruction, the learning and performance objectives, the standards for the training, and the guidelines shall be developed by the commission in consultation with appropriate groups and individuals having an interest and expertise in the field on use of force. The groups and individuals shall include, but not be limited to, law enforcement agencies, police academy instructors, subject matter experts, and members of the public.

(2) The commission, in consultation with these groups and individuals, shall review existing training programs to determine the ways in which use of force training may be included as part of ongoing programs.

(e) It is the intent of the Legislature that each law enforcement agency adopt, promulgate, and require regular and periodic training consistent with an agency's specific use of force policy that, at a minimum, complies with the guidelines developed under subdivisions (a) and (b).

SEC. 5. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because, in that regard, this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

However, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

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CALIFORNIA LEGISLATURE— 2019–2020 REGULAR SESSION

ASSEMBLY BILL**No. 392**

Introduced by Assembly Members Weber and McCarty
(Principal coauthor: Assembly Member Holden)
(Principal coauthors: Senators Bradford and Mitchell)
(Coauthor: Assembly Member Mark Stone)

February 06, 2019

An act to amend Sections 196 and 835a of the Penal Code, relating to peace officers.

LEGISLATIVE COUNSEL'S DIGEST

AB 392, as introduced, Weber. Peace officers: deadly force.

Existing law authorizes a peace officer to make an arrest pursuant to a warrant or based upon probable cause, as specified. Under existing law, an arrest is made by the actual restraint of the person or by submission to the custody of the arresting officer.

Existing law authorizes a peace officer to use reasonable force to effect the arrest, to prevent escape, or to overcome resistance. Existing law does not require an officer to retreat or desist from an attempt to make an arrest because of resistance or threatened resistance of the person being arrested.

Under existing law, a homicide committed by a peace officer is justifiable when necessarily committed in arresting a person who has committed a felony and the person is fleeing or resisting such arrest.

Existing case law deems such a homicide to be a seizure under the Fourth Amendment of the Constitution of the United States, and as such, requires the actions to be reasonable.

This bill would redefine the circumstances under which a homicide by a peace officer is deemed justifiable to include when the killing is in self-defense or the defense of another, consistent with the existing legal standard for self-defense, or when the killing is necessary to prevent the escape of a fleeing felon whose immediate apprehension is necessary to prevent death or serious injury. The bill would additionally bar the use of this defense if the peace officer acted in a criminally negligent manner that caused the death, including if the officer's criminally negligent actions created the necessity for the use of deadly force.

The bill would also affirmatively prescribe the circumstances under which a peace officer is authorized to use deadly force to effect an arrest, to prevent escape or to overcome resistance.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 196 of the Penal Code is amended to read:

196. (a) Homicide is justifiable when committed by ~~public~~ *peace* officers and those acting by their command in their aid and assistance, ~~either— under any of the following circumstances:~~

~~1.~~

~~(1) In obedience to any judgment of a competent ~~Court; or,~~ court.~~

~~2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,~~

~~3. When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest.~~

(2) When the homicide results from a peace officer's use of force, other than deadly force, that is in compliance with subdivision (b) of Section 835a.

(3) When, except as otherwise provided in subdivision (b), the homicide would be justifiable pursuant to Section 197, in self-defense or the defense of another person.

(4) When, subject to subdivision (b), the officer reasonably believes, based on the totality of the circumstances, that the use of force resulting in a homicide is necessary to prevent the escape of a person, and all of the following are true:

(A) The peace officer reasonably believes that the person has committed, or has attempted to commit, a felony involving the use or threatened use of deadly force.

(B) The peace officer reasonably believes that the person will cause death or inflict serious bodily injury to another unless immediately apprehended.

(C) If feasible, the peace officer has identified themselves as a peace officer and given a warning that deadly force may be used unless the person ceases flight, unless the officer has reasonable ground to believe the person is aware of these facts.

(b) As used in paragraph (4) of subdivision (a), "necessary" means that, given the totality of the circumstances, an objectively reasonable peace officer in the same situation would conclude that there was no reasonable alternative to the use of deadly force that would prevent death or serious bodily injury to the peace officer or to another person. The totality of the circumstances means all facts known to the peace officer at the time and includes the tactical conduct and decisions of the officer leading up to the use of deadly force.

(c) Neither this section nor Section 197 provide a peace officer with a defense to manslaughter in violation of Section 192, if that person was killed due to the criminally negligent conduct of the officer, including situations in which the victim is a person other than the person that the peace officer was seeking to arrest, retain in custody, or defend against, or if the necessity for the use of deadly force was created by the peace officer's criminal negligence.

SEC. 2. Section 835a of the Penal Code is amended to read:

835a. (a) *The Legislature finds and declares all of the following:*

(1) That the authority to use physical force, conferred on peace officers by this section, is a serious responsibility that shall be exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life. The Legislature further finds and declares that every person has a right to be free from excessive use of force by officers acting under color of law.

(2) That the decision by a peace officer to use force shall be evaluated carefully and thoroughly, in a manner that reflects the gravity of that authority and the serious consequences of the use of force by peace officers, in order to ensure that officers use force consistent with law and agency policies.

(3) That the decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight, and that the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force.

Any

(b) Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable ~~force~~ force, other than deadly force, to effect the arrest, to prevent escape or to overcome resistance.

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(c) A peace officer who makes or attempts to make an arrest need not ~~retreat~~ ~~abandon~~ or desist from ~~his efforts~~ the arrest by reason of the resistance or threatened resistance of the person being ~~arrested; nor shall such arrested~~. A peace officer shall not be deemed an aggressor or lose ~~his~~ the right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance. A peace officer shall, however, attempt to control an incident through sound tactics, including the use of time, distance, communications, tactical repositioning, and available resources, in an effort to reduce or avoid the need to use force whenever it is safe, feasible, and reasonable to do so. This subdivision does not conflict with the limitations on the use of deadly force set forth in this section or Section 196.

(d) (1) A peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary for either of the following reasons:

(A) To defend against a threat of imminent death or serious bodily injury to the officer or to another person.

(B) To prevent the escape of a fleeing suspect consistent with paragraph (4) of subdivision (a) of Section 196.

(2) A peace officer shall not use deadly force against a person based on the danger that person poses to themselves, if the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.

(3) This subdivision does not provide the legal standard and shall not be used in any criminal proceeding against a peace officer relating to the use of force by that peace officer, or to any defenses to criminal charges under sections 196 or 197 or any other defense asserted by that officer, but may be used in any civil or administrative proceeding.

(e) For purposes of this section, the following definitions shall apply:

(1) "Deadly force" means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm.

(2) A threat of death or serious bodily injury is "imminent" when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

(3) "Necessary" means that, given the totality of the circumstances, an objectively reasonable peace officer in the same situation would conclude that there was no reasonable alternative to the use of deadly force that would prevent death or serious bodily injury to the peace officer or to another person.

(4) "Totality of the circumstances" means all facts known to the peace officer at the time and includes the tactical conduct and decisions of the officer leading up to the use of deadly force.

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8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF FRESNO**

11 **UNLIMITED JURISDICTION**

12 FRESNO DEPUTY SHERIFF'S
ASSOCIATION,

13 Petitioner,

14 v.

15 COUNTY OF FRESNO; and DOES 1-10,
16 inclusive,

17 Respondent.

Case No.

**VERIFIED PETITION BY FRESNO
DEPUTY SHERIFF'S ASSOCIATION
FOR PEREMPTORY WRIT OF
MANDATE, ALTERNATIVE WRIT OF
MANDATE, AND REQUEST FOR STAY
ORDER**

[CCP §§1085, 1087]

[Unlimited Civil Action]

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20 Petitioner Fresno Deputy Sheriff's Association brings this Petition for Peremptory Writ of
21 Mandate, Alternative Writ of Mandate, and Request for Stay Order against Respondent County of
22 Fresno, and Does 1 through 10, inclusive, and alleges as follows:

23 **PARTIES**

24 1. Petitioner Fresno Deputy Sheriff's Association ("Petitioner" or "DSA") is an
25 employee organization as defined in Government Code §3500, *et seq.*, representing all deputy
26 sheriffs employed by the County with regard to all matters concerning wages, hours and
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1 a catch-all for “[a]ny other information the disclosure of which would constitute an unwarranted
2 invasion of personal privacy”).

3 6. On September 30, 2018, Governor Brown approved Senate Bill 1421 (“SB 1421”)
4 which amended Penal Code §§ 832.7 and 832.8.

5 7. SB 1421 amended Penal Code § 832.7 to (a) eliminate the long-standing statutory
6 confidentiality previously accorded certain categories of information contained in peace officer
7 and custodial officer (collectively, “Peace Officer”) personnel records, specifically personnel
8 record information relating to “[e]mployment advancement, appraisal or discipline...[, or]
9 [c]omplaints, or investigations of complaints, concerning an event or transaction in which [the
10 Peace Officer] participated, or which he or she perceived, and pertaining to the manner in which
11 he or she performed his or her duties,” and (b) allow public inspection of materials containing this
12 specific information through a PRA request. Under amended Penal Code § 832.7, these categories
13 comprise broad information regarding incidents: (1) involving the discharge of a firearm at a
14 person by a Peace Officer; (2) in which the use of force by a Peace Officer against a person
15 resulted in death, or in great bodily injury; (3) in which a sustained finding was made by any law
16 enforcement agency or oversight agency that a Peace Officer engaged in sexual assault involving a
17 member of the public; and (4) in which a sustained finding was made by any law enforcement
18 agency or oversight agency of dishonesty by a Peace Officer directly relating to the reporting,
19 investigation, or prosecution of a crime, or directly relating to the reporting of or investigation of
20 misconduct by, another Peace Officer, including, but not limited to, any sustained finding of
21 perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

22 8. Among other things, SB 1421 amended Penal Code §837.8 to add definitions for
23 the terms “sustained” and “unfounded” used in amended §832.7. Attached hereto as Exhibit A,
24 and incorporated herein by reference, is a true and correct copy of Chapter 988 of the 2017-2018
25 Regular Session, Senate Bill 1421.

26 9. Because SB 1421 was enacted during the regular legislative session, and not
27 designated “urgent,” the amendments became effective January 1, 2019.

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1 10. SB 1421 contains no express provision or language eliminating the confidentiality
2 long afforded this information with respect to materials created before January 1, 2019, nor any
3 clear indication that the Legislature intended the statute to operate so as to be applied and enforced
4 with respect to Peace Officer personnel records and information created prior to January 1, 2019.

5 11. Since January 1, 2019, numerous California Superior Courts have granted
6 temporary restraining orders or alternative writs of mandate staying the production of pre-January
7 1, 2019 records requested under the PRA pursuant to SB 1421, including Orange County, Los
8 Angeles County, San Bernardino County, and Riverside County. In addition, the Ventura County
9 Superior Court has issued a preliminary injunction on any such production after having previously
10 granted a TRO.

11 On February 1, 2019, the California Attorney General announced that it would not be
12 releasing records created before January 1, 2019 until further guidance from the courts, stating:
13 “Historically, peace officers have had a significant privacy right in their personnel records ... the
14 public interest in accessing these records is clearly outweighed by the public’s interest in
15 protecting privacy rights.” <https://www.sacbee.com/news/state/california/article226293420.html>.

16 12. To date only two superior courts have denied union requests for to block disclosure
17 of police personnel files under SB 1421 (after having granted temporary restraining orders) -
18 Contra Costa County (*Walnut Creek Police Officers’ Association v. City of Walnut Creek* (and
19 related cases), Case No. N19-0109) and Los Angeles County (*Los Angeles Police Protective*
20 *League v. City of Los Angeles*, Case No. 18STCP03495). Both courts, however, stayed
21 implementation of their orders to allow an appeal and request for stay before the applicable district
22 court of appeal. The unions have appealed the Contra Costa decision; the Los Angeles County
23 decision issued on February 19.

24 13. On or after January 1, 2019, the County received multiple lengthy PRA requests
25 pursuant to SB 1421 from individuals and various media organizations for voluminous materials
26 created before January 1, 2019.

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1 **FIRST CAUSE OF ACTION**

2 **FOR ISSUANCE OF PEREMPTORY WRIT OF MANDATE,**
3 **ALTERNATIVE WRIT AND STAY**
4 **(Code of Civil Procedure §1085)**

5 14. The DSA realleges and incorporates herein by reference the allegations of
6 paragraphs 1 through 14, inclusive.

7 15. The SB 1421 amendments to Penal Code §§ 832.7 and 832.8 constitute a
8 substantial and adverse change to the existing statutory privacy rights of the DSA's membership.
9 Pursuant to California Constitution, Article 1, §3(b)(3), any broad construction of statutes
10 pertaining to the right of access to information of public agencies (such as the CPRA) does not
11 supersede the construction of statutes that protect the constitutional right of privacy, including
12 any statutory procedures governing discovery or disclosure of information concerning the
13 official performance or professional qualifications of a Peace Officer.

14 16. The DSA's members have no plain, speedy and adequate alternative remedy at
15 law, and they will suffer irreparable injury and damage in that, once publicly disclosed, the
16 statutorily-mandated right of confidentiality in the private information contained in their personnel
17 records created prior to January 1, 2019, will have been irretrievably lost. Moreover, violation of
18 the statutory procedures for disclosure of police personnel records does not give rise to a private
19 right of action for damages. Thus, with no private right of action for damages available to them
20 for disclosure of information that has not even been subjected to the rigors of a *Pitchess* process,
21 the DSA's members will be precluded from any relief if this information is disclosed yet
22 ultimately determined to retain its statutory confidentiality prior to January 1, 2019.

23 17. Further, no guidelines have been promulgated at the County or city level as yet
24 with regard to the parameters of what may be produced under the amendments. To the extent that
25 Respondent produces materials created prior to January 1, 2019 absent any guidelines, even those
26 private personnel materials still subject to continuing confidentiality are at risk for being
27 disclosed.

28 18. Given that the legislation itself was not deemed "urgent," there is no need to push
for immediate responses under the PRA without judicial clarification as to the scope of the

1 amendments, particularly given the inherent conflict between existing statutes respecting such
2 disciplinary records and SB 1421. More guidance is plainly needed and the DSA's members will
3 irreparably suffer if a decision to allow disclosure is hastily made.

4 19. The DSA has a beneficial interest in Respondent's compliance with its ministerial
5 duty to guard the privacy rights of the DSA's members by refraining from applying SB 1421 so as
6 to result in the release of confidential records created prior to January 1, 2019, the effective date of
7 SB 1421.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Petitioner prays for the following relief:

10 1. That this Court forthwith issue an alternative writ of mandate directing
11 Respondent and its agents, employees and representatives to refrain from enforcing or applying
12 SB 1421's amendments to Penal Code §§832.7 and 832.8 in any manner that would result in the
13 disclosure or production of Peace Officer information contained in personnel records regarding
14 incidents or conduct occurring prior to January 1, 2019, or in the alternative, to show cause before
15 this Court at a specified time and place why Respondent has not done so;

16 2. That on Respondent's return to the alternative writ, a hearing be held before this
17 Court at the earliest practicable time so that the issue involved in this Petition may be adjudicated
18 promptly;

19 3. That pending such return and hearing on the alternative writ of mandate,
20 and until this Court otherwise directs, the Court issue an immediate stay order or grant an
21 injunction prohibiting any enforcement or application of SB 1421 by Respondent and its agents,
22 employees and representatives in any manner that would result in the disclosure or production of
23 information contained in Peace Officer personnel records regarding incidents or reflecting conduct
24 described in SB 1421 occurring prior to January 1, 2019;

25 4. That following the hearing on this Petition, the Court issue a peremptory writ of
26 mandate or other relief directing Respondent and its agents, employees and representatives to
27 refrain from enforcing or applying the amendments to Penal Code §§832.7 and 832.8 implemented
28 by SB 1421 in any manner that would result in the disclosure or production of information

1 contained in Peace Officer personnel records regarding incidents or conduct occurring prior to
2 January 1, 2019;

3 5. That Petitioner be awarded attorneys' fees and costs of suit; and

4 6. For such other and further relief as the Court may deem just and proper.

5 Dated: February __, 2019

MESSING ADAM & JASMINE LLP

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By _____
Monique Alonso
Attorneys for Petitioner
FRESNO DEPUTY SHERIFF'S ASSOCIATION

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VERIFICATION

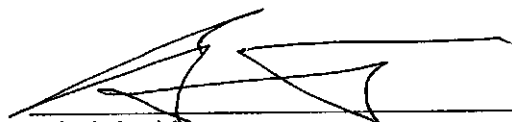
STATE OF CALIFORNIA, COUNTY OF FRESNO

I have read the foregoing VERIFIED PETITION BY FRESNO DEPUTY SHERIFF'S ASSOCIATION FOR PEREMPTORY WRIT OF MANDATE, ALTERNATIVE WRIT OF MANDATE, AND REQUEST FOR STAY ORDER and know its contents.

I am the President of Fresno Deputy Sheriff's Association, a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 21, 2019 at Fresno, California.


Eric Schmidt