

RESOLUTION 07-02-2015

DIGEST

Police Records: Forcing Disclosure of Confidential Police Disciplinary Records

This resolution amends Government Code sections 832.5 and 832.7 to force disclosure of confidential police disciplinary records.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend California Government Code sections 832.5 and 832.7 to read as follows:

§832.5

1 It is the intent of the Legislature in enacting this legislation to overturn the California
2 Supreme Court decision in Copley Press vs. Superior Court 39 Cal 4th 1272 (2006) and to
3 restore public access to peace officer records and to restore public access to meetings and
4 hearings that were open to the public prior to the Copley decision.

5 (a)(1) Each department or agency in this state that employs peace officers shall establish
6 a procedure to investigate complaints by members of the public against the personnel of these
7 departments or agencies, and shall make a written description of the procedure available to the
8 public.

9 (2) Each department or agency that employs custodial officers, as defined in Section
10 831.5, may establish a procedure to investigate complaints by members of the public against
11 those custodial officers employed by these departments or agencies, provided however, that any
12 procedure so established shall comply with the provisions of this section and with the provisions
13 of Section 832.7.

14 (b) Complaints and any reports or findings relating to these complaints shall be retained
15 for a period of at least five years. All complaints retained pursuant to this subdivision may be
16 maintained either in the peace or custodial officer's general personnel file or in a separate file
17 designated and maintained by the department or agency as provided by department or agency
18 policy, in accordance with all applicable requirements of law. However, prior to any official
19 determination regarding promotion, transfer, or disciplinary action by an officer's employing
20 department or agency, the complaints described by subdivision (c) shall be removed from the
21 officer's general personnel file and placed in a separate file designated by the department or
22 agency, in accordance with all applicable requirements of law.

23 (c) Complaints by members of the public that are determined by the peace or custodial
24 officer's employing agency to be frivolous, as defined in Section 128.5 of the Code of Civil
25 Procedure, or unfounded or exonerated, or any portion of a complaint that is determined to be
26 frivolous, unfounded, or exonerated, shall not be maintained in that officer's general personnel
27 file. However, these complaints shall be retained in other, separate files that shall be deemed
28 personnel records for purposes of the California Public Records Act (Chapter 3.5 (commencing
29 with Section 6250) of Division 7 of Title 1 of the Government Code) and Section 1043 of the
30 Evidence Code.

31 (1) Management of the peace or custodial officer's employing agency shall have access to
32 the files described in this subdivision.

33 (2) Management of the peace or custodial officer's employing agency shall not use the
34 complaints contained in these separate files for punitive or promotional purposes except as
35 permitted by subdivision (f) of Section 3304 of the Government Code.

36 (3) Management of the peace or custodial officer's employing agency may identify any
37 officer who is subject to the complaints maintained in these files which require counseling or
38 additional training. However, if a complaint is removed from the officer's personnel file, any
39 reference in the personnel file to the complaint or to a separate file shall be deleted.

40 (d) As used in this section, the following definitions apply:

41 (1) "General personnel file" means the file maintained by the agency containing the
42 primary records specific to each peace or custodial officer's employment, including evaluations,
43 assignments, status changes, and imposed discipline.

44 (2) "Unfounded" means that the investigation clearly established that the allegation is not
45 true.

46 (3) "Exonerated" means that the investigation clearly established that the actions of the
47 peace or custodial officer that formed the basis for the complaint are not violations of law or
48 department policy.

49 (4) "Department" or "agency" means the particular department or agency that directly
50 employs peace or custodial officers and which has established a procedure to investigate
51 complaints by members of the public against its personnel pursuant to subdivision (a) and that is
52 primarily responsible for the initial investigation of the complaints and the maintenance of its
53 investigative records. The term does not include any other governmental body that reviews the
54 investigations, findings or employment actions of a department or agency.

55 § 832.7

56 (a) Peace officer or custodial officer personnel records and records maintained by any
57 state or local agency pursuant to Section 832.5, or information obtained from these records, are
58 confidential and shall not be disclosed in any criminal or civil proceeding except by discovery
59 pursuant to Sections 1043 and 1046 of the Evidence Code. This section shall not apply to
60 investigations or proceedings concerning the conduct of peace officers or custodial officers, or an
61 agency or department that employs those officers, conducted by a grand jury, a district attorney's
62 office, or the Attorney General's office.

63 (b) Notwithstanding subdivision (a), a department or agency shall release to the
64 complaining party a copy of his or her own statements at the time the complaint is filed.

65 (c) Notwithstanding subdivision (a), a department or agency that employs peace or
66 custodial officers may disseminate data regarding the number, type, or disposition of complaints
67 (sustained, not sustained, exonerated, or unfounded) made against its officers if that information
68 is in a form which does not identify the individuals involved.

69 (d) Notwithstanding subdivision (a), a department or agency that employs peace or
70 custodial officers may release factual information concerning a disciplinary investigation if the
71 officer who is the subject of the disciplinary investigation, or the officer's agent or representative,
72 publicly makes a statement he or she knows to be false concerning the investigation or the
73 imposition of disciplinary action. Information may not be disclosed by the peace or custodial
74 officer's employer unless the false statement was published by an established medium of
75 communication, such as television, radio, or a newspaper. Disclosure of factual information by
76 the employing agency pursuant to this subdivision is limited to facts contained in the officer's
77 personnel file concerning the disciplinary investigation or imposition of disciplinary action that
78

79 specifically refute the false statements made public by the peace or custodial officer or his or her
80 agent or representative.

81 (e) Notwithstanding subdivision (a), with respect to each complaint charge, disciplinary
82 matter, or internal investigation that results in either discipline, a sustained complaint or charge,
83 or a finding that an officer's conduct was out of policy, a department or agency that employs
84 peace or custodial officers shall release:

85 (1) The name and badge number of the subject officer;

86 (2) The name and current address of the complainant, unless the complainant requests it
87 be kept confidential;

88 (3) A summary of the factual allegations contained in the complaint or other charging
89 document;

90 (4) The charges brought against the officer;

91 (5) The factual findings with respect to the conduct at issue;

92 (6) The discipline imposed or corrective action taken.

93 (f) Notwithstanding subdivision (a), in cases in which a civilian review board or other
94 governmental body outside the department or agency recommends imposition of discipline or
95 makes or recommends a finding that an officer's conduct was out of policy or that a complaint
96 was founded, and such finding is overturned or such recommendation not followed by the
97 department or agency that employs the peace officer, the department or agency may in its
98 discretion release any information already released by the outside body as well as a summary of
99 the grounds for overturning the outside body's finding or not following its recommendation.

100 (g)(1) The department or agency shall provide written notification to the complaining
101 party of the disposition of the complaint within 30 days of the disposition.

102 (2) The notification described in this subdivision shall not be conclusive or binding or
103 admissible as evidence in any separate or subsequent action or proceeding brought before an
104 arbitrator, court, or judge of this state or the United States.

105 (h) Nothing in this section shall affect the discovery or disclosure of information
106 contained in a peace or custodial officer's personnel file pursuant to Section 1043 of the
107 Evidence Code.

108 (i) Information disclosable pursuant to this section shall be made available upon request
109 pursuant to the Section 6250 et seq. of the Government Code.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: The Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Penal Code sections 832.5 and 832.7, as interpreted by the recent California Supreme Court decision in *Copley Press vs. Superior Court* 39 Cal 4th 1272 (2006), prevent public access to information about sustained complaints about police misconduct and discipline that flows from such misconduct. The *Copley Press* decision has also called into question the legality of public civilian review boards and has been used by police officer associations to challenge oversight agencies that have been in place for decades. Under current law, among public employees, only peace officers are granted such protections.

Under current state law as interpreted by the Copley Press decision, the public is foreclosed from learning about sustained misconduct and discipline of police and correctional officers. The impact of this decision is far reaching. It prevents the public and press from learning about misconduct by public officials, evaluating the extent to which officers that engage in misconduct are promoted, reassigned, or disciplined, and will significantly undermine efforts to achieve police accountability. Dissemination of information serves as a deterrent against misconduct and generates public confidence in the ability of government to hold police accountable when necessary. The case has also been used to close down access to records or limit the scope of civilian oversight agencies throughout the state in cities including Oakland, Berkeley, Los Angeles, and San Francisco.

The Solution: This resolution supports legislation in the California legislature aimed at overturning the Copley Press decision and providing greater access to information related to police misconduct.

IMPACT STATEMENT

This resolution does not affect any other statute or case law.

CURRENT OR PRIOR RELATED LEGISLATION

Not known.

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RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

Similar to Resolutions 06-06-2007 and 03-09-2012, which were approved in principle.

Reasons:

This resolution amends Government Code sections 832.5 and 832.7 to force disclosure of confidential police disciplinary records. This resolution should be disapproved because sufficient access to police disciplinary records already exists.

Evidence Code sections 1043 and 1045 provide the procedural mechanism for access to a peace or custodial officer's personnel records, including access to records of complaints, investigations of complaints, and disciplinary records. Rather than granting unfettered access by any person or organization to an employee's confidential personnel file, the Evidence Code permits access but balances the need for information against the relevance of the information sought. Furthermore, access is limited to parties where the court finds the information relevant to the litigation, thereby curbing the release of sensitive information to third parties. However, the resolution mandates the automatic release of confidential information such as the contents of an officer's disciplinary file, including the officer's name as well as the complainant's name and address, unless the

complainant knew enough to request that such information be kept confidential. This information would also be subject to a Public Records Act request.

While the resolution's objective is to create open access by of non-parties, such as the press, to peace officers' personnel files, the resolution goes too far because there are no restrictions or limitations on access. Nothing in *Copley Press v. Superior Court* (2006) 39 Cal.4th 1272 prohibits access to documents and other information concerning sustained complaints of police misconduct and discipline. Rather, *Copley* merely rejected the unrestricted access to such confidential information not provided by the Evidence Code. While the public's and media's need for certain information is an important concern, sensitive information – such as confidential personnel and disciplinary records – should not be made readily available without the court's balance of the need versus the need for confidentiality.