

A guide to the
**Public Safety Officers
Procedural Bill of Rights Act**

Gary Messing
Jason Jasmine
Tylor Dominguez

Public Safety Officers Procedural Bill of Rights Act

Government Code § 3300, *et seq.*

This chapter shall be known, and may be cited, as the

Public Safety Officers Procedural Bill of Rights Act (POBR)

Government Code § 3301

Definitions

“Public Safety Officer” means any public safety officer under the following California Penal Code (“PC”) sections:

PC 830.1(a)

- Sheriffs, Undersheriffs and Deputy Sheriffs employed by a County;
- Police Chiefs or Chief/Directors, or Chief Executive Officers of a Consolidated Municipal Public Safety Agency;
- Any Police Officer employed by a City or other Municipal Safety Agency;
- Any Police Officer of a District, including the San Diego Unified Port District Harbor Police;
- Marshals or Deputy Marshals of a Superior Court or County;
- Port Wardens or Port Police Officer of the Harbor Department of the City of Los Angeles;
- Any Inspector or Investigator employed in that capacity in the Office of a District Attorney.

Government Code § 3301 (cont.)

Definitions

continued

- PC 830.1(b) – The Attorney General and Special Agents of the CA Department of Justice;
- PC 830.1(c) – *Any Deputy Sheriff of the Counties of: Butte, Calaveras, Colusa, Glenn, Humboldt, Imperial, Inyo, Kern, Kings, Lake, Lassen, Mariposa, Mendocino, Plumas, Riverside, San Benito, San Diego, San Luis Obispo, Santa Barbara, Santa Clara, Shasta, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Trinity, Tulare, Tuolumne, and Yuba who performs custodial assignments which are responsible for maintaining the operations of County custodial facilities*

Government Code § 3301 (cont.)

Definitions

continued

- PC 830.2 (a) – Any member of the California Highway Patrol whose primary job is to enforce California Vehicle Code or provide other police services;
- PC 830.2(b) – Any member of the University of California Police Department, whose primary duty is the enforcement of Section 92600 of the Education Code;
- PC 830.2(c) – Any member of the California State University Police Department, whose primary duty is the enforcement of Section 92600 of the Education Code;
- PC 830.2(d)(1) Any member of the Office of Correctional Safety of the Department of Corrections and Rehabilitation (DCR), whose primary duties are investigation and apprehension of inmates, wards, parolees, parole violators, or escapees from state institutions.

Government Code § 3302

Political Activity

Unless a Public Safety Officer is on duty and in uniform he or she may not be prohibited from engaging in, or coerced/required to engage in **political activity** nor shall a public safety officer be prohibited from **seeking election** to the governing board of a school district.

Government Code § 3303

Interrogation

When any public safety officer is **under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department that could lead to punitive action**, the interrogation shall be conducted under the following conditions:

- *CCPOA v. State of California* (2000) 82 Cal.App.4th 294 – Questions by an outside agency can trigger the protections listed below. In this case, witnesses were told by a commanding officer that they must answer questions being asked by the Attorney General's Office or be suspended. The targets of the investigation were told they must answer the Attorney General's questions or be immediately arrested.
- *City of Los Angeles v. Superior Court (Labio)* (1997) 57 Cal.App.4th 1506 – Any inquiry into sanctionable conduct triggers the protections listed below. The inquiry need not be a formal investigation.
- *Paterson v. City of Los Angeles* (2009) 95 Cal.Rptr.3d 333 – Even if an officer is exonerated, POBR rights apply to the underlying investigation as the investigation was one which *while it was being conducted* “could lead to punitive action.”
- Note that while punitive action *may* be taken against public employees for misconduct committed while on unpaid leave (*Negron v. Los Angeles County Civil Service Commission* (2015) 240 Cal.App.4th 874), as will be discussed below, the rights and protections under the Firefighters Procedural Bill of Rights Act only apply to a firefighter during events and circumstances involving the performance of his or her official duties.

Government Code § 3303

Interrogation

continued

“Punitive action” means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for the purposes of punishment.

- *White v. County of Sacramento* (1982) 31 Cal.3d 676 – “For purposes of punishment” only modifies the word “transfer.”
- But, transfers that do not result in loss of pay and are not for purposes of punishment do not trigger right to appeal. (*Los Angeles Police Protective League v. City of Los Angeles* (2014) 232 Cal.App.4th 136.)
- *Henneberque v. City of Culver City* (1983) 147 Cal.App.3d 250 – Permanent employee on probation in new position is entitled to administrative appeal from demotion (and corresponding salary decrease).
- *Otto v. Los Angeles Unified School District* (2001) 89 Cal.App.4th 985 – “May lead to ...” (Includes a “summary of conference” memo which warned of possible future disciplinary action).
- *Turturici v. City of Redwood City* (1987) 190 Cal.App.3d 1447 – Routine negative evaluations are not punitive action.
- *Leonard v. City of Los Angeles* (9th Cir. 2016) 2016 WL 6212008 – Reassignment and non-promotion is not punitive action when passing a psychological exam is a requirement for appointment under POBR and FFBR.
- *Perez v. Westminster* (2016) 5 Cal.App.5th 358 – Removal from SWAT, honor guard and failure to assign trainees not punitive action under POBR (§ 3303).

Government Code § 3303(a)

Interrogation

continued

1. Conducted at a **reasonable hour**
2. Conducted **on-duty**, unless the seriousness of the investigation requires otherwise
3. If conducted **off-duty**, Public Safety Officer must be **compensated**
4. Public Safety Officer **can't be released from employment** for any missing work while being interrogated

Government Code § 3303(b)-(e)

Interrogation

continued

- A Public Safety Officer under investigation shall be informed, of the name, rank and command of the **officer in charge** of the interrogation, the interrogating officers, and all other persons present. The shall be no more than **two interrogating officers** at one time, and the Public Safety Officer shall **be informed of the nature of the investigation, prior to** any interrogation.
- The interrogation shall be for a **reasonable period of time**, and the Public Safety Officer must be allowed reasonable breaks.
- *City of Los Angeles v. Superior Court (Labio)* (1997) 57 Cal.App.4th 1506 – Statements obtained in violation of these rules, even in an informal investigation, can be suppressed. (Labio drove by fatal accident in a marked patrol vehicle to a doughnut shop. He was questioned without being advised that he was under investigation, without being advised of his Miranda rights. If he were informed he might have taped the discussion and requested a representative).
- *Ellins v. City of Sierra Madre* (2016) 244 Cal.App.4th 445. – Requirement that firefighter be notified of the nature of the investigation prior to any interrogation must allow time to meaningfully consult with a representative of his/her choosing. The Court suggests meaningful consultation includes the need for enough specificity in the allegations to adequately prepare.
- *Perez v. Los Angeles Community College District* (2014) PERB Decision No. 2404 – Burden is on the employer to justify a blanket admonition not to discuss investigation with other employees as interference with the right to represent oneself under applicable bargaining laws.

Government Code § 3303(e)

Interrogation (Lybarger Immunity)

continued

- A Public Safety Officer, **under interrogation**, shall not be subjected to offensive language or threatened with punitive action, except that **an Officer refusing to respond to questions or submit to interrogations** shall be informed that **failure to answer questions directly related to the investigation or interrogation** may result in punitive action.
 - See *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822.
 - *Garrity v. New Jersey* (1967) 385 U.S. 493 – The seminal case overturning peace officer convictions that had been based in part on the officers' own statements given after being told that if they refused to answer questions they would be terminated. The U.S. Supreme Court held that the threat of removal from public office rendered the resulting statements involuntary and therefore inadmissible in the state criminal proceedings.
 - *Spielbauer v. County of Santa Clara* (2007) 53 Cal.Rptr.3d 357 – The Court of Appeal decision had threatened to turn a long line of cases on its head by holding that an employee has a constitutional right to remain silent unless given an express grant of immunity. The California Supreme Court subsequently granted review and agreed with our position, expressed in our amicus curiae brief filed with the California Supreme Court, that while employees can be ordered to respond to questions during an administrative investigation (and can be punished for refusal to answer those questions), the use of those statements in any criminal proceeding is forbidden, without any need to obtain a formal grant of immunity.
 - *United States v. Smith* (11th Cir. 2016) 821 F.3d 1293 – A required written report of a critical incident is protected if clearly ordered.

Government Code § 3303(e)

Media

A Public Safety Officer's **photograph and contact information** shall not be given to the media, nor shall a Public Safety Officer be **subjected to visits by the media** without the express consent of the Public Safety Officer.

Government Code § 3303(f)(1) & (2)

Coerced Statements (Lybarger Immunity)

A statement made during interrogation by a Public Safety Officer under threat of punitive action **shall not be admissible** in any subsequent civil proceeding, except when:

1. the Department is seeking **civil sanctions** against any Public Safety Officer, including disciplinary action brought under Section 19572.
2. the Public Safety Officer or his or her association has brought a **civil or administrative action arising out of the disciplinary action**.
3. an *in camera* review has determined that the statements can serve to impeach the Officer's testimony, and the statements are in fact used to impeach the Officer's testimony.
4. the Officer being interrogated is subsequently deceased, his or her statements shall be admissible.

Government Code § 3303(g)

Recorded Statements

The interrogation of a Public Safety Officer may be **recorded**, and the Public Safety Officer may bring his or her own recording device. The Public Safety Officer shall have **access** any recordings prior to any further interrogation. The Public Safety Officer is **entitled to a transcribed copy of any notes made by a stenographer or any reports or complaints made by investigators or other persons**, except those portions that are required by law to be kept confidential. Confidential reports shall not be entered into a Public Safety Officer's personnel file.

- *Pasadena POA v. City of Pasadena* (1990) 51 Cal.3d 564 – No pre-interrogation discovery. However, a transcript or tape of the employee's own prior interrogation is available at any follow-up interrogation. No right to complaints and reports until receipt of Skelly package.
- *McMahon v. City of Los Angeles* (2009) 172 Cal.App.4th 1324 – Department did not have to provide officer with materials used in investigation if he was cleared of all charges, and such materials could not be used for personnel purposes. In such circumstances all that must be provided is a summary of complaints and the identity of the complainants. This is so due to the fact that the officer was exonerated and Department's regulations prohibited the use of such materials in making personnel decisions.

Government Code § 3303(h) “Miranda Rights”

If, prior to or during the interrogation of a Public Safety Officer, it is contemplated that he or she may be charged with a criminal offense, he or she shall be immediately informed of his or her constitutional rights.

- See Criminal Immunity - § 3303
- See Lybarger Immunity - § 3303(f)(1)-(4)

Government Code § 3303(i)

Right to Representation

Whenever an interrogation may result in punitive action against a Public Safety Officer, that Public Safety Officer shall have the right to a **representative of his or her choice** present at all times during the interrogation.

The representative shall not be a person subject to the same investigation. The representative shall **not be required to disclose**, or be subject to any punitive action for refusing to disclose any information received from the Public Safety Officer under investigation for **non-criminal matters**.

This **does not apply to counseling, instruction, or informal verbal admonishments by, or other routine or unplanned contact with, a supervisor or any other Public Safety Officer.**

- *Titus v. Civil Service Commission* (1982) 130 Cal.App.3d 357 – Attorney-client privilege vs. Police Officer's law enforcement duties. (Discharge of Lieutenant, who was also an attorney, upheld where he refused, due to attorney-client privilege, to disclose name and identity of individual possessing dynamite).
- *Redwoods Community College District v. Public Employment Relations Board* (1984) 159 Cal.App.3d 617 – Although this section purports to exclude representation for "counseling" this case held that in some (unusual) circumstances, right to representation exists for counseling under bargaining laws when (for example) the issue is highly emotional and contentious.
- *Upland POA v. City of Upland* (2003) 111 Cal.App.4th 1294 – Employee entitled to a "reasonably available representative of his or her choice." Court also implied a "mutually agreeable time." In this case, it was held that the representative (who was a lawyer) was only entitled to reschedule the interrogation once.
- *Quezada v. City of Los Angeles* (2014) 222 Cal.App.4th 993. Officers had no right to postpone interrogation due to the seriousness of the charge (firing weapon while off-duty and drunk) even though officers were awake for 24 hours, intoxicated, hung over, and chosen representative unavailable.

Government Code § 3303(j)

Assignments

A Public Safety Officer shall not be loaned or temporarily reassigned to a location or duty assignment if a sworn Public Safety Officer of his or her department would **not normally** be sent to that location or would not normally be given that duty assignment **under similar circumstances**.

- *Crupi v. City of Los Angeles* (1990) 219 Cal.App.3d 1111. (Being assigned to a desk job was normal for officers involved in shootings, until the officers are cleared by a psychiatrist).
- *McManigal v. City of Seal Beach* (1985) 166 Cal.App.3d 975 – Transfer resulting in loss of pay is per se punitive.

Government Code § 3304(a)

Punitive Action

- A Public Safety Officer **shall not** be subjected to or threatened with **punitive** action, or denied promotion, because of the **lawful exercise of rights** granted **under this Act**, or under **any** administrative grievance procedure.
- However, if a Public Safety Officer fails to comply with an order to cooperate with other agencies involved in criminal investigations, the Agency may officially charge him or her with insubordination.
- [Court v. PERB/Arbitration? See § 3260.]

Government Code § 3304(b)

Punitive Action (Administrative Appeal)

- Punitive action or denial of promotion on grounds other than merit shall not be undertaken against any non-probationary Public Safety Officer without providing the Public Safety Officer with an **opportunity** for **administrative appeal**.
- *Butler v. County of Los Angeles* (1981) 116 Cal.App.3d 633 – Opportunity for appeal comes after action is taken
- *James v. City of Coronado* (2003) 106 Cal.App.4th 905 – For some discipline, hearing need not be a “due process hearing,” unless there is a loss of pay.
- *Giuffre v. Sparks* (1999) 76 Cal.App.4th 1322 – Due Process (property interest). (Removal from SWAT, with a pay reduction, entitled officer to full evidentiary appeal)..
- *Orange County Employees Association v. County of Orange* (1988) 205 Cal.App.3d 1289 – No appeal from transfer for “deficiency in performance.”

Government Code § 3304(c) **Punitive Action (Police Chief)**

- A Police Chief shall not be removed without **written notice and an opportunity for administrative appeal**. Nothing in this subdivision shall be construed to create a **property interest**, if one does not otherwise exist by rule of law, in the job of Police Chief
- Establish record – name clearing hearing.
Binkley v. City of Long Beach (1993) 16 Cal.App.4th 1795.
- Impartial hearing officer required –
Gray v. City of Gustine (1990)
224 Cal.App.3d 621

Government Code § 3304(d)(1) Punitive Action (Limitations Period)

Punitive action or denial of promotion on ground other than merit shall not be undertaken if the investigation of an allegation is not completed within one year of discovery, if the discovery of the act, omission, or other misconduct occurred on or after January 1, 1998. If it is determined that discipline may be taken, the investigation must be completed and the Public Safety Officer must be notified of the proposed disciplinary action within one year, except in any of the following circumstances:

- *Sanchez v. City of Los Angeles* (2006) 140 Cal.App.4th 1069 – Upholds one-year statute of limitations. While the one-year statute of limitations is still applicable, The California Supreme Court, in *Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, held that the relevant section of the POBR merely requires that the public agency must notify the employee that it has decided that it might take some type of disciplinary action against the officer for certain, specified misconduct. Notice of the specific level of discipline to be imposed is no longer required.
- *Alameida v. State Personnel Board* (2004) 120 Cal.App.4th 46 – Officer's allegedly false denial of charges during administrative interview did not constitute a separate offense of untruthfulness for the purposes of extending the statute of limitations.
- NOTE: The Agency shall not be required to impose the discipline within that one-year period. BUT SEE
- *CCPOA v. SPB* (2007) 147 Cal.App.4th 797 – Extensive lying during administrative interview can constitute a separate offense triggering a new one year statute of limitations period. (Unlike *Alameida*, the charges were only a few months past the statute of limitations period, so memories were still fresh. Additionally, the dishonesty was not simply a denial of charges, but concerned a variety of issues regarding the investigation).
- *Melkonians v. Los Angeles County Civil Service Commission* (2009) 174 Cal.App.4th 1159 – SOL to bring a punitive action against an employee for one set of allegations was tolled during the period of time the officer had been terminated (and was appealing) his termination for other alleged misconduct.

Government Code § 3304(d)(2)

Punitive Action (Limitation Period Exceptions)

- A) If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending, shall toll the one-year period.
- B) If the Public Safety Officer waives the one-year time period, the period shall be tolled for the time specified in the written waiver.
- C) If the investigation is multijurisdictional and requires a reasonable extension for coordination of the involved agencies.
- *Huelsse v. County of Santa Clara* (May 7, 2010) WL 1828616 (unpublished opinion) – The SOL for punitive action against an officer is tolled during a pending criminal investigation of another officer for conduct related to the conduct that is the subject of the punitive action.
 - *Department of Corrections and Rehabilitation v. SPB* (2016) 247 Cal.App.4th 700 (Iqbal) – Statute of limitations is tolled even when criminal investigation is conducted internally.

Government Code § 3304(d)(2)

Punitive Action (Limitations Period Exceptions)

continued

- D) If the investigation involves more than one employee and requires a reasonable extension.
- E) If the investigation involves an employee who is incapacitated or unavailable.
- F) If the investigation involves a matter in civil litigation where the Public Safety Officer is named as a defendant, the one-year time period is tolled while that civil action is pending.
- G) If the investigation involves a matter in criminal litigation in which the complainant is a criminal defendant, the one-year time period shall be tolled during the period of that defendant's criminal investigation and prosecution.
- H) If the investigation involves an allegation of workers' compensation fraud by the Public Safety Officer.
 - *CDCR v. SPB (Moya)* (2013) 215 Cal.App.4th 1101 – SOL does not apply if the investigation involves an allegation of workers' compensation fraud.

Government Code § 3304(e)

Pre-Disciplinary Responses

Where a pre-disciplinary response or grievance procedure is required or utilized, the time for this response or procedure shall not be governed or limited by this chapter.

Government Code § 3304(f)

Punitive Action (Notification Period)

If the **Public Agency** decides to impose discipline, that Agency shall notify the Public Safety Officer, in writing, of its decision to impose discipline, including the date that the discipline will be imposed, **within 30 days of the decision**, except where the Public Safety Officer is unavailable for discipline.

- *Neves v. California Department of Corrections and Rehabilitation* (2012) – Public safety officer was properly notified of intent to impose disciplinary action where he received notice of adverse action within 30 days of the decision to impose the action. This leads to situations where as long as the employee is notified that some discipline will be imposed within the 1-year period of limitations, the Department has an additional 30-days to notify the employee of *what* that discipline might be.

Government Code § 3304(g)

Punitive Action (Reopening of Investigation)

An investigation may be reopened after the one-year limitations period if both the following circumstances exist:

1. Significant **new evidence** has been discovered that is likely to affect the outcome of the investigation; **AND**
2. Either, the evidence could **not reasonably have been discovered** in the normal course of investigation without resorting to extraordinary measures by the agency, **OR** the evidence resulted from the **Public Safety Officer's pre-disciplinary response or procedure**.

Government Code § 3304(h)

30-Day Notice

For those members listed in subdivision (a) of Section 830.2 of the Penal Code, the 30-day time period provided for in subdivision (f) shall not commence with the service of a preliminary notice of adverse action, should the public agency elect to provide the public safety officer with such a notice.

Government Code § 3304.5

Administrative Appeals

Administrative appeals instituted by a Public Safety Officer under this chapter shall be conducted in conformance with rules and procedures adopted by the local public agency.

- Due process requires a pre-disciplinary hearing, and an evidentiary appeal after imposition of the discipline. *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194. However, in the case of short term suspensions (generally 5 days or less), no pre-disciplinary hearing is required – rather the hearing may occur shortly after the imposition of the penalty. *Ng v. State Personnel Board* (1977) 68 Cal.App.3d 600; *Civil Service Association, Local 400 v. City and County of San Francisco* (1978) 79 Cal.3d 540).
- An Amendment to the FFBOR provides that if an MOU provides for binding arbitration of administrative appeals, the arbitrator shall serve as the “hearing officer” in accordance with the APA. However, an MOU with binding arbitration does not control the process for administrative appeals with licensing or certifying agencies. Such appeals must adhere to the requirements of the APA.
- *Siebert v. City of San Jose* (2016) 247 Cal.App.4th 1027 – Under FFBOR the APA requires hearing by an ALJ.

Government Code § 3305

Personnel Files (Adverse Comments)

- A Public Safety Officer shall not have any adverse comments entered in a **personnel file** (or any other file used for personnel purposes), without the Public Safety Officer having **first read and signed** the instrument containing the adverse comment indicating he or she is aware of the comment. If the Public Safety Officer has read the instrument and **refuses to sign it**, that fact shall be **noted** on the document, signed or initiated by the Public Safety Officer, and then the entry may be made.
- *Miller v. Chico Unified School District* (1979) 24 Cal.3d 703 – Under the Education Code, any file used for personnel purposes is a personnel file.
- *Sacramento POA v. Venegas* (2002) 101 Cal.App.4th 916 – An index card regarding an allegation of neglect of duty is an adverse comment.
- *Haight v. City of San Diego* (1991) 228 Cal.App.3d 413 – Excludes negative comments in promotional exam. This section does not cover promotional exams.
- *Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378 – The first California Supreme Court decision interpreting the FFBOR, this case held that daily logs kept by a Fire Captain were NOT subject to the FFBOR requirement allowing a firefighters the opportunity to review and comment because (according to the Court) they were not used for personnel purposes but to refresh the memory of the Fire Captain.
- *White v. County of Los Angeles* (2016) 2016 WL 2910095 – Adverse comments in confidential memoranda leading to a fitness for duty exam are subject to POBR right to review and respond.

Government Code § 3305.5(a) and (b)

Personnel Files (Brady List)

- No punitive action, or denial of promotion on grounds other than merit, shall be undertaken by any public safety agency against a Public Safety Officer solely because that officer's name has been placed on a Brady list, or that the officer's name may otherwise be subject to disclosure pursuant to *Brady v. Maryland* (1963) 373 U.S. 83.
- However, a public safety agency is not prohibited from taking punitive action, denying promotions on grounds other than merit, or taking other personnel actions against a Public Safety Officer based on the underlying acts or omissions for which that Officer's name was placed on the Brady List, or is otherwise subject to disclosure pursuant to *Brady v. Maryland*.

Government Code § 3305.5(c)-(e)

Brady Lists - Administrative Appeals or Punitive Action

- No evidence that a Public Safety Officer's name has been placed on a Brady list, or is otherwise subject to disclosure under *Brady v. Maryland* (1963) 373 U.S. 83, **shall be introduced in any administrative appeal or punitive action** unless the act or omission giving rise to the Officer's name being placed on the Brady List is found to be subject to some form of punitive action.
- If a hearing officer or other administrative tribunal finds that the Officer has committed the underlying acts or omissions that will result in punitive action, denial of a promotion on grounds other than on merit, or other adverse personnel action, and evidence exists that the Public Safety Officer's name has been placed on a Brady List, then that evidence **shall be introduced for the sole purpose of determining the type or level of punitive action to be imposed.**
- This provision was added effective January 1, 2014.
- *Nazir v. County of Los Angeles* (2013) 2013 WL 1303327 (unpublished decision) – District Attorney's action in placing peace officer on Brady List does not trigger POBR protections.
- "Penal Code section 832.7(a) does not authorize a DA to directly review Peace Officer personnel files of officers expected to be prosecution witnesses to comply with *Brady*." [AG Opinion Kamala Harris 12-401 (2015).]

Government Code § 3306

Personnel Files (Response to Adverse Comments)

- A Public Safety Officer shall have **30 days** within which to file a **written response** to any adverse comment entered in his or her personnel file. The written response shall be attached to, and shall accompany, the adverse comment.
- While routine negative evaluations are not punitive action (*Turturici v. City of Redwood City* (1987) 190 Cal.App.3d 1447), there is still a right to respond – but not to appeal.

Government Code § 3306.5

Personnel Files (Inspection)

- Employers must keep Public Safety Officers' personnel files. Firefighters have the right to **inspect** their personnel files within a **reasonable period** of time after making a request, during normal business hours, with **no loss of compensation**.

Government Code § 3306.5

Personnel Files (Inspection)

continued

- If a Public Safety Officer believes that any material is mistakenly or unlawfully placed in their personnel file, the Public Safety Officer may request, in writing, that the **mistaken or unlawful** portion be **corrected or deleted**. Within 30 calendar days of the request, the employer shall either grant the request or notify the Public Safety Officer of the refusal to grant the request. If the employer refuses to grant the request, the employer shall state, **in writing, the reasons for refusing the request**, and that statement shall become part of the personnel file.
- *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419 – Despite the confidentiality of peace officer personnel records under Penal Code sections 832.5 and 832.7, no remedy is set forth in the statutes, so there is no right to bring a private lawsuit for disclosure of confidential personnel records. [See also, *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607]
- *Barber v. California Dept. of Corrections and Rehabilitation* (2012) 203 Cal.App.4th 638 – Because POBR rights were only intended to apply during employment, after termination the right to inspect a personnel file ends.

Government Code § 3307

“Lie Detector”

A Public Safety Officer cannot be compelled to submit to a **lie detector test**, and refusal to submit cannot be noted or used against the Public Safety Officer.

- *Estes v. City of Grover City* (1978) 82 Cal.App.3d 509 – Establishes an exclusionary rule.
- *Aengst v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 275 – Even voluntary exams are not admissible.
- *Los Angeles Police Protective League v. City of Los Angeles* (1995) 35 Cal.App.4th 1535 – No prohibition on use of lie detector for screening for voluntary transfer to sensitive assignments

Government Code § 3307.5

Privacy Rights of Public Safety Officers

- (a) No public safety officer shall be required as a condition of employment by his or her employing public safety department or other public agency to consent to the use of his or her photograph or identity as a public safety officer on the Internet for any purpose if that officer reasonably believes that the disclosure may result in a threat, harassment, intimidation, or harm to that officer or his or her family.
- (b) Based upon his or her reasonable belief that the disclosure of his or her photograph or identity as a public safety officer on the Internet as described in subdivision (a) may result in a threat, harassment, intimidation, or harm, the officer may notify the department or other public agency to cease and desist from that disclosure. After the notification to cease and desist, the officer, a district attorney, or a United States Attorney may seek an injunction prohibiting any official or unofficial use by the department or other public agency on the Internet of his or her photograph or identity as a public safety officer. **The court may impose a civil penalty in an amount not to exceed five hundred dollars (\$500) per day commencing two working days after the date of receipt of the notification to cease and desist.**

Government Code § 3308

Disclosure of Assets

A Public Safety Officer cannot be required or requested to disclose his or her **assets, income, or debts**, unless such information is obtained or required under state law or proper legal procedure, AND EITHER tends to indicate **a conflict of interest** with respect to the performance of his official duties, OR is necessary for the employing agency to determine the desirability of **assigning the Public Safety Officer to a specialized unit** where there is a strong possibility that bribes or other improper inducements may be offered.

Government Code § 3309

Locker Search

A Public Agency employer cannot search a Public Safety Officer's **locker or other space for storage** unless he or she is **present**, or **consents**, or has been notified that a search will be conducted, or a **valid search warrant** has been obtained.

- *O'Connor v. Ortega* (1987) 480 U.S. 709. – Establishes standards for “reasonable expectations of privacy” under the 4th Amendment to the U.S. Constitution.
- *Delia v. City of Rialto* (9th Cir. 2010) 621 F.3d 1069 – Compelled search of firefighter’s home during internal affairs investigation violates 4th Amendment. Thus, an employee has a constitutional right, in the course of an internal affairs investigation, not to be ordered (under the threat of discipline) to consent to a warrantless search of the employee’s home. (Note that this case arose pre-FFBOR).

- *Is a telephone or computer “other space for storage”?*
 - See *Quon v. City of Ontario* (2010) 560 U.S. 746 – U.S. Supreme Court held City Police Officer had a reasonable expectation of privacy in his text messages. However, Court held that searches conducted for non-investigatory, work-related purposes or for the investigation of work-related misconduct, a government employer’s warrantless search is reasonable if 1) it’s justified at its inception; and 2) the measures adopted are reasonably related to the objective of the search and not exclusively intrusive.
 - See also *Larios v. Lunardi* (2016) 2016 WL 6679874 – Court held that CHP officer had a reasonable expectation of privacy in his personal cellphone, despite having used it at times for work with the permission of his government employer, AND even in the face of notice that any work product would have to be turned over to the state
 - See also *Penal Code 1546 et. seq. – California Electronic Communications Privacy Act*

But See

- *City of San Jose v. Superior Court of Santa Clara County* (2017) – CA Supreme Court held that communication about public business or on a personal account may be subject to disclosure requirements under the California Public Records Act (CPRA)

Government Code § 3309.5

Enforcement of this Act

- It is unlawful for any public safety department to deny or refuse any Public Safety Officer the rights and protections of this Act, and a Public Safety Officer or association may file a **lawsuit in superior court alleging violations of this Act**.
- The superior court can render **injunctive** or other extraordinary relief to remedy the violation(s) and to prevent future violations of a like and similar nature. This can include an injunction prohibiting the department from **taking any punitive action** against the Public Safety Officer.
- *Mounger v. Gates* (1987) 193 Cal.App.3d 1248 – No exhaustion of administrative remedies is required.
- *Lanigan v. City of Los Angeles* (2011) 199 Cal.App.4th 1020 – Rights may be waived by individual employees during employment as part of a disciplinary settlement agreement.
- *Mitchel v. City of Santa Rosa* (2011) 2011 WL 6807553 (unpublished) – Although POBR (and, by extension the FFBOR) grants initial jurisdiction to State courts, this does not vest *exclusive* jurisdiction over such claims in the courts.
- *Hanna v. City of Los Angeles* (1989) 212 Cal.App.3d 363 – Exclusion of statements that could impact the outcome of a disciplinary case.

Government Code § 3309.5

Enforcement of this Act

continued

- If the court finds that a **public safety department maliciously** violated any provision of the Act with the **intent to injure** the Public Safety Officer, the department shall be liable for a **civil penalty** of up to **\$25,000**, for each violation, in addition to **actual damages** established, to be awarded to the Public Safety Officer whose right or protection was denied and for **reasonable attorney's fees** as may be determined by the court.
- A court can also issue sanctions and award attorney's fees and expenses against a party filing an action under these sanctions, if it finds that the action was frivolous or brought in bad faith.

Government Code § 3310

Equivalent Procedures

Any Public Agency which has adopted, through action of its governing body or its official designee, any procedure which at a minimum provides to Peace Officers the same rights or protections as provided pursuant to this chapter shall not be subject to this chapter with regard to such a procedure.

Government Code § 3311

Mutual Aid Agreements/Jurisdiction

Nothing in this chapter shall in any way be construed to limit the use of any public safety agency or any public safety officer in the fulfilling of mutual aid agreements with other jurisdictions or agencies, nor shall this chapter be construed in any way to limit any jurisdictional or interagency cooperation under any circumstances where such activity is deemed necessary or desirable by the jurisdictions or the agencies involved.

Government Code § 3312

Display of American Flag on Uniform

Notwithstanding any other provision of law, the employer of a public safety officer may not take any punitive action against an officer for wearing a pin or displaying any other item containing the American flag, unless the employer gives the officer written notice that includes all of the following:

- (a) A statement that the officer's pin or other item violates an existing rule, regulation, policy, or local agency agreement or contract regarding the wearing of a pin, or the displaying of any other item, containing the American flag.
- (b) A citation to the specific rule, regulation, policy, or local agency agreement or contract that the pin or other item violates.
- (c) A statement that the officer may file an appeal against the employer challenging the alleged violation pursuant to applicable grievance or appeal procedures adopted by the department or public agency that otherwise comply with existing law.

Government Code § 3313

Modifications/Amendments

- In the 2005-06 fiscal year, the Commission on State Mandates shall review its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim and make any modifications necessary to this decision to clarify whether the subject legislation imposed a mandate consistent with the California Supreme Court Decision in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 and other applicable court decisions.
- If the Commission on State Mandates revises its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim, the revised decision shall apply to local government Peace Officer Procedural Bill of Rights activities occurring after the date the revised decision is adopted.

The Role of Representatives During Internal Affairs Investigations

Guide Officers through the process:

- **Procedural Rights Only:** Educate officers on POBR's procedural rights. It does not protect against imposition of discipline. If you screw up, then you screwed up.
- **You lie, you die:** Officers have to assume the Investigators know everything or will find out. Worst case scenario – officer charged with lying during IA interview.
- **Obey and Grieve:** Do not interrupt interview unless clear POBR violation. Never instruct the Officer to leave the interview.

Role of Public Safety During Critical Incidents (OIS/In-Custody Deaths)

Employees involved in critical incidents should be mindful of the following:

1. To the extent possible, refrain from “venting” to other employees the details of the incident;
2. Any statements given outside the presence of an association attorney should be limited to basic facts and the employee should avoid representations regarding state of mind; and
3. Prior to being questioned regarding the details of the incident outside the presence of an attorney, the employee should ask the investigator whether they are entitled to a representative. Regardless of the whether the investigator agrees that the employee is entitled to representation, the employee should assert his/her right to a representative if the employee believes that his/her responses might subject the employee to administrative discipline or criminal charges.

Role of Representative in OIS/In-Custody Deaths

- **Notify the POA/DSA**
- **Safety Statements:** Department has a right to question officer involved *re* # and direction of shots fired, witnesses, suspect description, direction of flight, identification of crime scene, or any other information related to public safety.
- **Do NOT ask about incident:** There is no privilege in criminal matters. You could be called to testify. Ensure that officer **only** speaks to an attorney about the how/what/when, etc. of incident.
- **Ensure Officer's Mental Well-Being:** Call significant other, instruct them to sleep, eat or whatever else is necessary.

CONTACT US



GARY MESSING
CAL FIRE Local 2881 Chief
Legal Counsel / Labor Partner
Sacramento Office
916.446.5297
gary@majlabor.com



JASON JASMINE
Labor Partner
Sacramento Office
916.446.5297
jason@majlabor.com

www.majlabor.com