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Via Overnight Delivery

Diane Eisenberg, Deputy Attorney General
State of California, Department of Justice
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-7004

Re: Opinion No. 12-401

Dear Ms. Eisenberg:

I am writing on behalf of the League of California Cities (League) in response to your solicitation of views of interested parties regarding Opinion No.12-401.The request, from Ventura County District Attorney Gregory D. Totten, posits two questions regarding the disclosure of information from peace officer personnel files during the course of and in the context of criminal prosecution proceedings.

The League is an association of 469 California cities dedicated to the protection and restoration of local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee (LAC), which is comprised of 24 city attorneys from all regions of the State. The LAC monitors litigation affecting municipalities as well as requests from the Attorney General for views on pending requests for legal opinions, and identifies issues of statewide or national significance. The LAC has identified this opinion request and the issues it presents as being of such significance. On behalf of the League, I hereby offer the following response.

DISCUSSION

The questions presented in this request relate to the disclosure of information from confidential peace officer personnel records to prosecutors prior to their bringing any *Pitchess* motion during the course of the criminal prosecution process. They are the following:

1. To facilitate compliance with *Brady v. Maryland,* may the California Highway Patrol (CHP) lawfully release to the district attorney's office the names of the officers who have sustained complaints of dishonest or moral turpitude conduct, with no information other than the officer's name and date of earliest conduct, so that the district attorney may bring a *Pitchess/Brady* motion for *in camera* review of the officers' personnel files?

2. Does Penal Code section 832.7(a) authorize the district attorney to routinely review the personnel files of peace officers who will be prosecution witnesses?

A. THERE IS NO LEGAL BASIS TO RELEASE OR ALLOW REVIEW BY PROSECUTORS OF CONFIDENTIAL POLICE PERSONNEL INFORMATION ABSENT FULL COMPLIANCE WITH PENAL AND EVIDENCE CODE REQUIREMENTS.

The League believes the answer to both questions is no. There is no legal authority to release any information from a police officer's personnel file outside the established statutory process in the Penal and Evidence Codes. The law is unequivocal that information contained in a peace officer's personnel file is privileged and confidential and can only be reviewed or discovered through the processes set forth in Evidence Code section 1043 *et. seq.* – the commonly referred to *Pitchess* motion – with very limited exceptions as discussed below. (Pen. Code, § 832.7; *Pitchess v. Superior Ct.* (1974) 11 Cal.3d 531.) The law is equally clear that the prosecution is subject to the same statutory requirements as the defense when seeking to learn about or discover a peace officer's discipline or complaint history, except where a prosecuting agency is actually investigating an officer for misconduct. (*Alford v. Superior Court* (2003) 29 Cal. 4th 1033.) The *Pitchess* motion procedures set forth in Penal Code section 832.7 and Evidence Code sections1043 *et seq.* are the *exclusive* means of obtaining information from confidential peace officers' personnel records. These statutory requirements cannot be circumvented in any manner, including through the use of a subpoena, or any other type of motion, including those seeking discovery pursuant to Penal Code section 1054.1 or *Brady v. Maryland* (1963) 373 U.S. 83. (*Garden Grove Police Department v. Superior Court* (2001) 89 Cal.App.4th 430, 434-435.)

Neither of the procedures presented in this request are sanctioned in the law. There is no legal basis on which to authorize a prosecuting agency to have a preview, in essence, of what is in a police officer's confidential and privileged personnel file – whether it is by being told by a police agency that an officer has been disciplined for acts involving dishonesty or moral turpitude, or by being given access to the entire personnel file to review. Neither of these processes is available to the criminal defendant. It turns the law on its head to suggest that the Legislature would require the defendant to pursue a highly structured statutory two-part process to access information regarding a police officer's complaint and discipline history, but yet implicitly allow the

prosecutor to have a preview of this same information – or more – all in the name of protecting the defendant's due process rights.

In its opinion at 71 Ops. Atty. Gen. 246, 250 (1988), the Attorney General noted that the Legislature did carve out five exceptions to the two-part noticed motion/*in camera* process provided by statute. None of these exceptions authorize the prosecution to have such a preview of confidential and privileged information prior to filing a motion as required by Penal Code section 832.7. To allow access under either scenario presented in this request for Opinion 12-401 is essentially an "end run" around the *Pitchess* process and the protections that have been so carefully developed by the Legislature and courts over the past 35 years. Why would the prosecution have more access to this confidential information under the guise of protecting a defendant's due process rights, a la *Brady v. Maryland, supra,* than the defendant himself has? If the Legislature had intended to allow prosecutors to review police officers' confidential records or to be informed by the police agency of the names of officers who have received discipline, it would have provided for it in the statute and its many revisions. It should be, and can only be, the Legislature who can sanction any such process.

B. OVERVIEW OF PITCHESS PROCESS.

The *Pitchess* process that has evolved since 1974 balances two important constitutional rights – a criminal defendant's right to a fair trial, and the equally important constitutional right of privacy that attaches to confidential peace officer personnel records. The Legislature and the courts have established procedural and substantive standards designed to require the trial courts to closely review every motion and to carefully assess materiality, good cause, and relevance on the basis of each case's unique set of facts and circumstances. There is no question that the statute has declared, case law has reinforced, and even this opinion request has acknowledged, that information regarding a police officer's sustained discipline is confidential pursuant to Penal Code section 832.7. Peace officer personnel records ". . . or information obtained from these records" are confidential and "*shall not*" be disclosed except by discovery pursuant to Evidence Code sections 1043, 1045 and 1046, Penal Code section 832.7. Penal Code section 832.8 defines peace officer personnel records to include files maintained by the employing agency under the officer's name, containing personal data, medical history, and employee benefit elections, "(d) [e]mployee advancement, appraisal, or *discipline*, (e) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties..." (Emphasis added.)

The dilemma presented by District Attorney Totten and CDAA in this opinion request may represent a legitimate concern of many prosecutors throughout the state – which is how to determine when to file a *Pitchess* motion and for which officers in a case. That

same dilemma exists, however, for the defense and the same issues raised in this request – i.e., *Brady* and other due process concerns -- have also been raised many times by defendants and have been put to bed by the courts exhaustively. All the information in a police officer's personnel file is confidential and privileged ("...*shall* not be disclosed" – Penal Code section 832.7). Compliance with Evidence Code section 1043 is the *exclusive* method for obtaining both officer personnel records and information contained therein. (*Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393.)

This process applies to any litigant in a criminal, civil or administrative proceeding. A noticed motion must be filed, identifying the officers whose records are being sought, and articulating both good cause and materiality of the information to the case. The officers whose records are sought must be notified about the motion and have legal standing to object. (Evid. Code, § 1043; *City and County of San Francisco v. Super. Ct. (1993)* 21 Cal.App.4th 1021.) In order to establish this good cause and materiality, a criminal defendant must present to the court a factual scenario of officer misconduct, a defense, and a link between the misconduct and the defense. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74; *Warrick v. Superior Court,* (2005) 35 Cal.4th 1011.) Litigants other than criminal defendants, including prosecutors and civil litigants, do not necessarily have to allege the same type of information as a criminal defendant (i.e., officer misconduct, etc.), but they must still meet the threshold "good cause" and "materiality" relevance standard in their noticed motion. The second step in the statutory process requires the court to review specified personnel records *in camera* to make yet another and more focused relevance determination before disclosing any information from confidential personnel files. "In this manner, the Legislature has attempted to protect [the moving party]'s right to a fair trial and the officer's interest in privacy to the fullest extent possible." (*People v. Mooc* (2001) 26 Cal.4th 1216.)

In 71 Ops. Atty. Gen. 246, 250 (1988), the Attorney General noted that it was "[s]ignificant that the Legislature designated citizens' complaints and records and information obtained therefrom to be confidential ... [meaning] 'not publicly disseminated'", and that the Legislature did not, in Penal Code section 832.7 "vest any discretion in a public agency as to whether or not to disclose this information." The California Highway Patrol's practice of inviting prosecutors to review officer personnel files is without legal authority. (See *People v. Gutierrez* (2003) 112 Cal.App.4th 1463.) The proposed/existing practice of releasing to the prosecutor the names of officers who have sustained discipline is also without legal authority.

In the same 1988 Attorney General opinion cited above, as well as in a subsequent opinion (73 Ops. Atty. Gen. 90 (1990)), the Attorney General addressed the five – and only five – exceptions to the confidentiality requirements of Penal Code section 832.7. The first two are explicit in Penal Code section 832.7, and allow: (1) discovery of confidential personnel information through the process set forth in Evidence Code

section 1043 *et. seq.*, and (2) review by a grand jury, attorney general, or district attorney who is investigating the conduct of the officer. The third exception was, as noted by the Attorney General, an exception by implication for those within the officer's employing agency who were designated to investigate the officers' actions, and the fourth, for those charged with reviewing, advising or imposing discipline. These implied exceptions were codified in 1989 (Stats. 1989, Ch. 615, § 1), and a fifth exception was added by the Legislature for the purpose of "notifying the *complaining party* of the disposition of *his or her* complaint." (Pen. Code, § 832.7, subd. (d); emphasis added.) There are no other exceptions, implied or otherwise, for a prosecutor to be provided with names of officers who have been disciplined or for prosecutors to review the actual files without following the requirements of the statute.

Over the past 35 years since the *Pitchess* case was decided and the statutes enacted and amended, California courts have addressed seemingly every possible scenario in which a defendant, prosecutor or other litigant has attempted to circumvent the statutory requirements of the Penal and Evidence Codes. The Courts have conclusively put this issue to rest:

- In *Garden Grove Police Department v. Superior Court* (2001) 89 Cal.App.4th 430, the Court of Appeal held: "We cannot allow [the defendant] to make an end run on the *Pitchess* process by requesting the officers' personnel records under the guise of a Penal Code section 1054.1 and *Brady* discovery motion." (At pp. 434-435.)

- "[T]he prosecution itself remains free to seek *Pitchess* disclosure by complying with the procedure set forth in Evidence Code sections 1043 and 1045." (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1046.)

- In *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1144, the court held: "'[W]here the People seek discovery of the peace officer personnel records ... the district attorney is not exempted under the provisions of Penal Code 832.7, subdivision (a), and must comply with the requirements of Evidence Code sections 1043 *et seq.*' " (Quoting *People v. Superior Court* (*Gremminger*) (1997) 58 Cal.App.4th 397, 407; see also *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 613.)

- "The recognition by the Supreme Court that an officer remains free to discuss with the prosecution any material in his files, in preparation for trial, means that the officer practically may give to the prosecution that which it could not get directly... *However, this does not translate into a "back door" for the prosecution to evade the legal requirements imposed by Alford."* (Emphasis added; *Becerrada v. Superior Court* (2005) 131 Cal.App.4th 409, 415.)

- "The scope of the district attorney's exemption from Penal Code section 832.7, subdivision (a)'s confidentiality provisions is limited to the district attorney's investigations of *police officer* or *police agency* conduct." (*People v. Superior Court (Gremminger)* (1997) 58 Cal.App.4th 397, 404.)

- "In [*People v.*] *Wheeler* [(1992) 4 Cal.4th 284], our Supreme Court held that 'nonfelony conduct involving moral turpitude should be admissible to impeach a criminal witness [at p. 295]....[T]here is nothing in the decision to suggest that a defendant is entitled by virtue of the court's ruling to obtain any police **personnel records** reflecting moral turpitude without first making the **good cause** showing required by Evidence Code section 1043." (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010; emphasis in original.)

- Defendants cannot share with each other material disclosed pursuant to a *Pitchess* motion. "Because disclosure of information contained in such records is permitted only on a showing of materiality to a particular case, to interpret the statute as allowing a defendant to share such information with other defendants would defeat the purpose of the balancing process." (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1042.)

- In *City of San Diego v. Superior Ct.* (1981) 136 Cal.App.3d 236, when officers were asked in deposition whether they had received reprimands for their work, the court held: "a litigant may not obtain indirectly what is directly privileged and immune from discovery. The statutes which protect personnel records and information from such records also protect the identical information about personnel history which is within the officer's personal recollection." The court reasoned there would be no purpose in protecting the information via the statutory process if it could be obtained by simply asking the officers.

C. REQUIREMENTS OF BRADY V. MARYLAND DO NOT "TRUMP" PITCHESS STATUTORY PROCESS.

The courts have also routinely rejected defendants' challenges under *Brady* to the limitations contained in the *Pitchess* statutory scheme. *Brady* does not "trump" *Pitchess*. (*People v. Gutierrez* (2004) 112 Cal.App.4th 1463; *Garden Grove Police Department v. Superior Court* (2001) 89 Cal.App.4th 430.) The *Pitchess* threshold requires a showing that the information sought is material to the subject matter of the litigation, while in *Brady*, the court must look at whether the information is material to the fairness of the trial. (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 10.) As the California Supreme Court held in *In re Brown* (1998) 17 Cal.4th 873, "not every non-disclosure of favorable evidence denies due process" or amounts to a *Brady* violation. (*In re Brown*, at p. 884.) Citing *Brady* as a compelling reason for circumventing the

Pitchess process is legally incorrect. The *Pitchess* process casts a wider net and will necessarily capture information that might fall within the *Brady* standard. The courts have held that there is no separate or paramount basis under *Brady* that abrogates the statutory scheme in California courts.[1]

In *People v. Gutierrez* (2004) 112 Cal.App.4th 1463, the Court addressed this issue head on: "[T]he *Pitchess* scheme does not unconstitutionally trump a defendant's right to exculpatory evidence as delineated in *Brady.* Instead the two schemes operate in tandem. ...Because *Brady's* constitutional materiality standard is narrower than the *Pitchess* requirements, any citizen complaint that meets *Brady's* test of materiality necessarily meets the relevance standard for disclosure under *Pitchess.* Thus, if a defendant meets the good cause requirement for *Pitchess* discovery, any *Brady* material in an officer's file will necessarily be included. Stated conversely, if a defendant cannot meet the less stringent *Pitchess* materiality standard he or she cannot meet the more taxing *Brady* materiality requirement." (*People v. Gutierrez*, *supra*, 112 Cal.App.4th, at p. 1474.) Further, in this same case, the court rejected the defense argument that prosecutors should, in order to fulfill their *Brady* requirements, routinely review police officer witness' confidential personnel files. "[A] 'prosecutor's duty under *Brady* to disclose material exculpatory evidence applies to evidence the prosecutor, or the prosecution team, *knowingly possesses or has the right to possess* ' that is 'actually or constructively in its possession or accessible to it.'(Italics added.) Because under *Alford* the prosecutor does not generally have the right to possess and does not have access to confidential peace officer files, Gutierrez's argument for routine review of the complete files of all police officer witnesses in a criminal proceeding necessarily fails." (*People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1474-1475 (emphasis added), citing *People v. Jordan* 108 Cal.App.4th at p. 358.)

The League believes the Attorney General should not endorse *any* policy of a prosecuting or law enforcement agency that has the effect of providing confidential peace officer personnel information to a prosecutor by any means that would abrogate or circumvent the statutory *Pitchess* process.

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[1] The request points to pending legislation that would standardize *Brady* disclosures in all federal courts. However, federal law does not recognize state law privileges and there are no *Pitchess* or other similar requirements protecting police personnel records in federal courts. "Questions of evidentiary privilege that arise in the course of adjudicating federal rights are governed by principles of federal common law. See *United States v. Zolin,* 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989) (citing Rule 501 of the Federal Rules of Evidence)." (Green v. Baca 226 F.R.D. 624, 643 (C.D.Cal.2005).)

D. CONCLUSION.

Under the most fundamental premise of statutory construction, the Legislature is presumed to say what it means and mean what it says. In other words, had the Legislature intended to allow either scenario presented in this request – for prosecutors to review confidential personnel files, or for police agencies to disclose to prosecutors the names of officers who have sustained discipline against them – they would have provided for it in the statutes. While some access prior to filing the motion would be more convenient for the prosecution, why would that same "convenience" argument not also be valid for the defense? And would not the prosecution have an obligation under Penal Code section1054.1 to disclose to the defense that it had been told by the police department that officers have sustained complaints involving dishonesty/moral turpitude? And would not a dual function city attorney's office (such as the City of Los Angeles that handles both state misdemeanor prosecutions and civil matters) also have conflicting obligations to disclose peace officer personnel records and information that it has been given access to through its prosecutors, while also protecting the confidentiality of such records and information through its civil attorneys? And what about the requirement that an officer be notified of attempts to view his or her personnel file? Where would that fit into this process as suggested by the requester?

The *fact* that an officer has a complaint, an investigation and/or a sustained finding of conduct involving dishonesty or moral turpitude is a *fact* that lives only in an officer's personnel file. "Where the People seek discovery of the peace officer personnel records ... the district attorney is not exempted under the provisions of Penal Code section 832.7, subd. (a), and must comply with the requirements of the Evidence Code section 1043 *et seq.*" (*City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1144.) It is respectfully submitted that, in essence, says it all. The League believes that there is no legal basis for law enforcement agencies to provide any information from confidential police personnel files to prosecutors without compliance by the prosecutors with the statutory requirements of the Penal Code and Evidence Code referenced in this letter.

On behalf of the League, thank you for the opportunity to comment on these very important issues. I am available to discuss any questions you may have regarding this letter.

Sincerely,

Juli C. Scott /KK

Juli C. Scott, Attorney at Law
On Behalf of the League of California Cities