Fundamentals of Opposing Motions for Discovery of Peace Officer Personnel Records (Pitchess Motions)

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Pitchess Motion Fundamentals

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1. Introduction

This paper is intended as a practical guide to the litigation of motions for the discovery of peace officer personnel records (*Pitchess* motions) in California criminal and civil cases. It also touches on the intersection of the *Pitchess* process and the Constitutional due process and fair trial requirements in the seminal Brady *v. Maryland case,* the often misconstrued and miscited *Vela* case, and the challenges of protecting confidential peace officer personnel files in Federal criminal and civil cases.

Although a significant body of law has developed since the California Supreme Court first decided *Pitchess v. Superior Court* in 1974 (11 Cal.3d 531), in many ways, the challenge presented to the California Supreme Court in 1974 continues to form the essence of the challenges attorneys face today in responding to these discovery motions, the bulk of which arise in state criminal cases. Criminal defendants continue to attempt to divert their culpability to the officers who arrested them. The Court in *Pitchess* struggled to balance the defendant's right to a fair trial (by being able to access relevant information about a police officer's character traits), with the privacy rights of the peace officers, using the only tools available to the court at that time – the Evidence Code's relevance and official information privilege provisions.

The tensions between those same competing principles have not changed. The *Pitchess* process that has evolved since 1974 is specifically designed to give the courts better tools to balance these two important constitutionally protected 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 results from both the Legislature and the courts are 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.

What has changed most over the years is the scope and breadth of this unique discovery process. For many years this discovery process was allowed only in cases where a defendant alleged he acted in self-defense against an

officer who used excessive force against him. Over the years, the courts have expanded on the scope of alleged police misconduct that would justify intrusion into the confidential personnel files of peace officers. Potentially acceptable allegations in support of *Pitchess* discovery may now include lying and falsifying police reports, planting and fabricating evidence, ethnic, racial, and sexual orientation bias, coerced confession, "code of silence" and others. The trial courts themselves, with their continually dwindling resources, have less and less patience with the statutorily mandated two-step process; and yet the appellate courts continue to uphold the threshold showing required of a litigant, the important balancing process designed to preserve the confidentiality of police personnel records and the overall integrity of police investigation and disciplinary systems.

The most common *Pitchess* motion we see today in criminal cases alleges simply that the defendant disagrees with what the officer has reported in his official police report – i.e., he did not commit the crime, did not make inculpatory or *any* statements, the officer did not find contraband or other evidence of a crime, etc. – and thus, the officer lied, planted or fabricated evidence and prepared a false police report. Defendants today seek complaints against *any* officer who was involved in, present during or investigated his arrest, or who prepared a report relating to the arrest/investigation. They ask the court to search the officer's confidential personnel files for prior complaints against the officer for unlawful arrest, false testimony, fabrication of evidence, planting evidence, false police reports and the popular catchall provision, "moral turpitude". The defendants today also seek to have the courts expand the scope of materials released from the officers' personnel files, to include the actual investigation reports, statements of witnesses, compelled statements of the officers provided to investigators, photographs, audio- and videotapes, and even psychological testing results.

The bulk of the body of law in this area focuses on criminal discovery; however, the *Pitchess* process is equally applicable in civil cases – most commonly police misconduct litigation. Discovery of confidential police personnel records is also sought in federal criminal and civil cases, although the state law privileges of confidentiality are not recognized in cases in which federal rights are adjudicated. The federal courts afford these state law privileges some weight, as discussed herein, and federal common law will be applied. A city attorney's ultimate goal in these matters should be to use the many resources that the Legislature and the courts have provided to ensure that all trial courts engage in a fair, balanced, and thorough review of the need for this discovery, while balancing the officers' rights of confidentiality in their personnel records.

2. *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 - The Unintended Legacy of L.A. County Sheriff Peter Pitchess

The seminal 1974 decision in *Pitchess v. Superior Court* (1974) 11 Cal 3d. 531 (*Pitchess*) was the catalyst for the current statutorily mandated discovery process and procedures set forth in the California Penal and Evidence Codes. The defendant in that case was charged with the battery of four deputy sheriffs. To support his claim that he acted in self-defense to the overly aggressive use of force by deputies, he sought discovery of evidence of the deputies' propensity for violence, which he believed was contained in internal investigations conducted by the sheriff's department as the result of other citizens' complaints against these same deputies.

In the opinion written by Justice Mosk, we see the footprint for the body of law that has followed. These fundamental principles are as applicable today as they were in 1974. The court held:

a. A lesser standard of relevance applies to discovery in a criminal proceeding - the accused need only provide general allegations which demonstrate that the requested information would "facilitate the ascertainment of the facts and a fair trial";
b. Evidence was relevant and admissible to establish the character or trait of character of the victim (i.e., deputy sheriff) per Ev. Code § 1103 to prove conduct of the victim in conformity with such character;
c. Defendant couldn't "readily obtain" the information through his own efforts;
d. The defendant's need and good cause for the requested evidence was to be balanced against the need to maintain its secrecy in the best interests of the public on the basis of the "official information" privilege of Evidence Code § 1040. (The case was remanded to the trial court to balance these two competing interests.)

3. The Legislature's Response to the *Pitchess* Decision

In 1974, the same year as the *Pitchess* decision, the Legislature enacted Penal Code §832.5, which required every sheriff's department and every city police department to establish a procedure for investigating citizens' complaints against its personnel, and to make a written description of the procedure available to the public. (Section 832.5 now applies to every department or agency in the state that employs peace officers.)

In 1978, after several years of discovery abuses by the criminal defense bar as well as destruction of investigation files by police agencies, the California legislature codified the balancing doctrine created in the *Pitchess*

decision by enacting Penal Code §§ 832.7, 832.8 and Evidence Code §§ 1043 and 1045, all of which established an "exclusive" procedure for the discovery of peace officer personnel records or information contained in them. Penal Code §832.5 was also amended in 1978 to include a requirement that the complaints be maintained for a period of five years. The purpose of these bills was to both require retention of police personnel investigation files and records, but at the same time protect them from "random discovery" and dissemination. (*San Francisco Police Officers' Assn. v. Superior Court* (1988) 202 Cal.App.3d 183, 189-190, referencing the analysis of Senate Bill No. 1436 prepared for the Assembly Committee on Criminal Justice.) "In enacting [Evidence Code] sections 1043 and 1045, the Legislature clearly intended to place specific limitations and procedural safeguards on the disclosure of peace officer personnel files which had not previously been found in judicial decisions." (*California Highway Patrol v. Superior Court* (2000) 84 Cal. App. 4th 1022.)

4. Fundamentals of the *Pitchess* Process

Penal Code § 832.7 provides the foundational premise that peace officer personnel records and records of citizen complaints, " . . . or information obtained from these records . . ." are confidential and "*shall not*" be disclosed in any criminal or civil proceeding except by discovery pursuant to Evidence Code §§ 1043 and 1046. Penal Code §832.8 defines "personnel records" to include personal data, medical history, appraisals and discipline, complaints and investigations relating to an event an officer perceived and/or relating to the manner in which his or her duties were performed, and any other information the disclosure of which would constitute an unwarranted invasion of privacy.

Evidence Code §1043 sets out the requirements for a motion seeking personnel records. The motion must be a written motion noticed according to the requirements of CCP §1005. The notice requirements are mandatory. "No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section, except upon a showing by the moving party of good cause for non-compliance, or upon a waiver of the hearing by the government agency identified as having the records." (Ev. Code §1043(c).) If there are allegations of the use of excessive force by the officers, the motion must also include a copy of the police report per Ev. Code §1046. The motion must be served on the agency having custody and control of the records and the officer must be given notice of the motion by his or her employer even if he no longer works for the agency. (*Abatti v. Superior Court* (203) 112 Cal.App.4th 39.)

> *Practice note: Many criminal defense counsel are unaware of or simply ignore these notice requirements. CCP § 1005 currently requires 16 court days notice for a motion, plus an additional 5 days if served by mail.*

The motion must include a description of the records and information sought and most importantly, "(3) Affidavits showing *good cause* for the discovery or disclosure sought, setting forth the *materiality* thereof to the subject matter involved in the pending litigation . . ." The declaration must also include a statement that the agency has the records or information sought. Contrary to state law requirements that a declarant must be competent to testify based on personal knowledge of facts in a declaration, the declaration in support of a *Pitchess* motion does not have to be made by the defendant, but may be and almost always is made by the defense attorney based on information and belief, and may also include hearsay, supposition, and speculation. (See, *City of Santa Cruz v. Municipal Court* (1989) 49 Cal. 3d 74.) Because the fundamental concept underlying all of the *Pitchess* process is relevance, each defendant must make his or her own separate motion and cannot simply "me too" another defendant's motion. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1042.)

> *Practice Note*: Some judges need to be reminded that the statute requires a **two-step** process and that they cannot require you to bring either the files or the custodian with you to the hearing on the motion. *Not all police agencies respond in the same manner to Pitchess motions. Some police agencies choose not to oppose the motion itself, but rather simply have a custodian or non-attorney representative of the department show up in court with personnel records for an in camera hearing on the date of the motion hearing. Others respond to the motion but also bring their custodian with the files so the court can conduct the in camera at the same time, if necessary. Still others oppose the motions and if granted, return for the in camera hearing on another day.* Even if you do not bring your custodian with you, the court will appreciate if you have your custodian "on call" and ready to come to court with the required files at the court's convenience once the Court has decided the motion.

5. The Courts Interpret the Legislation: In Criminal Cases, Defendant Must Allege a Factual Scenario of Officer Misconduct, A Defense, And a Link Between the Misconduct and the Defense.

In *City of Santa Cruz v. Municipal Court* (1989) 49 Cal. 3d 74, the court held that the declaration in support of a motion for peace officer personnel

files must demonstrate the *relevance* of the requested information by providing a "'*specific factual scenario*' establishing a '*plausible factual foundation*' for the alleged misconduct in order to establish the requisite 'materiality' of the disclosure to the pending litigation." While the *Santa Cruz* court also described this burden as a "relatively relaxed standard," it is a threshold standard nonetheless that many times is not met by the defense.

The starting place for this threshold showing is an assertion that the officer engaged in some form of misconduct. These facts must be specifically articulated for each officer whose files are sought. In *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010 the court stated: "Our Supreme Court has indicated that a showing of good cause must be based on a discovery request which is tailored to the specific officer misconduct which is alleged. Thus, when a defendant asserts that his confession was coerced, a discovery request that seeks all excessive force complaints against the arresting officer is overly broad . . . [instead] only complaints by prisoners who alleged excessive techniques in questioning [are] relevant."

The California courts have addressed this requirement extensively and while the outcomes are not always consistent, the California Supreme Court has not wavered from this standard. At the heart of this good cause/"materiality" inquiry is a requirement that the defendant (1) describe with "some specificity" an officer's misconduct, (2) propose a defense to the pending charge, and (3) articulate how the discovery being sought would support the defense or impeach the officer's "*version of the events." (Warrick v. Superior Court,* (2005) 35 Cal.4th 1011, 1021.) "[A] showing of good cause requires a defendant seeking *Pitchess* discovery to establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events." Further, a defendant must provide enough specificity so that his request "...*is limited to instances of officer misconduct related to the misconduct asserted by the defendant.* [Citations.]*"*, and "excludes requests for officer information that are irrelevant to the pending charges." *(Warrick, supra,* at p. 1021; emphasis added.)

"Plausibility" is broadly construed as something that might or could have occurred. "A plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges. *[Citing Warrick supra, at p. 1026]." (People v. Galan (2009) 178 Cal.App.4th 6; see also People v. Hustead (1999) 74 Cal.App.4th 410.)*

Despite this well articulated threshold showing that a defendant must make, the courts are not entirely consistent as to what kind of information

sufficiently establishes the "specific factual scenario" and "plausible foundation". It is always helpful to read the factual bases of individual cases and pay particular attention to information the courts have – and equally as important, have not – found to be legally sufficient. For example, in *City of San Jose v. Superior Court* (1998) 67 Cal. App. 4th 1135*,* the Court described what kind of declaration does *not* meet the *Santa Cruz* standard. The defense in *City of San Jose*, *supra*, sought discovery of complaints against the arresting officers involving illegal search and seizure, dishonesty or deceit, fabrication of evidence or charges, and untruthfulness in the preparation of reports. In support of these requests, defense counsel provided a declaration in which he stated that:

a. knowing consent to enter and search was not given by the defendant, contrary to the statements of the officers in the police reports;

b. material misrepresentations in the police report were made in order to conceal that fact that consent was not obtained; and,

c. evidence was mishandled by the officers so as to deny the defendant a fair trial.

The court in *City of San Jose* held that none of these statements (which are nothing more than conclusions) were sufficient to provide the requisite "'specific factual scenario' establishing a 'plausible factual foundation' for [the] allegation[s]." Without such a foundation, the court said, "... the trial court could not properly determine whether the 'discovery or disclosure sought' was material to 'the subject matter involved in the pending litigation.' [Citing *City of Santa Cruz, supra,* at 85-86.]" The court specifically criticized defense counsel's use of general conclusory language rather than specifying, "which particular statement or statements in the police report or in the officers' testimony contained material misrepresentations, nor did he explain in what respect the statements were incorrect." (*City of San Jose, supra,* 67 Cal. App. 4th at 1147.)

In *People v. Thompson ((2006)* 141 Cal. App. 4th 1312), the court gave another excellent analysis of why the supporting declaration was insufficient. The court held that it was not enough for a defendant to simply deny the elements of the crime for which he was charged, and to claim that the officers made it all up. In *Thompson,* the defendant was arrested for a narcotics offense after a sting operation. Defense counsel's declaration sought *Pitchess* discovery, claiming that (1) the officers did not recover any money from the defendant, (2) the defendant did not offer and sell drugs, (3) the defendant was arrested "because he was in an area where they were doing arrests," and, (4) the officers fabricated a story to cover up their mishandling of the situation.

Both the trial court and the appellate court found the declaration insufficient, because it contained conclusory statements only, and it lacked specificity. The court noted that the declaration "does not present a factual account of the scope of the alleged police misconduct, and does not explain [the defendant's] own actions in a manner that supports his defense." *Id.,* at 1317. The court determined that the defense showing was insufficient because it was not "internally consistent" or complete. Although Thompson, through counsel, denied he was in possession of cocaine or that he received $10 from the officer, he "did not state a non-culpable explanation for his presence, present a factual basis for being singled out by the police, or assert any "mishandling of the situation" prior to his detention and arrest. Counsel's declaration simply denied the elements of the offense charged." *Id.,* at 1317-18. The court further held that the defendant must provide "an alternate version of the facts regarding his presence and his actions prior and at the time of his arrest" and not just that the incident was fabricated and the report falsified. *Id., at 1318.*

Practice Note*: In your opposition to the motion, go beyond citing your court to the holdings of these cases and give the court more about how the appellate courts have actually applied the standard to specific cases. This can be effective in opposing many Pitchess motions – especially those where defense counsel use the same boilerplate motion every time.*

Other useful cases that may fit your own scenario include the following:

a. A defendant's undisputed extrajudicial statements that are reasonably consistent with the officer's description of the crime will defeat the motion. In *People v. Galan* (2009) 178 Cal.App.6, the defendant was arrested after he tried to run two motorcycle officers over as they tried to stop him for a traffic violation. During his post-arrest interrogation, he conceded that he drove his car towards the officers. The defense counsel declared in his *Pitchess* motion that the officers falsely stated that the defendant drove his car in a manner requiring them to take evasive action. The court denied the motion on the basis that defendant's own statements negated the requisite "plausible factual scenario" in support of any alleged misconduct (i.e., that the officers lied). The court said, "Were we to rule otherwise, imaginative defense counsel could ignore his client's extrajudicial statements and defeat the *Pitchess* scheme's purpose 'to protect the defendant's right to a fair trial

and the officer's interest in privacy [in his personnel records] to the fullest extent possible…" (Citing *Mooc,* at 1227.) (*Galan,* at 105.) [1]

> ***Practice Note:*** *Find out if the defendant was interviewed, audio- or video-taped and review those materials. Provide them to the court with your opposition.*

b. A bare allegation that "the officer lied and will do so again", or "it is common knowledge that all police officers lie to protect each other", without more in the way of a plausible factual foundation and factual scenario is not a sufficient basis for holding an *in camera* hearing. The court in *Eulloqui v. Superior Court (*2010) 181 Cal App 4th 1055.) rejected such a showing as inadequate and declared that it "abrogates the strong ring of protection the Legislature and courts have erected around peace officer personnel records." Eulloqui, at 1069.

c. A *Pitchess* motion is not a blanket fishing expedition where a defendant can simply "cast[] about for any helpful information."*Santa Cruz, supra,* at p. 85; *People v. Mooc* (2001) 26 Cal.4th 1216, 1226. Keep in mind that the original premise behind the *Pitchess* decision was to allow a defendant to discover evidence of habit or custom to show that a person acted in conformity with it on a given occasion. (See also *People v. Gill* (1997) 60 Cal.App.4th 743, 749, 70 Cal.Rptr.2d 369; *People v. Hustead* (1999) 74 Cal.App.4th 410, 417, 87 Cal.Rptr.2d 875; *People v. Memro*, 38 Cal.3d 658, 681, where the court concluded that "evidence that the interrogating officers had a custom or habit of obtaining confessions by violence, force, threat, or unlawful aggressive behavior would have been admissible on the issue of whether the confession had been coerced.")

> ***Practice Note***: *If you can't defeat the motion entirely at the initial hearing, you should still use the opportunity to ask the court to limit,* ***on the record****, the scope of what you are to bring to the in camera –i.e., only files as to those officers who were actually involved and only as to the* ***types*** *of complaints and investigations similar to the misconduct alleged in the motion, e.g., excessive force during handcuffing, false police reports re grounds for investigative*

[1] Contrast this with *People v. Husted* (1999) 74 Cal.App.4th 410, another pursuit case in which the defendant claimed in his motion that the officers fabricated his reckless driving. As there were no other extra-judicial statements by the defendant, this was held by the court to be sufficient.

detention, coerced confessions, etc. Defense attorneys would of course like a general fishing expedition. Limit the Catch!

6. Discovery of Peace Officer Personnel Records Is by Statute a TWO-Step Process

The courts have made it very clear that the discovery of a peace officer's personnel records is a *two-step* process. Step one requires a threshold showing of materiality and good cause, which must be made in the form of a motion that follows the criteria set forth in Evidence Code § 1043. If the trial court concludes that the defendant has fulfilled the "good cause and materiality" prerequisites, the custodian of records should bring to court all documents potentially relevant to the defendant's motion." The trial court is instructed to then examine the information in chambers "out of the presence of all persons except the person authorized to possess the records and such other person the custodian is willing to have present" (e.g., the city attorney). Neither the defense attorney nor the prosecutor is allowed to participate in this *in camera* hearing. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226). The officer whose files are being reviewed has the right to be present at the in camera review of the files. (Evid.Code, §915; *Becerrada v. Superior Court* (2005) 131 Cal.App.4th 409, 415 .)

The court, in *Alford, supra,* explains how the two steps of this process work together. "The relatively relaxed standards for a showing of good cause under section 1043, subdivision (b) – 'materiality' to the subject matter of the pending litigation ... insure the production for inspection of all potentially relevant documents. The in camera review procedure and disclosure guidelines set forth in section 1045 guarantee, in turn, a balancing of the officer's privacy interests against the defendant's need for disclosure. [citing *City of Santa Cruz*, at 49 Cal.3d at pp. 81-84]." *Alford v. Superior Court* (2003) 29 Cal.4th 1033. "The statutory scheme carefully balances two directly conflicting interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to the defense." (*People v. Mooc, supra,* 26 Cal.4th at 1227.)

Evidence Code § 1045(b) requires that as the court makes this second relevance determination in chambers "in conformity with [Evidence Code] section 915"[2], the court "shall exclude from disclosure":

a. Complaints concerning conduct occurring more than five (5) years before the event which is the subject of the litigation,

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[2] Evidence Code sec. 915 sets forth general procedure for *in camera* review of all privilege claims.

b. In criminal cases, the conclusions of the officers investigating such citizen complaints, and

c. Facts sought to be disclosed that are "so remote as to make disclosure of little or no practical benefit."

Evidence Code § 1047 also specifically exempts from disclosure the records of peace officers, including supervisorial officers, who either were not present during the arrest, had no contact with the party from time of arrest until time of booking, or who were not present at the time the conduct is alleged to have occurred within the jail facility.

Numerous authorities, including the unanimous California Supreme Court decision in *People v. Mooc*, provide that a request for information from peace officer personnel records in a criminal case, even one supported by good cause, authorizes only the discovery of the names and addresses of complaining witnesses and not their statements made to investigators. (*See also, Warrick v. Superior Court,* 35 Cal. 4th 1011 (2005); *Kelvin L. v. Superior Court*, 62 Cal. App. 3d 823 (1976); *Carruthers v. Municipal Court*, 110 Cal. App. 3d 439 (1980); *People v. Castian*, 122 Cal. App. 3d 138 (1981).) As explained below, this is not cast in stone. Discovery of the investigative reports prepared pursuant to citizen complaints is specifically excluded from discovery in a *criminal* proceeding by Evidence Code §1045(b)(2).

7. What to Bring to the *In Camera* Proceeding?

If you are unable to defeat the motion at the first step, you should still attempt to convince the court to focus the *in camera* inquiry (for example, to bring only complaints of specific type of misconduct similar to that alleged in motion per *California Highway Patrol* case; to look at files only for those officers who were directly involved in the arrest or had actual communication or interaction with the defendant; to look for complaints and investigations going back only 5 years before incident; etc.).

Once the court directs you as to what it wants to see and as to which officers, what are you obligated to bring to the *in camera* proceeding?

> "When a trial court concludes a defendant's *Pitchess* motion shows good cause for discovery of relevant evidence contained in a law enforcement officer's personnel files, the custodian of the records is obligated to bring to the trial court all 'potentially relevant' documents to permit the trial court to examine them for itself. (*Santa Cruz, supra,* 49 Cal.3d at p. 84) … Documents clearly irrelevant to a defendant's *Pitchess* request need not be presented to the trial court for in camera review. But if the custodian has any doubt whether a particular document is relevant, he or she should present it to the trial court. Such practice is consistent with the

> premise of … sections 1043 and 1045 that the locus of decision making is to be the trial court, not the prosecution or the custodian of records. … The trial court should then make a record of what documents it examined before ruling on the Pitchess motion. Such a record will permit future appellate review. (*Mooc*, supra, 26 Cal.4th at pp. 1228-1229, italics added.)" (*Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 405.)

The Supreme Court in *Mooc* flatly rejected the argument that the entire personnel file of the officer must be produced for the *in camera* proceeding. "A law enforcement officer's personnel record will commonly contain many documents that would, in the normal case, be irrelevant to a Pitchess motion, including those describing marital status and identifying family members, employment applications, letters of recommendation, promotion records, and health records. (See Pen.Code, §832.8.) Documents clearly irrelevant to a defendant's *Pitchess* request need not be presented to the trial court for in camera review."(*People v. Mooc* 26 Cal.4th at 1228.)

Practice Note: *Penal Code § 832.5(d)(1) defines "general personnel file" as that file maintained by the agency containing the primary records specific to each peace officer's employment including evaluations, assignments, status changes and imposed discipline. §832.5(c) mandates that complaints determined to be frivolous, unfounded or exonerated shall not be maintained in the officer's general personnel files. They must by statute be maintained in other separate files. As a practical matter, most police departments maintain the investigation files separately from the general personnel file, and if they don't it is generally advisable that they do so.*

The *Mooc* court suggests that a court reporter should be present to document what records were brought, any questions the court has for the custodian and the custodian's response. The court should also seal the record of the *in camera* proceedings.

Practice Note: *Avoid confusion about what the court expects your custodian to bring to the* in camera hearing *by clarifying on the record at the hearing on the motion exactly what the court is expecting you to bring. You may still need to be prepared to argue the relevance of the materials you do bring at the in camera, although some judges are uncomfortable with this. It is always helpful to review the materials in the officer's file as you are preparing your initial opposition to the motion and not wait until after the motion is granted.*

8. What Should The Court Release From the File?

Once the court has made the requisite threshold determination of good cause and materiality, has reviewed files *in camera* and made a determination that relevant information exists in the personnel files, you may still need to present arguments to the court regarding the scope and extent of materials and/or information which legally may be released to the defendant. The court may need to be reminded of the provisions of Evidence Code sec. 1045 that list items that the the court *shall* exclude from disclosure. These include:

(1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought.

(2) In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to Section 832.5 of the Penal Code.

(3) Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit.

For many years, courts have been persuaded to release only the names and addresses of complaining witnesses -- this despite boilerplate defense requests for investigation reports, verbatim witness statements, records of statements, reputation, opinions, and reports made by fellow and superior officers, psychiatrists, and psychologists pertaining to dishonesty and moral turpitude, etc. Typically, the courts have relied on the provisions of Ev. Code § 1045(b)(3) which excludes from discovery facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit. "The *in camera* review procedure and disclosure guidelines set forth in section 1045 guarantee, in turn, a balancing of the officer's privacy interests against the defendant's need for disclosure. As a further safeguard, moreover, the courts have generally refused to disclose verbatim reports or records of any kind from peace officer personnel files, ordering instead ... that the agency reveal only the name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question. ..." (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039.)

Practice Note: *The limitation on release of names and addresses of witnesses is a judicially created imitation and is not cast in stone. There are unpublished decisions where the release of witness statements has been held to be proper, e.g., witness statements made during the course of an investigation in response to the defendant's own citizen complaint, or where the defense has been unsuccessful in locating the witnesses using names and addresses only. Further, this limitation will not always apply in civil cases, see below.*

9. Make Sure to Ask for a Protective Order

The protective order provisions of Ev. Code § 1045(e) should never be overlooked. (A proposed protective order should be included with the opposition to the motion.) § 1045(d) provides that "upon motion seasonably made", and good cause, the court may make "any order which justice requires to protect the officer or agency from unnecessary annoyance embarrassment or oppression." § 1045(e) provides that the court *shall* order that any records or information disclosed may not be used for "any purpose other than a court proceeding pursuant to applicable law." For this reason, the information the Court ultimately determines must be disclosed must not be publicly announced on the record.

The Supreme Court in *Alford, supra,* reinforced the importance of the protective order. "[B]ecause 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.) Each defendant as well as the prosecution must make his or her own *Pitchess* motion, make his or her own showing of relevance and cannot piggy-back on another motion. "Pursuant to Evidence Code section 1045 subdivision (e), the court may enter a protective order concerning the use of the information obtained. The information ordered produced may not be provided to the prosecution in the action, absent a separate *Pitchess* proceeding, nor may that information be used for any proceeding other than the one in which it was ordered disclosed." *Alford, supra,* at pp. 1045–1046.) (*Becerrada v. Superior Court* (2005) 131 Cal.App.4th 409, 414.)

> ***Practice Note***: *Bring several copies of the Protective Order with you to the In Camera for the Court to fill in and sign. You should also have the opposing attorney sign the protective order acknowledging it. Your protective order should of course prohibit the dissemination of the information to anyone but the defense counsel, including office mates, in certain cases, the defendant himself, any employees of counsel except those absolutely necessary for the case, prohibit the copying of any documents produced, and require the destruction of any copies and return of originals upon conclusion of the case.*

10. Motions Filed Under Seal

In *Garcia v. Superior Court* (2007) 42 Cal.4th 63, the court considered whether the required affidavit in support of a *Pitchess* motion could be filed under seal. Many local court rules generally require the court's permission to file any document under seal, and the court recognized the trial court's inherent discretion to allow documents to be filed under seal "in order to protect against revelation of privileged information" (*id.,* at p. 71-72). The court determined, however, that the trial court was not bound by counsel's "naked assertion" that everything contained in the declaration was confidential and should carefully weigh and "balance[e] an accused's interest in protecting privileged information against opposing counsel's right to effectively challenge the discovery motion." (*id.,* at p. 72). The Court noted that only in a very few cases would a defendant actually need to use – and thus potentially reveal – privileged information in order to meet the required first step threshold -- proposing a potential defense, articulating how the discovery might lead to or constitute impeachment evidence or supporting for that defense, and describe an "internally consistent" factual scenario of claimed officer misconduct.

The court in *Garcia* articulated the procedure to be followed ("should be adhered to") when a defense attorney seeks to file a *Pitchess* affidavit under seal. This procedure closely mirrors that set forth in Evidence Code § 915(b). Defense Counsel must first give "proper and timely notice" of the claim of privilege, and provide the court with both the affidavit the defense seeks to file under seal, along with a proposed redacted version. The proposed redacted version should be served on opposing counsel. The trial court must then conduct an *in camera* hearing on the request to file the affidavit or parts of it under seal.

During this *in camera* hearing only the defense attorney may be present. At the hearing, defense counsel should explain to the court how the information they propose to redact is privileged and subject to protection from disclosure; and demonstrate why that information is even required in order to support the motion (i.e., why the motion can't be filed without it). The *Garcia* court also determined that opposing counsel (the city attorney) should have an opportunity to propound questions for the trial court to ask defense counsel during the *in camera*. (*People v. Hobbs* (1994) 7 Cal.4th 948, 973.) If the court concludes that parts of the affidavit do pose a risk of revealing privileged information, and that filing under seal is the *only* feasible way to protect that required information, the court may allow the affidavit to be so filed [with those parts redacted]." (*Garcia*, at 73.)

Finally, the *Garcia* court was very clear that the *Alford* case was not to be read as concluding that where a *Pitchess* affidavit states theories regarding the

relevance of the materials sought, or possible trial strategies, it *must* be filed under seal and reviewed in camera. (*Garcia,* at p. 74.)

The following are some sample questions to provide to the court to be propounded to defense counsel during the *in camera* regarding the sealed declaration:

For every sentence redacted in whole or in part, the respondent requests that the court inquire as follows:

a. On what basis did you redact this sentence—attorney-client privilege or attorney work product?

b. Where attorney-client privilege is claimed, is the source of the information your client only or someone else?

c. If the source of the information is your client only, why can you not phrase this "on information and belief" as authorized by law so that respondent's counsel can evaluate whether there is a sufficient factual scenario to support the motion?

d. If the source of the information is not your client only, on what basis do you claim attorney-client privilege?

e. If the information is based on attorney workproduct protections, do you claim this is "core" work product, in other words only the impressions, conclusions and opinions of the attorney, or is it information derived from work product (i.e., statements from witnesses, investigation conducted, etc.)?

> ***Practice Note:*** *Keep in mind that not all attorney work product is absolutely privileged. Only those writings containing the attorney's impressions, conclusions, opinions, etc. are absolutely privileged. Other work product is protected by a qualified privilege that can be broached if a party is unfairly prejudiced in preparing its claim or defense or where it will result in an injustice. (C.C.P. § 2018.030.)*

11. Right of District Attorney/Attorney General to Confidential Peace Officer Personnel Records

With limited exceptions, prosecuting attorneys must follow the same statutory procedures to obtain information from a peace officer's personnel files as the defense. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033.) "[T]he prosecution is free to seek such information by bringing its own *Pitchess* motion in compliance with the procedures set forth in Evidence Code sections 1043 and 1045." (*People v. Gutierrez* (2003) 112 Cal. App.4th 1463, 1474.) The exception to this requirement is found in the language of Penal Code §832.7, which provides that the confidentiality protections for the records do

not apply to investigations or proceedings conducted by the district attorney's office or the attorney general that concern the conduct of police officers or police agencies. In other words, where police officers are either under investigation or being prosecuted for criminal violations, the district attorney or attorney general are entitled to access to the officer's personnel file. "… [T]he information at issue is already in the hands of public officials, is the property of a government agency, and release of the material to another public official, the district attorney, does not mean the loss of 'confidentiality,' " under Government Code sections exempting personnel and other records from disclosure laws. (66 Ops.Cal.Atty.Gen. 128, 130 (1983); *See* also, *Michael v. Gates* (1995) 38 Cal.App.4th 737, 745; *People v. Gremminger* (1997) 58 Cal.App.4th 397.)

12. What Does *Brady v. Maryland* Have to Do With All This?

Criminal defense attorneys commonly cite the *Brady v. Maryland* decision which was decided by the United States Supreme Court in 1963 (373 U.S. 83) as a "catch-all" authority entitling them to whatever discovery they ask for, including peace officer personnel records. They typically argue that even if they cannot meet their burden under the *Pitchess* statutory and case guidelines, they are still entitled to the information sought under *Brady*. They argue that because of *Brady* they are entitled to any and all exculpatory evidence which includes anything in the police officer's file that could be impeaching (and thus, they argue, exculpatory.) And finally, they assert that *Brady* trumps *Pitchess* because it addresses the defendant's constitutional right of due process. The California courts have rejected those arguments.

The disclosure requirements set forth in the *Brady* case and the *Pitchess* process are very different. Under *Brady,* evidence must be disclosed by the prosecution to the defense if it would be material to the fairness of the trial, while under *Pitchess,* a defendant need only show that the information sought is material "to the subject matter involved in the pending litigation." (§1043, subd. (b)(3); *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 10.) In *People v. Gutierrez* (2004) 112 Cal.App.4th 1463, the court explained how not every nondisclosure of favorable evidence denies due process. "[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*, at 1474.)

See also, *Garden Grove Police Department v. Superior Court* (2001) 89 Cal.App.4th 430 in which 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." (*Id.* at pp. 434-435.)

Practice Note: *The requirements of Brady are imposed on the prosecutor and not the city attorney. It is always helpful to become familiar with your prosecutor's Brady policies – usually available on their websites – to see what kind of material the prosecuting attorney considers to be Brady material. Many Brady policies require the police department to self-report and the prosecutors to keep their own database of Brady information.*

13. What Rights Do Prosecutors Have to Discover Peace Officer Personnel Records?

The prosecutor is entitled to review a complaint investigation contained in a peace officer's personnel record only when its agency is investigating or prosecuting the officer whose conduct was complained about, and only that file relating to the incident for which the officer is being investigated or prosecuted (Pen. Code sec 832.7(a)). When doing so, the district attorney must still maintain the non-public nature of the files absent judicial review of the relevance of the information to a particular criminal or civil action. *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 618.

Where the exception afforded the prosecution by section 832.7, subdivision (a) is inapplicable, the prosecution must comply with the procedure set forth in Evidence Code sections 1043 and 1045", and must make the same showing of materiality and good cause as any defense attorney would. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1046; see also, *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1144; *People v. Superior Court* (G*remminger*) (1997) 58 Cal.App.4th 397, 407.)

The courts have recognized that an officer remains free to discuss with the prosecution any material in his files, in preparation for trial, "mean[ing] 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.)

14. Where Does *Vela v. Superior Court* Fit in All This?

The case of *Vela v. Superior Court* (1989) 208 Cal.App.3d 141, is often thrown into the *Pitchess* process in an effort to obtain statements made by the officers or other witnesses. Defense counsel typically make either a "*Pitchess/Vela* Motion" or a stand-alone motion for the statements. It is frequently misrepresented by the defense – most likely due to a failure to actually read the case. The specific issue the court decided in *Vela* was framed by the court as follows: "Is the City entitled to assert an attorney-client privilege over the investigative statements taken by the SIT [Special Investigating Team] from police officers who were percipient witnesses to alleged criminal activity? If so, are such privileged statements nonetheless subject to discovery by a criminal defendant where necessary to protect his constitutional rights of confrontation and cross-examination?" (*Vela, supra,* at p. 147.)

In *Vela,* the court addressed a unique special investigation unit of the Culver City Police Department whose express mission was to gather "information for communication to and use by the City Attorney in defense of civil litigation only." (*Vela,* at p. 145.) When the criminal defendant, Mr. Vela, sought to obtain statements made to this special unit by the officers who were involved in his criminal case, the city asserted the attorney-client privilege. The court engaged in an extended discussion about the need to strike a balance between the attorney-client privilege held by the city and the criminal defendant's confrontation rights. "We therefore conclude that the City is the holder of an attorney-client privilege with respect to the SIT reports and, absent any constitutional circumstances compelling a contrary result, may assert such privilege to prevent disclosure thereof."(*Vela, supra,* at 150.) The court did *not* mandate the release of the statements but instead referred the case back to the trial court to determine whether there was any compelling circumstances that would defeat the attorney-client privilege.

15. *Pitchess* in State Civil and Administrative Cases

Although the bulk of the case law addresses *Pitchess* motions in the criminal context, the statutory *Pitchess* process is applicable in state civil litigation and most administrative proceedings. "Peace officer personnel records, records and information obtained from them that are maintained by any state or local agency pursuant to Penal Code § 832.5 "are confidential and shall not be disclosed in any criminal *or civil proceeding* except by discovery pursuant to Sections 1043 and 1046 of the Evidence Codes. (Pen. Code § 832.7.) It is the *exclusive* method for obtaining both peace officer personnel records and the information contained therein.

A litigant cannot circumvent the mandatory statutory process or attempt to obtain the protected information indirectly by asking for personnel information at a deposition or through written discovery such as interrogatories. In *City of San Diego v. Superior Ct.* (1981) 136 Cal.App.3d 236, when officers were asked 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. Likewise, in *Hackett v. Superior Court* (1993) 13 Cal.App.4th 96, 98 the Court rebuffed the attempted discovery of a police officer's home address, telephone number, place of birth, driver's license number and educational background – even though it was possible the information was available through other public resources. "[T]here is *nothing* in the statutory scheme or its history suggesting a legislative intent to exclude from the privilege information which happens to be obtainable elsewhere." (*Hackett,* at p. 99.)

The court further expounded on the nature of this "conditional privilege": "Although it is clear the bill was conceived as a legislative response to *Pitchess* … as a means to regulate access to citizen complaints and disciplinary information in police personnel files (*People v. Breaux* (1991) 1 Cal.4th 281, 311-312 [3 Cal.Rptr.2d 81, 821 P.2d 585]; *County of Los Angeles v. Superior Court* (1990) 219 Cal.App.3d 1605, 1609 [269 Cal.Rptr. 187]), it is equally clear from its plain language that the bill, from the outset, was intended to create a privilege for *all* information in peace officers' personnel files." (*Hackett*, at p. 100.)

A. Privilege is Conditional – No private cause of action for release of information

The peace officer personnel record privilege is a "conditional or limited" privilege for the reason that an officer cannot prevent disclosure of his or her personnel records or of the information contained in those records simply because he or she does not desire disclosure. Where a moving party follows the statutory requirements of notice motion, etc., and is able to demonstrate to a court the requisite good cause and materiality to the subject matter in the pending litigation, the information will be disclosed. (*City of Santa Cruz, supra,* at p. 83, 260 Cal.Rptr. 520, 776 P.2d 222; *Michael v. Gates, supra,* 38 Cal.App.4th at p. 745, 45 Cal.Rptr.2d 163; *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 426-427.)

The courts have also determined that police officers have no reasonable expectation of privacy nor a private right of action for negligence or violations of state or federal privacy rights when information is disclosed by the employing agency, inadvertent or otherwise. (See, *Bradshaw v. City of Los Angeles* (1990) 221 Cal.App.3d 908, "[T]he Legislature did not by the use of the word 'confidential' in Penal Code section 832.7, subdivision (a) intend to impose upon an agency a standard of care, the violation of which could be the basis for a cause of action for negligence *per se*.") (*Bradshaw* has been disapproved on other grounds, but see also, *Rosales v. City of Los Angeles*, supra, at p. 427; *City of Hemet v. Superior Court, supra,* 37 Cal.App.4th 1411, 1430; *City of Richmond v. Superior Court, supra,* 32 Cal.App.4th 1430 – request made per California Public Records Act; *Nilson v. Layton City* (10th Cir.1995) 45 F.3d 369, 371; and *San Diego Police Officers' Assn. v. City of San Diego Civil Service Com.* (2002) 104 Cal.App.4th 275, 282 – records made public at disciplinary appeal hearing – all recognizing broad confidentiality protection for peace officer personnel records regardless of the context in which the documents are sought.) "We cannot conclude the Legislature intended to enable third parties, by invoking the CPRA, so easily to circumvent the privacy protection granted under section 832.7." (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1286.)

The privilege of confidentiality that attaches to peace officer personnel records belongs both to the officer and the employing agency. (*San Francisco Police Officers' Assn. v. Superior Court* (1988) 202 Cal.App.3d 183, 189.) It continues to attach even after an officer has retired or been terminated. In *Davis v. Sacramento,* the plaintiffs sought personnel records of a retired sheriff who was testifying as an expert for the defense. The court reasoned that as the officer's personnel records were "presumably generated while the officer is employed by the police department, they are '[r]ecords of peace officers'" within the statute and do not cease being such after the officer's retirement.

> *Practice Note: This issue arises as a challenge to your standing to resist a motion or subpoena for these records in both criminal and civil cases when an officer has retired or been terminated, is suing your agency or testifying against you. It can also arise when you are involved in employment discrimination cases involving multiple plaintiffs and defendants who are all police officers.*

Although it may seem obvious, it is important to keep in mind that what constitutes "good cause" and "materiality" in a criminal case may be quite different in a civil case. Likewise, although the two-step process is well intact, as is the requirement that the court balance the needs of the litigants with the

privacy protections of the officers, the materials that the court may consider to be relevant and released after the *in camera* hearing may be very different in a civil case. This area has not been litigated as frequently in civil cases as in criminal. An important published decision on this issue is *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, in which the court addressed the discovery of personnel records in a civil case alleging that officers used excessive force. The plaintiff sought the internal investigation reports of the incident that formed the basis of the lawsuit. The declaration of counsel in support of the motion was factually extensive. The court upheld the release of the investigation reports, finding that they were “directly relevant to the matters at issue in the lawsuit” that the plaintiff would have the burden of proving at trial, and that his counsel would need them in order to prepare effective cross-examination of defense witnesses, etc. The court expressly rejected the notion that in a civil case only the names and addresses of witnesses could be disclosed.

The court in *Haggerty* relied on the “expansive” provisions of Evidence Code sec. 1045 subdiv. (a), which provides that access to records of complaints, investigations or discipline concerning an event or transaction an officer participated in or perceived, or which pertains to how the officer performed, would not be limited, provided it is relevant to the pending litigation. Likewise, this sec. 1045 subdiv. (c) provides that where the issue in litigation concerns policies or patterns of conduct of the employing agency, the court must consider whether information sought may be obtained from other records of the agency. These provisions clearly open more of a door to discovery in civil cases. The court did confirm however, that any disclosure under these sections would still be subject to a protective order that they not be used for any other purpose.

16. Confidentiality of Peace Officer Personnel Records Under Federal Law

A. Civil

In federal cases, where the court is adjudicating federal rights (such as a case brought under 42 U.S.C. sec. 1983), the state law privileges that apply to peace officer personnel records are not recognized. “State privilege doctrine, whether derived from statutes or court decisions, is not binding on federal courts in these kinds of cases.” [citing *Kelly v. City of San Jose,* 114 F.R.D. 653, 655–56 (N.D.Cal.1987)]” *Howard v. County of San Diego* 2011 WL 2182441, 1 (S.D.Cal.) (S.D.Cal.,2011). 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, Rule 501 of the Federal Rules of Evidence, Green v. Baca 226 F.R.D. 624, 643 (C.D.Cal.,2005).)

In *Breed v. United States District Court,* 542 F.2d 1114, 1115 (9th Cir.1976), the court determined that while state law is a "useful reference point in assessing assertions of privilege in federal cases", it is not controlling. The scope of an evidentiary privilege in a section 1983 civil rights action will always be a question of federal law and the doctrine that "governmental privilege precludes disclosure of personnel records, whether or not established in California state courts, is not the law of this circuit."

There is a very good discussion in the *Kelly* case (*supra*) about how the court should address state law privileges in federal cases. While the *Pitchess* statutory scheme is not recognized as protecting the disclosure of peace officer personnel records as it is in state court, the court in *Kelly* discussed that federal courts generally should give *some weight* to privacy rights that are protected by state constitutions or state statutes. "Of course, ultimate responsibility for deciding how much weight to ascribe to such interests, and how that weight compares with the significance of competing interests, must reside with the federal courts." (*Kelly v. City of San Jose* 114 F.R.D. 653, 656 (N.D.Cal. 1987).) The *Kelly* court advocates that as there are no codified guidelines to assist the courts in addressing state law privileges such as this one, that the courts adopt a "more flexible" analysis of the privilege in order to cull out materials that should be protected from those that may not be as critical. "In other words, an important argument in favor of rejecting an absolute privilege for information gathered by police departments is that courts will be willing to consider more kinds of information as falling within the scope of the privilege (thus entitled to some level of qualified protection) if they can use a more flexible analysis thereafter to decide whether, in a given situation, a plaintiff should have access to the material." (*Kelly,* at 658.)

Practice Note: *Given the mandatory "voluntary" discovery provisions in federal law, it is advisable to first attempt to negotiate limitations on disclosure of police personnel files and an appropriate protective order with opposing counsel and if that does not work, to seek in camera review from the court and a protective order for information that is clearly not relevant to the case.*

B. Federal Criminal Cases

In criminal cases adjudicated in the federal Ninth Circuit, it is the prosecutor's duty to find out from the involved police department whether evidence material to the defense is contained in a police officer's confidential personnel file. That duty includes an examination of the files. The government must then "disclose information favorable to the defense that meets the appropriate standard of materiality. Where the prosecution may be uncertain about the materiality of information within its possession, it may submit the

information to the trial court for *in camera* inspection and evaluation." (*U.S. v. Henthorn* 931 F.2d 29, 30 -31 (C.A.9 (Cal.)1991).)

Practice Note: You may receive a call or correspondence from your area's United States Attorney requesting that they be allowed to review the files. Most if not all will agree to come to the police station to review the files, rather than require you to bring the records to them. Further, the U.S. Attorney should be consulted if you receive a subpoena for police officer personnel records in a criminal case. The Federal Rules of Criminal Procedure restrict the use of subpoenas for third party records and these subpoenas can usually be quashed.

17. Odds and Ends: Who Can Access the Records and What Information May Be Released Without Complying with Noticed Motion Requirements?

It goes without saying (although a court actually had to say it) that a city attorney who is responding to a motion for discovery of peace officer personnel records may review the records in question in order to formulate an appropriate response to the motion. In *Michael v. Gates,* (1995) 38 Cal.App.4th 737*,* the police department was sued for invasion of privacy when it turned over an officer's personnel records to the city attorney for use in a civil case in which the officer was testifying as an expert against the city. The court determined it was entirely proper for the government agency and its attorney to review files within the custody and control of that agency – to conduct a "contained and limited review " of the personnel records. "It is patent that the agency cannot make these decisions without reviewing the records … [and] the agency and its attorney are not required to go through the statutory steps of notification, motion and court order." Michael, at p. 744. [One note of concern with this case is that the court sustained objections to the city attorney's attempted use of personnel information to impeach the officer and that issue has been left unresolved.]

Likewise, city managers, assistant city managers and citizens' review boards have a right to inspect citizen complaints against a city police officer *if* they are authorized by charter, ordinance or regulation of the city to investigate such complaints , or to advise, impose or review discipline of officers – *otherwise they are not*. (71 Ops.Cal.Atty.Gen. 1.)

Penal Code § 832.7, subd. (d) authorizes disclosure of the circumstances and result of an internal investigation when an officer publicly makes false statements about such matters through an established medium of communication, such as television, radio, or a newspaper. This provision was added specifically "to level the playing field in regard to police officer records" by enabling peace officer employers to respond to false and misleading

statements made by a peace officer about the nature and extent of any disciplinary proceedings against the officer. (Sen. Com. on Criminal Procedure, Analysis of Assem. Bill No. 2176 (1995–1996 Reg. Sess.) June 25, 1996; For a very good discussion of this issue, see also the unpublished decision in *Dunn v. City of Burbank* 2011 WL 4487331, 5 (Cal.App. 2 Dist.,2011) in which the court affirmed the trial court's granting of the city's special motion to strike, pursuant to CCP § 425.16 (anti-SLAPP motion), when the plaintiff sued for invasion of privacy, defamation, negligence, and injunctive relief. The suit was brought after the City released a statement in response to the press conference held by the former officer's attorney in which he falsely represented that his client had been terminated due to his race.

In a series of recent decisions, California courts have clarified that the names, employing agencies, dates of employment and most recently, the names of officers involved in on-duty shootings are not shielded by Pen. Code § 832.7 – even though they fall within the definitions of Penal Code § 832.8 and are of course contained in a peace officer's personnel file. See *Commission on Peace Officer Standards Training v. Superior Court* (2007) 42 Cal.4th 278, 293: "[W]e do not believe that the Legislature intended that a public agency be able to shield information from public disclosure simply by placing it in a file that contains the type of information specified in section 832.8". See also *Zanone v. City of Whittier* (2008) 162 Cal.App.4th 174, 189, "to be a personnel record the complaint or investigation of a complaint must both concern an event that involved the officer as a participant or witness *and* pertain to the officer's performance of his or her duties". Most recently, in *Long Beach Peace Officers Association v. City of Long Beach* (2012 WL 375326, Cal.App. 2 Dist. Feb 07, 2012), the court rejected the argument that the names of officers involved in on-duty shootings could be shielded from public disclosure by the provisions of Penal Code section 832.7.

18. Writ of Mandate is Proper Means of Review; Abuse of Discretion Standard

A writ of mandate is the appropriate remedy for review of a trial court's discretionary decision on discovery relating to peace officer personnel records. Moreover, courts have held that writ review of an order to disclose confidential police personnel records is particularly appropriate because the protections of Penal Code § 832.7 and Evidence Code §§ 1043, 1045 are the "only protections available" to officers to safeguard the privacy of their records. (*Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 614 (citing *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 427-428)). Post-judgment appellate remedies would not be adequate to redress the erroneous disclosure of private information, and there would be no other recourse for the affected

police officers following the ordered disclosure of their confidential records. (*California Highway Patrol,* at 1018.)

A court's determination regarding materiality and good cause are reviewed *de novo* for abuse of discretion as it involves an interpretation of a legal principle or statute. (*Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 49; see also, *Fletcher, supra*, at 390-391.) A trial court will be held to have abused its discretion where it ordered disclosure even though the moving party did not satisfy the statutory requirements for discovery of officer personnel records. (*California Highway Patrol, supra,* at 1019.) (See also, *Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 392 – failure to apply established law to the facts is an abuse of discretion; *see* also *Abatti, id,* at 49 – writ review is also proper for *denial* of a Pitchess Motion.)

Practice Note: *If you are planning to seek a writ of mandate to challenge a trial court's discovery order, ask the trial court to stay its order and immediately request a copy of the transcript of the hearing – expedited if necessary. If the trial court denies a stay, you will need to file an application for a stay with the appellate court at the same time as you file the writ. There is helpful language in both the Fagan and California Highway Patrol cases referenced above to support such a stay pending review. Once the disclosure has been made, the privacy of the officer is breached. No post-judgment review can restore that.*

BIOGRAPHICAL INFORMATION

Juli Christine Scott, most recently Chief Assistant City Attorney for the City of Burbank, California, has over 33 years of experience as a municipal attorney and litigator focusing on state and federal police misconduct civil rights litigation, employment discrimination, first amendment and other constitutional claims. She recently retired from the Burbank City Attorney's office after 26 years as the police department's primary legal advisor, administrator and manager of the day to day operations of the Burbank City Attorney's office, and the City's litigation. She has defended over a thousand motions seeking discovery of police officer personnel files in criminal and civil cases in both state and federal trial and appellate courts. She continues to offer consultation services to cities and police departments throughout California.