

Guide to Understanding The Public Safety Officers Procedural Bill of Rights Act



Michael P. Baranic, Chief Legal Advisor
San Diego County Sheriff's Department

California Public Safety Officers Procedural Bill of Rights Act

THE BASICS

PSOPBRA vs. POBR vs. Peace Officer Bill of Rights

- ▶ When did the California POBR become law?
Added in 1976
- ▶ Where do I find the POBR?
Cal. Government Code §§ 3300-3313
- 14 states have laws providing for rights for peace officers;
in Congress, bills calling for a national LEOBR have been
debated for years

What is POBR?

- ▶ What is the POBR?
 - A law that specifies basic procedural rights and protections which must be afforded to all public safety officers by the agencies that employ them when the employees are subject to *investigation or discipline*.
 - What are the remedies for a violation?
 - TRO or Injunction; fine; actual damages; attorney's fees

POBR

- ▶ Who does the California POBR apply to?
- POBR applies to all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.38, 830.4, and 830.5 of the Penal Code. (See Gov. Code § 3301)

Note: Probationary peace officers – do not have right to administrative appeals of punitive actions.

California's POBR does not apply to officers not listed by statute, so federal officers are not covered.

POBR

- ▶ When do the POBR rights apply?
 - *When the peace officer employee is under investigation and subjected to interrogation that **could** lead to punitive action.*
 - Not in criminal investigations; POBR does not apply to an investigation concerned **solely** and directly with alleged criminal activities.
 - Not in normal course of duty or other routine contact with a supervisor. § 3303(i).

It Usually Starts with a Complaint...

- ▶ What is a complaint?
 - A formal accusation taken by a department from a citizen, or another employee, or a superior officer alleging a peace officer employee engaged in misconduct.
- ▶ Why do we take complaints from the public?
 - Cal Penal Code § 832.5 requires every law enforcement agency in California to establish a procedure to investigate “complaints” against peace officers made by members of the public.

“Punitive Action”

- What is a punitive action under POBR?
 - Any action that **may** lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment. § 3303
 - Note, “punitive action” under POBR is broader than what many local civil service rules refer to as “discipline” for which a hearing is available at the commission or personnel board.
 - (E.g., reprimands, transfers for punishment?)

“Interrogation”

- ▶ Is an interrogation the same as an interview?

Yes. For purposes of the POBR, the terms interview and interrogation are interchangeable.

Rights regarding Interrogation

- When can an interview / interrogation take place?

“...at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise.” § 3303(a)

Scheduling of Interrogation

- What if I can't wait until the employee comes back from days off?

“If the interrogation does occur during off-duty time of the public safety officer being interrogated, the public safety officer shall be compensated for any off-duty time in accordance with regular department procedures...” § 3303(a)

Interrogation

- Must I identify myself prior to the interrogation?

Yes.

“The public safety officer under investigation shall be informed prior to the interrogation of the rank, name, and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation.” §3303(b)

Interrogation

- How many people can ask questions during an interrogation?

TWO.

“All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time.” § 3303(b)

Interrogation

- Do I have to tell the peace officer why I am investigating them?

Yes.

“The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.” §3303(c)

Interrogation

- Am I required to give the employee bathroom breaks during the interrogation?

Yes.

“The person under interrogation shall be allowed to attend to his or her own personal physical necessities.” § 3303(d)

Interrogation

- Is it okay to promise not to discipline an employee if they answers the questions?

No.

“No promise of reward shall be made as an inducement to answering any question.” §3303(e)

Pre-interrogation discovery?

- ▶ Is an employee entitled to pre-interrogation discovery?

No.

After an interrogation, peace officers are entitled to “copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons”.

Usually only after charges and findings made.

What do they mean by reports?

- What is a disclosable report?
 - The final written report of the investigator.
- What about other reports?
 - A report originating from a criminal investigation, either by the employing public safety department or an outside agency, have to be made available where it has been expressly made part of the department's internal affairs investigation of an officer."
- What about attachments to the IA report?
 - Yes, items that are tabbed for reference in the report, such as transcripts of interviews or any other items, have to be disclosed.

What do they mean by complaints?

- What is a disclosable complaint?
 - A formal allegation against a party.

Tape Recording

- Can an interview be tape recorded?

Yes.

“The complete interrogation of a public safety officer may be recorded.” § 3303(g)

Tape Recording

- Is a peace officer entitled to a copy of the tape?

Yes.

“...the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time.” § 3303(g)

Tape Recording

- Can a peace officer bring their own tape recorder?

Yes:

“The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation.” § 3303(g)

Self Incrimination

- Do I need to “admonish” the peace officer?

Yes:

“If prior to or during the interrogation of a public safety officer it is deemed that he or she *may be charged with a criminal offense*, he or she shall be immediately informed of his or her constitutional rights” against self-incrimination. § 3303(h)

If the peace officer refuses to answer on the ground that the answers may be self incriminating, the deputy must be given a *Lybarger* warning, that he is being ordered to answer, and their statements cannot be used against him in a subsequent criminal proceeding.

Miranda, Garrity, Lybarger

Self Incrimination

- What if the peace officer refuses to answer my questions after being fully admonished?

Give a direct order to answer the questions.
If refuses to answer, then write the case for insubordination.

Employee CAN be disciplined for refusing to answer after being admonished. *Lybarger v. City of Los Angeles* 40 Cal.3d 822

Self Incrimination

- If the peace officer agrees to answer the questions after being admonished, can their answers be used against them in a criminal case?

Under almost all circumstances the answer is NO, the answers cannot be used in a criminal case against the officer because the statement is considered coerced.
Garrity v. State of New Jersey 385 U.S. 493

Representation

- Is a peace officer entitled to a representative during an interrogation?

Yes.

“...whenever an interrogation focuses on matters that are likely to result in punitive action against any public safety officer, that officer, *at his or her request*, shall have the right to be represented by a representative of his or her choice...” § 3303(i)

Representation

- ▶ If necessary can I take a 'public safety statement' before the employee talks to a representative?

Yes: However questions must be limited to public safety:

- Number and directions of rounds
- Injuries
- Witnesses
- Location and time of discharge
- Suspects
- Location of firearms/weapons

Representation

- Can you separate multiple employees involved in an incident under investigation?

Yes.

There is no right to consult with legal counsel and/or labor representatives collectively or in groups.

Association for Los Angeles Deputy Sheriffs v. County of LA (2008) 166 Cal.App.4th 1625.

Representation

- What if a representative is unavailable at the scheduled time?

The investigator should attempt to agree with the representative on a mutually agreeable time without having unreasonable delay based upon the seriousness of the offense. If canceled multiple times or necessary urgency, and representative of choice not available, set time and advise employee to seek an available representative. *Alhambra POA v. City of Alhambra* (2003) 113 Cal.App.4th 1413.

Representation

- Can a representative also be an accused in the same case?

No.

“The representative shall not be a person subject to the same investigation.” § 3303(i)

Representation

- Can a representative speak during an interrogation?

Yes.

But a representative should not be answering questions for the employee. If a representative provides information, always confirm it with the employee. *Robinson v. State Personnel* (1979) 97 Cal.App.3d 994.

Representation

- ▶ Can a representative who is a peace officer be compelled to tell what the officer has told them?
 - In non-criminal matters - **No**: “The representative shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information received from the officer under investigation for *noncriminal* matters.” § 3303(i)
 - In criminal matters - **Yes**: Peace officer representatives can be compelled to disclose.
 - Why? Peace officer first, representative second. (The accused peace officer will use a lawyer.)

Representation

- ▶ What if I just want to talk to the peace officer? Is that an interrogation requiring a representative?

No.

The sections requiring a representative do “not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer, nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities.” § 3303(i)

Temporary Reassignment

- Can I reassign a peace officer while the investigation is being conducted?

Yes.

However, “[n]o public safety officer shall be loaned or temporarily reassigned to a location or duty assignment if a sworn member of his or her department would not normally be sent to that location or would not normally be given that duty assignment under similar circumstances.” § 3303(j)

Temporary Reassignment

- **GROUP QUESTION:** Where does your agency reassign peace officers while an investigation is being conducted?

Right to Decline Lie Detector Test

- Can I give a peace officer a lie detector test?

You can offer, but “[n]o public safety officer shall be compelled to submit to a lie detector test against his or her will.” § 3307

AND

No comment shall “be entered anywhere in the investigator's notes or anywhere else that the public safety officer refused to take, or did not take, a lie detector test....” § 3307

Questions about Financial Records

- ▶ Can I ask about a peace officer's financial records during an investigation?

No: "No public safety officer shall be required or requested for purposes of job assignment or other personnel action to disclose any item of his property, income, assets, source of income, debts or personal or domestic expenditures..." § 3308

"unless such information is obtained or required under state law or proper legal procedure, tends to indicate a conflict of interest with respect to the performance of his official duties...or is necessary to ascertain the desirability of assigning the public safety officer to a specialized unit in which there is a strong possibility that bribes or other improper inducements may be offered." § 3308

Evidence Tampering

- Is it a crime to tamper with evidence in order to harm a peace officer?

Yes.

“Any person who knowingly alters, tampers with, conceals, or destroys relevant evidence in any disciplinary proceeding against a public safety officer, for the purpose of harming that public safety officer, is guilty of a misdemeanor.” Penal Code § 135.5

Confidentiality of Investigation

- ▶ Can I disclose my investigation of a peace officer to someone outside of the department?

No:

“Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed...”

Penal Code § 832.7 (Exceptions, for courts to determine). Remember this for later.

Timeliness of Investigation

- How long do I have to complete my investigation?

One Year.

“No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's *discovery by a person authorized to initiate an investigation* of the allegation of an act, omission, or other misconduct.” § 3304(d)

Timeliness of Investigation

- ▶ How long do I REALLY have to complete my investigation?
- ▶ Limited Exceptions to one year rule:
 - (A) If the allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or prosecution is pending shall toll the one-year time period.
 - (B) If the public safety officer waives the one-year time period in writing, the time period is tolled as specified.
 - (C) If the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies.
 - (D) If the investigation involves more than one employee and requires a reasonable extension. (CONT.)

Timeliness of Investigation

- ▶ More Limited Exceptions to one year rule:
 - (E) If the investigation involves an employee who is incapacitated or otherwise unavailable.
 - (F) If the investigation involves a matter in civil litigation where the public safety officer is named as a party defendant, then tolled while that civil action is pending.
 - (G) If the investigation involves a matter in criminal litigation where the complainant is a criminal defendant, then tolled during the period of that defendant's criminal investigation and prosecution.
 - (H) If the investigation involves an allegation of workers' compensation fraud on the part of the public safety officer.

Timeliness of Investigation

- ▶ Does a person authorized to initiate an investigation have to know or suspect the identity of the officer who allegedly committed the misconduct before the limitations period begins?

No. Ignorance of the accused officer's identity does not postpone the commencement of the one-year limitations period under Government Code § 3304, subdivision (d)(1). *Pedro v. City of Los Angeles* (2014) 229 Cal. App. 4th 87.

Timeliness of Proposed Discipline

- If the Department intends to impose discipline, when does the employee need to be notified?

“In the event that the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed discipline by a Letter of Intent or Notice of Adverse Action articulating the discipline” within one year.

The requirement to notify a public safety officer of proposed discipline within the year means the officer has to *receive actual notice*.

Timeliness of Order of Discipline

- When discipline is issued, when does the employee have to receive it?

Within 30 days of agency's decision.

"If ... agency decides to impose discipline, agency shall notify officer in writing of its decision to impose discipline, including the date it will be imposed, within 30 days of its decision, except if the officer is unavailable for discipline." § 3304(f)

Administrative Appeal

- What is the peace officer's right when subjected to a punitive action?
 - Peace officer must receive an "opportunity for an administrative appeal".
 - Peace officer has opportunity to:
 - Establish a formal record of the circumstance surrounding discipline;
 - Attempt to convince employing agency to reverse its decision by demonstrating the falsity of charges that led to punitive action, or proof of mitigating circumstances. § 3304

Administrative Appeal

- ▶ What type of administrative appeal is required under POBR? § 3304
 - Administrative appeal shall be conducted in conformance with rules and procedures adopted by the public agency (e.g. civil service hearing); however,
 - Where a punitive action does not impact officer's pay (e.g. reprimand or punitive transfer without pay reduction), agency may provide a hearing that does not afford the peace officer a right to confront and cross-examine witnesses.
 - Probationary employees have no appeal rights under section 3304.

Right to Administrative Appeal

Group Exercise – Is this a punitive action that provides POBR right to an administrative appeal?

1. Transfer with loss of 5% skill pay?
2. Transfer not for punishment and does not cause loss of compensation?
3. Denial of promotion based on unsatisfactory performance during probationary period?
4. Involuntary transfer for department purposes, to give officer fresh start in another unit?
5. Transfer for purposes of punishment that does not cause loss of compensation?
6. Letter of Reprimand?

POBR Rights re: Searches

- ▶ Can I search a peace officer's locker, desk or other personal space?

No. "No public safety officer shall have his locker, or other space for storage that may be assigned to him searched, except:

- If a valid search warrant has been obtained;
- where he has been notified that a search will be conducted; or
- in his presence; or
- with his consent.

Searches

- Can I order a peace officer to consent to a search of their personal car or home?

No.

No authority permits an administratively coerced search of location other than those under department control.

Los Angeles Police Protective League v. Gates (9th Cir. 1990) 907 F.2d 879.

Searches

- Can an agency drug test a peace officer employee?

MAYBE: You must follow your local agency's drug testing policy!

POBR Rights re: Political Activity

- When is a public safety officer prohibited from participation in political activities?

No public safety officer shall be prohibited from engaging in political activity:

- Except:
 - Where prohibited by law;
 - When on duty;
 - When in uniform

§ 3302

POBR Rights re: Political Activity

- Can a public safety officer be required to participate in political activities?

No public safety officer shall be coerced or required to engage in political activity.

§ 3302

POBR Rights re: Personnel Records

- ▶ Are peace officers entitled to review their own files?
 - Yes. Officer has right to inspect personnel files that are used or were used to determine qualification for employment, promotion, additional compensation or termination or other disciplinary action.
 - Officer has right to request correction or deletion of material the officer believes was mistakenly or unlawfully placed in file. Agency has 30 days to respond.
 - Officer has right to receive notice of adverse comments entered into their file and 30 days to respond.

§§ 3305-3306.

Confidentiality of Personnel Records

- ▶ Are peace officers' personnel records deemed confidential?

Some are:

- Not provided in POBR
- Rather, the laws are:
Penal Code sections 832.5 *et seq.* and
Evidence Code sections 1043 and 1045

Exceptions:

Discovery, SB 1421 and SB 16 (effective January 1, 2022)

Confidentiality of Personnel Records

Discovery of Peace Officer Records

- via *Pitchess* motions

Confidentiality of Personnel Records

SB 1421:

- Use of force involving death or GBI
- Discharge of a firearm
- Sustained finding of dishonesty relating to the reporting, investigation, prosecution of a crime or dishonesty regarding a partner of above.
- Sustained finding of sexual assault of a member of the public

Confidentiality of Personnel Records

SB 16 (effective January 1, 2022):

- Sustained finding of unreasonable or excessive force
- Sustained finding that an officer failed to intervene against another officer using force that is clearly unreasonable or excessive
- Sustained finding of prejudice or discrimination
- Sustained finding of unlawful arrest or unlawful search

Confidentiality of Personnel Records

SB 16 (effective January 1, 2022):

- Requires departments to retain:
 - Not Sustained complaints for 5 years
 - Sustained complaints for 15 years
- Requires release of records even if the peace officer employee resigns before the department's investigation is completed

Questions?

Michael P. Baranic, Legal Advisor
michael.baranic@sdsheriff.org

San Diego County Sheriff's Department
Legal Affairs Unit: (858) 974-2255