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RECENT DISTRICT ATTORNEY AND ATTORNEY GENERAL OPINIONS THAT EFFECT THE RIGHTS OF PEACE OFFICERS

DISTRICT ATTORNEY'S OFFICE GREATLY LIMITS THE CIRCUMSTANCES UNDER WHICH REQUESTS FOR PUBLIC RECORDS WILL BE GRANTED, WHILE THE ATTORNEY GENERAL'S OFFICE EFFECTIVELY MAKES THE MARITAL PRIVILEGE INAPPLICABLE TO PEACE OFFICERS

By
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Two recent opinions issued by the District Attorney's and Attorney General's offices provide important interpretations into areas which have a significant impact on peace officers' ability to provide as strong a legal defense as possible on their behalf and upon their marital communications.

Opinions of both the District Attorney ("D.A.") and the Attorney General ("A.G.") are not binding in the sense that a trial court is expected to follow the rule set forth, as would be the case with a published decision of an appellate court. However, A.G. opinions are said to be "persuasive authority" insofar as they interpret a provision of California law.

Public Records Request:

Given this persuasive effect, Los Angeles District Attorney Steve Cooley addressed the issue of requests for public records in a recent publication. Mr. Cooley addressed this issue asking whether a prosecutor may produce records with respect to five common disclosure requests:

1. Whether a recently charged or soon-to-be charged defendant is currently on probation or parole, and details of his or her prior offenses;

2. An individual's criminal history in the county, including all arrests and case dispositions;

3. The disposition of matters referred to the district attorney for filing of criminal charges;

4. Criminal histories associated with a requested list of cases in which a specified witness has testified; and

5. Numerous criminal histories associated with a request for names and identities of all defendants charged with a specific kind of crime over a period of years.

Ultimately Mr. Cooley reached the conclusion that disclosure is not permitted regarding any of the requests listed above. The lone exception is where certain limited disclosures of current information derived from records in the prosecutors' file under circumstances (1) and (3) are required. In reaching his conclusion, Mr. Cooley points to statutory and case law governing such disclosures while providing a cursory analysis of how to resolve the conflict of two statutory schemes: the Public Records Act (Gov. Code §§ 6250-6276.48), which adheres to the theory that public access to information is a fundamental right, and Penal Code §§ 13300-13305, which seeks to protect against unwarranted public intrusion into matters personal and sensitive in nature.

Under the Public Records Act, most records of state and local public agencies are subject to public disclosure, unless the records are exempt. Exemptions to disclosure are to be narrowly drawn, as required by subdivision (b) to § 3 of Article I of the Constitution.[1]

Exemptions that would be valid include those where disclosure of records would interfere with an ongoing investigation or would create a safety risk to investigators. Examination into whether such an exemption would apply would naturally be determined on a case-by-case basis because not one of the five circumstances examined in his publication creates a per se exemption to the Public Records Act.

While admitting that the District Attorney's office is a "local agency" and subject to both schemes, Mr. Cooley points out a local agency retains discretion to produce local criminal history information for inspection or copying. It is argued that the legislature's intent when constructing the Penal Code was to make non-disclosure the general rule. In these circumstances the privacy concerns of those whose records are sought are considered exceptional and these individuals have not consented to release of their records. Under this approach, information

[1] West's Ann. Cal. Const. Art. 1, § 3(a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good. (b)(1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

making up a person's local criminal history information may not be disclosed. This restriction has been codified in the form of a series of exemptions from disclosure.

Additionally it may be presumed that Penal Code § 13302, which makes it a misdemeanor to disclose information to an unauthorized person, factored heavily into Mr. Cooley's determination.[2] The potential imposition of misdemeanor charges has the effect of chilling exercise of the local agencies proposed "discretion."

Following is a breakdown of Mr. Cooley's justification for barring disclosure in each of the five requests detailed above.

1. Whether a recently charged or soon-to-be charged defendant is currently on probation or parole, and details of his or her prior offenses.

Because this information is part of one's local criminal history, it may not be disclosed. The exception to this restriction is when the DA's office arrests the person and the request is for current information. In this scenario, certain current information must be made available to the public (i.e., parole or probation holds upon which the individual is being held).

2. An individual's criminal history in the county, including all arrests and case dispositions.

This request for "rapsheets" is barred and neither the record nor information derived from the record may be disclosed, except to authorized recipients. This determination is meant to extend to other sources to prohibit circumvention of the prohibition.

3. The disposition of matters referred to the district attorney for filing of criminal charges.

Again, disclosure with this type of request is limited to information on current matters and that disclosures may include the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response. Requests for information concerning previous complaints or requests for assistance are not subject to disclosure. This information includes matters referred to the DA for filing and the disposition of such referrals. Disclosure of the records sought are restricted to authorized persons per Penal Code §§ 13301(b).[3]

4. Criminal histories associated with a requested list of cases in which a specified witness has testified.

These requests are similar to those for rap sheets and are barred on the theory that disclosure compromises the privacy interest of the person whose records are subject to disclosure and who has not consented to the disclosure. Again, disclosure is limited to

[2] West's Ann. Cal. Penal Code § 13302. Any employee of the local criminal justice agency who knowingly furnishes a record or information obtained from a record to a person who is not authorized by law to receive the record or information is guilty of a misdemeanor.

[3] West's Ann. Cal. Penal Code § 13301(b) "A person authorized by law to receive a record" means any person or public agency authorized by a court, statute, or decisional law to receive a record.

authorized persons under Penal Code §§ 13301(b).

5. Numerous criminal histories associated with a request for names and identities of all defendants charged with a specific kind of crime over a period of years.

Because of the historical nature of the request, disclosure will be barred. The exception is if disclosure is strictly limited to support statistical analysis, provided that the identity of the subject of the record is not disclosed. Penal Code § 13300(h).[4]

<u>What This Means To You</u>:

Given the conclusions reached by District Attorney Cooley, inquiry into the underlying motivations supporting each is worthwhile. While Mr. Cooley discusses the importance of protecting the privacy interest of the persons who are the subject of the records sought, there is certainly an issue of bias and conflict of interest given Mr. Cooley's position in the District Attorney's office. Could the interest of a district attorney in not wanting to provide potentially damaging records to an accused be a substantial factor here?

Additionally, it appears as though Mr. Cooley's position would completely water down the rights provided for under the Public Records Act. Certainly the legislature did not intend for the public to be limited to access to town hall meeting minutes. In closing, it appears the current interpretation of statutory authority and case law favors restrictive disclosure of public records with nothing short of a showing of compelling public necessity to warrant such a production.

<u>Marital Privilege</u>:

In an opinion dated October 12, 2006, California Attorney General Bill Lockyer issued Opinion 05-903. This opinion was created in response to an inquiry by Mike Kanalakis, Sheriff of Monterey County, requesting an opinion on three questions pertaining to the marital privilege permitting a person to refrain from making statements that may adversely represent their spouse. Following are the A.G.'s conclusions with respect to each of the questions posed:

1. The privilege for marital communications does not apply when a married officer is interrogated in an IA investigation.

2. If a married officer asserts the privilege and refuses a direct order to answer questions in conflict with the privilege, the law enforcement agency may take disciplinary action.

3. **If a peace officer discloses information otherwise confidential under the privilege to avoid discipline and the spouse is disciplined and challenges that agency's actions, the agency may introduce the officer's disclosed marital communications when the officer asserts the privilege at trial.**

[4] West's Ann. Cal. Penal Code § 13300(h). It is not a violation of this article to disseminate statistical or research information obtained from a record, provided that the identity of the subject of the record is not disclosed.

Reasoning Behind The Opinion:

The Attorney General begins his argument by citing support for the contention that there is no general privilege to withhold information, unless provided by statute. The martial privilege statute is then cited along with its justification "to promote respect for privacy and harmony within marital relationships."

1. The Attorney General mentions that the marital privilege under Evidence Code § 980 imposes few restrictions, but decides that this privilege applies only in "proceedings." The basis for this is section 910 which states that, "except as otherwise provided by statute, the provisions of sections 900-1070 apply in all proceedings." Application to "all proceedings" effectively serves to limit the privilege, according to the Attorney General. However, section 910 is a general inclusionary statute that only serves to make the privileges included in the Penal Code applicable to proceedings. Nowhere within section 910 is application limited to proceedings. Additionally, it is reasoned that, while a proceeding is deemed to include investigations and other actions where, pursuant to law, testimony can be compelled, Internal Affairs ("IA") interrogations cannot compel statements in the sense intended. The officer may elect not to disclose information, and will only be subjected to agency discipline.

The Attorney General did not address how this holding places officers in a position to choose between their spouses or jobs and the "blackmail" connotation implicit in this choice.

Finally, the Attorney General differentiates the IA proceeding from other proceedings subject to the marital privilege on the basis that an IA interrogation is without subpoena power and the justification for providing the privilege (immunity against contempt sanction) does not apply here.

Again, this argument does not deal with the manner which the information is being sought, nor does it address any of the policy concerns for that the marital privilege was enacted to protect.

2. The justification for permitting a law enforcement agency to discipline an officer for electing not to follow a direct order to answer IA questions on the basis of marital privilege, is based entirely upon the *Pasadena Police Officers Assn v. City of Pasadena* case, despite that case's focus on the issue of self-incrimination.[5] *Pasadena Police Officers Assn. v. City of Pasadena*, 51 Cal. 3d 564 (1990).

While the justification for imposing discipline is applicable when an officer seeks to disclose information for his own personal benefit and there exists no threat of criminal prosecution, the Attorney General does not attempt to reason why this justification should apply when a genuine fear of criminal sanction against the police officer's spouse exists.

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[5]The Pasadena P.O.A. case involved an attempt by the P.OA. and an officer also under investigation to enjoin the police department from proceeding with their interrogation of the officer until the department disclosed to the officer notes of an interview with another officer.

The majority opinion of the California Supreme Court indicated that among the tools vested in an investigative agency in its efforts to seek the truth is the power to order the accused officer to answer questions under the threat of discipline.

3. Finally, the issue of admitting into evidence the officer's statements, made under threat of discipline, and where the officer refuses to testify at his spouse's disciplinary proceeding, is resolved on the basis that the proceeding stems from the IA investigation. If the reviewing body were unable to examine the officer's statements, it would be unable fairly to evaluate the justifications for the appropriateness of the action.

What This Means To You:

Under this holding, the compulsion to provide information necessary to achieve informed adjudication trumps the statutory privileges and the legislature's interest in promoting respect for privacy and harmony in marital relationships. This holding effectively allows law enforcement agencies to circumvent the marital privilege by permitting information relating to a spouse's actions to be brought in through IA's administrative power. The message sent by this rendering is that law enforcement agencies may require disclosure of any matter where discipline may be handed down upon an officer. Broadly interpreted, law enforcement agencies may compel disclosure of any aspect of the officer's life, including his marital relations. If the peace officer chooses not to disclose marital communications, that is fine with the Attorney General, so long as the officer is willing to risk losing his career over it.
If you have any questions, feel free to call us at (626) 683-5600.

Stay Safe!

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Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 27 years, following 13 years as a police officer, supervisor and police attorney.