

## The Role of *Pitchess* Discovery in Non-Criminal Actions

By

Sierra J. Spitzer, Esq.

Schwartz Semerdjian Ballard & Cauley LLP

In *Brown v. Valverde* (2010) 183 Cal.App.4th 1531, the First District Court of Appeal examined the issue of whether in a Department of Motor Vehicles (“DMV”) administrative per se hearing, a driver, facing license suspension following an arrest for driving under the influence, could seek discovery of confidential peace officer personnel records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal. 3d 531 (“*Pitchess*”) and its statutory codifications. The Superior Court concluded the driver could use the *Pitchess* discovery process and issued a writ of mandate directing the administrative officer to hear the motion.

The Court of Appeal, however, disagreed and reversed the ruling, concluding that the *Pitchess* procedure has no place in an administrative hearing. In reaching its decision, the Court of Appeal examined the two statutory schemes at issue: the DMV administrative per se law (Veh.Code, §§13350 *et seq.*) and what has become known as *Pitchess* discovery (Evidence Code §§1043, 1045 and Penal Code §§832.7, 832.8).

### **DMV Administrative Per Se Law**

Under the administrative per se law, the DMV must immediately suspend the driver's license of a person who is driving with .08% or more blood alcohol content. The procedure is called “administrative per se” because it does not impose criminal penalties, but simply suspends a person's driver's license as an administrative matter. The legislative purpose behind such administrative suspension is to act quickly to revoke the driving privilege of persons driving while intoxicated and to get them off the road. This was deemed necessary due to the time lag that often occurs between an arrest and a conviction for drunk driving.

### ***Pitchess* Discovery**

In *Pitchess, supra*, the Supreme Court held that a criminal defendant who is being prosecuted for battery on a peace officer is entitled to discovery of personnel records to show that the officer had a history of using excessive force and that defendant acted in self-defense. *Id.* at 535–537. Following the *Pitchess* decision, concerns were raised by criminal defendants that law enforcement agencies were destroying records to protect the privacy of officers whose personnel files contained potentially damaging information. *City of Los Angeles v. Superior Court* (2003) 111 Cal.App.4th 883, 889. At the same time, concerns were expressed by law officers that defendants would simply abuse the *Pitchess* discovery as a way to conduct fishing expeditions into the personnel files of their arresting officer. *San Francisco Police Officers' Assn. v. Superior Court* (1988) 202 Cal.App.3d 183, 189–190.

In order to address concerns on both sides, in 1978, the California Legislature enacted Evidence Code §§1043 and 1045 and Penal Code §§832.7 and 832.8 which codified specific privileges and procedures for *Pitchess* motions. *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81. In particular, Evidence Code §1043 requires a written motion and notice to the governmental agency which has custody of the records sought. The motion must include a description of the

type of records or information sought and affidavits showing “good cause” for the discovery or disclosure sought and setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that such governmental agency identified has such records or information from such records.

Once good cause for discovery has been established, the court then does an *in camera* review of the information and excludes from disclosure several enumerated categories of information, including: (1) complaints more than five years old, (2) the “conclusions of any officer investigating a complaint ...” and (3) facts which are “so remote as to make disclosure of little or no practical benefit.” Evidence Code §1045, subd. (b). Evidence Code §1045 also establishes general criteria to guide the court's determination and insure that the privacy interests of the officers subject to the motion are protected. When the issue in litigation concerns the policies or pattern of conduct of the employing agency, the statute requires that the court examine whether the information sought can be obtained from other records thus obviating the need for disclosure of personnel records. The law further authorizes the court, in its discretion, to make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression. As a result of these many safeguards, the information yielded from *Pitchess* discovery is still rather limited in scope.

In *Brown v. Valverde, supra*, Brown was stopped by CHP officer after exhibiting signs of impairment while driving. The officer could smell alcohol emanating from the car, Brown admitted he had been drinking earlier and failed several field sobriety tests. He was arrested for driving under the influence. Testing at the CHP office showed his blood alcohol content to be over .08. Brown was then served with a notice of order of suspension of license for 30 days and was told that he could challenge the suspension by timely requesting an administrative per se hearing. Brown challenged. At the administrative hearing, the DMV found that the officer had probable cause to initiate the stop and had made a lawful arrest. The DMV then issued a one year suspension of Brown's license due to a prior drunk driving conviction. Brown challenged this decision and also filed a *Pitchess* motion seeking discovery of the officer's personnel records regarding complaints filed against the officer for conducting illegal traffic stops and detentions, effecting illegal arrests, testifying falsely in court or administrative proceedings, etc. He also sought records of discipline imposed on the officer as a result of any such complaints. Brown argued that good cause existed for disclosure of such information because it would be relevant to the officer's credibility in opposing Brown's contentions that the officer had fabricated evidence regarding the circumstances of Brown's arrest that night.

The CHP opposed Brown's motion arguing that only a court of law, rather than an administrative tribunal, had the authority to rule on a *Pitchess* motion. After considering the submissions from both sides, the administrative hearing officer denied Brown's *Pitchess* motion. Brown quickly followed up by petitioning the superior court for a writ of administrative mandamus directing the hearing officer to grant the *Pitchess* motion and order the production of the officer's personnel records. The superior court granted the petition, finding that the administrative body did in fact have the authority to rule on a *Pitchess* motion and ordered the DMV to conduct a hearing on Brown's motion. The DMV filed a timely appeal of this decision.

In considering the issue of whether a *Pitchess* motion is available in a DMV administrative per se hearing, the appellate court examined the rules of statutory construction set forth in *MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076. Applying this three-step process to the *Brown* case, the appellate court first looked at the procedures governing discovery in a DMV administrative hearing to ascertain whether there was evidence of a legislative intent to allow a driver facing suspension to file a *Pitchess* motion as a means of discovery. After considering the rules regarding evidence at this type of hearing, the court found that an officer's personnel records were not listed among the evidence that a DMV hearing officer is to consider in such proceeding. Further, such administrative hearings are specifically governed by the Administrative Procedures Act and Government Code, and discovery in these hearings is intentionally meant to be conducted on a more expedited and limited basis than in civil matters.

Examining the second prong, the court found that the legislative history suggested that the Legislature did not intend *Pitchess* discovery to extend to administrative per se hearings. The *Pitchess* decision recognized a criminal defendant's right to discovery of an officer's personnel records to support a claim of self defense to charges of assault on an officer. The Legislature responded to concerns raised about this decision (i.e. law enforcement agencies shredding records to prevent discovery and defendants abusing the discovery process) by specifically codifying the *Pitchess* discovery process. In other words, the legislative history of the *Pitchess* process indicates that it was intended to detail procedures for obtaining discovery of law enforcement personnel records in cases involving allegations of excessive force only, and there is no indication that the Legislature intended to increase the scope of *Pitchess* discovery to include discovery of law enforcement personnel records in every proceeding—criminal, civil, or administrative—when the moving party claims the records are relevant to any issue, such as the officer's credibility.

Finally, looking at the third step of the process, the appellate court applied reason, practicality and common sense to the language at hand. The fundamental purpose of the DMV administrative per se hearing is to provide a "swift and certain" procedure (*Bell v. Department of Motor Vehicles* (1992) 11 Cal.App.4th 304, 312) to "quickly" suspend the license of a person suspected of drunk driving. *Gikas v. Zolin* (1993) 6 Cal.4th 841, 847. Therefore, permitting *Pitchess* discovery, which is an involved and somewhat elongated process, in such a hearing would be defeat this purpose.

Thus, after using the three-step *MacIsaac* process to analyze the statutory language controlling *Pitchess* discovery, the appellate court concluded that the Legislature did not intend for the *Pitchess* process to be applied in the context of administrative per se hearings and reversed the granting of *Brown's* writ by the superior court. The matter was then remanded to the DMV for completion of the administrative per se hearing on the issue of suspending *Brown's* license.

The Court's ruling in *Brown v. Valverde, supra*, limiting the use of the *Pitchess* discovery process to certain types of proceedings raises an interesting question for all civil matters involving peace officers, e.g., employment matters involving one peace officer against another or a former peace officer against an employing agency, etc. A number of questions remain about the intended scope of *Pitchess* discovery in the broader context of civil litigation. *Brown v.*

*Valverde* also suggests the need for further clarification from the Legislature regarding when and how *Pitchess* discovery can or should be applied in different types of matters or if its reach should in fact be limited to criminal cases involving use of excessive force.