

CALIFORNIA DEPARTMENT OF JUSTICE
NOTICE OF PROPOSED RULEMAKING ACTION

TITLE 11. LAW
DIVISION 1. ATTORNEY GENERAL

(Notice to be Published on May 10, 2019)

Notice is hereby given that the Department of Justice (Department) proposes to adopt sections 770 through 775.8 of Title 11, Division 1, Chapter 7.6, of the California Code of Regulations (CCR), concerning the Fair and Accurate Governance of Shared Gang Database Systems, pursuant to the authority provided in Penal Code section 186.36.

PUBLIC HEARING

The Department will hold two public hearings to receive public comments on the proposed regulatory action, as follows:

Date: June 26, 2019
Time: 9:00 a.m. – 1:00 p.m.
Location: Office of the Attorney General
300 South Spring Street
Los Angeles, CA 90013

This auditorium is wheelchair accessible. There is no designated parking lot. Parking will need to be found nearby.

Date: June 27, 2019
Time: 9:00 a.m. – 12:00 p.m.
Location: Ziggurat Building
707 3rd Street
West Sacramento, CA 95605

This auditorium is wheelchair accessible. Parking will be available for a fee in the structure next to the building.

At either of these hearings, any person may present oral or written comments regarding the proposed regulatory action. The Department requests, but does not require, that persons who make oral comments at the hearing also submit a written copy of their testimony.

WRITTEN COMMENT PERIOD

The public comment period for this regulatory action will begin on May 10, 2019. Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Department. The written comment period closes at 5:00 p.m. on June 25, 2019. Only comments received by the Department by that time will be considered. Written comments shall be submitted to:

Shayna Rivera, CalGang Unit Manager
Bureau of Criminal Identification and Investigative Services
California Justice Information Services Division
4949 Broadway
Sacramento, CA 95820
Email: gangdatabaseGDTAC@doj.ca.gov

Or

Thomas Bierfreund, Associate Governmental Program Analyst
Bureau of Criminal Identification and Investigative Services
California Justice Information Services Division
4949 Broadway
Sacramento, CA 95820
Email: gangdatabaseGDTAC@doj.ca.gov

Please note that under the California Public Records Act (Gov. Code, § 6250 et seq.), written and oral comments, attachments, and associated contact information (e.g., address, phone, email, etc.) become part of the public record and can be released to the public upon request.

AUTHORITY AND REFERENCE

Subdivisions (k), (l), and (q) of Penal Code section 186.36 authorize the Department to adopt proposed regulations sections 770 to 775.8. The proposed regulatory action will implement, interpret, and make specific the provisions of Penal Code sections 186.34, 186.35, and 186.36 as they relate to any shared gang databases in California, other than the CalGang database, in which California law enforcement agencies participate (shared gang databases).

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Background:

The CalGang database, a shared gang intelligence database, is designed to enhance officer safety and improve the efficiency of criminal investigations by providing an electronically-generated base of statewide gang-related intelligence information. Since the inception of the CalGang database in 1996, local law enforcement has entered intelligence data into the system for the purpose of cross-jurisdictional information sharing.

In 2016, the California State Auditor's Office (State Auditor) determined that the CalGang database and, by extension, shared gang databases needed a different oversight structure to ensure that the information within the database was reliable and all users adhered to requirements that protected a person's rights. The State Auditor recommended that the California Legislature adopt state law assigning the Department responsibility for oversight of the CalGang database and defining the requirements under which the CalGang database shall operate, such as periodic record reviews. At the time the State Auditor performed the audit, maintenance of the database was funded by the Department but the database was governed by uncodified policies and

procedures and two informal committees made up of representatives from law enforcement agencies that functioned independently from the state.

Upon release of the State Auditor's report, the Department began working with the law enforcement users of the database to resolve the issues brought to light. This resulted in many positive and critical changes, including the following:

- Enactment of technical mechanisms to prevent children under the age of 10 from being entered into the database and ensure that records are automatically purged at the end of the five-year retention period.
- Posting of information on the Attorney General's website in an effort to provide more transparency.
- Implementation of new user policies, such as requiring new user agreements every two years, password resets on a regular basis, and account deactivation after 180 days of non-use and upon a change in employment status; mandatory online recertification training every two years; and mandatory standardized training.
- Improvement of auditing protocol and review of records by the appropriate supervisory classification.

As a result of the State Auditor's report, the California Legislature introduced Assembly Bill (AB) 90 (Stats. 2017, Ch. 695), which chaptered in October 2017. AB 90 requires the Department to promulgate regulations governing the use, operation, and oversight of shared gang databases, including, among other things, establishing the requirements for entering and reviewing gang designations, the retention period for listed gangs, and the criteria for identifying gang members. Moreover, AB 90 requires the Department to establish the Gang Database Technical Advisory Committee (GDTAC) with specified members to advise the Department in promulgating regulations for the specific purposes of governing the use, operation, and oversight of shared gang databases. For shared gang databases specifically, AB 90 requires the Department to promulgate regulations to provide for system integrity of a shared gang database, require all users of a shared gang database to undergo comprehensive and standardized training on the use of a shared gang database and related policies and procedures, ensure that proper criteria are established for supervisory reviews of all shared gang database entries and regular reviews of records entered into a shared gang database, establish reasonable measures to be taken to locate equipment related to the operation of a shared gang database in a secure area, require user agencies to notify the Department of any missing equipment that could potentially compromise a shared gang database, limit access to a shared gang database, ensure that records contained in a shared gang database are not disclosed for specified purposes. It also requires the regulations to establish policies and procedures for entering, reviewing, and purging documentation; criteria for designating a person as a gang member or gang associate; retention periods for information contained in a shared gang database; criteria for designating an organization as a criminal street gang; policies and procedures for sending a notice to a person who will be designated in a shared gang database; policies and procedures for responding to an information request, request for removal, or petition for removal from a shared gang database; and policies and procedures for sharing information from a shared gang database with a federal or out-of-state agencies.

In response to AB 90, the Department has drafted two chapters of proposed regulations -one pertains to the governance of the CalGang database, whereas the other, proposed in a separate

rulemaking file, governs shared gang databases. Presently, the Department has determined that the CalGang database is the only shared gang database to exist in the state of California. Hence, the Department wrote two chapters so that it could clearly distinguish the regulations for the only existing shared gang database, the CalGang database, from those that will govern shared gang databases that may arise in the future.

The Department is committed to continuously working to improve the effectiveness of any shared gang database in California, balancing the need of law enforcement users, and at the same time protecting individual's rights. Even after the regulations are adopted, the Department will continue collecting data and conducting empirical research to evaluate the effectiveness of the CalGang and any other shared gang database. The Department will engage in a separate rulemaking process upon the conclusion of the empirical research to further bolster the oversight of the CalGang and any other shared gang database and to enhance the quality and integrity of the data.

Effect of the Proposed Rulemaking:

The proposed regulations codify and update existing policies and procedures governing the CalGang database, which, as noted, is currently the only shared gang database in California, and provide significant changes to previous guidelines for entry of data into the CalGang database. Specifically, the regulations increase the minimum age for entry into the database, make the criteria for designating an individual as a gang member or associate more robust, and limit the circumstances when a tattoo may be used as a way to designate an individual as a gang member or associate. In addition, they expand training requirements to address best practices for gathering criminal intelligence, how to mitigate the entry and release of inaccurate data, implicit bias, and the negative impact of releasing data for unauthorized purposes. They implement the requirement that an individual be notified of his or her inclusion in a shared gang database. They increase the number of required audits of records in a shared gang database both for individuals and gangs and implement an audit requirement in relation to proxy queries. Lastly, these regulations require user agencies to include additional justification when utilizing specific criteria for entry into a shared gang database and maintain source documentation and other pertinent information for specified periods of time.

Proposed California Code of Regulations, Title 11, Division 1, Chapter 7.6, interprets and details the specifics of these laws as follows:

Article 1 specifies the title and scope of the new chapter, which is to govern the policies and procedures of shared gang databases.

Article 2 defines the terms used throughout the new chapter.

Article 3 specifies who may have access to a shared gang database and the process and requirements for gaining access. It also specifies the responsibilities of System Administrators in handling requests from an out-of-state or federal agency for access to shared gang database records, and specifies the purpose for which shared gang database records may be used by an out-of-state or federal agency. It further specifies the process by which a non-user may request a proxy query for information contained within a shared gang database, and when information from a shared gang database may be disseminated to non-users.

Article 4 relates to user training. It requires users to take a certification exam prior to utilizing a shared gang database and a recertification exam once every two years.

It also specifies the requirements for becoming an approved shared gang database instructor.

Article 5 specifies the standard and criteria for entry into a shared gang database as a gang member or gang associate, including the minimum age of entry.

Article 6 requires supervisory review of data entered into a shared gang database and establishes a process for deleting records from the database. It also specifies that the user agency must engage with other user agencies that have entered additional information related to the record to be deleted prior to deleting it.

Article 7 specifies the means by which a person may be notified of his or her inclusion in a shared gang database, the components that must and may be included in the notification, guidance for determining when the notification requirement has been met, and requirements for documenting that the notice has been sent.

Article 8 relates to information requests. It establishes that user agencies may develop a form for the purpose of verifying the identity of an individual who wants to request information regarding his or her designation in a shared gang database. It establishes the requirements for responding to a request for information regarding an individual's designation in a shared gang database, as well as the components that must be included in an agency's response. It also specifies that an agency must respond to a request from an individual seeking removal from a shared gang database.

Article 9 establishes the length of time that records in a shared gang database must be retained, including when the retention period may be reset. It establishes the length of time that notifications sent to individuals prior to their inclusion in a shared gang database must be retained. It establishes the length of time that requests for information regarding an individual's designation in a shared gang database and the associated responses must be retained. It also specifies who is responsible for maintaining source documents related to information entered into a shared gang database and requirements for removing criteria for which supporting source documents are missing or incomplete.

Article 10 establishes requirements for System Administrator audits of shared gang database records, including frequency and substance of the audits. It establishes requirements for auditing criminal street gangs designated in a shared gang database, including who is responsible for conducting them and frequency and substance of the audits. It establishes the Department's authority to conduct audits of records in a shared gang database.

Article 11 specifies restrictions for the sharing of information contained in a shared gang database.

Article 12 relates to system security. It specifies the requirements for storing equipment that transmits or receives shared gang database information and any associated printouts. It specifies that the Department must be granted access to any such equipment to ensure compliance with the

storage requirements. It establishes notification requirements for any missing equipment that could compromise the confidentiality and security of a shared gang database. It also specifies the requirements for investigating and reporting any potential misuse of a shared gang database or the information contained therein.

Article 13 specifies the actions that may be taken by a System Administrator against a user who violates any statute or regulation governing a shared gang database.

Comparable Federal Regulations:

Penal Code section 186.36, subdivision (m) requires that the CalGang database operate in compliance with Code of Federal Regulations, Title 28, Part 23 governing criminal intelligence systems operating policies. This regulation is consistent with those federal regulations.

Anticipated Benefits of the Proposed Regulations:

The objective of the proposed rulemaking action is to clarify the requirements of the Fair and Accurate Gang Database Act of 2017 (Act), as outlined in Penal Code sections 186.34 through 186.36, inclusive. The Act, and these regulations by extension, are meant to ensure that information contained in shared gang databases is controlled, substantiated, and safeguarded.

The Department anticipates that these regulations will benefit the health and welfare of California residents because they will protect the integrity of shared gang databases and the information contained therein. By detailing the requirements for access and use, these regulations will ensure that the information in shared gang databases is only used to direct users to the law enforcement agency who entered it, and not in court proceedings or for housing, employment, or immigration purposes. They will also provide as much transparency as possible to the public, implement safeguards against entry of unsupported records into a shared gang database, and provide a system of checks and balances in the form of increased auditing by both peers and the Department.

Evaluation of Inconsistency/Incompatibility with Existing State Regulations:

Pursuant to Government Code section 11346.5, subdivision (a)(3)(D), the Department shall evaluate whether the proposed regulations are inconsistent or incompatible with existing state regulations. Pursuant to this evaluation, the Department has reviewed existing regulations in the California Code of Regulations and has determined that no other regulations address criminal intelligence information or shared gang databases. Hence, these proposed regulations are not inconsistent or incompatible with existing state regulations. This determination is based on the fact that the proposed regulations specify new legislation that was enacted recently and are unconnected to any previous regulations.

Documents Incorporated by Reference:

None.

Mandated by Federal Law or Regulations:

The proposed regulations are not mandated by federal law or regulations.

Other Statutory Requirements:

Penal Code section 186.36 requires the Department to obtain the advice of GDTAC when promulgating regulations governing shared gang databases in California (Pen. Code, § 186.36, subds. (k), (n) and (o).) The Department worked closely with GDTAC in drafting these regulations. In 2018, GDTAC held five public meetings throughout the state to consider, discuss and receive public input on the regulations.

DISCLOSURES REGARDING THE PROPOSED REGULATION

The Department has made the following initial determinations:

Mandate on Local Agencies and School Districts: None.

Cost or Savings to Any State Agency: These regulations could result in additional costs to State government, specifically the Department, of approximately \$2,431,000. The Department received an ongoing appropriation and position authority for 11.0 new positions, beginning in the Fiscal Year 2017-2018, in relation to an audit conducted by the California State Audit regarding the CalGang database and Assembly Bill 90 (2017), which requires the CalGang regulations. This appropriation, based on input from the Department, was designed to enable the Department to address the following areas of responsibility:

- Drafting regulations to establish parameters for usage, data governance, etc.
- Providing administrative support to the technical advisory committee.
- Overseeing the review of the approximately 200,000 individual records currently in the system.
- Developing marketing materials such as Information Bulletins to increase both agency usage and knowledge and understanding of regulations.
- Developing, implementing, and maintaining training and audits.
- Conducting system user outreach to discuss enhancements and additional features to better meet agency needs.
- Creating and publishing quarterly and annual reports.
- Ensuring implementation of audit recommendations and legislative mandates.
- Building safeguards to protect against entry of incomplete and unverified records, as well as those for which criteria for entry has not been met.
- Ensuring that individuals are notified prior to being designated in the CalGang system.
- Generating relevant CalGang statistics.
- Facilitating coordination between the California Gang Node Advisory Committee, technical advisory committee, and technical and administrative teams within the Department, as well as all associated meeting.

In developing the regulations, the Department has determined that it will need one Associate Governmental Program Analyst (AGPA) in addition to the resources already appropriated. The AGPA is needed to address the expanded audit and training responsibilities of the Department, as outlined in these regulations. There are currently three positions dedicated to performing the

administrative functions outlined above; however, the demand for training has exceeded their capabilities, as has the need to conduct back-end audits of new and existing data within the CalGang database.

Cost to Any Local Agency or School District Which Must Be Reimbursed in Accordance with Government Code Sections 17500 through 17630: The Department has determined that the proposed regulatory action could result in additional approximate costs to local agencies ranging from \$2,395,100 to \$4,082,600 in the current State Fiscal Year which are reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and sections 17500 et seq. of the Government Code. However, it is difficult to approximate the potential fiscal effect these proposed changes may have, due to the fact that participation would be voluntary and there the CalGang database is currently the only shared gang database in California. It is unknown how many, if any, California law enforcement agencies would choose to participate if a shared gang database other than the CalGang database was created. As of April 4, 2019, there 187 user agencies participating in the CalGang database. The Department is using this number to estimate potential costs to local agencies that may result if a new shared gang database was created.

Such agencies could incur costs as a result of some of the requirements outlined in these regulations, most of which would be related to staff time. For example, agencies that want to begin participating in the CalGang database would be required to designate a point of contact. This individual would be responsible for facilitating training, retrieving source documents, and updating CalGang records, as necessary. The extent of the staff time that would need to be dedicated to this role would depend on the number of individuals who will require direct access to the CalGang database and the records therein, the level of suspected gang activity in the area, and the level of participation in the database, among other factors. The Department estimates that these activities would occupy no more than 10% of the designated individual's time. Many of the existing users of the CalGang database are employed at the Detective classification, so the Department is using that as the basis for estimating the cost of additional staff hours. According to the California Employment Development Department, the median salary for a Detective in California was approximately \$98,000 annually, or \$47 hourly, in 2018 (Retrieved April 26, 2019, from <https://www.labormarketinfo.edd.ca.gov/OccGuides/Detail.aspx?Soccode=333021&Geography=0604000073>). Assuming the responsibility would be assigned to a Detective, the Department estimates that a new user agency could incur a cost of approximately \$9,800 annually for the performance of the point-of-contact duties. This would result in local agencies incurring a cost of \$1,832,600 annually.

Pursuant to Penal Code section 186.36, any individual with access to the CalGang database or the records contained therein are required to undergo the comprehensive training. The Department estimates that required training hours could range from four to 16, depending on the method of instruction and length of each component instituted by the System Administrator. Based on the number of existing user agencies (187) and active users (3,000) of the CalGang database, the Department estimates that approximate 16 individuals per new user agency would need to participate in training. The Department estimates that local agencies could incur approximate costs ranging from \$562,500 to \$2,250,000 in staff time as a result of attending training.

As noted above, the training is typically provided by node or user agencies; however, the agencies could also choose to work with an outside vendor to provide some specific components of the required training, such as database security or implicit bias. The costs resulting from contracted training would depend on the components being taught, the number of participants, and the length of the class(es), and would vary widely. As such, the Department cannot estimate the potential cost to local agencies.

Pursuant to Penal Code sections 186.34, user agencies are required to notify an individual prior to designating him/her as a gang member or gang associate in a shared gang database. It also authorizes an individual to request information from a law enforcement agency as to whether s/he is designated in a shared gang database, requires the agency receiving the request to respond, except as specified, and outlines a process by which an individual can contest his/her designation in the database. While the specific information that must be contained in the designation notifications and information request responses are delineated in Sections 753.6, 754, and 754.2 of the regulation, the statute implements the requirements on local agencies. As such, the associated costs are not a result of the regulations. In an effort to alleviate impact to user agencies, the Department has made every attempt to enact performance standards rather than prescribing actions, as often as possible.

Other Nondiscretionary Cost or Savings Imposed on Local Agencies: None.

Cost or Savings in Federal Funding to the State: None.

Significant Effect on Housing Costs: None.

Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including Ability to Compete: The Department has made an initial determination that the proposed regulatory action would not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states, or on representative private persons.

Results of the Economic Impact Analysis/Assessment Prepared Pursuant to Government Code Section 11346.3, Subdivision (b):

Effect on Jobs/Businesses:

The Department has determined that the proposed regulatory action would not affect the creation or elimination of jobs or businesses within the State of California or the expansion of businesses currently doing business within the State of California. This determination is based on the fact that this proposed action only applies to law enforcement agencies who choose to voluntarily participate in a shared gang database. Furthermore, this proposed action would have no impact on any other businesses or jobs. The Department does not require businesses to participate in the use of a shared gang database in any way, and training for the CalGang database, the only existing shared gang database in California, is typically provided by personnel within the node or user agencies. It is possible that user agencies could choose to contract with a private business to conduct the training; however, it is not possible for the Department to anticipate how many user agencies may do so or what the scope of the training would be.

Benefits of the Proposed Regulation:

The regulations proposed in this rulemaking action would standardize the procedures and processes for obtaining access to a shared gang database and the information therein. They would prevent ambiguity and confusion that was found to be surrounding use of the CalGang database, which is currently the only shared gang database in California, as well as create as much transparency as possible into its workings.

In addition, the proposed regulatory action will positively impact the privacy of California residents by establishing policies and responsibilities for those engaged with a shared gang database. This will enable the Department to be more closely involved in the business of a shared gang database and its users, as well as ensure that all user agencies are adhering to policies and procedures necessary to protect the information contained in a shared gang database.

Cost Impacts on Representative Private Persons or Business:

The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Business Report:

These regulations do not require a report that applies to businesses.

Small Business Determination:

The Department has determined, pursuant to CCR, Title 1, Section 4, that the proposed regulatory action would not affect small business, because it pertains only to users of shared gang databases, not the general public.

CONSIDERATION OF ALTERNATIVES

Before taking final action on the amendments, the Department must determine that no reasonable alternative it considered, or that has otherwise been identified and brought to its attention, would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected persons and equally effective in implementing the statutory policy or other provision of law.

The Department invites interested persons to present statements or arguments, with respect to alternatives, to the proposed regulations during the 45-day written comment period.

CONTACT PERSONS

Inquiries concerning the proposed regulatory action may be directed to:

Shayna Rivera, CalGang Unit Manager
Bureau of Criminal Identification and Investigative Services
California Justice Information Services Division

4949 Broadway
Sacramento, CA 95820
(916) 210-4296

The backup contact person for these inquiries is:

Thomas Bierfreund, Associate Governmental Program Analyst
Bureau of Criminal Identification and Investigative Services
California Justice Information Services Division
4949 Broadway
Sacramento, CA 95820
(916) 210-3451

AVAILABILITY OF STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, AND RULEMAKING FILE

The Department will have the entire rulemaking file available for inspection and copying throughout the rulemaking process. The text of the proposed regulation (the “express terms”), the Initial Statement of Reasons, and the information upon which the proposed rulemaking is based are available at the Department’s website at <https://oag.ca.gov/>. Copies may also be obtained by contacting:

Shayna Rivera, CalGang Unit Manager
Bureau of Criminal Identification and Investigative Services
California Justice Information Services Division
4949 Broadway
Sacramento, CA 95820
(916) 210-4296

AVAILABILITY OF CHANGED OR MODIFIED TEXT

This regulatory proceeding will be conducted in accordance with the California Administrative Procedure Act, Government Code, Title 2, Division 3, Part 1, Chapter 3.5 (commencing with section 11340).

After the Department analyzes all timely and relevant comments received during the 45-day public comment period, the Department will either adopt the regulations as described in this notice, or make modifications based on the comments. If the Department makes modifications which are sufficiently related to the original text of the proposed regulations, the amended text, with the changes clearly indicated, will be made available for an additional 15-day public comment period, before the Department adopts the regulations. The Department will accept written comments on the modifications to the regulations during the 15-day public comment period.

AVAILABILITY OF FINAL STATEMENT OF REASONS

Upon completion, the Final Statement of Reasons will be available on the Department's website at <https://oag.ca.gov/>. You may also obtain a written copy of the final statement of reasons by contacting:

Shayna Rivera, CalGang Unit Manager
Bureau of Criminal Identification and Investigative Services
California Justice Information Services Division
4949 Broadway
Sacramento, CA 95820
(916) 210-4296

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulations in underline and strikeout format, as well as the Final Statement of Reasons once completed, are available on the Department's website at <https://oag.ca.gov/>.