

REFERENCE TITLE: law enforcement; investigations; public records

State of Arizona  
Senate  
Fiftieth Legislature  
Second Regular Session  
2012

# **SB 1434**

Introduced by  
Senator Gray

AN ACT

AMENDING SECTION 38-1101, ARIZONA REVISED STATUTES; RELATING TO LAW  
ENFORCEMENT OFFICERS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 38-1101, Arizona Revised Statutes, is amended to  
3 read:

4 38-1101. Law enforcement officers; probation officers; right to  
5 representation; right to evidence on appeal; change  
6 of hearing officer or administrative law judge;  
7 burden of proof; polygraph examinations; definitions

8 A. If an employer interviews a law enforcement officer or probation  
9 officer and the employer reasonably believes that the interview could result  
10 in dismissal, demotion or suspension or if the law enforcement officer or  
11 probation officer reasonably believes the investigation could result in a  
12 dismissal, demotion or suspension:

13 1. The law enforcement officer or probation officer may request to  
14 have a representative of the officer present at no cost to the employer  
15 during the interview. The law enforcement officer or probation officer shall  
16 select a representative who is available on reasonable notice so that the  
17 interview is not unreasonably delayed. The representative shall participate  
18 in the interview only as an observer. Unless agreed to by the employer, the  
19 representative shall be from the same agency and shall not be an attorney  
20 except that if a representative from the same agency is not reasonably  
21 available, with the employer's permission, the law enforcement officer's or  
22 probation officer's representative may be from the law enforcement officer's  
23 or probation officer's professional membership organization. The law  
24 enforcement officer or probation officer shall be permitted reasonable breaks  
25 of limited duration during any interview for telephonic or in person  
26 consultation with others, including an attorney, who are immediately  
27 available. An employer shall not discipline, retaliate against or threaten  
28 to retaliate against a law enforcement officer or probation officer for  
29 requesting that a representative be present or for acting as the  
30 representative of a law enforcement officer or probation officer pursuant to  
31 this paragraph.

32 2. Before the commencement of any interview described in this section,  
33 the employer shall provide the law enforcement officer or probation officer  
34 with a written notice informing the officer of the alleged facts that are the  
35 basis of the investigation, the specific nature of the investigation, the  
36 officer's status in the investigation, all known allegations of misconduct  
37 that are the reason for the interview and the officer's right to have a  
38 representative present at the interview. The notice shall include copies of  
39 all complaints that contain the alleged facts that are reasonably available,  
40 except for copies of complaints that involve matters pursuant to federal laws  
41 under the jurisdiction of the equal employment opportunity commission.

42 3. After an employer completes an investigation of a law enforcement  
43 officer or probation officer if the employer seeks disciplinary action at the  
44 request of the law enforcement officer or probation officer, the employer  
45 shall provide a basic summary of any discipline ordered against any other law

1 enforcement officer or probation officer of generally similar rank and  
2 experience employed by the employer within the previous two years for the  
3 same or a similar violation. As an alternative, the employer may provide  
4 file copies of the relevant disciplinary cases. The employer shall not take  
5 final action and the employer shall not schedule the hearing until the basic  
6 summary or file copies are provided to the law enforcement officer or  
7 probation officer. This paragraph does not apply if court rule prohibits the  
8 release of file copies of disciplinary cases.

9 4. The employer may require the law enforcement officer or probation  
10 officer to submit to a polygraph examination if the officer makes a statement  
11 to the employer during the investigation that differs from other information  
12 relating to the investigation that is known to the employer and reconciling  
13 that difference is necessary to complete the investigation. If a polygraph  
14 examination is administered pursuant to this paragraph, the employer or the  
15 person administering the polygraph examination shall make an audio recording  
16 of the complete polygraph procedure and provide a copy of the recording to  
17 the law enforcement officer or probation officer.

18 5. The law enforcement officer or probation officer, at the conclusion  
19 of the interview, is entitled to a period of time to consult with the  
20 officer's representative and may make a statement not to exceed five minutes  
21 addressing specific facts or policies that are related to the interview.

22 B. The results of a polygraph examination in an investigation shall  
23 not be the basis for disciplinary action unless other evidence or information  
24 exists.

25 C. Subsection A of this section does not require the employer to  
26 either:

27 1. Stop an interview to issue another notice for allegations based on  
28 information provided by the law enforcement officer or probation officer  
29 during the interview.

30 2. Disclose any fact to the law enforcement officer or probation  
31 officer or the law enforcement officer's or probation officer's  
32 representative that would impede the investigation.

33 D. Subsection A, paragraphs 1 and 2 of this section do not apply to an  
34 interview of a law enforcement officer or probation officer that is:

35 1. In the normal course of duty, counseling or instruction or an  
36 informal verbal admonishment by, or other routine or unplanned contact with,  
37 a supervisor or any other law enforcement officer or probation officer.

38 2. Preliminary questioning to determine the scope of the allegations  
39 or if an investigation is necessary.

40 3. Conducted in the course of a criminal investigation.

41 4. Conducted in the course of a polygraph examination.

42 E. In any appeal of a disciplinary action by a law enforcement officer  
43 or probation officer, the parties shall exchange copies of all relevant  
44 documents and a list of all witnesses pursuant to the following time periods  
45 and requirements:

1           1. Within three business days after the employer's receipt of a  
2 written request from the law enforcement officer or probation officer for a  
3 copy of the investigative file that is accompanied by a copy of the filed  
4 notice of appeal, the employer shall provide a complete copy of the  
5 investigative file as well as the names and home or work mailing addresses of  
6 all persons interviewed during the course of the investigation.

7           2. No later than five business days before the appeal hearing, or, if  
8 the appeal hearing is scheduled more than twenty days after the notice of  
9 appeal, no later than ten business days before the appeal hearing, the  
10 employer and the law enforcement officer or probation officer shall exchange  
11 copies of any documents that may be introduced at the hearing and that have  
12 not previously been disclosed.

13           3. No later than five business days before the appeal hearing, or, if  
14 the appeal hearing is scheduled more than twenty days after the notice of  
15 appeal, no later than ten business days before the appeal hearing, the  
16 employer and the law enforcement officer or probation officer shall exchange  
17 the names of all witnesses who may be called to testify. A witness may be  
18 interviewed at the discretion of the witness. The parties shall not  
19 interfere with any decision of a witness regarding whether to be interviewed.  
20 An employer shall not discipline, retaliate against or threaten to retaliate  
21 against any witness for agreeing to be interviewed or for testifying or  
22 providing evidence in the appeal.

23           F. It is unlawful for a person to disseminate information that is  
24 disclosed pursuant to subsection E of this section to any person other than  
25 the parties to the appeal and their lawful representatives for purposes of  
26 the appeal of the disciplinary action. This subsection does not prohibit the  
27 use of the information in the hearing or disclosure pursuant to title 39,  
28 chapter 1, article 2.

29           G. The employer or the law enforcement officer or probation officer  
30 may seek a determination by the hearing officer, administrative law judge or  
31 appeals board hearing the appeal regarding any evidence that the employer or  
32 the law enforcement officer or probation officer believes should not be  
33 disclosed pursuant to subsection E of this section because the risk of harm  
34 involved in disclosure outweighs any usefulness of the disclosure in the  
35 hearing. In determining whether evidence will be disclosed, the hearing  
36 officer, administrative law judge or appeals board may perform an in camera  
37 review of the evidence and may disclose the material subject to any  
38 restriction on the disclosure, including the closing of the hearing or the  
39 sealing of the records, that the hearing officer, administrative law judge or  
40 appeals board finds necessary under the circumstances.

41           H. In any appeal of a disciplinary action by a law enforcement officer  
42 or probation officer in which a single hearing officer or administrative law  
43 judge has been appointed to conduct the appeal hearing, the law enforcement  
44 officer or probation officer or the employer may request a change of hearing  
45 officer or administrative law judge. In cases before the office of

1 administrative hearings or if the employer is a county, city or town on the  
2 first request of a party, the request shall be granted. A city or town with  
3 a population of less than sixty-five thousand persons or a county with a  
4 population of less than two hundred fifty thousand persons must provide for  
5 an alternate hearing officer by means of an interagency agreement with  
6 another city, town or county. If the law enforcement officer or probation  
7 officer is the party that requested the alternate hearing officer, the law  
8 enforcement officer or probation officer shall reimburse the city, town or  
9 county for one-half of any additional expenses incurred by the city, town or  
10 county in procuring the alternate hearing officer under the interagency  
11 agreement. If an alternate hearing officer is requested by means of an  
12 interagency agreement, the hearing officer shall provide to the law  
13 enforcement officer or probation officer or employer the option of continuing  
14 the hearing for an additional ten days. Any subsequent requests may be  
15 granted only on a showing that a fair and impartial hearing cannot be  
16 obtained due to the prejudice of the assigned hearing officer or  
17 administrative law judge. The supervisor or supervising body of the hearing  
18 officer or administrative law judge shall decide whether a showing of  
19 prejudice has been made.

20 I. A party who violates subsection A, paragraph 1 of this section, or  
21 subsection E or F of this section, unless the violation is harmless, shall  
22 not be permitted to use that evidence at the hearing, except on a showing of  
23 good cause. The hearing officer or administrative law judge, on a showing of  
24 good cause, may grant the opposing party a continuance, otherwise limit the  
25 use of the evidence or make such other order as may be appropriate.

26 J. The burden of proof in an appeal of a disciplinary action by a law  
27 enforcement officer or probation officer shall be on the employer.

28 K. Except where a statute or ordinance makes the administrative  
29 evidentiary hearing the final administrative determination, an employer or a  
30 person acting on behalf of an employer may amend, modify, reject or reverse a  
31 decision made by a hearing officer, administrative law judge or appeals board  
32 after a hearing where the law enforcement officer or probation officer and  
33 the employer have been equally allowed to call and examine witnesses,  
34 cross-examine witnesses, provide documentary evidence and otherwise fully  
35 participate in the hearing if the decision was arbitrary or without  
36 reasonable justification and the employer or person acting on behalf of the  
37 employer states the reason for the amendment, modification, rejection or  
38 reversal.

39 L. An employer shall not include in that portion of the personnel file  
40 of a law enforcement officer or probation officer that is available for  
41 public inspection and copying any information about an investigation until  
42 the investigation is complete or the employer has discontinued the  
43 investigation. If the law enforcement officer or probation officer has  
44 timely appealed a disciplinary action, the investigation is not complete  
45 until the conclusion of the appeal process. **NOTHING IN THIS SECTION**

1 PROHIBITS THE INSPECTION OF RECORDS OF INVESTIGATIONS INTO THE CONDUCT OF LAW  
2 ENFORCEMENT OFFICERS ON MATTERS OF PUBLIC CONCERN PURSUANT TO TITLE 39,  
3 CHAPTER 1, ARTICLE 2.

4 M. This section does not preempt agreements that supplant, revise or  
5 otherwise alter the provisions of this section, including preexisting  
6 agreements between the employer and the law enforcement officer or probation  
7 officer or the law enforcement officer's or probation officer's lawful  
8 representative association.

9 N. Notwithstanding section 39-123, all data and reports from a  
10 polygraph examination of a law enforcement officer or probation officer are  
11 confidential and may only be used for employment, certification or  
12 reactivation of certification purposes or the administrative matter for which  
13 a polygraph was administered, including other ancillary matters. All other  
14 uses are prohibited.

15 O. Except for a preemployment polygraph in which an applicant was not  
16 hired or in the case of an active investigation or an appeal, the data and  
17 reports from a polygraph examination of a law enforcement officer or  
18 probation officer shall be destroyed as soon as practicable three years after  
19 the date of appointment or employment but not more than ninety days after  
20 that date.

21 P. For the purposes of this section:

22 1. "Appeal" means a hearing before a state or local merit board, a  
23 civil service board, an administrative law judge or a hearing officer.

24 2. "Disciplinary action" means the dismissal, demotion or suspension  
25 for more than eight hours of a law enforcement officer or probation officer  
26 that is authorized by statute, charter or ordinance and that is subject to a  
27 hearing or other procedure by a local merit board, a civil service board, an  
28 administrative law judge or a hearing officer.

29 3. "Investigative file" means the law enforcement agency's complete  
30 report and any attachments detailing the incidents leading to the  
31 disciplinary action.

32 4. "Law enforcement officer" means:

33 (a) An individual, other than a probationary employee, who is  
34 certified by the Arizona peace officer standards and training board, other  
35 than a person employed by a multi-county water conservation district.

36 (b) A detention officer or correction officer, other than a  
37 probationary employee, who is employed by this state or a political  
38 subdivision of this state.

39 5. "Probation officer" means a probation officer or surveillance  
40 officer, other than a probationary employee, who is employed by this state or  
41 a political subdivision of this state.