IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

LONG BEACH POLICE OFFICERS ASSOCIATION AND DOES 1-150,

Plaintiffs and Appellants,

vs.

CITY OF LONG BEACH, a municipal corporation, LONG BEACH POLICE DEPARTMENT, JAMES MCDONNELL, Chief of Police,

Defendants and Appellants.

LOS ANGELES TIMES COMMUNICATIONS LLC,

Real Party in Interest and Respondent.

Case No. S200872

2d Civ. No. B231245

Los Angeles Super. Ct. No. NC055491
Hon. Patrick T. Madden, Judge

ANSWER TO PETITIONS FOR REVIEW

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Real Party in Interest and Respondent Los Angeles Times Communications LLC ("the Times") respectfully submits this Answer to the Petitions For Review submitted by Plaintiffs /Appellants Long Beach Police Officers Association and Doe Officers 1-150 (collectively "LBPOA") and Defendants/Appellants City of Long Beach, Long Beach Police Department and James McDonnell (collectively "City").

As discussed in more detail below, the Second Appellate District Court of Appeal properly rejected the arguments jointly advanced by the purported "plaintiffs" and "defendants" in this reverse-CPRA lawsuit, and correctly found that the identity of police officers who exercised lethal force against citizens of this State over a five-year period cannot be kept secret. The collusive nature of the underlying proceedings, however – in which a government agency joined forces with its own employees in a lawsuit designed to block the disclosure of information under California's Public Records Act[1] – portends a dangerous trend that threatens to derail the State's statutory and constitutional goal of providing timely information to the public about the conduct of government officials.

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[1] Cal. Gov't Code § 6250, et seq.; Cal Const. Art. I, § 3(b).

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Consequently, if this Court accepts review of this case, The Times respectfully requests that it accept for review the following additional issues of statewide concern (CRC 8.500(b)(1), (c)):[2]

ADDITIONAL ISSUES PRESENTED FOR REVIEW

1. May an employee of a public agency bring a reverse-CPRA lawsuit that the agency itself is prohibited from bringing under Filarsky v. Superior Court, 28 Cal. 4th 419 (2002)?
2. Does Filarsky v. Superior Court, 28 Cal. 4th 419 (2002) and public policy bar a government agency and its employees from cooperating in a collusive lawsuit designed to block the disclosure of records in response to a CPRA request?
3. Are lawsuits brought by public employees or third parties to block the disclosure of public records subject to the provisions of the CPRA, including the provisions for fee-shifting and expedited review?

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[2] Similar reverse-CPRA issues have been raised in another Petition For Review pending in this Court. Marken v. Santa Monica-Malibu Unified School Dist., California Supreme Court Case No. S200500. In recent years, the practice by public employees of suing to block disclosure of public records by their employers has become more and more common, particularly by police officers and their unions. Consequently, this Court should accept review of these additional issues even if it declines to reach the issues raised by Petitioners.

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STATEMENT OF THE CASE

This lawsuit arose from a newspaper's inquiry into the use of lethal force by Long Beach police officers. On December 12, 2010, Long Beach police officers shot and killed an unarmed 35-year-old man, Douglas Zerby, who was carrying a garden hose nozzle that police apparently mistook for a gun. C.T. 000035, 000057-000080. In the wake of this controversial shooting, on December 15, 2010, Los AngelesTimes reporter Richard Winton made a request to the City under the California Public Records Act ("CPRA") for "[t]he names of Long Beach police officers involved in the December 12 office[r] involved shooting in the 5300 block of East Ocean Boulevard," and "[t]he names of Long Beach police officers involved in officer involved shootings from Jan. 1[,] 2005 to Dec. 11, 2010." C.T. 000048-000054.

The City apparently informed LBPOA and the affected police officers about The Times' CPRA requests, and notwithstanding the deadlines for disclosure set forth in the CPRA, agreed to withhold the requested information until January 10, 2011. C.T. 000006-000007.[3] Taking their cue, and without providing notice to The Times, LBPOA

[3] In light of the City's current position supporting LBPOA's lawsuit – a lawsuit that in name only portrays them as adverse parties – this appears to have been a deliberate decision to assist LBPOA in obtaining an order "restraining" the City from doing something it did not want to do: release the names of police officers involved in shooting civilians.

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initiated a lawsuit against the City to block the disclosure of the requested records. C.T. 000005-000020. The trial court issued a temporary restraining order on December 30, 2010 (C.T. 000024; LBPOA Petitioner's Appendix (P.A.) 000146),[4] but ordered LBPOA to give notice to The Times, and subsequently permitted The Times to intervene to oppose the injunction request. 12/30/10 Hearing Tr. at 2-5; P.A. at 000193 (Trial Court's Order Denying Preliminary Injunction at 12).

From the outset, the City "defendants" joined with the LBPOA "plaintiffs" to support issuance of an injunction preventing disclosure of information to The Times. See, e.g., C.T. 000236-000241. After reviewing The Times' opposition brief, however, and hearing argument that included The Times' counsel, the trial court rejected the injunction request, but granted a thirty-day stay to permit the parties to seek appellate writ relief. C.T. 000300-000301. LBPOA and City delayed almost an entire month before filing writ petitions with the Court of Appeal, in which they conceded that the trial court's ruling was not an appealable order;[5] nonetheless, LBPOA also filed a Notice of Appeal, which the Court of Appeal held automatically stayed the trial court's denial of the preliminary injunction

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[4] The Notice of Ruling with the Temporary Restraining Order is in the Petitioner's Appendix submitted by LBPOA to the Court of Appeal, but was not included in the Clerk's Transcript. See P.A. 000146.

[5] LBPOA Writ Petition at 6; City Writ Petition at 6.

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request. 2/23/11 Order at 1.[6] Further demonstrating the collusive nature of the underlying litigation, the City then filed its own Notice of Appeal – even though it ostensibly had prevailed as the defendant in the trial court. C.T. 000314-000315. The Times' motion to dismiss the appeals, or, in the alternative, for calendar preference, was denied on April 19, 2011, and the appeals proceeded with briefing and oral argument.

On February 7, 2012 – thirteen months after The Times requested information from the City under the CPRA – the Second Appellate District Court of Appeal unanimously held that the objections to disclosure raised by the City and LBPOA were invalid. Addressing the Petitioners' primary objection, the Court of Appeal rejected Petitioners' assertion that the identity of police officers who exercise lethal force are barred from disclosure under the "Pitchess" statutes, Penal Code §§ 832.5, 832.7 and 832.8. Op. at 11-20. In its ruling, the Court of Appeal relied heavily on this Court's decision in Commission on Peace Officer Standards & Training v. Superior Court, 42 Cal. 4th 278, 291-297 ("POST"), which similarly had rejected arguments raised by police officers that their identities could be shielded from the public. The Court of Appeal also cited to a decision by the Attorney General, which had addressed the precise issue raised by

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[6] The Court of Appeal subsequently issued an order treating LBPOA's petition as a petition for a writ of supersedeas petition, which was granted. 3/11/2011 Order at 1-2.

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Petitioners two years earlier, and had rejected the argument that disclosure of police officers' identities in connection with a specific event -- like the shooting of a unarmed citizen – had to be kept secret forever. See 91 Ops. Cal. Atty. Gen. 11 (May 19, 2008).

Finally, in reaching its conclusion that the names of officers must be disclosed, the Court of Appeal properly held that the speculative safety concerns presented by the City and LBPOA did not clearly outweigh the manifest public interest in disclosure, noting that the identity of police officers is "all the more a matter of public interest when those officers use deadly force and kill a suspect." Op. at 22 (quoting New York Times v. Superior Court, 52 Cal. App. 4th 97, 105 (1997)).

The Court of Appeal's decision on these issues was well-reasoned, and is entirely consistent with controlling authority from this Court, with the decision in New York Times, and with the conclusions reached by the Attorney General. There is no contrary published decision on those issues that would justify review by this Court. See CRC 8.500(b)(1).

Nonetheless, despite the Court of Appeal's published decision – which is binding on law enforcement agencies and trial courts throughout the state[7] – the names of law enforcement officers involved in uses of force

[7] See, e.g., Auto Equity Sales, Inc. v. Superior Court, 57 Cal. 2d 450, 455 (1962) (under stare decisis doctrine, court of appeal decision must be followed by all superior courts in California, regardless of which appellate

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still are being improperly withheld. For example, the Alameda Superior Court last week refused to disclose the names of officers named in a report by retired Supreme Court Justice Cruz Reynoso about the use of pepper against passive student protesters at UC Davis. Pike v. Univ. of Calif. Bd. of Regents, Alameda Superior Court Case No. RG12-619930; see also "UC Davis pepper-spray report should be released, judge says," San Jose Mercury News, March 28, 2012, available at http://www.mercurynews.com/education/ci_20274624/uc-davis-pepper-spray-incident-report. Similarly, in February, just days after the Court of Appeal's decision, the Orange County Sheriff refused to comply with CPRA requests for the identity of the deputy sheriff who shot and killed a Marine in front of his children, relenting only after the San Clemente Patch published an article identifying the officer based on information from other sources. See "Sheriff confirms deputy's identity: Right move, wrong reason," Orange County Register, February 19, 2012, available at http://taxdollars.ocregister.com/2012/02/19/sheriff-confirms-deputys-identity-right-move-wrong-reason/149204/. These cases demonstrate the

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district rendered the opinion); Gwartz v. Superior Court, 71 Cal. App. 4th 480, 481 (1999) ("[w]e thought – incorrectly, as it turned out – that the trial courts would simply follow our opinion even if they disagreed with it. Stare decisis and all that stuff.... But sometimes it seems as though we have to remind the lower court there is a judicial pecking order"); Cuccia v. Superior Court, 153 Cal. App. 4th 347, 353-354 (2007) ("[i]t is simply not appropriate for the trial court to state its disagreement and rule contrary to the appellate opinion," or claim case was "wrongly decided").

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continued intransigence of public agencies in complying with requests by the press and public for the names of peace officers who use force while on duty. Consequently, if this Court grants review of this case, it should affirm the Court of Appeal's decision, and reaffirm its holding in POST that "the public must be kept fully informed of the activities of its peace officers." 42 Cal. 4th at 297 (citing New York Times, 52 Cal. App. 4th at 104-05) (emphasis added).

In addition, if this Court grants review, it should resolve the additional issues raised here, namely, whether a public agency can effectively collude with its employee(s) or third parties to initiate litigation for the purpose of blocking the disclosure of public records.

In Filarsky v. Superior Court, 28 Cal. 4th 419, 423 (2002), this Court barred public agencies from bringing "reverse-CPRA" lawsuits, finding that the "exclusive procedure for litigating the issue of a public agency's obligation to disclose records" is for "a declaratory relief proceeding [to be] commenced only by an individual or entity seeking disclosure" of those records. Id. at 423, 426. This Court concluded that allowing public agencies to initiate litigation of this nature would undermine the CPRA's carefully structured protections for public records requesters, including fee shifting for successful PRA requesters, expedited procedures in the trial court, discretionary appellate review only by extraordinary writ rather than

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by mandatory appeal, and a prohibition on automatic stays that block the disclosure of public records. Id. at 427-429.

In a transparent end-run of Filarsky, public agency employees have worked hand-in-hand with agencies to initiate the same kind of injunctive relief lawsuits that the agencies are prohibited from bringing, including the lawsuit in this case. Even where, as here, the lawsuits are unsuccessful, the agencies and their employees can delay disclosure of the records for many months, if not years, while the "plaintiffs" appeal the denial of a preliminary injunction. Indeed, in this case, even the public agencies that were the nominal defendants were allowed to appeal the denial of the request for a preliminary injunction – even though the City "defendants" technically prevailed in the trial court! See 4/19/11 Order denying The Times' Motion to Dismiss Appeals.

The procedural tactic used in this case has substantively delayed the public from learning the identities of the Long Beach police officers involved in shootings over the last six years – even though the City and LBPOA were unsuccessful in the trial court and in the Court of Appeal. This delay is directly contrary to the CPRA's goal of providing timely information to the public about the conduct of government officials. As this Court recognized in Powers v. City of Richmond, 10 Cal. 4th 85, 111 (1995), the purpose of the 1984 amendment to the CPRA barring appeals and requiring expeditious resolution through the appellate writ process was

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to prevent "delays of the appeal process, by means of which public officials are frustrating the intent of the laws for disclosure" so that by the time the information is disclosed, "the story [is] no longer newsworthy."

The use of this reverse-CPRA procedure also has thrown into doubt the ability of prevailing public records requesters to recover their attorneys' fees and costs, despite the statutory mandate designed to encourage vindication of the public's rights. See Gov't Code § 6259(d); Fontana Police Dep't v. Villegas-Banuelos, 74 Cal. App. 4th 1249, 1253 (1999) (the prevailing party in an action that is "the functional equivalent of a proceeding to compel production of" public records under the CPRA is "entitled to recover attorneys' fees despite the fact that he was not denominated 'plaintiff' in the action"). Although LBPOA admitted to the Court of Appeal that it should have to pay The Times' fees if The Times ultimately prevails,[8] police unions have argued in other cases that the CPRA's mandatory fee-shifting provision does not permit an award of fees against them. See, e.g., Los Angeles Times Communications LLC v. Los Angeles County Sheriff's Department, Los Angeles Superior Court Case No. BS123076. See also Marken v. Santa Monica-Malibu Unified School

[8] LBPOA made this concession when faced with The Times' argument that LBPOA should not have standing to pursue a reverse-CPRA lawsuit, in part because of the detrimental impact on the CPRA's goals if prevailing requesters cannot recover fees. LBPOA Second District Opening Brief 35-36.

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Dist., 202 Cal. App. 4th 1250, 1268 (2012) ("a requesting party who participates in a reverse-CPRA lawsuit would not be entitled to the recovery of attorney fees") (petition for review pending, Cal. Supreme Court Case No. S200500).

Consequently, this Court should accept the additional issues for review to make clear that public employees or third parties who stand in the shoes of a public agency in opposing public records act requests are subject to the same fee-shifting rules that would apply to a public agency that is sued under the CPRA.[9] Without mandatory fee recovery for prevailaing public records requesters, public agencies and their employees can utilize reverse-CPRA cases to undermine a vital aspect of the CPRA.

I.
THIS COURT SHOULD GRANT REVIEW OF THE ADDITIONAL ISSUES TO PREVENT COLLUSIVE THIRD PARTY REVERSE-CPRA LITIGATION.

As discussed above, this case and other recent cases demonstrate the need for this Court's intervention to prevent public agencies and their employees from evading the statutory and constitutional mandates of this State's Public Records Act. Allowing third parties to initiate litigation to block the disclosure of public records – without imposing upon them, and

[9] In addition, where, as here, the public agency effectively invites its employees or third parties to initiate a lawsuit seeking to frustrate disclosure of public records, the agency should be jointly and severally liable for the requesters' fees incurred in defending the public's right of access.

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their cooperating public agencies, the strictures of the CPRA – invites abuse, and effectively negates the carefully-constructed protections set forth in the Act.

A. Permitting Reverse-CPRA Injunction And Appeal Procedures Is Inconsistent With The CPRA And Filarsky.

This case provides a textbook example of why reverse-CPRA suits should be prohibited, so that public agencies cannot evade their legal obligations by orchestrating litigation with supposedly "adverse" parties.

In conformance with the policy goal of promoting maximum public access to records, the CPRA expressly requires agencies like the City to make public records "promptly available" to requesters like The Times. Gov't Code § 6253(b). Consistent with this language, public agencies are required to provide a response no more than 10 days after receiving a PRA request, unless good cause exists for a two-week extension of this deadline. Gov't Code § 6253(c). Here, instead of providing requested information "promptly," or even responding within the statutory period, the City stonewalled, so that LBPOA would have sufficient time to file a conspiratorial lawsuit for an order enjoining disclosure of the requested information.[10]

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[10] Here, as in other cases, the putative "third party" plaintiffs filed their injunction lawsuit without even providing notice to the requester whose request was the subject of the lawsuit. If the trial court had not sua sponte ordered that The Times be added as a real party in interest, the

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The City's pretense of being a "defendant" in this case was almost immediately abandoned; at the hearing before the trial court, counsel for the City joined LBPOA in arguing against disclosure of the officers' names. See 1/18/11 Hearing Tr. at 9-13. Even more notably, the City then appealed from the trial court's order in its favor, which denied the plaintiffs' preliminary injunction request. C.T. 000314-000315. In subsequent proceedings, the City has adopted all of the arguments presented by LBPOA in its appellate briefs, and even filed a Petition for Review in this Court. See, e.g., City of Long Beach Second District Opening Brief at 2-4, 6-29; Second District Reply at 1-18.

This wink-and-nod collusion between the City and LBPOA is a transparent attempt to circumvent this Court's decision in Filarsky, 28 Cal. 4th at 423-426, which held that the "exclusive procedure for litigating the issue of a public agency's obligation to disclose records" is for "a declaratory relief proceeding [to be] commenced only by an individual or entity seeking disclosure" of those records. Id. at 423, 426 (emphasis added). As this Court pointed out, Government Code § 6258 allows only a CPRA requester to seek injunctive or declarative relief or writ of mandate

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collusive reverse-CPRA lawsuit would have proceeded with the only participants being the City and LPBOA – both of which sought to prevent disclosure to The Times.

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"to enforce his or her right to inspect or to receive a copy of any public record." Id. at 428-429.

Although this Court was faced in Filarsky with a lawsuit initiated by a public agency, and thus did not expressly address third-party lawsuits seeking to block disclosure of public records, the rationale for the decision applies equally here. The CPRA was designed expressly to serve the interests of individuals seeking information from the government; it was not intended to provide a means for public agencies (or their surrogates) to discourage journalists and others who scrutinize government conduct from seeking information through the CPRA.

Moreover, this Court noted in Filarsky that the federal Freedom of Information Act (5 U.S.C. § 552) expressly permits "reverse" FOIA" actions to bar release of public records, but the CPRA does not contain such a provision. Id. at 432. Thus, this Court indicated that parties seeking to prevent disclosure are outside of the purview of the Act. Id. See also Teamsters Local 856 v. Priceless, LLC, 112 Cal. App. 4th 1500, 1508 n.6 (2004) ("there is no express authority for a third party to bring an action to preclude a public agency from disclosing documents under the CPRA"; noting that the press agreed to third-party TRO application), overruled on other grounds, Int'l Federation of Professional & Technical Eng., Local 21, AFL-CIO v. Superior Court, 42 Cal. 4th 319, 335 (2007).

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Similarly, in Los Angeles Police Dep't v. Superior Court, 65 Cal. App. 3d 661 (1977), the court recognized that "a subject person has no right under Act to prevent disclosure of the record to any other person." Id. at 668 (quoting Black Panther Party v. Kehoe, 42 Cal. App. 3d 645 (1974)). See also City of Santa Rosa v. Press Democrat, 187 Cal. App. 3d 1315, 1320 (1986) ("there is no provision for an action by the government agency or for any action to prevent disclosure") (emphasis in original).[11] The CPRA itself makes clear that a "state or local agency may not allow another party to

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[11] LBPOA attempted to distinguish Filarsky by claiming that it was limited to cases where the plaintiffs are seeking declaratory judgment – a limitation that does not appear anywhere in the case. LBPOA Second District Opening Brief at 34. LBPOA also claimed that this case is somehow different than Filarsky because it is seeking equitable relief (id.), namely, a temporary restraining order, a preliminary injunction, and a permanent injunction in its first (and only) "cause of action." Second District Clerk's Transcript 000010-000011. But an injunction is a remedy, not a cause of action. See 6 Witkin Cal. Procedure (5th ed.) § 274. "Because a preliminary injunction is an interim remedy, and not a cause of action, a cause of action must exist before an injunction is issued." Id.; see also Major v. Miraverde Homeowners Ass'n, 7 Cal. App. 4th 618, 623 (1992) ("a cause of action must exist before injunctive relief may be granted"); Korean Amer. Legal Advocacy Foundation v. Los Angeles, 23 Cal. App. 4th 376, 398-399 (1994) (same).

Here, LBPOA and the officers have not identified a cognizable "cause of action." The only thing identified in the text of the First Cause of Action is "the Public Records Act." C.T. 000010 (¶ 16). But, as LBPOA admitted in the Court of Appeal, the Legislature has provided that only the public records requester enjoys a cause of action to determine whether a particular record or class of records may be disclosed. LBPOA Second District Opening Brief at 30-31. Thus, LBPOA's cause of action cannot be a "reverse-CPRA" cause of action, because such an action to prohibit the disclosure of public records is outside the exclusive procedure called for in the CPRA.

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control the disclosure of information that is otherwise subject to disclosure pursuant to this chapter." Gov't Code § 6253.3 (emphasis added).

Here, the City was permitted to evade the protections afforded to requesters under Filarsky and the CPRA by effectively outsourcing to its employees the role of "plaintiffs" in seeking to bar disclosure of the requested information (and in the process, disregarding its own legal obligation to make the records promptly available). This insupportable conduct illustrates the problems caused by reverse-CPRA lawsuits, and should be addressed by this Court.[12]

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[12] The Second District relied on an earlier appellate decision, County of Santa Clara (Naymark) v. Superior Court, 171 Cal. App. 4th 119 (2009), in concluding that the CPRA does not preclude third parties from bringing equitable actions to prevent disclosure of public records. If this Court grants review, The Times will demonstrate why both Filarsky and the public policy behind the CPRA support the opposite conclusion. Among other things, in Naymark, the Court distinguished between lawsuits that may involve public records in some way, and lawsuits that directly involve "whether a particular record or class of records must be disclosed." (Emphasis added.) This lawsuit clearly involves the latter. In contrast, the plaintiffs in Naymark were seeking redress under Code of Civil Procedure § 526a to prevent public agencies from engaging in policies that would impede public access to records (such as charging impermissible "research" fees, requiring requesters to show driver's licenses, and forcing requesters to state the purpose of their requests). Because the lawsuit "furthered," rather than "obstructed," the "purpose of the CPRA," and because it was outside the class of cases on whether public records must be disclosed, the Court of Appeal in Naymark held that the plaintiffs' lawsuit could proceed. Id.

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B. This Court Should Grant Review Of The Additional Issues To Prevent Delays In Disclosure Of Public Records That The CPRA Is Designed To Prevent.

Where, as here, a lawsuit involving the disclosure of public records is allowed to proceed outside the auspices of the CPRA, the Legislature's intention to provide for expedited review is frustrated. Even though the City and LBPOA had submitted the complete trial court record in connection with their initial writ petitions – utilizing the review process contemplated by the CPRA – the subsequent recognition of their "appeals" required a duplicative Clerk's Transcript to be prepared, resulting in months of delay. By the time the parties' briefing in the Court of Appeal was concluded and oral argument took place, more than a year had passed since The Times made its CPRA request in December 2010 for the names of the Long Beach officers involved in the exercise of lethal force.[13]

In contrast, the Legislature amended the CPRA expressly to provide expedited appellate relief through the writ process,[14] so that public agencies would be prohibited "from delaying the disclosure of public records by appealing a trial court decision and using continuances in order to frustrate

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[13] The Second District Court of Appeal also declined The Times' request for an expedited appeal (CRC 8.240) (April 19, 2011 Order at 1), demonstrating that that the appeals process is inadequate to protect the rights of requesters to obtain speedy review.

[14] Under the CPRA, any requests for appellate relief must proceed within 20 days by extraordinary writ. Gov't Code § 6259(c).

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the intent of the Act." Filarsky, 28 Cal. 4th at 426-427; see also Freedom Newspapers, Inc. v. Superior Court, 186 Cal. App. 3d 1102, 1108 (1986) (citing legislative history, court held that "[t]he sponsors of this bill seek to correct an injustice they perceive due to Orange County's delaying tactics, as well as the potential for other public agencies to delay the disclosure of public documents").[15] The reverse-CPRA lawsuit brought by LBPOA in cooperation with the City threatens to render this provision of the CPRA a nullity – public agencies can simply encourage their employees or other third parties to file injunctive relief lawsuits, and if the suit is unsuccessful, the agency can join the employees or third parties in protracted appellate proceedings that delay disclosure for months, if not years. See Powers, 10 Cal. 4th at 111 (expedited appellate proceedings provisions are intended to prohibit a party "from delaying the disclosure of public records by appealing a trial court decision and using continuances in order to frustrate the intent of the Public Records Act"); Los Angeles Times v. Alameda Corridor Transp. Auth., 88 Cal. App. 4th 1381, 1386 (2001) (the "exclusive purpose"

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[15] The Legislature made the policy decision that questions concerning the public's right of access to records should be heard expeditiously, including in appellate courts. Because the Legislature outlined in Government Code §§ 6258 and 6259 the exclusive procedures for dealing with the question of whether public records must be disclosed, the appellate provision concerning expedited review should be applied to any case that involves the disclosure of public records, regardless of how or by whom it is initiated.

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of the provision for review by extraordinary writ "was to speed appellate review").

Allowing parties in reverse-CPRA cases to proceed by appeal also results in an automatic stay, in contravention of the CPRA provision that no automatic stays be given from a trial court's ruling in favor of a CPRA requester. See Gov't Code § 6259(c) (stay of a trial court order "shall not be granted unless the petitioning party demonstrates it will otherwise sustain irreparable damage and probable success on the merits") (emphasis added). The CPRA's prohibition on automatic stays reflects the Legislature's objective to prevent proponents of secrecy from "delaying disclosure of the records ... by simply filing an appeal from the trial court's ruling" and by requiring the proponent of secrecy to "make the substantial showing required by the statute" to obtain a stay. Powers, 10 Cal. 4th at 119 (George, J., concurring).

This Court should address the Additional Issues presented, to ensure that reverse-CPRA lawsuits, like the underlying lawsuit here, are not used to thwart the Legislature's goals of expedited review.

C. This Court Should Grant Review Of The Additional Issues To Ensure That The CPRA's Fee-Shifting Provisions Are Applied To Collusive Reverse-CPRA Actions.

LBPOA appears to concede that it is subject to an attorneys' fee award under the CPRA (Gov't Code § 6259(d)) if the trial court's and Second District's orders are affirmed. LBPOA Second District Opening

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Brief 35-36.[16] But other third parties have claimed that the CPRA fee-shifting provision applies only to public agencies, and that no fee award may be granted against third parties who seek to prevent disclosure of public records. See Los Angeles Times Communications LLC v. Superior Court, Los Angeles Superior Court Case No. BS123076. Similarly, although the City's position on this issue is unclear, other public agencies have claimed that they should not be held responsible for fees incurred as a result of lawsuits by public employees or other third parties to block disclosure of public records. Id. Although the Fourth Appellate District properly held that a prevailing party in an action that is "the functional equivalent" of a CPRA action is entitled to recover fees regardless of whether that party is denominated as the "plaintiff" (Fontana Police Dep't v. Villegas-Banuelos, 74 Cal. App. 4th 1249, 1253 (1999)), the Second Appellate District disagreed in Marken, noting in dicta that a requester could not recover attorneys' fees and costs in a reverse-CPRA action. 202 Cal. App. 4th at 1268.[17]

This lack of clarity erodes the CPRA's provision for a mandatory fee recovery to prevailing public records requesters, which serves as an

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[16] LBPOA's counsel also made this concession at oral argument in the Second District. The City has not agreed that it is subject to a fee award.

[17] In this case, The Times' fee motion is being submitted to the trial court in accordance with the Code of Civil Procedure, but there is no ruling at this stage.

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"incentive[] for members of the public to seek judicial enforcement of their right to inspect public records subject to disclosure." Filarsky, 28 Cal. 4th at 427. This Court should accept the Additional Issues for review to make clear that, regardless of how or by whom the lawsuit is initiated, a case involving the disclosure of public records falls within the scope of the CPRA, and the party seeking to vindicate the public's right of access to public records must, if successful, be awarded its attorneys' fees and costs.

II.
CONCLUSION

Allowing public agency employees to bring reverse-CPRA lawsuits obstructs the goals of the CPRA and substantially weakens its protections for public records requesters. For these reasons and for the reasons stated above, The Times respectfully requests that this Court grant review of the Additional Issues set forth above, and protect the rights granted to public

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records requesters under the CPRA and the California Constitution.

Respectfully submitted,

DATED: April 5, 2012

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CERTIFICATE OF WORD COUNT

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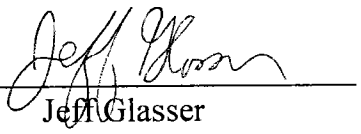
By: 
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Natasha Majorko

Supreme Court Case No. S200872
Court of Appeal Case No. B231245
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