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Supreme Court Case No. S200872

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

LONG BEACH POLICE OFFICERS ASSOCIATION AND DOE OFFICERS 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.

Court of Appeal of the State of California
Second Appellate District, Division Three
Case No. B231245

Superior Court of the County of Los Angeles
Case No. NC055491
Hon. Patrick T. Madden, Judge, Dept. B

CITY OF LONG BEACH'S OPENING BRIEF ON THE MERITS

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

I.
STATEMENT OF THE ISSUES FOR REVIEW

1. Whether the Court of Appeal's decision is consistent with this Court's decisions in *Copley Press, Inc. v. Superior Court* (2006) 39 Cal. 4th 1272 and *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal. 4th 278.

2. Whether California Government Code section 6254(f) exempts from disclosure the name of a police officer who is subject to investigation for being involved in an on duty shooting.

3. Whether the accessibility of personal information on-line and the real potential for targeting identified police officers who have been involved in a critical incident such as a shooting warrants additional consideration in the context of protecting the personal security of those officers and their families under the California Public Records Act.

II.

STANDARD OF REVIEW

The interpretation of the California Public Records Act and its application to undisputed facts present questions of law that are subject to de novo review. (*BRV, Inc. v. Superior Court* (2006) 143 Cal. App. 4th 742, 750.)

III.

STATEMENT OF THE CASE

A. INTRODUCTION.

State law governing the release of the names of police officers, linked to a critical incident, such as an officer involved shooting, is currently unclear. The decision to withhold or release a police officer's name is governed by the interplay of two sets of statutes; the California Public Records Act (hereinafter "CPRA"), California Government Code sections 6250-6270 and the "Pitchess" statutes found at California Penal Code sections 832.5, 832.7, 832.8 and California Evidence Code sections 1043-1047.

Decisions at the trial court level regarding the disclosure of police officers' names after they have been involved in a critical incident are inconsistent. Some courts deny requests for disclosure under the CPRA.

Other courts order disclosure. In this case, the trial court ordered the City of Long Beach (hereinafter "City") to disclose the names of police officers involved in an on-duty shooting in contravention of this Court's decision in *Copley Press, Inc. v. Superior Court* (2006) 39 Cal. 4th 1272 (hereinafter "*Copley Press*"). Moreover, in ordering disclosure, the trial court expanded the limitations this Court placed on disclosure in *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal. 4th 278 (hereinafter "*POST*"). Law enforcement agencies require clear direction regarding the circumstances under which police officers' names should be released in response to a request for public records.

This is especially true today, where the Internet serves as a goldmine of personal, private information that is easily accessible. With the evolution of technology, the provision of a police officer's name is not simply the provision of a name. Instead, it is the wholesale provision of personal data including the officer's home address and personal phone number, not to mention the names of his or her family members and their contact information. This is exactly the type of personal information the Pitchess statutes are designed to protect.[1] The existing tension between the public disclosure of police officer information and an officer's privacy in

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[1] California Penal Code section 832(a) describes records relating to personal data including home address, phone numbers, marital status and family member information, or similar information.

his personnel information, including his name, when linked to a critical incident, demands resolution.

Since the Court of Appeal decision has been published in this case, an Internet group called "Anonymous," together with a group styling itself as "Occupy Long Beach" has posted the personal information of six Long Beach Police Officers on the Internet.[2] These officers were involved in shootings or uses of force and include the two officers who were involved in a particular shooting (see discussion, infra.), which "Occupy Long Beach" and "Anonymous" describe in their postings as "murder." The postings remind these officers about the "warnings" they were previously given and threaten them by saying, "we do not forgive, we do not forget, expect us."

Along with the threats, "Anonymous" posted the officer's home addresses, home and cell phone numbers, and in some cases, the names and ages of their family members. As a result of this and prior postings, one officer was contacted at his home, via telephone wherein the caller stated,

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[2] See Long Beach Post article dated March 7, 2012 - "Anonymous" Warns Long Beach City Officials to "Expect Us". *http.www.lbpost.com/news/greggorymoore/139300245*. Within the article are links to "pastebin.com," "this padded cell," and "imagist.com." Once the link is accessed, the viewer is taken to the particular website which had posted the private information of at least six officers.

"Bitch, we know where you live." According to the Court of Appeal, speculative threats are not sufficient to justify withholding an officer's name under the CPRA. But in this day and age, the potential for misuse of information is real, not speculative, and City police officers' lives are actually being threatened at home. The reality is that the disclosure of a "mere" name allows for access to personal information on the internet, and this information can be procured with relative ease.[3]

The City of Long Beach respectfully requests this Court provide a bright line rule which recognizes the intent of the California Public Records Act in the context of the Internet age without compromising a police officers' right to privacy and a public agency's duty to protect police personnel information. Specifically, the City requests this Court find that the CPRA exempts the disclosure of an officer's name when that officer has been involved in a critical incident which has become the subject of an internal investigation.

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[3] Assuming the L.A. Times argues that the same potential exists with the release of all police officer names; the reality is that when the focus is on an individual officer or a small number of officers who are being painted as "murderers", the likelihood of cyber stalking and actual danger is real, as opposed to the disclosure of hundreds or thousands of names which would be a massive fishing expedition.

B. PROCEDURAL POSTURE.

1. Trial Court Proceedings.

On December 12, 2010, Long Beach police officers shot and killed Douglas Zerby. This incident garnered significant media attention because Mr. Zerby was holding a garden hose nozzle that the police officers believed was a gun. The Los Angeles Times (hereinafter "L.A. Times") made a request to the City under the California Public Records Act for the names of all police officers involved in shootings from January 1, 2005 through December 20, 2010.

On December 30, 2010, the Long Beach Police Officer Association (hereinafter "LBPOA") filed a Verified Complaint for Temporary Restraining Order; Preliminary Injunction; and Permanent Injunction naming the City of Long Beach as Defendant in order to prevent the release of its members' names. The LBPOA expressed concerns for its members' safety and referenced the ease by which personal information can be obtained over the internet. The City expressed similar concerns and opposed divulging an officer's name during a pending internal investigation due to the fact that the City's investigation into the incident could be compromised.

The Superior Court issued a temporary restraining order. The Los Angeles Times intervened in the case and opposed the LBPOA's position,

which the City had joined. Police Lieutenant Lloyd Cox informed the trial court that the Police Department's policy is to protect officers' names during the course of the administrative and/or criminal investigation based in part on the fact that the investigative materials are part of an officer's personnel file. Lieutenant Cox also informed the court that the department produces information from police personnel files only in response to motions filed pursuant to *Pitchess v. Superior Court* (1974) 11 Cal. 3d 531, or through discovery in criminal and civil cases. Lieutenant Cox echoed the LBPOA's concern that the identity of an officer should be protected when the officer is involved in a critical incident, including a shooting, in order to ensure the officer's safety and the safety of his or her family.

After full briefing and hearing, the trial court denied the request for injunctive relief and dissolved the temporary restraining order. It found the officers' names were not protected under California Government Code sections 6254(c), 6254(f) or 6254(k) or under California Penal Code sections 832.7 or 832.8. Finally, the court found the names were not protected under California Government Code section 6255(a) because of insufficient evidence of a threat to the involved officers. The LBPOA filed an application for a thirty day stay in order to file for writ relief with the California Court of Appeal.

2. Appellate Court Proceedings.

The City and the LBPOA filed Petitions for Writ of Mandate with the Court of Appeal, Second Appellate District, Division Two. The LBPOA simultaneously filed a Notice of Appeal. Rather than granting either of the Petitions for Writ of Mandate, the appellate court construed the LBPOA's petition as a petition for writ of supersedeas, thus staying the trial court's order. It simultaneously issued an order indicating that the trial court's order was directly appealable pursuant to Code of Civil Procedure section 904.1(a)(6). The City then filed its Notice of Appeal.

On appeal, the City raised the following issues:

(1) whether the trial court misconstrued the applicable statutory scheme under the California Public Records Act and under California Supreme Court authority in ordering the disclosure of police officer names, and

(2) whether the trial court engaged in improper balancing of interests in failing to afford due weight to the interest served by non-disclosure.

The California Court of Appeal affirmed the trial court's decision, concluding that the names of police officers who are involved in a shooting are not rendered confidential by any of the statutory exemptions contained in the CPRA. The Court of Appeal did not acknowledge that the

exceptions to the CPRA at issue were developed years prior to the advent of the Internet, where a person armed with a mere name, and the touch of a few keystrokes can access a plethora of private information about a police officer and by extension his or her family.

C. APPLICABLE LAW AND POLICY.

1. The California Public Records Act.

The California Public Records Act is based on the principle that "access to information concerning the conduct of the public's business is a fundamental and necessary right of every person in this state." (California Government Code § 6250.) However, this right is not absolute and in adopting the CPRA, the Legislature also declared it was "mindful of the right of individuals to privacy." (*Id.*) Accordingly, there are numerous exemptions to the CPRA that are designed to protect individuals' privacy rights. (California Government Code § 6254.)

The exemptions at issue in this case are sections 6254(k) and 6254(f). Under California Government Code section 6254(k) "[r]ecords, the disclosure of which [are] exempted or prohibited pursuant to federal or state law, including, but not limited to provisions of the Evidence Code relating to privilege" are exempt from disclosure. (California Government Code § 6254(k).) In 1998 the Legislature enumerated over 500 statutes that fall under subsection (k). (*Copley Press Inc., v. Superior Court of San Diego*

County (2006) 39 Cal. 4th 1272, 1283.) This includes California Government Code section 6276.34 which exempts from disclosure police personnel records. (*California Government Code* § 6276.34.) In short, section 6254(k) incorporates the protections of California Penal Code sections 832.7 and 832.8 into its exemption.

Another statutory exemption exists for records of investigations conducted by a local law enforcement agency. (California Government Code § 6254(f).) Under subsection (f), "[r]ecords of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, ... any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes..." are exempt from disclosure. (*Id.*)

Law enforcement agencies are required to disclose information concerning certain enumerated crimes to the victim of an incident, to the victim's authorized representative, to an insurance carrier against which a claim has been made, and to any person suffering bodily injury or property damage or loss, as the result of the incident. Disclosure is required unless it would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion

of the investigation or a related investigation. (*Id.*)

2. The Pitchess Statutes.

California law governing the protection of police officer personnel records is found in a series of statutes in the California Penal Code and the California Evidence Code. These statutes are commonly referred to as "Pitchess statutes" in reference to the California Supreme Court case *Pitchess v. Superior Court.* (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) California Penal Code section 832.7 establishes the confidentiality of police officer personnel records. (California Penal Code § 832.7) California Penal Code Section 832.8 identifies various categories of information as personnel records. These include: (a) personal data, (b) medical history, (c) employee benefits, (d) employee appraisal, advancement, or discipline; (e) complaints or investigations of complaints regarding how an officer performed his duties, and (f) any other information, the disclosure of which would constitute an unwarranted invasion of personal privacy. (California Penal Code § 832.8.) A personnel file is defined as "the file maintained by the agency containing the primary records specific to each peace or custodial officer's employment, including evaluations, assignments, status changes, and imposed discipline. (California Penal Code § 832.5(d)(1).)

In enacting the Pitchess statutes, the Legislature made a decision that

police officer personnel records are confidential. It specified only two circumstances where an employer has discretion to release limited information. The Legislature permits, but does not require, agencies to disclose data about the number, type and disposition of a complaint against an officer, provided the agency does not identify the individual officers involved. (California Penal Code § 832.7(c).)(Emphasis added.) In addition, the Legislature allows an agency to release factual information about a disciplinary investigation if the officer or his agent publicly makes a false statement about the investigation or the imposition of discipline. (California Penal Code § 832.7(d).) Notably, both of these exceptions leave the decision about disclosure to the agency's discretion.

3. The California Constitution.

Article I, section 1 of the California Constitution states, "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining, safety, happiness and privacy." (California Constitution, article I, § 1). The inalienable right to privacy was added to the California Constitution via voter initiative in the 1972 general election.

While there is a constitutional right to privacy, the California Constitution also evidences the competing principles regarding record

disclosure. On the one hand, the public has the right to monitor governmental activities, and, on the other hand, a police officer retains the right to privacy in his personnel records. (California Constitution, article I, § 3, subds. (b)(1) and (3).) Importantly, the Constitution, as amended by California voters in 2004, expressly preserves "statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer." Article I, section (b)(3) also explicitly provides that nothing in subdivision (b) supersedes or modifies the right of privacy guaranteed by Section 1. (California Constitution, article I, § 3, subd. (b)(3).)

4. The City of Long Beach's Shooting Review Policy.

Police officers who are involved in an on-duty shooting immediately become the subject of both an administrative and criminal investigation so the Police Department can ascertain if its officers' actions were in or out of policy and whether their actions were in compliance with the law. (Clerk's Transcript (hereinafter "CT") 000242). The investigative materials from the administrative investigation, which contain the name of the involved officer, along with other information, are kept in the officer's personnel file and constitute personnel records. (CT 00242.) They are discoverable through the Pitchess process. The department ceased releasing names of officers

involved in shootings in 2007 following this Court's decision in *Copley Press*. (CT 00242.)

IV.

LEGAL ARGUMENT

A. THE DECISION IN *LONG BEACH POLICE OFFICERS ASSOCIATION V. CITY OF LONG BEACH* IS INCONSISTENT WITH THIS COURT'S PRIOR RULINGS IN *COPLEY PRESS* AND *POST.*

1. The Holding in *Copley Press v. Superior Court* That Police Personnel Records Are Not Subject to Disclosure Under the CPRA Should Preclude Disclosure of the Names of Officers Investigated For On-Duty Shootings.

The basis of the dispute in *Copley Press* was the press' request under the CPRA for the names of police officers who were being disciplined, and the agency's refusal to disclose that information. (*Copley Press v. Superior Court,, supra,* 39 Cal.4th at p. 1279.)

In *Copley Press*, the press argued that policy considerations mandated the release of officers' names because public scrutiny is an essential component in preventing the arbitrary exercise of police power. The agency declined the request, relying on various statutory exceptions to

the CPRA, including Government Code section 6254(k), which applies to: "[r]ecords, the disclosure of which [are] exempted or prohibited pursuant to federal or state law, excluding, but not limited to provisions of the Evidence Code relating to privilege." (California Government Code § 6254(k).)

In settling the dispute between the press and the agency, this Court noted that the Legislature enacted the CPRA for "the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies." (*Copley Press v. Superior Court,* 39 Cal.4th at p. 1281.) However, this Court also recognized the right of access to public records under the CPRA is not absolute, and in enacting the CPRA, the Legislature expressly declared that it was mindful of an individual's right to privacy. (*Id.* at p. 1282.) Importantly, this Court explicitly stated, "the legislature.....made the policy decision that the desirability of confidentiality in police personnel matters does outweigh the public interest in openness." (*Id.* at pp. 1298-1299.) (Emphasis in original.) California voters echoed the Legislature's concern for police officer privacy when it amended the State Constitution in 2004 and expressly preserved statutory procedures in place that were specifically designed to protect police officers. (California Constitution, article I, § 3, subd. (b)(3).) This specific protection is in line with the guarantee to

privacy found in Article I, section 1 of the Constitution. (California Constitution, article I, §1.)

The L.A. Times is asserting policy arguments similar to those made in *Copley Press*. The trial court relied on these policy arguments in issuing its order, which specifically referenced police conduct, including the shooting of suspects or others as being a "core matter of public concern". (CT 000282.) The Court of Appeal concurred, holding the police officers' names were not protected by any statutory exemptions in the CPRA. While the City does not dispute the general premise that police conduct constitutes a matter of public concern, it does find the court's ruling inconsistent with this Court's holding that "'the desirability of confidentiality in police personnel matters does outweigh the public interest in openness.'" (*Copley Press, supra,* 39 Cal.4th at p. 1298-1299.)

Aside from the L.A. Times' policy arguments in *Copley Press,* the L.A. Times relied heavily upon the holding in *New York Times Co. v. Superior Court* (1997) 52 Cal.App.4th 97. In *New York Times,* the Second Appellate District held that that the names of deputies who discharged their weapons during an incident were a matter of public record, despite the fact the incident was under investigation and investigative materials were placed in personnel files as part of an investigative report. (*New York Times Co. v. Superior Court* (1997) 52 Cal.App.4th 97, 104.)(Overruled in

part.) The *New York Times* court reasoned that the agency placed the investigation files in the officers' personnel files in an attempt to prevent disclosure of the police officers' names. It refused to recognize that internal investigations into police officer shootings constitute protected personnel information and are inseparable from a police officer's personnel file. It also stated that because police officers are statutorily required to wear identification, the names of officers should be a matter of public record. (*Id.* at 103.)

This Court overruled the central holding in *New York Times* and declared that the lower court's "unsupported assertion is simply incorrect, at least insofar as it applies to disciplinary matters . . . ." (*Copley Press, supra,* 39 Cal.4th at p. 1298.) First, this Court indicated that *New York Times* does not stand for the proposition that "records within a public agency's possession lose protection to which they are otherwise entitled merely because they were, at some time, available from some other source." (*Id.* at p. 1293.) This is important because the L.A. Times has raised the argument that the names of the police officers who were involved in the Zerby shooting and other shootings have already been disclosed publicly; therefore, they are automatically public records that must be disclosed by the City. This is not the state of the law. The mere fact that officers' names are available from other sources does not necessarily mean

that the information cannot be considered personal, or private, or exempt from disclosure under the CPRA. (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal. 4th 278, 296, fn.5, citing *Department of Defense v. FLRA* (1994) 510 U.S. 487.) In addition, *New York Times* was decided in 1997, well before the explosion of Internet use, "hacking", and the easy access to all manner of private information as a way of life.

Aside from the L.A. Times' heavy reliance on *New York Times,* it relied on the California Attorney General's opinion which described the narrow holding in *Copley Press* to mean "that a peace officer's name may be kept confidential when it is sought in connection with information pertaining to a confidential matter such as an internal investigation or a disciplinary proceeding." (*Long Beach Police Officers Association v. City of Long Beach* (2012) 203 Cal.App.4th 292, 318, citing 91 Ops. Cal. Atty. Gen. 11, 14 (2008).)(Emphasis added.) It is a well-settled rule of statutory construction that the term "or" has a disjunctive meaning and denotes a choice between at least two things. (*Houge v. Ford* (1955) 44 Cal.2d 706, 712; see also, *In re Jesusa* (2004) 32 Cal.4th 588.) "In its ordinary sense, the function of the word 'or' is to mark an alternative such as 'either this or that.'" (*Houge v. Ford, supra,* 44 Cal.2d at p. 712.) It appears the holding in *Copley Press* was intended to prevent the disclosure of confidential

information including internal investigations.

The Court of Appeal in this case concurred with the LA Times and did not apply the *Copley Press* holding to the City's internal police officer investigations. The Court of Appeal reasoned that this Court's deliberate reliance on *New York Times* and its limited disapproval to an isolated sentence in that case demonstrates that the *New York Times* case is still viable. (*Long Beach Police Officers Assn. v. City of Long Beach* (2012) 203 Cal.App.4th 292, 310.) The Court of Appeal failed to recognize that the connection between an officer's name and a specific incident is protected personnel information, even when the name stems from an appraisal of job performance or forms part of a law enforcement investigation.[4] The Court of Appeal concluded that the disclosure of the name of an officer who was involved in a shooting does not reveal any information about the officer's advancement, appraisal or discipline; therefore, the name is not protected under Penal Code section 832.8(d). The Appellate Court determined that its conclusion was consistent with *Copley Press.* (*Id.* at p. 312.)

The City respectfully disagrees and asserts the Court of Appeal's

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[4] It did, however, appear to recognize that if there is a citizen complaint against an officer who is the subject of an internal investigation, his name would not be subject to disclosure under the CPRA. (*Long Beach Police Officers Assn. v. City of Long Beach, supra,* 203 Cal.App.4th at p. 313.)

decision is inconsistent. On the one hand, the Court found that a police officer's name in connection with an officer involved shooting investigation is a matter of public record, claiming it is "just a name." On the other hand, the Court spoke to the Legislature's intent to protect names when they are linked to "personnel" information. The City put forth evidence that on-duty shooting review investigations form part of an officer's personnel file, thereby demonstrating the link between an officer's name and protected personnel information. (CT 000242.) In short, it appears the Court of Appeal ignored this Court's fundamental holding in *Copley Press* which precludes the release of a police officer's name when that name is linked to private personnel information.

2. This Court's Decision in *Commission on Peace Officer Standards & Training v. Superior Court* Did Not Abrogate Its Previous Decision in *Copley Press* That Police Officer's Names Are Confidential When They Are Linked to an Investigation or Disciplinary Matter.

This Court's subsequent decision in *POST* did not abrogate the decision in *Copley Press* that police officers' names are confidential when they are linked to an investigation or disciplinary matter. (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal. 4th 278.) In *POST*, the press sought the names and employment dates of police officers registered in the State of California. The narrow issue before this Court was whether the Commission's records of the names, employing

departments, and dates of employment constituted 'peace officer personnel records' under Penal Code section 832.7 which would fall under the exemption of 6254(k). (*Id.* at p. 289.)

This Court examined Penal Code section 832.8(a), which is incorporated into Government Code section 6254(k), and reviewed whether the term "employment history . . . or similar information" meant that a police officer's name and dates of employment constituted "employment history" such that the information would be prohibited from disclosure under the CPRA. The Court reviewed the legislative history and opined that when it adopted California Government Code sections 832.7 and 832.8 it did not appear the Legislature was concerned with making police officers' names confidential. This Court did opine that the legislative concern "appears to have been with linking a named officer to private or sensitive information listed in 832.8." (*Id.* at 295.)

Importantly, this Court in *POST* distinguished the facts before it from the facts in the *Copley Press* case and specified that the case before it did not "involve the identification of an individual as the officer involved in an incident that was the subject of a complaint or disciplinary investigation. The officers' names, employing departments, and dates of employment were not sought in conjunction with any of the personnel or sensitive

information that the statute seeks to protect." (*Id.* at p. 299.) (Emphasis added.)

This Court also analyzed disclosure under California Government Code 6254(c) which exempts personnel records form disclosure only if their disclosure would constitute an unwarranted invasion of personal privacy, which, as the court noted, requires a balancing test between the officer's right to privacy and the public's interest in disclosure. (*Id.* at p. 302.) In analyzing subsection (c) of section 6254, this Court relied on *Stone v. F.B.I.* and recognized that the concern surrounding the release of police officers' names was not with the name, per se. Instead, the concern is with the connection between the name and an event.[5] (*Stone v. F.B.I.* (D.D.C. 1990) 727 F.Supp. 662.) The court in *Stone* stated that "[w]hat could reasonably be expected to constitute an unwarranted invasion of an agent's privacy is not that he or she is revealed as an FBI agent but that he or she is named as an FBI agent *who participated in the RFK*

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[5] In *Stone v. F.B.I.*, the Court was tasked with deciding whether a request under the Freedom of Information Act seeking the names of agents who were involved in the investigation of Robert F. Kennedy's assassination were exempt from disclosure under 5 U.S.C. §552(b)(7)(C) which requires information be disclosed except for "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy. (5 U.S.C. § 552(b)(7)(C).)

investigation." (*Id.* at 665.) In *POST*, this Court commented that in the case before it, the information sought "merely would reveal that the named individuals had worked as peace officers; it would not reveal their involvement in any particular case." (*Commission on Peace Officer Standards & Training v. Superior Court, supra,* 42 Cal. 4th at p. 302, fn. 12.)

The Court of Appeal referenced this Court's comment, stating it "could be construed to suggest that disclosing an officer's name in connection with a particular incident can constitute a basis for nondisclosure, [but] we do not believe that the *POST* Court intended to eliminate or minimize the burden on the party seeking nondisclosure to make a particularized showing as to why disclosure would be an unwarranted invasion of personal privacy under section 6254, subdivision (c)." (*Long Beach Police Officers Assn. v. City of Long Beach* (2012) 203 Cal.App.4th 292, 318) Despite the Court of Appeal's uncertainty about the disclosure of an officer's name in connection with a particular incident, it refused to allow the City to keep its police officer personnel records private, absent a showing of unwarranted invasion of privacy, even under 6254(k).

Notably, Government Code section 6254(k) does not require any balancing of interests. The City should not be required to make a

particularized showing when the information sought is statutorily protected. Section 6254(k) is a blanket exception to disclosure, unlike subsection (c)[6] In *POST*, this Court recognized the prohibition under 6254(k) and harmonized its previous holding in *Copley Press* stating, "[b]ecause section 832.7 deems peace officer personnel records and information obtained from those records to be "confidential," they are exempt from disclosure under the Act." (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal. 4th 278, 289, citing *Copley Press, Inc. v. Superior Court, supra,* 39 Cal.4th at 1284-1286.)

In *POST*, this Court concluded that it was "unlikely that the Legislature contemplated that the identification of an individual as a peace officer, *unconnected to any of the information* it defined as part of a personnel record, would be rendered confidential by § 832.8." (*Commission on Peace Officer Standards & Training v. Superior Court, supra,* 42 Cal. 4th at pp. 295-296.)(Emphasis added.) This Court further suggested that disclosing an officer's name in connection with a particular incident could constitute a basis for nondisclosure. (*Id.* at 302, fn.12.)

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[6] California Government Code 6254(c) excepts from disclosure, "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy," while subsection (k) prevents the disclosure of [r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." (California Government Code § 6254(c).)

Clearly, this Court has recognized that the release of police officer names in and of themselves, unconnected to any personnel information is permissible and distinct from the release of information protected by Penal Code section 832.8. The *POST* decision is unmistakably clear. The names of police officers must be released only if the request under the CPRA is general with respect to employees who are identified as working for a particular department. Even under the holding in *POST*, there are limitations, allowing for the protection of officers who require anonymity in performing their duties, such as undercover officers or those assigned to sensitive or hazardous assignments. Those officers' names, standing alone, can be exempt from disclosure to a request for public records under Government Code section 6255(a). (*Id.* at 301). The Court of Appeal erred in broadly interpreting *POST* to stand for the proposition that the disclosure of individual police officer's names, linked to protected personnel information is permissible, thereby expanding the scope of *POST*.

Reading *Copley Press* and *POST* together, it appears the law in the State of California is that the name of a police officer, unconnected to information contained in a police officer's personnel file, is a matter of public record, but when a police officer's name is connected to information contained in a police officer's personnel file, such as an appraisal or internal investigation, it is not. This Court's decisions are binding on the

lower court. As such, the Court of Appeal's decision should be reversed so that it comports with the letter and spirit of state law.

B. DISLOSING THE NAMES OF OFFICERS WHO ARE SUBJECT TO INTENRAL INVESTIGATION, BUT NOT THE SUBJECT OF A CITIZEN COMPLAINT, YIELDS INCONSISTENT RESULTS UNDER THE CPRA.

This Court has long recognized that its role in construing a statute is to give the statute reasonable construction conforming to the Legislature's intent and that the words must be construed in context, with statutes governing an issue being harmonized. (*Copley Press v. Superior Court* (2000) 39 Cal. 4th 1272, 1290, fn. 22.) This court recognized the legislative intent behind the Pitchess statutes and stated, "[t]he legislative history of this provision confirms the Legislature's intent to "prohibit any information identifying the individuals involved from being released, in an effort to protect the personal rights of both citizens and officers." (*Id.* at 1297, citing Assem. Com. on Public Safety, Republican Analysis of Assem. Bill No. 2222 (1989-1990 Reg. Sess.) Sept. 2, 1989; see also Assem. Com. on Ways & Means, Analysis of Assem. Bill No. 2222 (1989-1990 Reg. Sess.) as amended May 17, 1989.)

Under *Pitchess,* and pursuant to the California Penal Code, certain

information is considered part of a police officer's personnel file and is confidential. This includes, among other things, citizen complaints against a police officer pursuant to California Penal Code section 832.5. In the instant case, the Court of Appeal found the "Legislature's express protection of investigations of complaints does not encompass the name of an officer subject to an internal investigation that is unrelated to a complaint." (*Long Beach Police Officers Assn. v. City of Long Beach* (2012) 203 Cal.App.4th 292, 313.)

Following the Court of Appeal's logic, anytime a citizen complaint is filed in conjunction with an investigation into a shooting, the name of the involved police officer will be exempt from disclosure to a request under the CPRA. However, if a complaint is not filed, the officer's name will be subject to disclosure regardless of the department's internal investigation. This is certain to render inconsistent results.

The City of Long Beach conducts administrative and criminal investigations after each officer involved shooting and possesses investigative materials, including internal shooting review board reports which contain the name of the involved officer. (CT 00242.) Administrative investigation materials consist of the facts surrounding the shooting, which include an evaluation or appraisal of the officer's actions leading up to, during, and following the shooting. Criminal investigation

materials consist of similar materials, with the focus on whether or not the officer engaged in criminal conduct, or in the alternative, whether there was another crime committed. Both administrative and criminal investigative materials contain the officer's name. The administrative materials are integrated into the officer's personnel file regardless of whether a citizen files a complaint against the officer.

Potentially, there could be a shooting that involves two officers where both are administratively investigated in accordance with the Police Department's policy. (CT 000242.) Hypothetically, if only one officer is the subject of a citizens' complaint, his name will not be subject to disclosure under the CPRA, but his fellow officer who is not the subject of a citizen complaint will have his name released under the CPRA. It is doubtful that the Legislature intended for an inconsistent result regarding the disclosure of police officers' names when it crafted its protections for police officer personnel records.

This Court's decision in *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court,* is instructive on this point. In *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court*, a newspaper requested the names, titles and salary information of city employees, including peace officers. (*International Federation of Professional & Technical Engineers,*

Local 21, AFL-CIO v. Superior Court (2007) 42 Cal. 4th 319, 327.)

One of the issues was whether California Penal Code sections 832.7 and 832.8 exempted police officer salary information from disclosure. The court held salary information was subject to disclosure, based on a very straightforward textual interpretation of the phrase "personnel records" in section 832.8. (*Id.* at p. 346.) This Court reasoned that disclosure was warranted because the statute did not expressly mention salary information as a protected category of information, nor did it contain any other text from which one could reasonably imply that salary information should be protected. (*Id.* at p. 342.)

In sharp contrast, in the instant case, it could reasonably be implied by the Legislature's specific protection of information such as citizen complaints, appraisal information, and home addresses, that the name of an officer who is under internal investigation for a shooting should be protected as it falls squarely within each of these protected categories of information.[7]

An officer who is the subject of a citizen complaint will not have his name released in response to a request under the CPRA due to the protections of California Penal Code section 832.5. An internal

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[7] This information is protected from disclosure under California Penal Code sections 832.5, 832.8 (d), and 832.8(a), along with California Government Code section 6254.21, respectively.

investigation about an officer contains his name along with a detailed analysis about the officer's conduct during the performance of his duties. This type of material is governed by California Penal Code section 832.8(d) which exempts from disclosure records about a police officer's appraisal. Finally, an officer's name when linked to a critical incident also fits within 832.8(a) which protects an officer's address. The reason for this protection is due to the fact that with a mere name, an officer's home address can easily be discovered online.

The City respectfully requests that this Court construe an officer's name when connected to a critical incident and subject to investigation to be exempt from disclosure under the CPRA, even if there is no citizen complaint attached.

C. A POLICE OFFICER'S NAME THAT IS LINKED TO AN INTERNAL INVESTIGATION OF AN ON DUTY SHOOTING SHOULD BE EXEMPT FROM DISCLOSURE UNDER GOVERNMENT CODE SECTION 6254(f)

California Government Code 6254(f) provides that records of investigations conducted by a local law enforcement agency are not a matter of public record and exempts such investigatory material from

disclosure, with limited exceptions, pursuant to the CPRA.[8] Section 6254(f) should legally extend to the City's internal investigations into officer involved shootings, which include the name of the involved officer(s). In this case, the Court of Appeal referenced 6254(f) in its opinion, but did not confirm it is applicable to the instant situation. (*Long Beach Police Officers Assn. v. City of Long Beach* (2012) 203 Cal.App.4th 292, fn. 5.)

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[8] California Government Code, section 6254(f) states: "Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the Office of the Attorney General and the Department of Justice, the California Emergency Management Agency, and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes. However, state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (b) of Section 13951, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation. However, nothing in this division shall require the disclosure of that portion of those investigative files that reflects the analysis or conclusions of the investigating officer." (California Government Code § 6254(f).)

The City immediately launches both criminal and administrative investigations following an officer involved shooting. The statutory language in subsection (f) referencing "investigations conducted by . . . any local police agency" necessarily includes both the department's criminal investigation and the department's internal investigation into a shooting. The criminal and administrative investigations run on parallel tracks and are overseen by the Homicide detail. (CT 000242.)

While there are two investigations occurring simultaneously, it is important to note that the criminal investigators do not need to provide officers with protection under Peace Officers' Bill of Rights and may share information from their investigations with the administrative investigators. (*Van Winkle v. County of* Ventura (2007) 158 Cal.App.4th 492, 500.) Thus, in cases when criminal investigative materials are shared with administrative investigators, disclosure from the administrative investigation in response to a request for public records necessarily causes a disclosure of information from the criminal investigation. This disclosure would violate subsection (f), and would impair the integrity of the investigation.

In *Dixon v. Superior Court* (2009) 170 Cal. App. 4th 1271, 1276, the court explained the "reasons for this law enforcement investigation exemption are obvious. The exemption protects witnesses, victims, and

investigators, secures evidence and investigative techniques, encourages candor, recognizes the rawness and sensitivity in criminal investigations, and in effect makes such investigations possible." An administrative investigation conducted by a local police agency is similar to a criminal investigation and serves like purposes. Records of law enforcement investigations under California Government Code section 6254(f) are exempt on their face and the release of such investigative materials would publicly expose sensitive material. (*Haynie v. Superior Court* (2001) 26 Cal 4th 1061.)

The Court of Appeal appears to have ignored the plain language of the statute and erroneously found subsection (f) would only apply in cases where "disclosure would endanger the person's safety or the completion of the investigation". (*Long Beach Police Officers Assn. v. City of Long Beach* (2012) 203 Cal.App.4th 292, 303, fn. 5.) Yet, the balancing referenced in California Government Code 6254, subsection (f) applies to balancing whether the information should be provided to the victim of the crime or his authorized representative, not to the public. The balancing looks to whether the disclosure of the information would endanger the safety of a witness or compromise the successful completion of an investigation or a related investigation. The language of subsection (f) does not require broad disclosure as implied by the Court of Appeal. As such,

the City requests its internal investigations into officer involved shootings be protected under California Government Code section 6254(f), even if the officer is not the subject of a formal citizen complaint.

D. THE LEGISLATURE'S MANIFEST CONCERN FOR PROTECTING THE SAFETY AND PRIVACY OF POLICE OFFICERS OVER THE INTERNET MUST BE CONSIDERED.

The Internet is an international network of interconnected computers which "enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world." (*Pavlovich v. Superior Court* (2002) 29 Cal. 4th 262, 265, citing *Reno v. ACLU* (1997) 521 U.S. 844, 849-850). "The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world." (*Id.*, citing *Reno v. ACLU* (1997) 521 U.S. 844, 852.) On the Web, "documents, commonly known as Web 'pages,' are . . . prevalent." (*Pavlovich v. Superior Court, supra,* 29 Cal. 4th at p. 265.) These pages are located at Web sites and have addresses marking their location on the Web. If a Web page is freely accessible, then anyone with

access to a computer connected to the Internet may view that page. With its explosive growth over the past two decades, the Internet has become " 'a unique and wholly new medium of worldwide human communication.'" (*Id. at p. 265.*) The Internet revolution has created a host of new legal issues because as a communication framework, it is far more prolific and wide-spread than other forms of traditional communication.

In 1990, the Legislature amended California Penal Code section 832.8(a) by adding home addresses to the list of examples of personal data. According to the amendment's legislative history, one of the Legislature's purposes in adding this to the list was to protect officers and their families. (Assem. Comm. On Public Safety Analysis of Sen.Bill 1985 (1989-1990 Reg. Sess.) as amended May 16, 1990, p.2.) In Justice Chen's dissenting opinion in *POST*, he recognized that, "[g]iven that publicly available databases on the Internet make it easy to link a name to an address, the release of an officer's name would not seem to pose much, if any, less of a safety risk than would disclosing an officer's home address." (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal. 4th 278, 317 (dis. opn. of Chen, J.).) Justice Chen proceeded to recognize that in light of the accessibility of information through the Internet, it would be entirely feasible for someone to use an officer's name to locate his address. (*Id.*)

In 1998, the Legislature enacted California Government Code section 6254.21 as part of the CPRA. Section 6254.21 is congruent with California Penal Code section 832.8(a), which makes police officers' home addresses confidential. (California Government Code §6254.21.) California Government Code section 6254.21 governs state and local agencies Internet posting of home address and phone numbers of elected or appointed officials and prohibits the posting of such information absent written permission from the individual.[9]

In 2008, County Counsel for the County of El Dorado requested a legal opinion from the State Attorney General. The inquiry was whether a county that maintains a database of property related information that may incidentally contain the home address and telephone numbers of elected or appointed officials, but who are not identifiable as such from the data needed to obtain permission from those people under California Government Code section 6254.21(a) before transmitting the information over this limited access network. The Attorney General opined that it did not need to obtain permission when the information was transmitted over a limited access network. (2008 Cal. AG LEXIS 31 (May 20, 2008, No. 06-802).)

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[9] California Government Code section 6254.24 includes peace officers as appointed public officials who are covered by section 6254.21.

The Attorney General analyzed the legislative intent behind the statute. It relied on this Court's holding that "a wide variety of factors may illuminate the legislative design," including "context, the object in view, the evils to be remedied, the history of the time and of legislation upon the same subject, public policy and contemporaneous construction." (*Walters v. Weed* (1988) 45 Cal.3d 1, 10.) The Attorney General found that a legislative committee report indicated that "the author believes that public officials should not have their home addresses or home telephone numbers posted on the public agency Internet websites without permission." (Assembly Comm. on Appropriations, Rep. on Sen. Bill No. 1386 (1997-1998 Reg. Sess.) Aug. 5, 1998 (as proposed to be amended).) The Attorney General even considered a letter from State Senator Tim Leslie to then Governor Wilson, which stated in part, "[t]his section was added to the bill in response to a recent problem in Sacramento that highlighted the need for this prohibition. The City of Sacramento created a Web site that included the addresses and phone numbers of all public officials residing in the county, including local and state law enforcement officials who could easily be the target of criminals seeking revenge. The controversial Web site was discontinued, shortly after concerns were voiced by several public officials." (2008 Cal. AG LEXIS 31 (May 20, 2008, No. 06-802), page 9.) The Attorney General concluded that the intent of the statute was to

prohibit the publication of governmental officials' personal addresses and phone numbers without the express consent of the individual at issue.

Importantly, the Attorney General provided, "[i]n view of the Legislature's manifest concern for protecting the safety and privacy of public officials, we believe that the statute's purpose would also extend to databases, which, though they may not explicitly link named officials with their respective home information, nevertheless contain both the home information and the names and titles of those officials, such that a search engine could readily connect each officer with the corresponding personal information using only that database. (*Id.* at page 6.) It did not find the statutory intent to limit the placement of this information on a limited access or private network.

In 2004, California Government Code section 6254.21 was amended. This was done in response to a report to the Legislature from the Public Safety Officials Home Protection Act Advisory Task force. The amendments resulted in additional measures to protect private information in light of the internet and easy access to private information. Specifically, the amendment prohibited the public posting of the home address or telephone number of any appointed official if that official made a written demand not disclose his or her home address or telephone number. The amendment also provided various remedies for a violation of the statute.

Clearly, the safety of public officials including peace officers is of concern to the Legislature.

This Court should consider the legislative intent of a statute under the CPRA that was adopted and amended during the Internet age and apply its reasoning to the Legislative intent governing privacy protections found under the Pitchess statutes which are incorporated into the CPRA. The City is obligated to protect its police officers' personnel information. In light of easy access to a home address or phone number with a mere name, the City respectfully requests this Court hold the name of a police officer who is subject to investigation for a shooting is exempt from disclosure under the CPRA. Absent this exemption, police officers will continue to have their private contact information publicized and will continue to be the subject of threats from groups such as "Anonymous" and "Occupy Long Beach." And the likelihood of those groups honoring an officer's request to remove his personal contact information from the Internet is unlikely, at best.

VI.

CONCLUSION

The issue of protecting police officer names from disclosure during an internal investigation into a shooting and preserving the integrity of an agency's investigation is one of deep concern to cities and counties

throughout California. Law enforcement agencies are tasked with investigating crimes, which at times, involve the investigation of its own officers. They are also tasked with conducting internal investigations regarding police officer conduct. Agencies should not be compelled to compromise their criminal or administrative investigations by releasing the name of the officer who is under investigation. Moreover, with the proliferation of information on the internet and the ability to use a police officer's name as the starting point to obtaining personal and private information, it is critical that this issue be resolved. The City respectfully urges this Honorable Court to find that the names of police officers linked to a critical incident that is subject to investigation exempt from disclosure under the CPRA.

Dated: May 16, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that the enclosed Petition for Review was produced using 13-point Times New Roman type, including footnotes, and contains approximately 9718 words, which is less than the 14,000 words permitted. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: May 16, 2012

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PROOF OF SERVICE BY MAIL

I am a resident of the county of Los Angeles; I am over the age of 18 and not a party to the within action; my business address is 333 West Ocean Boulevard, 11th Floor, Long Beach, CA 90802-4664.

On May 16, 2012, I served the within:

CITY OF LONG BEACH'S OPENING BRIEF ON THE MERITS

on the interested parties herein by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Long Beach, California, addressed as follows:

SEE ATTACHED SERVICE LIST

I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Long Beach, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 16, 2012, at Long Beach, California.

Karen J. McCormick

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