ORIGINAL

No. S200872

SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

MAY 21 2012

Frederick K. Ohlrich Clerk

Deputy

CRC 8.25(b)

RECEIVED

MAY 21 2012

CLERK SUPREME COURT

LONG BEACH POLICE OFFICERS ASSOCIATION and DOE OFFICERS 1-150,

Plaintiffs and Appellants,

v.

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.

Appeal Arising from an Order of the Los Angeles Superior Court, Hon. Patrick T. Madden

---

OPENING BRIEF ON THE MERITS

James E. Trott
Larry J. Roberts
Law Offices of James E. Trott
8840 Warner Avenue, Suite 101
Fountain Valley, CA 92708
Telephone: (714) 596-8995
Email: jet202@aol.com

Attorneys for Plaintiffs and Appellants
LONG BEACH POLICE OFFICERS ASSOCIATION
and DOE OFFICERS 1-150

No. S200872

SUPREME COURT OF THE STATE OF CALIFORNIA

LONG BEACH POLICE OFFICERS ASSOCIATION and DOE OFFICERS 1-150,

Plaintiffs and Appellants,

v.

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.

Appeal Arising from an Order of the Los Angeles
Superior Court, Hon. Patrick T. Madden

OPENING BRIEF ON THE MERITS

James E. Trott
Larry J. Roberts
Law Offices of James E. Trott
8840 Warner Avenue, Suite 101
Fountain Valley, CA 92708
Telephone: (714) 596-8995
Email: jet202@aol.com

Attorneys for Plaintiffs and Appellants
LONG BEACH POLICE OFFICERS ASSOCIATION
and DOE OFFICERS 1-150

TABLE OF CONTENTS

Subject			Page
TABLE OF CONTENTS			i
TABLE OF AUTHORITIES			iii
QUESTIONS PRESENTED			1
STATEMENT OF THE CASE			1
	INTRODUCTION		1
	THE ESSENTIALS (Cal. R. Ct. 8.204(a)(2))		2
	SUMMARY OF THE RELEVANT FACTS		3
	PRIOR PROCEEDINGS		5
	STANDARD OF REVIEW		10
ARGUMENT			12
	I.	INTRODUCTION.	12
	II.	A BRIEF OVERVIEW OF CPRA.	12
	III.	THE NAMES OF PEACE OFFICERS INVOLVED IN SHOOTING INCIDENTS ARE CONFIDENTIAL AND THEREFORE EXEMPT FROM COMPELLED DISCLOSURE PURSUANT TO THE CPRA.	16
		A. Confidentiality Established.	16
		B. A Rejoinder to the Court of Appeal.	20
		C. Confidentiality Established Again.	22

/ / /

IV. THE BALANCE OF INTERESTS MUST BE STRUCK IN FAVOR OF CONFIDENTIALITY OF THE NAMES OF THE OFFICERS INVOLVED IN SHOOTINGS. 24

A. Confidentiality Established. 24

B. A Rejoinder to the Court of Appeal. 28

V. CONCLUSION. 29

TABLE OF AUTHORITIES

CONSTITUTIONS

Constitution	Page
Cal. Const. art. I, § 3(b)(1)	13

CASES

Case	Page
Ass'n for L.A. Cnty. Deputy Sheriffs v. Cnty. of L.A., 166 Cal. App. 4th 1625, 83 Cal. Rptr. 3d 494 (2008)	11
Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 117 Cal. Rptr. 106 (1974)	14
CBS, Inc. v. Block, 42 Cal. 3d 646, 725 P.2d 470, 230 Cal. Rptr. 362 (1985)	11, 13, 15, 25
City of Hemet v. Superior Court (Press Enter. Co.), 37 Cal. App. 4th 1411, 44 Cal. Rptr. 2d 532 (1995)	11
City of Poway v. City of San Diego, 229 Cal. App. 3d 847, 280 Cal. Rptr. 368 (1991)	24
City of Richmond v. Superior Court (S.F. Bay Gaurdian), 32 Cal. App. 4th 1430, 38 Cal. Rptr. 2d 632 (1995)	19, 21

///

///

Comm'n on Peace Officer Standards & Training v. Superior Court (L.A. Times Commc'ns LLC), 17
43 Cal. 4th 278,
165 P.3d 452,
64 Cal. Rptr. 3d 661 (2007)

Copley Press v. Superior Court (Cnty. of San Diego), 12, 14, 15, 18-22, 29
39 Cal. 4th 1272,
141 P.3d 288,
48 Cal. Rptr. 3d 183 (2006)

Dennis v. United States, 28
341 U.S. 494,
71 S. Ct. 857 (1951)

Filarsky v. Superior Court (City of Manhattan Beach), 10
28 Cal. 4th 419,
49 P.3d 194,
121 Cal. Rptr. 2d 644 (2009)

Long Beach Police Officers Ass'n v. City of Long Beach, 9
No. B231245 (Cal. App. Feb. 7, 2012)

People ex rel. Dep't of Alcoholic Beverage Control v. Miller Brewing Co.,
104 Cal. App. 4th 1189, 12
178 Cal. Rptr. 2d 861 (2002)

People v. Zambia, 24
51 Cal. 4th 965,
254 P.3d 965,
127 Cal. Rptr. 3d 662 (2011)

Pitchess v. Superior Court (Echeveria), 5
11 Cal. 3d 531,
522 P.2d 305,
113 Cal. Rptr. 897 (1974)

///

///

Roberts v. City of Palmdale, 13, 16
5 Cal. 4th 363,
853 P.2d 496,
20 Cal. Rptr. 330 (1993)

Sonoma Cnty. Employees' Ret. Ass'n v. Superior Court (The Press Democrat), 15
198 Cal. App. 4th 986,
130 Cal. Rptr. 3d 540 (2011)

Times Mirror Co. v. Superior Court (State), 10, 13, 29
53 Cal. 3d 1325,
813 P.2d 240,
283 Cal. Rptr. 893 (1991).

Valley Casework v. Custom Constr., 2
76 Cal. App. 4th 1013,
90 Cal. Rptr. 2d 779 (1999)

STATUTES

Statute	**Page**
Cal. Civ. Proc. Code § 904.1(a)(6) (West 2011)	9
Cal. Civ. Proc. Code § 904.1(f) (West 2011)	3
Cal. Gov't Code § 6250 (West 2008)	1, 13
Cal. Gov't Code §§ 6250-6270 (West 2008 & Supp. 2012)	1
Cal. Gov't Code § 6253(a) (West 2008)	13, 14
Cal. Gov't Code § 6254 (West Supp. 2012)	14
Cal. Gov't Code § 6254(c) (West Supp. 2012)	7, 14, 24, 25, 28
Cal. Gov't Code § 6254(e) (West Supp. 2012)	10

Cal. Gov't Code § 6254(f) (West Supp. 2012) 7

Cal. Gov't Code § 6254(k) (West Supp. 2012) 7, 14, 15 16

Cal. Gov't Code § 6255 (West 2008) 14, 15

Cal. Gov't Code § 6255(a) (West 2008) 8, 14

Cal. Gov't Code § 6259(c) (West 2008) 10

Cal. Penal Code § 832.5 (West 2008) 15, 16

Cal. Penal Code § 832.7 (West 2008) 7, 17, 18, 20, 21

Cal. Penal Code § 832.7(a) (West 2008) 15, 16, 18 - 20, 22

Cal. Penal Code § 832.7(c) (West 2008) 17, 19, 21

Cal. Penal Code § 832.8 (West 2008) 7, 20

Cal. Penal Code § 832.8(a) (West 2008) 9, 20

Cal. Penal Code § 832.8(d) (West 2008) 20

Cal. Penal Code § 832.8(e) (West 2008) 22 - 24

RULES OF COURT

Rule **Page**

Cal. R. Ct. 8.204(a)(2) 2

Cal. R. Ct. 8.500(c)(2) 3

QUESTIONS PRESENTED

Is the name of a peace officer involved in a shooting incident exempt from disclosure pursuant to the California Public Records Act inasmuch as such incidents are routinely investigated both administratively and criminally?

Is the name of a peace office involved in a shooting incident exempt from disclosure pursuant to the California Public Records Act inasmuch as the disclosure would constitute an unwarranted invasion of personal privacy?

STATEMENT OF THE CASE

INTRODUCTION

This action raises a significant question concerning the construction and application of the California Public Records Act, Cal. Gov't Code §§ 6250-6270 (West 2008 & Supp. 2012) (the CPRA or the Act). Namely, does the Act require disclosure of the names of peace officers involved in a shooting incident and thus subject to a disciplinary investigation? The Superior Court and the Court of Appeal both answered that question affirmatively, and Plaintiffs-Appellants Long Beach Police Officer Association (LBPOA) and Doe Officers 1-150 (Plaintiffs) consequently

appeal the issue to this Court.

THE ESSENTIALS (Cal. R. Ct. 8.204(a)(2))

Plaintiffs brought an equitable action seeking an order prohibiting the disclosure of the names of the Doe plaintiffs as well as the disclosure of any other information gleaned from their personnel files. (See V. Compl. para. 8, at 2; 1 C.T. 3.)[1] Plaintiffs sought a temporary restraining order, a preliminary injunction, and a permanent injunction preventing the City of Long Beach (the City) and its officials and employees from complying with the Public Records Act request submitted by Real Party in Interest and Respondent Los Angeles Times Communications LLC (The Times) as well as incidental relief. (See id. at 7; 1 C.T. 11.) The order appealed from, which denied all relief, is not final, but "[a]n order denying a preliminary injunction is appealable, as being within the meaning of the provision for appeals in cases involving injunctions". Valley Casework v. Custom Constr., 76 Cal. App. 4th 1013, 1019 n.4, 90 Cal. Rptr. 2d 779, 783 n.4

---

[1] Matters in the documentary record are referenced by the name of the document in abbreviated from and the page(s) thereof on which they appear followed by a parallel reference to the volume and page(s) of the Clerk's Transcript (C.T.) where they are reproduced. Matters in the Reporter's Transcript (R.T.) are identified by the page thereof where they appear together with a parenthetical identification of the speaker.

(1999) (citing Cal. Civ. Proc. Code § 904.1(f) (West 2011)).

SUMMARY OF THE RELEVANT FACTS[2]

The historical facts giving rise to this case are remarkably simple. On 12 December 2010, Long Beach police officers shot and killed Douglas Zerby, an intoxicated, unarmed thirty five year old man who was carrying a garden hose nozzle that the officers mistook for a gun. (See Decl. of Jeff Glasser Ex. C; 1 C.T. 57.) Following the shooting, Los Angeles Times reporter Richard Winton made a CPRA request to the City seeking the names of the officers involved in that incident and "[t]he names of Long Beach police officers involved in officer involved shootings from Jan.1[,] 2005 to Dec. 11, 2010". (Decl. of Richard Winton Ex. A; 1 C.T. 50.). The City initially responded that it intended to comply with the request by 10 January 2011. (See V. Compl. para. 7, at 3; 1 C.T. 2.)

The adjudicative facts of the case are somewhat sparse but nevertheless adequate for the purpose of resolving the issue presented.

---

[2] This recitation of the facts is taken almost verbatim from that synthesized by the Court of Appeal. Because no petition for rehearing was filed, those facts are virtually unassailable. See Cal. R. Ct. 8.500(c)(2) ("[A]s a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the . . . facts unless the party has called the Court of Appeal's attention to the alleged omission or misstatement of the . . . fact in a petition for rehearing.").

Those facts were offered by Lt Steve James, president of the LBPOA, on its behalf, and by Lt Lloyd Cox, on behalf of the City. Each lieutenant filed a declaration explaining why confidentiality of the names of officers involved in shootings is essential.

LBPOA president Steve James averred that he was aware that the shooting review which takes place following an officer involved shooting can lead to findings resulting in an internal affairs investigation. (See Decl. of Steve James paras. 2-3, at 1-2; 1 C.T. 21-22.) Lt James expressed safety concerns about releasing the names of shooting officers, referring to an incident in which an anonymous blog posting contained a threat to a shooting officer's family and to another incident in which an officer involved in a shooting was reassigned to another area following death threats. (See id. para. 4, at 2; 1 C.T. 22.) Lt James also described the ease with which the Internet allows an individual to discover personal information about another and opined that "[t]he best way to keep officers safe from these unknown people who may try to bring harm is to not let them know which officer was involved". (Id. para. [5], at 3; 1 C.T. 23.)

Lt Lloyd Cox averred that the policy of the Long Beach police department is not to release the names of officers involved in an officer involved shooting because those officers become the subject of an

administrative or criminal investigation or both and because the investigative materials become part of the officers' personnel records. (See Decl. of Lloyd Cox para. 3, at ii; 2 C.T. 242.) Lt Cox further declared that, upon completion of the investigative process, the officers' names are kept confidential unless a motion is filed pursuant to Pitchess v. Superior Court (Echeveria), 11 Cal. 3d 531, 522 P.2d 305, 113 Cal. Rptr. 897 (1974), or unless they are sought through discovery in a civil or criminal case. (See id. para. 4, at ii; 2 C.T. 242.) Lt Cox indicated that since late 2007 the police department had issued eight officer safety bulletins about potential threats or retaliation against officers, two of which related to officer involved shootings. (See id. para. 10, at iii, 2 C.T. 243.) Noting that knowing someone's name can be the gateway to a world of information about him or her through the Internet, Lt Cox declared that "the Long Beach Police Department insists on protecting the identity of its officers, when those officers are involved in critical incidents, including shootings, in order to ensure their safety and the safety of their families". (See id. para. 11, at iv; 2 C.T. 244.)

PRIOR PROCEEDINGS

After the City informed the LBPOA of the request for the identities

of officers involved in shootings and of its intent to comply, the LBPOA filed a verified complaint against the City, seeking a temporary restraining order and preliminary and permanent injunctions to prevent the release of the names. (See V. Compl. para. 8, at 3; 1 C.T. 7.) Following a hearing on 30 December 2011, the trial court issued a temporary restraining order preventing the release of the officers' names. (See Min. Order at 1 (Dec. 30, 2010); 1 C.T. 24.) Finding that The Times should have been given notice of the proceedings, the trial court directed the LBPOA to give notice and set the matter for a preliminary injunction hearing. (See R.T. at A-4 (ruling by the court).)

Thereafter, the Times moved to intervene, (see Not. of Mot. & Mot. to Intervene at 1; 1 C.T. 26), and filed an opposition, (see id. at 1-15; 1 C.T. 33-47). The City filed a memorandum in which it aligned itself with the LBPOA. (See Defs.' Mem. of Law Relating to Pls.' Request for Prelim. & Perm. Inj. at 1; 2 C.T. 237.)

Following a hearing on 18 January 2011, the trial court issued an order granting The Times' request to intervene, (see Order Re: OSC for Prelim. Inj. at 12; 2 C.T. 277 [hereinafter Trial Court Order]), and to dissolve the temporary restraining order, (see id. at 25; 2 C.T. 290), and denying without prejudice the LBPOA's preliminary injunction request,

(see id.). As part of the order, the trial court sustained The Times' evidentiary objections to Lt James' declaration. (See id. at 12; 2 C.T. 277.) Specifically, the trial court sustained objections to Lt James' generalized statements about safety concerns, his description of the two incidents of anonymous threats, and his opinions about Internet access and officer safety. (See id.) The Times did not file objections to Lt Cox's declaration.

Addressing the first requisite element of preliminary injunctive relief, the trial court ruled that the LBPOA had not demonstrated a likelihood of success on the merits. (See id. at 13, 2. C.T. 278.) The court concluded that the CPRA required disclosure of officers' names unless the LBPOA or the City established that the names were exempt from disclosure under a statutory exception. (See id.) The trial court ruled that the release of the names was not an unwarranted invasion of personal privacy, see Cal. Gov't Code § 6254(c) (West Supp. 2012), that the names could not be shielded as information contained in an investigative report, see Cal. Gov't Code § 6254(f) (West Supp. 2012), and that the names were not protected as a part of a police officer's personnel record, see Cal. Gov't Code § 6254(k) (West Supp. 2012); see also Cal. Penal Code §§ 832.7, 832.8 (West 2008). Further, the trial court found that the public interest in nondisclosure did not outweigh the public interest served by disclosure of the names. See

Cal. Gov't Code § 6255(a) (West 2008).

With respect to the element of irreparable harm, the trial court ruled that neither the LBPOA nor the City had demonstrated that any officer was likely to suffer harmful consequences as a result of disclosure. (See Trial Court Order at 25; 2 C.T. 290.) But the court recognized that, potentially, a showing could be made that disclosing the identity of a particular officer would compromise his or her safety. (See id.) Accordingly, the trial court ruled that its denial was without prejudice to renewed requests by the LBPOA or the City to seek upon a proper evidentiary showing an order protecting the names of particular officers from disclosure. (See id.) Finding that the balance of hardships element had been addressed in connection with the other elements, the trial court reasoned that the present balance weighed in favor of disclosure but, depending on a future evidentiary showing, it could shift with respect to the name of a particular officer. (See id.)

Thereafter, the trial court granted the application by the LBPOA for a thirty day stay in order to file for writ relief in the Court of Appeal. (See Court Order at 1-2; 2 C.T. 300-01.) In February of 2011, the LBPOA and the City filed petitions for a writ of mandate, and the LBPOA simultaneously filed a notice of appeal from the trial court order. (See

Notice of Appeal at 1-2; 2 C.T. 303-04.) The Court of Appeal issued an order providing that the trial court's order was directly appealable pursuant to section 904.1(a)(6) of the Code of Civil Procedure and that it had been appealed by LBPOA. The Court of Appeal construed the petition by the LBPOA as one for writ of supersedeas, which it granted, thus staying the trial court's order, and it denied the petition for a writ of mandate in all other respects. (See Order at 2 (Mar. 11, 2011).) The City filed a separate notice of appeal on 14 March 2011. (See Notice of Appeal at 1-2; 2 C.T. 314-15.) A motion by The Times to dismiss the appeal or alternatively for calendar preference was denied in its entirety. (See Order (April 13, 2011).)

In a published opinion the Court of Appeal, Second District, Division Two affirmed. (See Long Beach Police Officers Ass'n v. City of Long Beach, No. B231245, slip op. at 6 (Cal. App. Feb. 7, 2012) [hereinafter Slip Op.].) The Court concluded that the names of officers involved in shootings are not records relating to personal data made confidential by Penal Code section 832.8(a)[3], (see Slip Op. at 14-17), that the names are not records relating to employee advancement, appraisal, or discipline, (see id. at 17-19), and that the names are not records relating to

---

[3] Cal. Penal Code § 832.8(a) (West 2008).

complaints or investigation of complaints concerning an officer's performance of his duties, (see id. at 19-20). The Court further ruled that the disclosure of the names of officers involved in shootings does not constitute an unwarranted invasion of personal privacy that would justify withholding them pursuant to Government Code section 6254(e). (See Slip Op. at 20-26.)

STANDARD OF REVIEW

Assuming that this action is treated as a proceeding under the CPRA, that act provides that an order requiring disclosure of records by a public official is not a final judgment from which an appeal can be taken but that it "shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ". Cal. Gov't Code § 6259(c) (West 2008). "The legislative objective was to expedite the process and to make the appellate remedy more effective." Filarsky v. Superior Court (City of Manhattan Beach), 28 Cal. 4th 419, 427, 49 P.3d 194, 197, 121 Cal. Rptr. 2d 644, 648 (2009); see Times Mirror Co. v. Superior Court (State), 53 Cal. 3d 1325, 1335, 813 P.2d 240, 245, 283 Cal. Rptr. 893, 899 (1991). Hence, while writ procedure is employed, "trial court orders under the Act [are] reviewable **on their merits"**. Times Mirror, 53 Cal. 3d at 1335, 813 P.2d at

245, 263 Cal. Rptr. at 899 (emphasis added).

Accordingly, this Court must "conduct on independent review of the trial court's ruling". Id. The construction and interpretation of the CPRA is a question of law which necessarily will be considered de novo. See City of Hemet v. Superior Court (Press Enter. Co.), 37 Cal. App. 4th 1411, 1418, 44 Cal. Rptr. 2d 532, 535 (1995). Also, "this court must conduct an independent review of the trial court's statutory balancing analysis", although its factual findings will be upheld if they are based upon substantial evidence. CBS, Inc. v. Block, 42 Cal. 3d 646, 651, 725 P.2d 470, 473, 230 Cal. Rptr. 362, 365 (1985); accord Times Mirror, 53 Cal. 3d at 1386, 813 P.2d at 246, 283 Cal. Rptr. at 899.

Assuming that this action is treated as an ordinary appeal from the denial of a preliminary injunction, this Court reviews the ruling deferentially. See Ass'n for L.A. Cnty. Deputy Sheriffs v. Cnty. of L.A., 166 Cal. App. 4th 1625, 1634, 83 Cal. Rptr. 3d 494, 502 (2008). "A reviewing court shall not disturb a trial court's decision to grant or deny a preliminary injunction absent a showing that the trial court abused its discretion." Id. However, where (as here) the issue of whether the plaintiff is likely to prevail on the merits turns upon a question of law or the construction of a statute rather than upon the evidence of the case, "the

standard of review is whether the superior court correctly interpreted and applied the law", which this Court reviews de novo. People ex rel. Dep't of Alcoholic Beverage Control v. Miller Brewing Co., 104 Cal. App. 4th 1189, 1194, 178 Cal. Rptr. 2d 861, 864 (2002).

ARGUMENT

I. INTRODUCTION.

As explained herein, the identities of peace officers of peace officer involved in shooting incidents should be and are confidential. The ruling otherwise by the Court of Appeal misses the forest for the trees. When this Court's precedents and the controlling statutes are properly read, that those identities are confidential becomes readily apparent.

II. A BRIEF OVERVIEW OF CPRA.

"In 1968, 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 (Cnty. of San Diego), 39 Cal. 4th 1272, 1281, 141 P.3d 288, 293, 48 Cal. Rptr. 3d 183, 188 (2006). "The Act replaced a hodgepodge of statutes and court decisions relating to disclosure of public records." Times

Mirror Co., 53 Cal. 3d at 1338, 813 P.2d at 247, 283 Cal. Rptr. at 900.

"Its preamble declares 'that access to information concerning the conduct of the people's business is a fundamental and necessary right to every person in this state.'" Id. (quoting Cal. Gov't Code § 6250 (West 2008)). "The people have the right of access to information concerning the conduct of the people's business, and, therefore, . . . the writings of public officials and agencies shall be open to public scrutiny." Cal. Const. art I, § 3(b)(1). Hence, except as otherwise specified, the CPRA "provides that 'every person has a right to inspect any public record . . .'". Roberts v. City of Palmdale, 5 Cal. 4th 363, 370, 853 P.2d 496, 499, 20 Cal. Rptr. 330, 333 (1993) (quoting Cal. Gov't Code § 6253(a) (West 2008)).

But in the nature of things the right of access to records under the CPRA cannot and never has been absolute. The constitutional and statutory provisions favoring access to public records of necessity are tempered and limited by "competing societal concerns". CBS, Inc., 42 Cal. 3d at 651, 725 P.2d at 473, 230 Cal. Rptr. at 365. One such concern "is the privacy of individuals whose personal affairs are recorded in government files[,] . . . a narrower but no less important interest". Id. The Legislature has declared that it is "mindful of the right of individuals to privacy", Gov't Code § 6250, and this "dual concern" for privacy and disclosure runs

throughout the Act, Copley Press, 39 Cal. 4th at 1282, 141 P.3d at 293, 48 Cal. Rptr. 3d at 189 (quoting Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 652, 117 Cal. Rptr. 106, 110 (1974)).

Thus, pursuant to the Act public records are open to inspection and must be made available to the public upon request unless they are exempted from disclosure by an express provision of law. See Gov't Code § 6253(a). Amongst such provisions is section 6254 of the Government Code,[4] which exempts from disclosure a large number of specifically defined categories of records. Of particular relevance here is section 6254(c), which exempts from disclosure. "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy", and section 6254(k), which exempts "[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". In addition, "section 6255, subdivision (a),[[5]] often referred to as the 'catchall exemption', provides that an otherwise nonexempt record may be withheld if 'on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by

---

[4] Cal. Gov't Code § 6254 (West Supp. 2012).

[5] Cal. Gov't Code § 6255(a) (West 2008).

disclosure of the record'". Sonoma Cnty. Employees' Ret. Ass'n v. Superior Court (The Press Democrat), 198 Cal. App. 4th 986, 991, 130 Cal. Rptr. 3d 540, 543 (2011).

The exemption specified by section 6254(k) does not of itself exempt documents from disclosure, but rather it "merely incorporates other prohibitions established by law". Copley Press, 39 Cal. 4th at 1283, 141 P.3d at 294, 48 Cal. Rptr. 3d at 190. Those prohibitions include Penal Code section 832.7(a), which exempts "[p]eace officer or custodial personnel records and records maintained by any state or local agency pursuant to [Penal Code] Section 832.5, or information obtained from those records". Section 832.8 of the Penal Code defines "personnel records" in some detail.

In addition to these express exceptions, the CPRA includes "a catch-all exception that permits the government agency to withhold a record if it can demonstrate that 'on the facts of a particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record'". CBS, Inc., 42 Cal. 3d at 652, 725 P.2d at 473-74, 230 Cal. Rptr. at 365-66 (quoting Cal. Gov't Code § 6255 (West 2008) (emphasis omitted) (footnote omitted)). The Act thus recognizes and protects privacy interests both at a general, categorical level and at a particular, individual level.

III. THE NAMES OF PEACE OFFICERS INVOLVED IN SHOOTING INCIDENTS ARE CONFIDENTIAL AND THEREFORE EXEMPT FROM COMPELLED DISCLOSURE PURSUANT TO THE CPRA.

A. Confidentiality Established.

As mentioned, one of the most straightforward exceptions to the disclosure mandate of the CPRA incorporates other laws permitting or requiring confidentiality. Namely, nothing in the CPRA "shall be construed to require 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". Gov't Code § 6254(k); see Roberts, 5 Cal. 4th at 369-73, 853 P.2d at 499-501, 20 Cal. Rptr. 2d at 333-35 (upholding a refusal to disclose grounded in the attorney client privilege). Among the statutes thus incorporated is section 832.7(a) of the Penal Code, which provides that peace officer records and information obtained therefrom are confidential. Section 832.7(a) applies to two categories of records: personnel records, meaning records maintained under an officer's name by his employer and containing personal data and employment history, see Penal Code § 832.8, and records relating to the mandated investigation of complaints against an officer, see id. § 832.5.

Two relatively recent decisions by this Court, Copley Press, and Comm'n on Peace Officer Standards & Training v. Superior Court (L.A. Times Commc'ns LLC), 43 Cal. 4th 278, 165 P.3d 452, 64 Cal. Rptr. 3d 661 (2007) (POST), map the contours of the qualified privilege these statutes create. The two cases are especially salient in that both involved the disclosure of peace officers' names. The first, Copley Press, held that the identity of a deputy sheriff involved in a disciplinary matter is confidential. See 39 Cal. 4th at 1297, 141 P.3d at 304, 48 Cal. Rptr. 3d at 202. The second, POST, held that the identities of peace officers qua peace officers and the basic fact of their employment are not confidential. See 42 Cal. 4th at 295, 165 P.3d at 472, 64 Cal. Rptr. 3d at 673.

Copley Press held that the identity of a deputy involved in a disciplinary matter is confidential under section 832.7 of the Penal Code. See 39 Cal. 4th at 1297, 141 P.3d at 304, 48 Cal. Rptr. 3d at 204. Noting that the statute sanctions disclosure of specified information "but only 'if that information is in a form which does not identify the individuals involved'", this Court concluded that it is designed to protect inter alia the identity of officers subject to complaints. Id. (quoting Penal Code § 832.7(c)). Further, the legislative history of the provision confirmed that it was intended to prohibit the disclosure of the identities of the individuals

involved in an incident in order to protect the personal rights of officers as well as those of citizens. See id. Given the statutory language and the legislative history, the identity of a peace officer involved in a particular incident is clearly confidential. See id.

POST distinguished Copley Press, stating that that case had determined that section 832.7(a) is designed to protect the identity of officers subject to complaints. See 42 Cal. 4th at 298, 165 P.3d at 474, 64 Cal. Rptr. 3d at 676. While at least as to disciplinary matters a peace officer's name is exempt from disclosure, see id., his name and the bare fact of his employment as a peace officer is not, see id. at 299, 165 P.3d at 474, 64 Cal. Rptr. 3d at 676.

The upshot is that "the identification of an individual as the officer involved in an incident that was the subject of a complaint or a disciplinary investigation" is forbidden. Id. Inasmuch as all officer involved shootings are investigated both administratively and criminally, (see V. Compl. para. 15, at 6; 1 C.T. 10), the identity of the officer involved in the incident is beyond cavil confidential.

This outcome overlooks the reasoning of Copley Press. There, this Court declared that the Court of Appeal "erred in finding that [the deputy's identity] is not confidential under section 832.7". 39 Cal. 4th at 1297, 141

P.3d at 304, 48 Cal. Rptr. 2d at 202. The language of section 832.7(c) limiting the information that may be disclosed pursuant to that provision "demonstrates that section 832.7, subdivision (a), is designed to protect, among other things, 'the identity of officers' subject to complaints'". Id. (quoting City of Richmond v. Superior Court (S.F. Bay Gaurdian), 32 Cal. App. 4th 1430, 1440 n.3, 38 Cal. Rptr. 2d 632, 638 n.3 (1995)). "The legislative history of [section 832.7(c)] 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. (quoting legislative history). "Given the statutory language and the legislative history," the name of an officer involved in a critical incident is immune from compelled disclosure. See 39 Cal. 4th at 1297, 141 P.3d at 304, 48 Cal. Rptr. 2d at 202.

POST is not to the contrary. POST upheld compelled disclosure of peace "officers' identities as such", see 42 Cal. 4th at 298, 165 P.3d at 474, 64 Cal. Rptr. 3d at 675, or, otherwise stated, "the basic fact of their employment, see id. at 295, 165 P.3d at 472, 64 Cal. Rptr. 3d at 673. POST, unlike Copley Press, 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". Id. at 299, 165 P.3d at 474, 64

Cal. Rptr. 3d at 676.

As the Court of Appeal concedes, (see Slip. Op. at 17 & n.9), all officer involved shootings are subject to a disciplinary investigation. And Copley Press holds that Penal Code section 832.7(a) renders the identity of an officer who was subject to a disciplinary investigation confidential. Ergo, because the names of the officers involved in shootings are confidential, they are immune from disclosure.

B. A Rejoinder to the Court of Appeal.

The Court of Appeal ruled otherwise, declaring that sections 832.7 and 832.8 of the Penal code do not "protect the confidentiality of officer names when those names are untethered to one of the specified components of the officer's personnel file". (Slip. Op. at 14.) The Court of Appeal then concluded that the name of an officer involved in a shooting incident does not constitute "personal data" within the meaning of section 832.8(a) of the Penal Code, (see Slip. Op. at 17), that the name is not protected by section 832.8(d) of the Penal Code[6], which exempts files relating to employee advancement, appraisal, or discipline from disclosure, (see Slip. Op. at 18-19), and that the name is not protected by section 838.8(c) of the Penal Code, which does not encompass the name of an officer subject to an

---

[6] Cal. Penal Code § 832.8(d) (West 2008).

internal investigation that is unrelated to a citizen complaint, (see Slip. Op. at 19).

This outcome overlooks the reasoning of Copley Press. There, this Court declared that the Court of Appeal "erred in finding that [the deputy's identity] is not confidential under section 832.7". 39 Cal. 4th at 1297, 141 P.3d at 304, 48 Cal. Rptr. 2d at 202. The language of section 832.7(c) limiting the information that may be disclosed pursuant to that provision "demonstrates that section 832.7, subdivision (a), is designed to protect, among other things, 'the identity of officers' subject to complaints". Id. (quoting City of Richmond v. Superior Court (S.F. Bay Gaurdian), 32 Cal. App. 4th 1430, 1440 n.3, 38 Cal. Rptr. 2d 632, 638 n.3 (1995)). "The legislative history of [section 832.7(c)] 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. (quoting legislative history). "Given the statutory language and the legislative history," the name of an officer involved in a critical incident is immune from compelled disclosure. See 39 Cal. 4th at 1297, 141 P.3d at 304, 48 Cal. Rptr. 2d at 202.

POST is not to the contrary. POST upheld compelled disclosure of peace "officers' identities as such", see 42 Cal. 4th at 298, 165 P.3d at 474,

64 Cal. Rptr. 3d at 675, or, otherwise stated, "the basic fact of their employment, see id. at 295, 165 P.3d at 472, 64 Cal. Rptr. 3d at 673. POST, unlike Copley Press, 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". Id. at 299, 165 P.3d at 474, 64 Cal. Rptr. 3d at 676.

As the Court of Appeal concedes, (see Slip. Op. at 17 & n.9), all officer involved shootings are subject to a disciplinary investigation. And Copley Press holds that Penal Code section 832.7(a) renders the identity of an officer who was involved in a shooting confidential. Ergo, because the names of the officers involved in shootings are confidential, they are immune from disclosure.

C. Confidentiality Established Again.

Alternatively, the names of officers involved in shootings are confidential pursuant to Penal Code section 832.8(e), which defines personnel records to include "[c]omplaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties". As mentioned, all shooting incidents are investigated with regard to the manner in which the officer(s) involved

performed his or her duties. (See V. Compl. para. 15 at 6; 1 C.T. 10.)

The question, then, is whether these investigations relate to complaints. The Court of Appeal answered that question negatively, ruling that the express declaration of confidentiality with regard to the investigation of complaints does not encompass the name of an officer subject to an investigation that is unrelated to a complaint. (See Slip Op. at 19.)

But this niggardly construction of section 832.8(e) simply makes no sense. The name of an officer subject to a citizen complaint and an investigation thereof arising from a shooting is exempt from disclosure, but the name of an officer subject to an administrative complaint arising from the same shooting and an identical investigation is not. The one is "tethered" to one or more specified components of an officer's personnel file, but the other is not. But the two complaints are in substance identical. Such a result truly merits the epithet **absurd**. See People v. Mendoza, 23 Cal. 4th 896, 908, 4 P.3d 265, 274, 98 Cal. Rptr. 2d 431, 441 (2000) (["This Court] must . . . avoid a construction that would produce absurd consequences, which [it] presume[s] the Legislature did not intend.").

As this Court has recognized, "[a] statute 'must be given a reasonable and common sense interpretation consistent with the apparent

purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity'". People v. Zambia, 51 Cal. 4th 965, 972, 254 P.3d 965, 968-69, 127 Cal. Rptr. 3d 662, 666 (2011) (quoting City of Poway v. City of San Diego, 229 Cal. App. 3d 847, 858, 280 Cal. Rptr. 368, 374 (1991) (internal quotation omitted)). Here, a practical interpretation is one that places all disciplinary investigations on an equal footing by reading the word **complaint** as it appears in section 832.8(e) to encompass any and all questions about what an officer perceived or about the manner in which the officer performed his or her duties. In this fashion the apparent purpose of the Legislature to render the records of such investigations confidential can be accomplished, and the law can be applied uniformly and sensibly.

IV. THE BALANCE OF INTERESTS MUST BE STRUCK IN FAVOR OF CONFIDENTIALITY OF THE NAMES OF THE OFFICERS INVOLVED IN SHOOTINGS.

A. Confidentiality Established.

Even if the names of peace officers involved in shootings are not within the ambit of the peace officer privilege statutes and therefore exempt from disclosure, they are nevertheless exempt pursuant to section 6254(c) of

the CPRA. That section provides that "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy" are exempt from disclosure. Id. Here, the invasion of personal privacy that The Times seeks is extremely unwarranted, and the exemption therefore applies.

Section 6254(c) requires this Court "to balance the privacy interests of peace officers in the information at issue against the public interest in disclosure in order to determine whether any invasion of personal privacy is unwarranted". POST, 42 Cal. 4th at 299, 165 P.3d at 475, 64 Cal. Rptr. 3d at 676. Admittedly POST struck that balance in favor of disclosure of the names of peace officers in the abstract. See id. at 303, 165 P.3d at 477, 64 Cal. Rptr. 3d at 679. But POST considered "the privacy and safety interests of peace officers in general", id., not the heightened safety concerns of officers who have been involved in shootings. The balance must be struck differently with regard to this subgroup.

"The safety of peace officer and their families is most certainly a legitimate concern . . . ." Id. at 302, 165 P.3d at 476, 64 Cal. Rptr. 3d at 678. But "'[a] mere assertion of possible endangerment' is insufficient to justify nondisclosure". Id. (quoting CBS, Inc., 42 Cal. 3d at 652, 725 P.3d at 474, 230 Cal Rptr. at 366). The risk posed by the disclosure must be

shown to be "more than speculative". Id. at 302, 165 P.3d at 477, 64 Cal. Rptr. 3d at 679.

Here, that burden is met.

> A number of officer involved shootings involve gang members or violent criminals. It is common for such persons to reoffend and continue their violent behavior. Gangs constitute a criminal terrorist organization and make a living creating fear and terror in neighborhoods across America. When an act of violence occurs between two gangs, it's common for the gang who was attacked to retaliate against the attacker at a later date.
>
> Gang Members [sic] view law enforcement officers as an opposing force that prevents them from conducting their criminal activity. When an officer is involved in a shooting with a gang member, it is not uncommon for the gang to retaliate against law enforcement officers. The department is cognizant of this threat to officer safety and is committed to protecting the safety of its police officers.
>
> Since late 2007, the Long Beach Police Department has issued eight Officer Safety Bulletins to the department about potential retaliation/threats against officers, two of which were directly related to shootings involving police officers. As recently as January 10, 2011, the department was notified of graffiti at 5100 Appian Way that was approximately 4 feet high and 6 inches long which read "Strike Kill a Cop". The department immediately issued an officer safety memorandum informing officers of the death threat graffiti. The graffiti threat is

> currently under investigation and detectives will try and determine if there is any connection to recent enforcement activities, including officer involved shootings.
>
> Today, in the age of the internet, knowing an individual's name can be the gateway to a world of information. Public documents are readily accessible online and can provide anyone with the home address of an individual, including a police officer. The address of a police officer in the hands of a gang member, violent offender, or angry friend, relative, or associate of a person who was shot by a police officer is of great concern for the personal safety of both the officer and their [sic] family. Therefore the Long Beach Police Department insists on protecting the identity of its officers, when those officers are involved in critical incidents, including shootings, in order to ensure their safety and the safety of their families.

(Decl. of Lt. Lloyd Cox paras. 8 -11, at iii-iv; 2 C.T. 243-44.)

Surely, then, the threat to officers involved in shootings is real, not speculative. But the analysis should not stop with just an evaluation of the severity of threat. All such threats by their nature will be somewhat vague—killers do not usually announce their intentions in advance. But the vagueness of the threat is offset by the nature of the interest at stake: life itself. If there is even a small chance that the disclosure of the name of an officer involved in a shooting will lead to or facilitate retaliation against the officer, then the disclosure should be deemed an unwarranted invasion of

the officer's privacy. Cf. Dennis v. United States, 341 U.S. 494, 510, 71 S. Ct. 857, 868 (1951) (plurality opinion) (stating that the test of the First Amendment is whether the gravity of the evil, discounted by its improbability, justifies the invasion of free speech).

Of course, the privacy interest of the officers must be balanced against the public interest in disclosure. See POST, 42 Cal. 4th at 299, 165 P.3d at 475, 64 Cal. Rptr. 3d at 676. As a general matter that the latter interest is substantial. See id. But the question is not the gravity of the interest in general, but rather to what degree the public interest is incrementally served by disclosure of the names of officers involved in shootings in addition to reports regarding the shootings themselves. (See Mem. of Law in Reply to Opp'n at 2 & n.2; 2 C.T. 247 (stating that officers would not object to disclosure of such reports provided their names were redacted).) The answer is—not much.

At the end of the day, then, Petitioners' privacy interests clearly outweigh any public interest in disclosure of their names. Hence, the names are exempt from disclosure pursuant to section 6254(c).

B. A Rejoinder to the Court of Appeal.

The Court of Appeal ruled otherwise, declaring that Plaintiffs' assertions concerning possible threats were inadequate to trigger the

exemption. (See Slip Op. at 25.) But this Court has determined that disclosure of the Governor's schedule was not required precisely because that information **could** lead to a threat to his safety. See Times Mirror Co., 53 Cal. 3d at 1346, 813 P.2d at 253, 283 Cal. Rptr. at 906. When the lives of our public officials and our peace officers are at stake, **could** is good enough.

The additional risk to the officers involved in shootings from disclosure of their names may be acceptable to the Court of Appeal but it should not be to this Court. Plaintiffs should not be required to prove that the threat already has matured in order to prevent the harm in the first place. An assassination attempt would provide the concrete and specific evidence that the Court of Appeal and The Times demand, but it should not be required. Enough said!

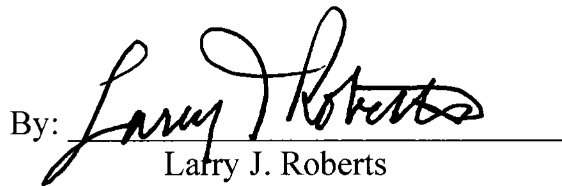
V. CONCLUSION.

The ruling by the Superior Court and the opinion of the Court of Appeal leave peace officers involved in shootings out in the cold, exposed to the vagaries of public opinion regarding matters that the Legislature has for good reason has declared should remain confidential, see Copley Press, 39 Cal. 4th at 1298, 141 P.3d at 305, 46 Cal. Rptr. 2d at 203, and to the

dangers that accompany notoriety. And for the reasons explained herein, the ruling and the opinion rest upon an erroneous reading of the relevant statutes and of this Court's opinions. Accordingly, this Court should reverse the judgment of the Court of Appeal and reverse the denial of the preliminary injunction by the Superior Court.

Dated: 18 May 2012

Respectfully submitted,

By: 
Larry J. Roberts

James E. Trott
Larry J. Roberts
Law Offices of James E. Trott

Attorneys for Plaintiffs and Appellants

CERTIFICATE OF COMPLIANCE

WITH APPELLATE RULE 8.204(b)(2)(3)(4)

Petitioners LONG BEACH POLICE OFFICERS ASSOCIATION and DOES 1-150 certify that their brief is in a proportionately spaced type face (Times New Roman) of 13 point, that it is double spaced, and that it contains 6,663 words.

Dated: 18 May 2012

By:
Larry J. Roberts

James E. Trott
Larry J. Roberts
Law Offices of James E. Trott

Attorneys for Plaintiffs and Appellants and Petitioners

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I am employed in the County of San Diego, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 315 N. Vine St., Fallbrook, CA 92028.

That on May 18, 2012, I served the foregoing document described as: **OPENING BRIEF ON THE MERITS** on all interested parties as follows:

(X) by placing ( ) the original (X) a true copy thereof enclosed in sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

(X) **(BY MAIL)** I deposited such envelope(s) in the mail at 1350 E. Chapman Ave., Fullerton, CA.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. The envelope was mailed with postage thereon fully prepaid. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing as stated in the Declaration.

Executed on May 18, 2012 at Fullerton, California.

I declare under penalty of perjury, under the laws of the State of California that the above is true and correct.

Diane Castillo

SERVICE LIST

California Court of Appeal
Second Appellate District
Division Two
Ronald Reagan State Bldg.
300 S. Spring St., 2nd Floor
Los Angeles, CA 90013

Hon. Patrick T. Madden
Los Angeles County Superior Court
South District
415 West Ocean Blvd.
Long Beach, CA 90802

Christina L. Checel
Deputy City Attorney
333 West Ocean Blvd., 11th Floor
Long Beach, CA 90802-4664

Kelli L. Sager
Davis Wright Tremaine LLP
865 South Figueroa, Suite 2400
Los Angeles, CA 90017-2566