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
Hon. Patrick T. Madden, Judge
Case No. NC055491

ANSWER BRIEF OF REAL PARTY IN INTEREST AND RESPONDENT LOS ANGELES TIMES COMMUNICATIONS LLC

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

Real Party in Interest and Respondent Los Angeles Times Communications LLC ("The Times") respectfully submits Respondent's Brief in response to the Opening Briefs filed by Plaintiffs and Appellants Long Beach Police Officers Association and Doe Officers 1-150 ("LBPOA"), and Defendants and Appellants City of Long Beach, Long Beach Police Department and James McDonnell (the "City") ("collectively "Appellants").[1]

1.

ADDITIONAL ISSUES PRESENTED FOR REVIEW[2]

1. May an employee of a public agency bring a reverse-CPRA lawsuit that the agency itself is prohibited from bringing under Filarsky v. Superior Court, 28 Cal. 4th 419 (2002)?

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[1] Pursuant to this Court's Order dated June 8, 2012, The Times is submitting a single oversized brief in response to the Opening Briefs filed by Appellants.

[2] Appellants' Opening Briefs failed to include the additional issues set forth in The Times' Answer To Petitions For Review. CRC 8.520(b)(2)(B).

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2. Does Filarsky v. Superior Court, 28 Cal. 4th 419 (2002) and public policy bar a government agency and its employees from cooperating in a collusive lawsuit designed to block the disclosure of records in response to a CPRA request?

3. Are lawsuits brought by public employees or third parties to block the disclosure of public records subject to the provisions of the CPRA, including the provisions for fee-shifting and expedited review?

2.

SUMMARY OF ARGUMENT

The City and LBPOA have joined forces in asking this Court to allow them to keep from the public, forever, the names of police officers who have shot – and even killed – citizens of this State. According to the City and LBPOA, even though California law requires peace officers to wear name tags on their uniforms,[3] officers' identities must remain secret forever if they exercise lethal force against citizens of the State. Under Appellants' restrictive view, government employees who use their official positions to shoot citizens are entitled to complete anonymity, even if there is no particularized showing of a threat to the officer(s) if their identities are revealed.

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[3] Penal Code § 830.10 mandates that peace officers wear a badge or nameplate identifying the officer.

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Appellants also seek this Court's imprimatur on reverse-California Public Records Act ("CPRA") lawsuits like this one, even though such suits are not provided for in the CPRA or elsewhere in California law. Permitting such suits by government employees would effectively nullify this Court's decision in Filarsky, and would open the floodgates to collusive lawsuits designed to stymie the public's rights under the CPRA.

Appellants' extraordinary bid for secrecy – which is more consistent with a dictatorial police state than a democratic government – is based primarily on the assertion that disclosing officers' identities in response to The Times' request under the CPRA (Cal. Gov't Code § 6250 et seq.; Cal. Const. Art. I, § 3(b)) would violate the so-called "Pitchess" statutes (Cal. Penal Code §§ 832.5, 832.7 and 832.8). Appellants claim that because the City currently has a practice of "investigating" every officer-involved shooting, and there is a possibility that an officer might be disciplined if the investigation finds misconduct, the identity of the officer who pulled the trigger must be kept secret forever – even if he or she never is disciplined, and even if the results of the investigation or any subsequent disciplinary proceedings are not disclosed. The City's position is even more extreme: it claims that an officer never can be identified in connection with any specific event that may be mentioned in his or her personnel file. Both positions are contrary to this Court's prior decisions and an on-point opinion from the California Attorney General's Office. See, e.g.,

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Commission on Peace Officer Standards & Training v. Superior Court, 42 Cal. 4th 278 (2007) ("POST"); 91 Ops. Cal. Atty. Gen. 11, at *1 (May 19, 2008).

In POST, this Court held unequivocally that the Pitchess statutes do not bar the disclosure of all information concerning state peace officers, but only cover specific, limited categories of information. Adopting a narrow construction of the Pitchess statutes, this Court made clear that neither the statutory language nor the legislative history indicated any intent to render peace officer identities confidential. 42 Cal. 4th at 292-299. This Court also found that information does not become a "personnel record" within the meaning of the Pitchess statutes merely because the information may be found in an officer's personnel file. In stressing the common-sense limits of the Pitchess statutes, this Court rejected the notion that the "location" of a record was determinative; instead, the Court focused on the specific types of information identified in the statutes, rather than the vagaries of a particular agency's record-keeping practices. In arguing to the contrary, LBPOA and the City urge this Court to reject its own recent decision, ignore the Pitchess statutes' legislative history, and rewrite the statutes to include information that the Legislature chose to omit.

As explained below, the Attorney General's office was correct in 2008 when it evaluated the POST decision, as well as the decision in Copley Press, Inc. v. Superior Court, 39 Cal. 4th 1272 (2006) ("Copley

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Press"), and concluded that the Pitchess statutes do not prevent disclosure of the names of peace officers involved in critical incidents. As the Attorney General found, such information must be disclosed in response to a CPRA request unless the proponents of secrecy show that the harm of disclosure clearly outweighs the benefits of public access in a specific case – generally, in those limited situations where a peace officer involved in a shooting is currently working undercover. 91 Ops. Cal. Atty. Gen. at *1.[4]

The trial court and Court of Appeal properly relied on POST and the AG Opinion in rejecting Appellants' argument that the Pitchess statutes prohibit disclosure of the names of officers who shoot citizens. Clerk's Transcript ("C.T.") 000284-000287; Op. at 11-13. See Section 5.A, infra.

The lower courts also correctly found that the City and LBPOA did not meet their heavy burden of demonstrating any actual harm from disclosure, let alone harm that "clearly outweighs" the public benefits of

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[4] In Copley Press, this Court found that the names of officers could not be disclosed when sought specifically in connection with a disciplinary appeal by a deputy sheriff who had been terminated. The Court stated that in that situation, or if names were sought in connection with a civilian complaint, the Pitchess statutes would come into play. 39 Cal. 4th at 1297-1298. But as discussed below, The Times is not asking for the names of officers in connection with any disciplinary appeals or investigation of civilian complaints, nor does disclosure of the names of officers involved in shootings reveal this information. To the contrary, the identities of officers involved in critical incidents are reflected in a variety of records, including incident reports, duty logs, and video recordings, that are neither "personnel" records nor disciplinary files. See Section 5.A.5, infra.

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access. As the Court of Appeal recognized, "[t]he public interest in the conduct of peace officers is substantial," particularly in light of their "authority and the ability to exercise force." Op. at 21 (citation omitted). As this Court explained in POST:

> "Law enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the State. In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers."

42 Cal. 4th at 297 (citing New York Times v. Superior Court, 52 Cal. App. 4th 97, 104-05 (1997) ("New York Times") (emphasis added)). Whether or not the exercise of force is ultimately found to be justified, the notion that a government agent can shoot and kill people anonymously is antithetical to the most fundamental notions of democracy, which depend on public scrutiny of official conduct. Thus, the suggestion that such officers have a countervailing "privacy" interest that precludes their names from being revealed properly was rejected by both the trial court and Court of Appeal.

Both courts also correctly found that Appellants did not meet their burden of showing any other actual harm to the officers that could outweigh the public's substantial interest in disclosure. Appellants' unsubstantiated "generalized" and "speculative" assertions about safety did not amount to a credible countervailing interest that clearly outweighs the public's right to know, especially when months – or even years – have passed since many of

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the shootings in question took place. C.T. 000280-000283; Op. at 23-25. See Section 5.B, infra.

This Court also should reject the City's new reliance on Section 6254(f), the investigatory files exemption. The City barely mentioned this exemption in the trial court, and abandoned it entirely in the Court of Appeal; LBPOA – the Plaintiff in this case – has never claimed that this exemption applies. Under Rule 8.500(c)(1), the Court should refuse to consider this exemption for the first time now.

But if the Court does consider Section 6254(f), the City's argument is meritless. The Times does not seek investigatory "records" or "files"; it has requested only the names of officers involved in shootings – information that is available from a variety of different sources. Thus, by its plain language the exemption does not apply. Moreover, the positions advanced by the City and LBPOA make clear that any investigations of officer-involved shootings are routine, and not based on a "concrete and definite prospect" of criminal enforcement proceedings, as required for Section 6254(f) to apply. Section 5.C, infra.

Finally, this Court should reject the reverse-CPRA action orchestrated by the City and LBPOA, and make clear that the Court's decision in Filarsky v. Superior Court, 28 Cal. 4th 419 (2002), applies fully to the collusive third party action filed here. In Filarsky, the Court held that public agencies may not institute "reverse-CPRA" actions seeking to

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prohibit the disclosure of public records to requesters. Instead, the "exclusive procedure for litigating the issue of a public agency's obligation to disclose records" is for "a declaratory relief proceeding [to be] commenced only by an individual or entity seeking disclosure" of those records. Id. at 423, 426.

This lawsuit was initiated by a police union working hand-in-hand with a municipality, where both sought to restrict the public's access to important public records. The appeals procedure utilized by the union and the City defendants violates the principles set forth in Filarsky, and threatens to upend the ability of public records requesters to enforce their constitutionally-recognized access rights under the CPRA. See Gov't Code § 6250 (now codified in Cal. Const., Art. I, §3(b)). Permitting this end-run around Filarsky will encourage countless other government agencies and their employees to initiate cooperative "third party" lawsuits to avoid disclosure of public records.

The injunction and appeal procedures used by Appellants already have served one of their joint interests: it has substantively delayed the public from learning the identities of the Long Beach police officers involved in shootings over the last six years. This is directly contrary to the CPRA's goal of providing timely information to the public about the conduct of government officials. As this Court recognized in Powers v. City of Richmond, 10 Cal. 4th 85, 111 (1995), the purpose of the 1984

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amendment to the CPRA barring appeals and requiring expeditious resolution through the appellate writ process was to prevent "delays of the appeal process, by means of which public officials are frustrating the intent of the laws for disclosure" to a time when "the story was no longer newsworthy." Allowing LBPOA and the City to proceed by appeal undermines this important provision of the CPRA.

A recent decision by the Second District Court of Appeal in another reverse-CPRA lawsuit further undermines the CPRA, by holding that third parties who initiate lawsuits to block release of public records are not liable for fees the CPRA requesters incur in protecting their rights. Marken v. Santa Monica-Malibu Unified School District, 202 Cal. App. 4th 1250, 1268 (2012). In Marken, the appellate court opined that CPRA requesters could avoid fees by standing on the sidelines and "rel[ying] on the agency to oppose the effort to bar access to the records." Id. But it defies reason to suggest that public agencies will fight to protect a CPRA requester's right to obtain records, particularly in the face of opposition by the agencies' employees (or a powerful union). This further threatens to undermine a key provision in the CPRA, which the Legislature included to protect citizens' ability to enforce their rights, and to encourage agency compliance by forcing the agency to pay the price if records are withheld wrongfully. See Section 6, infra.

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For all of these reasons, this Court should find that the trial court property rejected LBPOA's preliminary injunction request, and should reject the appeals brought by LBPOA and the City.

3. STATEMENT OF FACTS

On December 12, 2010, Long Beach police officers shot and killed an unarmed 35-year-old man, Douglas Zerby, who was carrying a garden hose nozzle that police apparently mistook for a gun. C.T. 000035, 000057-000080. Three days later, in the wake of this controversial shooting, Times reporter Richard Winton made a CPRA request to the City for "[t]he names of Long Beach police officers involved in the December 12 office[r] involved shooting in the 5300 block of East Ocean Boulevard," and "[t]he names of Long Beach police officers involved in officer involved shootings from Jan. 1[,] 2005 to Dec. 11, 2010." C.T. 000048-000054.

The City apparently informed LBPOA about The Times' CPRA requests, and agreed to delay disclosure for almost a month. C.T. 000006-000007.[5] In response, without providing any notice to The Times, LBPOA sought a temporary restraining order, which was issued by the trial court on December 30, 2010. C.T. 000024; LBPOA Petitioner's Appendix (P.A.)

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

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000146.[6] After counsel for the City pointed out that The Times should be given notice of the TRO (thereby justifying the City's refusal to provide it with the requested information), the trial court ordered LBPOA to give notice to The Times, added The Times as a real party in interest, and scheduled a preliminary injunction hearing for January 18, 2011. 12/30/10 Hearing Tr. at 2-5.

At the conclusion of the hearing, the trial court issued an order granting The Times' request to intervene, dissolved the TRO that had been entered against the City, and denied LBPOA's request for a preliminary injunction. C.T. 000266-000290. The trial court found that The Times' CPRA request "does not seek information from 'personnel records'" as defined in the Pitchess statutes, which cover "personal data" such as marital status and home address. See C.T. 000284-000285. As the trial court explained, "[t]he fact that an officer's name is linked to a critical event, such as a shooting, is not 'personal' to the officer in the same way that things like marital status, education, employment history, and the like are 'personal.'" Id. The trial court also held that the exemption in Gov't Code § 6254(c) did not apply because disclosure of names of officers involved in

[6] The Notice of Ruling with the Temporary Restraining Order is in the Petitioner's Appendix submitted by LBPOA in the Court of Appeal, and thus is part of the court file in these appellate proceedings. It was not included in the Clerk's Transcript. See P.A. 000146.

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shootings while on duty "would not constitute an unwarranted invasion of personal privacy." C.T. 000280-000281. Finally, based on its review of the evidence submitted by the parties, the trial court found that LBPOA's and the City's claims that disclosure of officers' names would put them at risk were "speculative" and "generalized," and the hypothetical risk to the officers did not clearly outweigh the public's interest in disclosure. C.T. 000281-000283, 000288.

On January 24, 2011, the trial court granted a 30-day stay of its order to permit LBPOA and the City to seek appellate writ relief. C.T. 000300-000301. Nearly a full month later, on February 22 and 23, 2011, LBPOA and the City filed petitions for writ of mandate in the Court of Appeal; LBPOA also filed a Notice of Appeal.

On February 23, the Court of Appeal issued an order stating that "[t]he perfecting of an appeal automatically stays an order denying a request for a mandatory preliminary injunction." 2/23/11 Order at 1. On March 11, 2011, after The Times filed a preliminary opposition to LBPOA's and the City's petitions, the court issued an order converting LBPOA's petition into a writ of supersedeas petition, which it granted, staying the trial court's order, and turning the writ proceedings into an appeal. 3/11/2011 Order at 1-2.

On March 21, 2011, the City filed its own Notice of Appeal – even though it ostensibly had prevailed in the trial court. C.T. 000314-000315.

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Following full briefing and a hearing, the Court of Appeal affirmed the trial court's order in full. The appeals court carefully analyzed this Court's decisions in POST and Copley Press, and the on-point opinion by the Attorney General, in rejecting Appellants' reliance on the Pitchess statutes. Op. at 10-20. The court then held that "relevant case law leads to the inexorable conclusion that the names of officers involved in officer-involved shootings over a five-year period must be disclosed under the CPRA, absent any particularized showing of the interests served by nondisclosure." Op. at 12. Following the analytical process set forth in POST, the Court of Appeal evaluated each component of the Pitchess statutes, finding that none applies to the information at issue here.[7] Op. at 13-20. The court concluded:

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[7] In its Opening Brief, LBPOA misrepresents both the facts and the law. Its Opening Brief begins by claiming, without any evidentiary support, that officers who are "involved in a shooting incident" are "subject to a disciplinary investigation." LBPOA O.B. at 1. But no evidence supports LBPOA's claim that shooting investigations are "disciplinary." Cf. C.T. 000242 (referring to an "administrative and/or criminal investigation").

LBPOA then claims that the Court of Appeal "concedes" that "all officer involved shootings are subject to a disciplinary investigation." LBPOA O.B. at 20. In fact, the Court of Appeal stated that "officers involved in a shooting are subject to an administrative and/or criminal investigation." Op. at 17 n.9. See also fn. 16, infra (discussing LBPOA's mischaracterization of this Court's opinion in Copley Press). The difference between "administrative" and "disciplinary" is significant under the Pitchess statutes, and dispositive in this case. LBPOA's arguments depend on its erroneous interpretation.

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> Nowhere in either the language of Penal Code sections 832.7 and 832.8 or the statutes' legislative history is there any indication that these provisions were designed to protect the confidentiality of officer names when those names are untethered to one of the specified components of the officer's personnel file.

Op. at 14.

In reaching its conclusion, the Court of Appeal rejected Appellants' reliance on Sections 6254(c) and 6255, and specifically rejected the argument that peace officers – who are public employees – have a privacy interest in anonymity that outweighs the public's interest in disclosure. Op. at 20-26. The Court of Appeal also concluded that Appellants' claims that officers would be put at risk was unsupported, noting that the "evidence" offered established "nothing 'beyond the generalized and speculative invocation of fear that someone, somewhere—for example, a family member of a shooting victim—may ultimately use names that are disclosed as stepping stones to find the officers and hurt them or their families.'" Op. at 23.

In a footnote, the Court of Appeal rejected The Times' argument that LBPOA have been precluded from bringing this reverse-CPRA lawsuit, finding that the statutory scheme did not prohibit third parties – or even "other public agenc[ies] – from bringing a lawsuit to block disclosure of public records. Op. at 6 n.2.

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4. STANDARD OF REVIEW

LBPOA and the City each filed notices of appeal from the trial court's order denying LBPOA's request for an injunction, and the Court of Appeal proceeded by appeal. C.T. 000303-000304, 000314-000315, Op. at 5. This procedural posture dictates application of the deferential standard of review that applies to injunction appeals. People ex rel. Gallo v. Acuna, 14 Cal. 4th 1090, 1109 (1997). Where, as here, the trial court has denied a preliminary injunction, the appellate court may not reverse unless it finds that the trial court abused its discretion as to both the likelihood of success and the balance of hardships. Cohen v. Board of Supervisors, 40 Cal. 3d 277, 286-287 (1985) (even if there was abuse of discretion as to one of the factors in denying preliminary injunction, appellate court should affirm where there was no abuse of discretion as to other factor); see also Sahlobei v. Providence Healthcare, 112 Cal. App. 4th 1137, 1145 (2003).

Inexplicably, the City and LBPOA argue that this Court should review this matter de novo, even though it is indisputably based on the denial of a preliminary injunction. City O.B. at 2; LBPOA O.B. at 10-12. But Appellants should not be permitted to take positions inconsistent with the procedural posture they chose to employ. If LBPOA is permitted to bring a suit for injunctive relief (cf. Section 6, infra), then it must be bound by the deferential standards of review that apply when the injunction is refused.

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The City's attempt to invoke de novo review, by claiming that this action raises only questions of law (City O.B. at 2), is similarly misplaced. Although the interpretation of the CPRA and the Pitchess statutes are questions of law, that are subject to de novo review, the trial court's evaluation of the facts – and, in particular, its conclusion that Appellants failed to meet their evidentiary burdens with respect to their claims of privacy and safety interests (C.T. 000283, C.T. 000288) – is entitled to deference. See ReadyLink Healthcare v. Cotton, 126 Cal. App. 4th 1006, 1016 (2005) ("even when presented by declaration, 'if the evidence on the application is in conflict, we must interpret the facts in the light most favorable to the prevailing party and indulge in all reasonable inferences in support of the trial court's order'") (quoting Whyte v. Schlage Lock Co., 101 Cal. App. 4th 1443, 1450 (2002)); see also Cinquegrani v. Dep't of Motor Vehicles, 163 Cal. App. 4th 741, 746 (2008) ("[i]f the evidence is in dispute, we interpret the facts in the light most favorable to the prevailing party").

The same standards would apply if this matter had proceeded by writ under the CPRA: the trial court's decision involved both legal issues, that are subject to de novo review, and the weighing of evidence, which is entitled to deference. Connell v. Superior Court, 56 Cal. App. 4th 601, 612 (1997) (even as to legal issues, appellate courts must "accord[] the usual deference to any express or implied factual findings of the superior court

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supported by substantial evidence") (quoting Times Mirror Co. v. Superior Court, 53 Cal. 3d 1325, 1339 (1991)) (emphasis added). See also Sacramento County Employees' Retirement System v. Superior Court, 195 Cal. App. 4th 440, 454 (2011) ("Sacramento County") ("[f]actual findings made by the trial court will be upheld if based on substantial evidence").

Thus, in considering Appellants' assertions concerning the alleged risk to the officers if their identities are disclosed, the trial court's findings indisputably are entitled to deference. See, e.g., Connell, 56 Cal. App. 4th at 613-614 (in CPRA action, appellate court "must resolve all factual disputes in favor of the judgment"; court therefore deferred to the trial court's findings that security concerns raised by the California Controller in declarations were speculative). Here, as in Connell, the trial court's findings that LBPOA and the City provided inadequate declarations that made speculative claims about privacy and safety (C.T. 000276, 000283) are entitled to substantial deference.

5. APPELLANTS HAVE NOT MET THEIR HEAVY BURDEN TO SUPPORT THEIR REQUEST FOR AN INJUNCTION.

Nearly four decades ago, the Legislature adopted the California Public Records Act, Government Code §§ 6250 et seq. The legislative intent in adopting the CPRA was clear:

> In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business

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> is a fundamental and necessary right of every person in this state.

Cal. Gov't Code § 6250. By recognizing a presumptive right of access to public records, the CPRA gives citizens a mechanism for monitoring government conduct. As this Court has explained:

> [I]mplicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.

CBS, Inc. v. Block, 42 Cal. 3d 646, 651 (1986). To achieve these laudable goals, this Court has declared that "[m]aximum disclosure of the conduct of governmental operations" is necessary. Id. at 651-52.

Californians reaffirmed this important principle in 2004, by elevating the public's right of access to government records to the state Constitution. Article I, § 3(b) of the California Constitution guarantees:

> (b)(1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to scrutiny.
>
> (2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access ....
>
> (3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of

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> information concerning the official performance or professional qualifications of a peace officer. ...

Cal. Const., Art. I, § 3(b).

Even before this constitutional amendment was enacted, it was well established that the CPRA embodies "a strong policy in favor of disclosure of public records, and any refusal to disclose public information must be based on a specific exception to that policy." California State University v. Superior Court, 90 Cal. App. 4th 810, 831 (2001). To justify secrecy, the government agency is required to demonstrate a "clear overbalance on the side of confidentiality." Id. (internal quotation marks omitted). Consistent with this onerous burden, the CPRA's "[s]tatutory exemptions from compelled disclosure are narrowly construed." Id. Accord New York Times v. Superior Court, 218 Cal. App. 3d 1579, 1585 (1990) (emphasis added).

There is no dispute that the names of Long Beach police officers involved in shootings since 2005 fall within the CPRA's broad coverage of "public records," nor is there any question that the City of Long Beach and its Police Department are agencies covered by the CPRA. Consequently, the information requested by The Times must be disclosed unless the proponents of secrecy met their burden of showing that one of the narrow exemptions to the CPRA applies. CBS Broadcasting v. Superior Court, 91 Cal. App. 4th 892, 908 (2001) ("[t]he burden of proof [of establishing that

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an exemption to the CPRA applies] is on the proponent of nondisclosure"); see also C.T. 000280. As explained below, because the Court of Appeal's decision properly interpreted the relevant statutes and recent case law, including an opinion from the state Attorney General that is precisely on point, and because LBPOA and the City did not meet their burden of providing evidence that any privacy or safety concerns are sufficient to clearly outweigh the public's strong interest in disclosure, this Court should affirm the Court of Appeal's ruling.

A. The Pitchess Statutes Do Not Require That The Names Of Officers Who Shoot Civilians Be Kept Confidential.

The City and LBPOA argue that California law prohibits agencies like the City from disclosing the identities of police officers who exercise force, even lethal force. But neither Opening Brief provides any legislative history of the relevant statutes, nor any other basis for believing that the California Legislature intended to enact a scheme that would allow government employees to anonymously kill citizens of this State. To the contrary, as set forth below, the plain language of the Pitchess statutes, their legislative history, and uniform case law establish that the Pitchess statutes have no application to the information sought by The Times.

1. LBPOA And The City Ignore The Narrow Construction Rule For Statutory Exemptions.

Entirely absent from Appellants' Opening Briefs is any acknowledgment of the important statutory construction rule in Public

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Records Act cases – "the familiar rule that we must construe statutory exemptions narrowly." Sacramento County, 195 Cal. App. 4th at 447 (emphasis added). Accord Sonoma County Employees' Retirement Association v. Superior Court, 198 Cal. App. 4th 986, 992, 993, 1000 (2011) ("[s]tatutory exemptions from compelled disclosure under the CPRA are narrowly construed") ("Sonoma County"); BRV, Inc. v. Superior Court, 143 Cal. App. 4th 742, 756 (2006) (same); Bakersfield City School Dist. v. Superior Court, 118 Cal. App. 4th 1041, 1045 (2004) (same).

As the California Constitution explicitly provides, statutes must be broadly construed if they further the people's right of access to public records and narrowly construed if they limit the right of access. Cal. Const. Art. 1, § 3(b). Yet even before the adoption of this constitutional mandate, courts repeatedly reaffirmed the requirement for narrow construction of statutory exemptions to the CPRA. See, e.g., California State University., 90 Cal. App. 4th at 831; New York Times, 218 Cal. App. 3d at 1585 ("[s]pecific exemptions from this general requirement of disclosure ... are construed narrowly to ensure maximum disclosure of the conduct of governmental operations"); Fairley v. Superior Court, 66 Cal. App. 4th 1414, 1420 (1998) ("[t]he general policy of disclosure reflected in the act can only be accomplished by narrow construction of the statutory exemptions"); Citizens for a Better Environment v. Dep't of Food & Agric., 171 Cal. App. 3d 704, 711 (1985) (same); South Coast Newspapers v. City

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of Oceanside, 160 Cal. App. 3d 261, 268 (1984) (same); San Gabriel Tribune v. Superior Court, 143 Cal. App. 3d 762, 773 (1983) (same). This well-settled rule of construction serves as the predicate for this Court's interpretation of the Pitchess statutes, and is significant to determining whether these statutes can be interpreted as exempting the names of officers involved in shootings from the CPRA even though no such language appears anywhere in the statutes.

The decision in Sacramento County last year is instructive. There, the Third District Court of Appeal evaluated whether a provision of the Government Code exempted from disclosure the names of retired public employees and the amounts of their pensions. 195 Cal. App. 4th at 460-466. Applying the narrow construction rule, the court concluded that the term "individual records" in the county pension statute covered sensitive information such as medical reports of retired public employees, but did not exempt from disclosure the names and amounts of pensions disbursed to these employees. Id. at 463. See also Sonoma County, 198 Cal. App. 4th at 993 ("In the particular context of the CPRA, if there is any ambiguity about the scope of an exemption from disclosure, we must construe it narrowly") (emphasis added). Thus, after reviewing the legislative history of Gov't Code § 31532 and finding no express intent to exempt the information sought, the Court of Appeal rejected the overbroad construction urged by the agency. 195 Cal. App. 4th at 463. In reaching its

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decision, the court also accorded "great weight" to two California Attorney General opinions, ultimately adopting their analyses that the pension statute was not intended to prevent the names and amounts of pensions given to public employees from being disclosed under the CPRA. Id. at 456. Accord Sonoma County, 198 Cal. App. 4th at 995-999.[8]

Similarly, the arguments presented by the City and LBPOA depend on a broad interpretation of the Pitchess statutes, because the express statutory language does not support their position. Under any reasonable interpretation of the Pitchess statutes, Appellants' interpretation must be rejected. But at a minimum, when the Pitchess statutes are interpreted narrowly – as they must be, just as all exemptions under the CPRA must be – Appellants cannot prevail.

2. The Plain Language Of The Pitchess Statutes Covers Only Two Categories Of Information, Neither of Which Is Applicable Here.

As addressed above, Section 832.7 establishes the confidentiality of certain records under the Pitchess statutes. As LBPOA concedes (LBPOA O.B. at 16), it provides for two – and only two – categories of confidential records: (a) "personnel records" (as defined in Section 832.8); and (b)

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[8] "Opinions of the Attorney General, while not binding, are entitled to great weight." Coffin v. Alcoholic Beverage Control Appeals Board, 139 Cal. App. 4th 471, 478 (2006) (citations omitted); Orange County Employees Assoc. v. County of Orange, 14 Cal. App. 4th 575, 578 (1993).

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citizen complaints and "reports or findings relating to these complaints."[9] Id. § 832.7(a). A review of this Court's decisions makes clear that the Pitchess statutes are limited to these two narrow categories of information, and do not encompass the undefined and amorphous categories of information advocated by LBPOA and the City. No authority supports Appellants' demand that the Court rewrite the Pitchess statutes to create a new category of confidential information.

a. The Names Of Officers Involved In Shootings Are Not "Personnel Records."

The City claims that the names of officers involved in shootings are personnel records exempted from disclosure. City O.B. at 14-20.[10] But this Court already has held that the Pitchess statutes do not expressly exempt officer names from disclosure. POST, 42 Cal. 4th at 290. Thus, in POST, this Court necessarily evaluated whether officer names were implicitly exempted from disclosure. Focusing on the precise language of the statute, the Court narrowly construed the key term "personal data" in the Pitchess statutes as precluding disclosure of sensitive information such as marital

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[9] Under Section 832.7, confidentiality attaches to records "maintained by any state or local agency pursuant to Section 832.5." Id. Section 832.5, in turn, refers to citizen complaints and records or findings related to such complaints.

[10] LBPOA's arguments are more general, and appear to claim that all internal investigations are covered by the statute. O.B. at 18.

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status, home address, and discipline of officers. Id. at 294-295.[11] This Court refused to expand the exemption to include names, explaining that "[w]ithout a more specific indication in the statute, we hesitate to conclude that the Legislature intended to classify the identity of a public official whose activities are a matter of serious public concern as 'personal data.'" Id. at 296. This conclusion was especially justified, as this Court found, because the Legislature easily could have included names as a protected category of information, but it chose not to do so. "Had the Legislature intended to prevent the disclosure of officers' identities as such, an obvious solution would have been to list 'name' as an item of '[p]ersonal data' under subdivision (a) of section 832.8." Id. at 298.

Notably, in POST, this Court expressly held "that peace officer personnel records include only the types of information enumerated in section 832.8." 42 Cal. 4th at 293 (emphasis added). Following this holding, the trial court correctly gave a narrow construction to the Pitchess statutes, explaining:

> Penal Code § 832.8 defines what is a police 'personnel record' for purposes of the privilege afforded by Penal Code § 832.7. POST makes clear that in order to be considered as coming from 'personnel records,' the information sought

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[11] LBPOA and the City do not argue that the names of the officers fit within the Section 832.8(b) category for medical history or the Section 832.8(c) category for election of employee benefits, nor could they credibly make such an argument.

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must fall into one of the categories listed in Penal Code § 832.8.

C.T. 000284 (emphasis added).[12]

Following POST, Sacramento County, and the other cases discussed above, construction of the Pitchess statutes – particularly the requisite narrow construction – compels the conclusion that the information The Times seeks is not exempt as a personnel record. Neither Penal Code § 832.7 nor Penal Code § 832.8 includes any language stating that the names of officers in connection with a particular event are exempt from discovery, let alone language stating that the identity of officers who shoot and kill civilians must be kept secret. Because this Court already has made clear that "personnel records include only the types of information enumerated in Section 832.8," the Court already has resolved this point against LBPOA and the City. POST, 42 Cal. 4th at 293-294. The fact that this information is not "enumerated" is determinative here.[13]

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[12] This only makes sense: the phrase "personnel records" referred to in Section 832.7 is defined in Section 832.8(a). Section 832.8(a) begins, "As used in Section 832.7, 'personnel records' means...." (Emphasis added.) Thus, Section 832.7 cannot be construed or interpreted independently of this definitional section.

[13] The City makes the convoluted assertion that disclosure of a name necessarily is equivalent to disclosure of a home address, because "an officer's home address can easily be discovered online." City O.B. at 29-30. Notably, the City offers no evidence to support this bald claim; nor does its conflation of two different pieces of information make sense: under this theory, no officer in California ever could be named, because the Pitchess statutes expressly render home addresses confidential. Penal Code

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Nor do the statutes prohibit any "connection" between an officer and a specific event, as the City and LBPOA claim. City O.B. at 21-26; LBPOA O.B. at 17-18. As the trial court explained, "[t]he fact that an officer's name is linked to a critical event, such as a shooting, is not 'personal' to the officer in the same way that things like marital status, education, employment history, and the like are 'personal.' On the contrary, a police shooting is an event of public concern." C.T. 000285 (Order at 20) (emphasis added).

Similarly, by its plain language, the Section 832.8(d) category for "[e]mployee advancement, appraisal, or discipline" cannot be read to include the names of officers involved in shootings, because releasing that information, without more, does not reveal anything about "advancement, appraisal, or discipline." As the trial court and Court of Appeal correctly concluded (C.T. 000286; Op. at 17-18), the fact that an officer was involved in a shooting does not mean that he or she was disciplined, promoted, or demoted, nor does the disclosure alone reveal anything about how or whether the shootings affected the officer's performance evaluations (i.e., how the officer was appraised).[14]

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§ 832.8(a). This Court already has rejected this same argument, pointing out that the Legislature has enacted safeguards to maintain the confidentiality of officer home addresses. POST, 42 Cal. 4th at 302 n.13.

[14] The City's assertion that the Pitchess statutes forbid the disclosure of an officer's name if it is "linked" in any way to a particular event or

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Struggling to overcome this dispositive fact, LBPOA attempts to convert all names of officers involved in shootings into exempt information by making the self-serving claim that every shooting will be "investigated," and that these internal investigations therefore are "appraisals." LBPOA O.B. at 18. But this is just the kind of overbroad construction that the Court rejected in POST, 42 Cal. 4th at 294-298, in deciding that "personal data" did not include the names of officers because names are not explicitly referenced in the statute as "personal data." An appraisal is an evaluation or estimation of worth – not the bare fact that an incident occurred. Black's Law Dictionary (8th ed.) at 110; see also Roget's II: The New Thesaurus (2010) (synonym of appraisal is "evaluation").[15] Disclosing the names of officers involved in a shooting says nothing about how an officer is being

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assignment also is contrary to the structure of the statutes themselves. (See City O.B. at 30-34.) The Pitchess statutes were designed to provide a procedural mechanism by which criminal defendants and civil rights litigants could obtain certain information about prior investigations into the conduct of peace officers involved in their arrest. The statutes assume that the parties seeking the peace officer information already have the officer's name, because they are required to include in the Pitchess motion the name of the officer whose records are sought. People v. Mooc, 26 Cal. 4th 1216, 1226 (2001) (discussing Cal. Evid. Code § 1043). If the name of the officer involved in a particular event or on-duty at a particular time or place must be kept secret, the Pitchess statutes would impose an effective "Catch-22," by depriving parties of the very same information required to file a Pitchess motion in the first instance. This is not, and cannot be, the law.

[15] Courts can and should rely on dictionaries to ascertain the plain meaning of language in statutes. In re Marriage of Bonds, 24 Cal. 4th 1, 16 (2000). Accord POST, 42 Cal. 4th at 296 (citing dictionary definitions of "personal" to construe "personal data" language in Pitchess statutes).

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"appraised" or evaluated – or even whether the officer has been evaluated at all. C.T. 000286.

If an officer is "evaluated" or "appraised," as LBPOA assumes, that second step would involve an inquiry into whether the shooting was justified or not; whether the officer followed policy or not; and whether the officer's conduct was appropriate or not. The Times is not seeking any of that information in the requests at issue here. Moreover, the bare fact that the shooting occurred reveals none of these things – any more than would be revealed by the fact that an officer was employed by a particular agency for a specific period of time. See POST, 42 Cal. 4th at 295. Indeed, under LBPOA's logic, since every officer will be "evaluated" at some point in time, the names of every officer must be kept secret, whether they were involved in a shooting or not. But that is precisely what this Court rejected in POST. Nothing in the statutory language or in the legislative history even remotely suggests that the word "appraisal" was intended to cover the names of officers involved in shootings. See Section 5.A.3, infra. In the end, Appellants fall far short of meeting their heavy burden to invoke the "personnel records" exemption under the Pitchess statutes.

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b. The Names Of Officers Involved in Shootings Are Not Records Of Discipline, Citizen Complaints, Or "Reports or Findings" Related to Such Complaints.

LBPOA relies heavily on the "discipline" portion of the personnel records exemption, confusingly combining it with the other exemption afforded by the Pitchess statutes for citizen complaints and "reports or findings" related to such complaints. LBPOA O.B. at 17-19. LBPOA then attempts to rely on Copley Press to argue that the names of officers involved in shootings are exempt as a report of an investigation of a citizen complaint or a disciplinary proceeding. Id.[16] But this argument is fundamentally misplaced. Disclosing the identity of an officer involved in a shooting is different from the situation in Copley Press, 39 Cal. 4th at 1298, where the newspaper sought to learn the name of an officer who had been disciplined, and who was appealing the sanction to the San Diego Civil Service Commission. The Times is not asking whether officers who shot civilians were disciplined, nor is it seeking any names in connection with any Long Beach Civil Service Commission disciplinary hearings (or

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[16] In making this argument, LBPOA misstates this Court's holding in Copley Press. LBPOA attempts to expand the ruling to say that any disclosure of an individual "involved in an incident" is prohibited. LBPOA O.B. at 17-18, citing Copley Press, 39 Cal. 4th at 1297. But in fact, this Court was clear in Copley Press that it was addressing only the disclosure of officers' names who had been the subject of discipline and/or citizen complaints. Nothing in the Court's actual language supports LBPOA's claim.

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equivalent hearings), as the trial court properly found. C.T. 000286. Nor is The Times asking whether officers who shot civilians were the subject of citizen complaints, or seeking information about civilian complaints (if any) that might have been filed as a result of the shooting.

When an officer shoots a civilian, the officer may or may not be disciplined. The officer also may or may not be the subject of a citizen's complaint. There is no inextricable link between the two things, any more than there is an inextricable link between a shooting and an internal investigation; one does not inherently follow the other. Indeed, heroic officers who have shot criminals in the course of armed robberies, hostage situations, or other events where the public was endangered are honored, not disciplined; and are the subject of citizens' adulation, not citizen's complaints. Thus, it is irrelevant whether or not the City currently chooses to "investigate" every officer-involved shooting (which may not always have been its practice, and is not the practice of every law enforcement agency). This administrative action does not change the basic nature of The Times' inquiry, nor does revealing the officers' identities reveal anything about the "investigation" that the City supposedly conducts.

This Court's decision in Copley Press was expressly "qualified," limited to the specific linking of an officer with a disciplinary hearing.

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POST, 42 Cal. 4th at 298.[17] The broader question presented here was not at issue in Copley Press, and this Court's later decision in POST makes clear that it cannot be interpreted so broadly.

Instead, the plain language of the Pitchess statutes answers the question without any ambiguity. Names of officers involved in shootings does not fit within the Section 832.8(e) category for "[c]omplaints, or investigations of complaints, concerning an event or transaction in which [the officer] participated ... and pertaining to the manner in which he or she performed his or her duties." Only information about citizen complaints and investigations related to those complaints are protected by a qualified privilege. Disclosing the basic factual information requested – the identities of officers who shot citizens – does not reveal whether "complaints" were made "about the conduct of officers who were involved in shootings," let alone the substance of those complaints. C.T. 000287.[18]

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[17] The specific issue before the Court in Copley Press was whether county civil service commissions functioned as the peace officer's "employing agency," and therefore were subject to statutory prohibitions against the disclosure of information about officers' administrative appeals from disciplinary actions. 39 Cal. 4th at 1288.

[18] LBPOA's and the City's efforts to extend the blanket of confidentiality for investigation of complaints and disciplinary actions to include the information here – based on their unsupported claims that all officer shootings result in an investigation – is akin to efforts routinely rejected by courts to expand the attorney-client privilege to include underlying facts that happen to be in an attorney's possession. "The [attorney-client] privilege only protects disclosure of communications, it

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Appellants' Opening Briefs also are based on a fundamental misunderstanding about the Legislature's intent in enacting the Pitchess statutes. City O.B. at 26-30; LBPOA O.B. at 23. They argue that under the trial court's and Court of Appeal's decisions, the statute would yield inconsistent results, because an officer's name would be withheld if a citizen complaint was filed in conjunction with a shooting, but released if no complaint was filed. City O.B. at 26-28; LBPOA O.B. at 23. But this premise is flawed. The citizen complaint itself, and "any reports or findings relating to these complaints," are not disclosed. Sections 832.5(a), (b)[19] and 832.7(a).[20] The officer's name in connection with a shooting can

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does not protect disclosure of the underlying facts by those who communicated with the attorney." Zurich American Ins. Co. v. Superior Court, 155 Cal. App. 4th 1485, 1498 (2007).

[19] Section 832.5 protects "complaints by members of the public." Disclosure of an officer's name does not disclose whether a complaint was made by a member of the public, or the substance of the complaint.

[20] Section 832.7(c), which also involves citizen complaints, states that the number, type or disposition of such citizen complaints against officers can be released so long as the information does not identify the officers against whom complaints have been lodged. LBPOA's attempt to rewrite this section of the statute as a prohibition against disclosing the names of officers involved in shootings (LBPOA at 17-18) is utterly baseless. Releasing the names of officers involved in shootings does not tell the public anything about any complaints lodged by members of the public, nor does releasing the names reveal whether any such citizen complaints have even been made against officers. To extend Section 832.7(c) to cover the names of officers involved in shootings – whether or not there was a citizen complaint – would require this Court to read into the Pitchess statutes words the Legislature never used, in violation of the well-established rules of statutory construction. See, e.g., All One God Faith,

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and must be released, however, without whether a complaint was made, or any records relating to that complaint. Thus, the inconsistency Appellants bemoan simply does not exist.

The legislative history shows that the Legislature's primary concern was with revealing information about citizen complaints, and not at all about protecting the names of officers involved in shootings. See Section 4.A.3, infra; POST, 42 Cal. 4th at 293 ("[i]t is apparent that the Legislature's major focus in adopting the statutory scheme here at issue was the type of record at issue in Pitchess – records of citizen complaints against police officers"). The Pitchess statutes protect against disclosure of reports of any investigation of a citizen complaint and disciplinary proceedings, but they do not prohibit the disclosure of every underlying fact that may relate to a subsequent complaint or disciplinary proceeding. Indeed, if LBPOA and the City's claims were correct, the City would be prohibited from releasing any information about officer-involved shootings because that information inevitably will end up in an investigative file. Clearly, that is not the law. Accordingly, any appropriately narrow construction of Section 832.8(e) simply cannot sweep within its ambit the names of officers involved in shootings.

Inc. v. Organic & Sustainable Ind. Stds., Inc., 183 Cal. App. 4th 1186, 1213 (2010) ("[t]his court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed") (citing Equilon Enterprises v. Consumer Cause, Inc., 29 Cal. 4th 53, 59 (2002)).

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3. The Legislative History Of The Pitchess Statutes Demonstrates That They Were Designed To Protect Only Discrete, Specifically Identified, Information.

Both the City and LBPOA claim that the legislative history of the Pitchess statutes supports their claim that the Legislature intended to make the names of officers involved in shootings exempt from disclosure under the CPRA. City O.B. at 26; LBPOA O.B. at 19. But there is not a single passage from the legislative history of the Pitchess statutes referenced anywhere in Appellants' Opening Briefs. It is a bold claim indeed that asks for retrenchment of basic public records law but provides no support for that request.

The Times lodged the complete legislative history of Senate Bill 1436, the 1978 enactment of the Pitchess statutes, with the Court of Appeal.[21] What is remarkable about the many hundreds of pages of legislative history is that not a single page discusses LBPOA's and the City's theory that the statutes were intended to render confidential the underlying fact that a particular officer was involved in a shooting. Not one state senator or assembly member voiced such an intent in any of the many committee analyses or memoranda on the bill. Even more telling, none of

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[21] The Times lodged excerpts of the Legislative History in the trial court. C.T. 000080-000110. So that the Court of Appeal had a complete record, The Times submitted the entire legislative history from 1977-1978, when Penal Code §§ 832.7 and 832.8 were enacted and Penal Code § 832.5 was modified. The Court of Appeal granted The Times' Request for Judicial Notice ("RJN"). Op. at 14 n.7.

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the many interested parties who commented to the Legislature about SB 1436 – including many law enforcement advocates and union representatives – ever suggested that any provision of SB 1436 was intended to keep secret the names of law enforcement officers involved in shootings.

Instead, the legislative history makes clear that the Pitchess statutes were intended to address a 1974 decision by this Court, which held that a criminal defendant might be entitled to discover information concerning previous citizen complaints against a peace officer involved in the defendant's arrest. Pitchess v. Superior Court, 11 Cal. 3d 531 (1974). Following the decision, criminal defendants and civil rights litigants reportedly began to make broad requests for information from peace officer personnel files, and in response, some police agencies allegedly began shredding records concerning citizen complaints and disciplinary proceedings. See C.T. 000080-000110; RJN, Ex. A at RJN0035-0108.

The Legislature responded in 1978 by enacting S.B. 1436, codified at Penal Code §§ 832.5, 832.7, and Evidence Code §§ 1043-1045. There were two specific purposes behind these statutes: to stop the practice by public agencies of destroying peace officer personnel records, and to provide a procedural mechanism for criminal defendants and civil litigants to obtain information about prior conduct by peace officers, while

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protecting officers against broad-based fishing expeditions into their personnel files. See id.[22]

As the Senate Committee on Judiciary SB 1436 Analysis states, "This bill would require that information derived from the investigation of citizens' complaints become part of a peace officer's personnel record.... The purpose of the bill is to protect peace officer personnel records from discovery by defendants asserting self-defense to charges involving criminal offenses against police officers." C.T. 000383. Similarly, the Assembly Committee on Criminal Justice Final Analysis of SB 1436 stated that the bill was designed to address fishing expeditions by defense attorneys to determine if the officers were facing citizen complaints against them. C.T. 000102. And then-Governor Jerry Brown issued a statement saying that SB 1436 "[s]pecifies that the information derived from the investigation of citizens' complaints shall become part of a peace officer's record." RJN, Ex. A at RJN0127. The "major focus" of the Legislature was to ensure that "records of citizen complaints against police officers" were maintained, and to provide assurances to officers that these citizen

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[22] This Court consistently has interpreted the Pitchess statutes as intended to fulfill these twin purposes. E.g., POST, 42 Cal. 4th at 292-293; Warrick v. Superior Court, 35 Cal. 4th 1011, 1018-19 (2005); Mooc, 26 Cal. 4th at 1225-26; see also C.T. 000080-000110; RJN, Exs. A-B.

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complaint records would remain confidential unless specific procedures were followed. POST, 42 Cal. 4th at 293.

The framers of SB 1436 also understood that the categories of information made exempt from discovery needed to be narrowly drawn. As the author of SB 1436 wrote to the Assembly Committee on Criminal Justice for an August 7, 1978 hearing: "The tendency in California is to limit the creation of privileges and to strictly construe existing privileges since the protection against the disclosure of privileged communications often leads to suppression of the truth and the defeat of justice." RJN, Ex. A at RJN0079.

Consistent with this strict construction principle, when identifying the categories of information qualifying as exempt "personnel records" under the Pitchess statutes (Section 832.8(a)), the Legislature chose not to include identification among the enumerated categories. As explained in detail in Section 4.A.2, infra, this Court also has declined to add "names" as an exempt category of "personnel records" in Section 832.8(a) of the Pitchess statutes, "find[ing] no indication that the Legislature, in adopting sections 832.7 and 832.8, was concerned with making confidential the identities of peace officers...." POST, 42 Cal. 4th at 295.

LBPOA and the City are asking this Court to add into the Pitchess statutes language that the Legislature chose not to include, and to read into the legislative history an intent that does not exist. But "this court does not

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legislate," as one California Court of Appeal recently noted. See Sacramento County, 195 Cal. App. 4th at 448 (quoting Williams v. California Physicians' Serv., 72 Cal. App. 4th 722, 731 (1999)). If LBPOA and the City believe that public disclosure of the names of officers involved in shootings is bad policy and that they can marshal the votes for a law on the subject, then the "remedy properly lies 'on the other side of Tenth Street, in the halls of the Legislature.'" See id.

4. This Court Repeatedly Has Made Clear That Information Is Not Exempt Under The CPRA Merely Because It Might Be Placed In A File Containing Exempt Information.

As discussed above, the Pitchess statutes do not purport to make all information about officers or all information concerning their conduct secret, wherever it may appear. To the contrary, factual information that discloses an officers' rank or years of experience, or that identifies a particular officer as a participant in a specific event – information that is found in a variety of records in addition to an officer's personnel file – is not covered by the express terms of the statutes and is not exempt from disclosure.[23] This conclusion only makes sense – if the Court accepted the City's overbroad argument that any information that identified a particular

[23] The Times' request seeks information that is available in incident reports, duty logs, video/audio recordings, and other materials that reflect the everyday operations of a law enforcement agency. See Section 5.A.5, infra.

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officer in connection with a specific event was restricted (City O.B. at 22-25), then nothing about an officer's conduct could ever be revealed – including the identities of officers killed or injured in the line of duty, commendations, and other information that routinely is released.[24] It also is inconsistent with other provisions of the statute, which provide for specific information about arrests or citizen requests for assistance to be revealed. Gov't Code § 6254(f).

This Court's decision in POST emphasized the limited nature of the Pitchess statutes, and held that their scope cannot be expanded beyond their specific terms:

> The categories of information listed in section 832.8 certainly are sufficiently broad to serve the purposes of the legislation and to protect the legitimate privacy interests of peace officers. To extend the statute's protection to information not included within any of the enumerated categories merely because that information is contained in a file that also includes the type of confidential information specified in the statute would serve no legitimate purpose and would lead to arbitrary results. Therefore, we conclude that peace officer personnel records include only the types of information enumerated in section 832.8.

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[24] For example, this Court can take judicial notice of the fact that the Los Angeles Police Department recently recognized – by name – thirteen officers in a public ceremony. See "Chief Beck Honors Officers with Distinguished Purple Heart & Medal of Valor Awards for Heroism," available at http://www.lapdonline.org/newsroom/ news_view/50890. But according to the City, this type of public recognition violates the Pitchess statutes.

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42 Cal. 4th at 293 (emphasis added).[25]

This point was reaffirmed in International Federation of Professional & Technical Eng., Local 21, AFL-CIO v. Superior Court ("Int'l Federation"), 42 Cal. 4th 319 (2007), where this Court held that the Pitchess statutes did not exempt peace officer salaries from public disclosure. Although salary information clearly was related to the officers' employment, and could be found in their personnel files, it did not fall into one of the enumerated categories of information exempted from disclosure; consequently, this Court held that to read its inclusion into the statute's exemptions would be improper regardless of where the information was located. Id. at 341-346.[26]

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[25] This Court refused to give the Pitchess statutes an interpretation that "would result in absurd consequences which the Legislature did not intend." 42 Cal. 4th at 290 (quoting Younger v. Superior Court, 21 Cal. 3d 102, 113 (1978)). Instead, the Court "select[ed] the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results." Id.

[26] The City's strained attempt to find support for its position in Int'l Federation fails. City O.B. at 28-29. In Int'l Federation, this Court refused to imply a protection for salary information, holding that the Pitchess statutes did not apply because the Legislature did not expressly include this information in the statutes. The City attempts to argue the same point that this Court rejected – namely, that it "could reasonably be implied" from the Pitchess statutes' protection of other information that names of officers who shoot citizens also is covered. City O.B. at 29. This argument should be rejected. The Pitchess statutes do not expressly protect the names of officers involved in a particular incident, and this Court should not rewrite

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In reaching its decisions, this Court consistently has rejected interpretations of the law that would give agencies the ability to control whether or not a record is subject to public scrutiny, merely by making an administrative decision about where it should be filed. POST, 42 Cal 4th at 290-291. Citing its prior decision in Williams v. Superior Court, 5 Cal. 4th 337, 355 (1993), this Court held in POST that "we do not believe that the Legislature intended that a public agency be able to shield information from public disclosure simply by placing it in a file that contains the type of information specified in section 832.8." Id. at 291.[27]

Similarly, the identity of an officer involved in a critical incident cannot be converted into protected information merely because an agency unilaterally decides to initiate an internal investigation. As this Court explained in Int'l Federation:

> The Act should apply in the same way to comparable records maintained by comparable governmental entities. Whether or not a particular type of record is exempt should not depend upon the peculiar practice of the government entity at issue – otherwise, an agency could transform public records into private ones simply by refusing to disclose them over a period of time.

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the statutes or disregard its own decisions in POST and Int'l Federation to create an "implied" category of information that the statute does not include.

[27] By way of example, then-Chief Justice George noted that a public agency cannot make a newspaper article about a police officer private by putting it in a personnel file. POST, 42 Cal. 4th at 290-291.

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42 Cal. 4th at 336. See also POST, 42 Cal. 4th at 293; Copley Press, 39 Cal. 4th at 1295; Williams, 5 Cal. 4th at 355.

In an opinion that is directly on point, the Attorney General considered whether a law enforcement agency must disclose the names of peace officers involved in a "critical incident" (i.e., an on-duty shooting like the ones at issue here) in response to a request made under the CPRA. 91 Ops. Cal. Atty. Gen. 11 (May 19, 2008). The Attorney General analyzed this Court's decisions in POST and Copley Press, as well as the Court of Appeal's decision in New York Times, 52 Cal. App. 4th at 103-104, and concluded that the underlying holding of New York Times – that police agencies must disclose the names of officer(s) involved in a lethal shooting – was not impacted by Copley Press.[28]

As the AG explained, Copley dealt only with the limited circumstance in which a CPRA inquiry was specifically tied to a disciplinary proceeding – there, the San Diego Civil Service Commission disciplinary appeal at which the deputy sheriff sought to overturn a

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[28] The City misstates this opinion, relying on a few words out of context to claim that "[i]t appears the holding in Copley Press was intended to prevent the disclosure of confidential information including internal investigations." City O.B. at 18-19. As discussed below, Copley Press says no such thing. In the section referenced by the Attorney General, this Court held only that the Pitchess statutes protect information identifying the individuals involved in citizen complaints filed against officers. 39 Cal. 3th at 1297. The Attorney General opinion directly supports The Times' position.

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termination decision. 39 Cal. 4th at 1298. Copley Press did not purport to disapprove New York Times outside of the context of the specific circumstances presented in the Copley Press case. This Court's subsequent decision in POST made this distinction clear; in fact, it cited New York Times with approval on the importance of disclosing information about the "activities of ... peace officers." 42 Cal. 4th at 297-299.[29] Thus, the Attorney General's Opinion concluded, the names of peace officers involved in an officer shooting must be disclosed under the Act, "unless, on the facts of the particular case, the public interest served by not disclosing the names clearly outweighs the public interest served by disclosing the names." Id. at 10.[30]

Applying the same rationale adopted by the AG, the City must disclose the requested information here because the Pitchess statutes do not forbid the disclosure of names of officers who shoot citizens, and because LBPOA and the City failed to meet their stringent burden of demonstrating

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[29] Consequently, the City's claim that "the central holding" of New York Times was overruled by this Court in Copley" is incorrect. See City O.B. at 17.

[30] This language tracks Government Code § 6255, the so-called catch-all exemption. The burden of establishing that the requisite balancing test has been satisfied, as with any exemption to the CPRA, is on the withholding agency. See Section 5.B, infra.

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that the strong public interest in identifying officers who exercise lethal force is "clearly" outweighed. See Section B, infra.[31]

5. The Pitchess Statutes Do Not Bar The Disclosure Of Information From Sources Other Than Personnel Records and Files.

At its core, Appellants' argument relies on the premise that any information which eventually may be found in a personnel file is exempt under the Pitchess statutes. This premise is necessary to their position, because it cannot be controverted that the identities of officers involved in shootings are known to many people inside and outside of the agency, and their names appear in records separate from whatever report may be generated after an administrative review of the shooting.

Contrary to their broad claims, California law is clear that not all information in the possession of a police agency that may relate to one of its officers – or even all information that may end up in an officer's personnel file – is protected by a qualified privilege. For example, as the Court recognized in Mooc, 26 Cal. 4th at 1227, under Evidence Code

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[31] The City's argument also ignores the League of California Cities Public Records Act handbook and supplement for city attorneys, which adopts the Attorney General opinion finding that the names of officers involved in shootings are subject to disclosure unless the public interest in nondisclosure clearly outweighs the public interest in disclosure. See http://www.cacities.org/resource_files/newCybrary/2008/legalresource/26872.PRA_08%20(2)_web.pdf; http://www.cacities.org/resource_files/29189.The%20People's%20Business_August%202010%20Supplement.pdf.

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§ 1045, "when the litigation at issue concerns the policies or pattern of conduct of the employing agency, the court shall consider whether the information sought may be obtained from other records maintained by the employing agency [in the regular course of agency business] which would not necessitate the disclosure of individual personnel records." This language would be meaningless if the statutes are interpreted as prohibiting the disclosure of information regardless of the source from which it is derived. Instead, if information found in personnel records also may be found in other public records, that information is not exempt from disclosure under the Pitchess statutes.

As this Court explained in drawing the distinction, if a newspaper article commending an officer's bravery was maintained in a public relations office file, and a copy also was placed in the officer's personnel file, the public agency clearly would have to produce the article in response to a CPRA request; placing a copy of the article in a personnel file would not somehow transform it into a "confidential" personnel record. POST, 42 Cal. 4th at 290-291. Similarly, assuming that an officer's personnel files refer to his or her involvement in a shooting, that does not and cannot render that fact, or all records containing that information, secret.

Indeed, the practical implications of Appellants' position are completely illogical. Under their reasoning, even if an officer-involved shooting were captured on tape by a bystander and disseminated on

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YouTube – so that the officer's identity was evident to the public at large – a public agency nonetheless would be barred from even mentioning the officer's name.[32]

Moreover, if LBPOA's and the City's interpretation of the Pitchess statutes were accepted, a police department would be barred from releasing any information about an officer-involved shooting forever if the identity of the officer was publicly known. This is because under LBPOA's and the City's reasoning, even routine information about shootings – including how many shots were fired, how many officers were involved, what led up to the shooting, among other details – necessarily would appear in and be related to the "personnel records" of the officers involved in the incident and thus be secret forever. In effect, every detail of every officer-involved shooting would be completely shielded from public scrutiny, even if a police department wanted to release facts that exonerated the relevant officers in the public eye, to correct misinformation about the identities of those involved, to commend an officer whose quick action led to the

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[32] This is not merely a hypothetical scenario: with the pervasiveness of video recording devices and camera phones, officer-involved shootings and other incidents involving the use of force may be widely disseminated to the public within hours of an incident, as occurred on New Year's Day in 2009 following the Oakland shooting of an unarmed man by transit police on New Year's Eve. See C.T. 000111. Similarly, LAObserved recently reported that a video of police shooting a suspect was available on Twitter. See http://www.laobserved.com/archive/2011/12/video_of_shooter_at_sunse.php.

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apprehension of a dangerous suspect, or simply to inform the public about crime in a neighborhood police blotter.

Recognizing the weakness of a position that would result in complete secrecy, LBPOA has claimed that substantive information about a shooting may be disclosed if names are withheld. LBPOA Ct. App. O.B. at 21.[33] This, of course, does not address the situation described above, where the officer's identity is known through witnesses at the scene.[34] Moreover, releasing factual information about a critical incident without identifying the officers involved is a pale and unacceptable substitute that this Court rejected in POST, 42 Cal. 4th at 299, 300 n.10. As the Court explained, the public's interest in the qualifications and conduct of peace officers "would not be served" if the public agency provided substantive information while redacting the "officers' names." Id. This Court expressly pointed to the

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[33] LBPOA's claim that substantive information on shootings can be disclosed is directly contrary to the theory elsewhere in its brief (and the City's theory) that any information related to an investigation or citizen complaint falls within the scope of confidential "personnel" records that must be kept secret. See LBPOA Ct. App. O.B. at 15; City O.B. at 13, 18.

[34] The City claims that under Copley Press and POST, an officer's identity can be deemed confidential under the Pitchess statutes even if that identity has been disclosed publicly. City O.B. at 17-18. But neither case supports this argument. In Copley Press, the Court merely recognized that information may be confidential insofar as it relates to a confidential matter, even if at some point in the past it existed in a non-confidential form. 39 Cal. 4th at 1293 n.15. POST contradicts the City's position, holding that "the public nature of an officer's name and activities is a factor we consider" in deciding whether officer names fall within the category of "personal data." 42 Cal. 4th at 296 n.5.

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importance of disclosing names, noting that "[a] police officer possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss." Id. Because "[a]ccess to the officers' names would permit The Times to conduct followup inquiries regarding specific examples of any trends identified by The Times and to examine their causes and effects," the names had to be disclosed and could not be redacted. Id.[35]

Neither LBPOA nor the City produced any evidence whatsoever to support the claim that the names of officers involved in shootings are reflected only in "personnel records"; to the contrary, they have impliedly conceded that the identities of Long Beach officers involved in shootings from 2005 to the present would be reflected in a variety of records that are generated and maintained in the normal course of Long Beach police operations, including duty logs, incident reports, radio transmissions, video or audio devices, public safety statements, and the like. See C.T. 000119-000120, 000123-000124, 000127, 000133.[36] All of these records would

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[35] Similarly, in Int'l Federation, in discussing the public's right of access to salaries of officers and other public employees, this Court noted that without the names, the press cannot "expose corruption, incompetence, inefficiency, prejudice, and favoritism." 42 Cal. 4th at 333-334.

[36] The Office of Independent Review ("OIR") Report concerning a police shooting in Pasadena even points out that information about officer-

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reflect the identities of the officers involved in a shooting, and none of them are "personnel records" within the scope and meaning of the Pitchess statutes.[37] Nor has there been any showing by the City or LBPOA that a single officer involved in a shooting in the last six years was the subject of a disciplinary investigation and/or a citizen complaint.

LBPOA's injunction request attempts to dramatically expand the scope of the Pitchess statutes. It asked for an order restraining not only the City defendants, but their "employees, agents, and anyone acting on [their] behalf" from disclosing the names of any officers who have been involved in shootings over a six-year period, regardless of the original source of the information, and even if the information already has been made public. See C.T. 000011; P.A. at 000146. Thus, under the order sought by LBPOA, the City and its employees would be forbidden from disclosing the officers' names even if the names came from lunch conversations, or from information learned by another officer from a neighbor who was at the

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involved shootings commonly is the subject of "locker room briefings" – casual conversations among officers. C.T. 000142.

[37] The City bears the burden of justifying nondisclosure of records by producing evidence that the names are only reflected in personnel records. See CBS Broadcasting, 91 Cal. App. 4th at 908. But neither the City nor LBPOA provided any evidence to substantiate this claim. The reason is obvious – as the OIR Report makes clear, the identities of officers involved in shootings are available in many records that are not "personnel records" under the Pitchess statutes. See C.T. 000119-000120, 000123-000124, 000127, 000133.

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scene. This attempt to exponentially expand the Pitchess statutes far beyond their express terms, and beyond any reasonable interpretation of decisions in this area, should be rejected.[38]

The Pitchess statutes never were intended to preclude agencies from releasing all information about peace officers; they certainly were not intended to preclude disclosure of the names of officials who exercise lethal force.[39] Instead, the Legislature carefully balanced the public's right to

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[38] At most, even if this Court accepted LBPOA's arguments notwithstanding POST, Copley Press, New York Times, and the AG's Opinion, the only relief LBPOA legitimately could request would be an order preventing the disclosure of information derived from personnel records – not, as sought below, an order restricting disclosure of names regardless of the source of the information.

[39] The other cases that LBPOA and the City have relied on to support their arguments – City of Hemet v. Superior Court, 37 Cal. App. 4th 1411 (1995), City of Richmond v. Superior Court, 32 Cal. App. 4th 1430, 1439 (1995), County of Los Angeles v. Superior Court, 18 Cal. App. 4th 588 (1993), Davis v. City of San Diego, 106 Cal. App. 4th 893, 900 (2003), and Hackett v. Superior Court, 13 Cal. App. 4th 96 (1993) – are not relevant because they all specifically involve the disclosure of information obtained from citizen complaint boards and/or internal investigations.

For example, the Hemet case involved an internal affairs investigative report on a deputy sheriff ignoring high school drug use. 37 Cal. App. 4th at 1415-1416. Similarly, in Davis, 106 Cal. App. 4th at 899-900, the City of San Diego wanted to release a detailed citizens' review board report. Those situations are easily distinguishable from a request for the officers' names involved in shootings, which reveals nothing substantive about any internal affairs or review board investigation. And in Hackett, 13 Cal. App. 4th at 98, the information at issue was the police officer's address, telephone number, place of birth, driver's license number, and educational background. These are categories of information specifically enumerated in Penal Code § 832.8 as "personnel records."

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know certain information against the rights of officers, by identifying specific, limited information that would be deemed presumptively confidential, while declining to protect other information. As the trial court and the Court of Appeal both understood, LBPOA's request for an injunction would upset this careful balance, and properly was rejected.

6. The City's Request That This Court Revise The Pitchess Statutes Should Be Rejected.

The City urges the Court to "consider the legislative intent" of a different statute – Government Code § 6254.21 – and expand the scope of the Pitchess statutes to include the information The Times seeks here. City O.B. at 38-39; see also id. at 8-9. The City purports to find support for this argument in an Attorney General decision analyzing Section 6254.21(a), which prohibits agencies from posting the home address or telephone number of elected officials, including peace officers, without written permission. City O.B. at 36-38, citing 2008 Cal. AG LEXIS 31 (May 20, 2008, No. 06-802). But that opinion does not purport to apply Section 6254.21(a) more broadly than its terms, let alone suggest that it can be expanded to include the identities of officers who exercise lethal force.

Indeed, the Attorney General's opinion narrowly construes Section 6254.21 to only prohibit release of an officer's home address if the same database identifies the officer as a peace officer. Id., pgs. 4-6. The opinion makes clear that the disclosure of a peace officer's home address itself is

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not prohibited. Id., pg. 7. Thus, the opinion actually supports The Times, because it narrowly interprets the exemption, and rejects the notion that an exemption should take into account what other information may be publicly-available that could be combined with the information sought.

The City's reliance on this statute, and the Attorney General opinion interpreting it, demonstrates the dearth of authority to support its position. As this Court recognized in POST, the Legislature has carefully crafted protections for peace officers as it deems appropriate, and expanding those protections "would serve no legitimate purpose." 42 Cal. App. 4th at 293. Despite numerous amendments to the CPRA since the advent of the Internet, the Legislature has never added provisions for a secret police force, nor has it acted to protect the identities of officers involved in shootings. This Court should not accept the City's invitation to amend the statute where the Legislature has chosen not to do so.

B. The Trial Court And Court Of Appeal Correctly Found That Appellants Did Not Meet Their Burden Of Proving A Competing Interest In Secrecy That "Clearly Outweighs" The Strong Public Interest In Disclosure.

LBPOA claims that release of the records The Times seeks is barred by Gov't Code § 6254(c) because of the alleged risk to officer safety. LBPOA O.B. at 24-28. Without invoking Section 6254(c), the City similarly urges this Court to shield the officers' identities from public

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disclosure, citing the alleged danger posed by the Internet. City O.B. at 34-39. Neither justifies the blanket secrecy they asked this Court to adopt.

Section 6254(c) exempts from disclosure only "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of privacy." (Emphasis added.) The final clause of subsection (c) is critical: as courts have recognized, this exemption protects only highly personal information contained in government files, and even then, only if its disclosure would amount to an unwarranted invasion of privacy. San Gabriel Tribune, 143 Cal. App. 3d at 773, 777.

In POST, 42 Cal. 4th at 299, this Court stated that in deciding whether Section 6254(c) applied, the Court had "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.'" The Court then cited the balancing standard used in Gov't Code § 6255, under which the proponent of secrecy has the burden of establishing a public interest in nondisclosure that clearly outweighs the public interest in disclosure. Id.

As one Court of Appeal explained, the proponent of nondisclosure "must demonstrate a 'clear overbalance' on the side of confidentiality." CBS Broadcasting, 91 Cal. App. 4th at 908 (internal citations and quotation marks omitted). Where information "pertain[s] to the conduct of the people's business there is a public interest in disclosure." Citizens for a

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Better Environment v. California Dept. of Food & Agriculture, 171 Cal. App. 3d 704, 715 (1985). "The weight of that interest is proportionate to the gravity of the governmental tasks sought to be illuminated[.]" Id.

The City and LBPOA have not met their heavy burden of establishing an interest in anonymity that "clearly outweighs" the public's strong interest in the disclosure of this public information.

1. There Is An Irrefutable, Compelling Public Interest In Knowing The Identities Of Officers Involved In Shootings.

This Court's conclusion in POST that officers' names must be disclosed to the public recognized "[t]he public's legitimate interest in the identity and activities of peace officers," which "is even greater than its interest in those of the average public servant." Id. at 297. As this Court held, "[t]he public's interest in the qualifications and conduct of peace officers is substantial, a circumstance that both diminishes and counterbalances any expectation officers may have that their names and employment as peace officers will be confidential." Id. at 299-300 (emphasis added).

The very nature of the job makes a police officer's identity a matter of public interest. As this Court explained, a police officer's privacy interest in his or her identity is "insubstantial" because of the public nature and public responsibilities of the job. POST, 42 Cal. 4th at 300. "Peace officers operate in the public realm on a daily basis, and identify

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themselves to the members of the public with whom they deal. Indeed, uniformed peace officers are required to wear a badge or nameplate with the officer's name or identification number." Id. at 301. Claims about hostility to uniformed police officers or general claims about safety if their names are known are unpersuasive, the Court added, because "by virtue of the visibility of their activities in the community, the identity of many officers is well known or readily obtainable." Id. at 300, 302-303.

In addition, the authority and power that accompany this particular job strongly supports disclosure of officers' names. As this Court stated, "[l]aw enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the state. In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers." Id. at 297 (quoting New York Times, 52 Cal. App. 4th at 104-105). No situation presents the importance of maintaining trust more directly than when a peace officer shoots and kills one of its citizens under the authority given to that officer by the state. See New York Times, 52 Cal. App. 4th at 105.[40]

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[40] In fact, it is difficult to imagine an exercise of government power with more gravity than an officer's use of force, particularly lethal force. As one court held, "[i]t is indisputable that law enforcement is a primary function of local government and that the public has a ... great[] interest in the qualifications and conduct of law enforcement officers ... especially at ... an 'on the street' level." Gomes v. Fried, 136 Cal. App. 3d 924, 933 (1982). Similarly, in City of Los Angeles v. Superior Court, 41 Cal. App.

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Here, the public interest in disclosure is even greater than in New York Times. First, in that case, Santa Barbara County deputies killed the suspect during a "firefight"; there was no public debate about the need to use deadly force. Id. at 99-100. By contrast, in the incident that triggered The Times' CPRA request, Long Beach police officers fired ten to twelve shots at an unarmed man who was carrying a garden nozzle. C.T. 000057-000080. Mr. Zerby's tragic death, and the history of shootings in recent years, raise important questions about the practices of Long Beach police in exercising force. Id. In a region that has experienced repeated police misconduct (including the Rodney King case and the Rampart scandal, among other scandals), the public interest in scrutinizing the conduct of law enforcement officers is only magnified, to avoid a perception that peace officer misconduct is tolerated or concealed. City of Hemet v. Superior Court, 37 Cal. App. 4th 1411, 1428 (1995).[41]

4th 1083, 1091 (1996), the court held that the "public interest w[ould] be better served" by the disclosure of information relating to "claims of excessive force in the use of police dogs" by the Los Angeles police than by the concealment of that information.

[41] The City's reliance on Stone v. F.B.I., 727 F. Supp. 662 (D.D.C. 1990), which involved a FOIA request for information identifying the officers who investigated Robert Kennedy's assassination, is misplaced. City O.B. at 22-23. This Court's decision in POST distinguished Stone, because the request for information in POST did not include the fact that any particular officer worked on any particular case. 42 Cal. 4th at 302 n.12. But the City's suggestion that this Court therefore adopted the holding in Stone is incorrect. To the contrary, this Court's decision does not support the City's premise that any linking of an officer to any specific

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Second, The Times sought the names of all officers involved in shootings from January 1, 2005 through December 11, 2010 – not merely the names of officers involved in a single shooting as in New York Times. C.T. 000050. The City did not come close to meeting its burden of establishing that every officer involved in a shooting for that period of time was entitled to remain anonymous. Indeed, it did not even try.

2. Appellants' Speculation And Hearsay "Evidence" Does Not Justify A Blanket Secrecy Rule.

In stark contrast to the significant public interest in the information sought by The Times, LBPOA and the City offered only generalized and speculative claims of harm if officers' identities are disclosed.

Notably, this Court's decision in POST already made clear that mere speculation about possible harm is inadequate to justify keeping officers' identities secret. As this Court held:

> The safety of peace officers and their families is most certainly a legitimate concern, but the Commission's contention that peace officers in general would be threatened by the release of the information in question is purely speculative. 'A mere assertion of possible endangerment' is insufficient to justify nondisclosure.

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incident is prohibited, regardless what the "incident" is; instead, this Court narrowly opined that "the legislative concern [in the Pitchess statutes] appears to have been with linking a named officer to the private or sensitive information listed in section 832.8." Id. at 29. As explained above, The Times does not seek to link an officer's name to information protected by Section 832.8. Moreover, the identity of an officer who shoots and kills a citizen of this State has far greater public importance than the information sought in Stone.

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POST, 42 Cal. 4th at 302 (emphasis added) (citing CBS, Inc. v. Block, 42 Cal. 3d at 652). Because the Commission did not offer any "persuasive illustration" of how release of officer names and employing departments would threaten the safety of specific officers, this Court held that the assertions about general safety concerns did not clearly outweigh the public's interest in disclosure of officers' names and employing departments. Id. at 302-303.

Notably, in reaching its conclusion, this Court rejected the same argument made by Appellants here, namely, that unidentified hostile persons might use the Internet or other means to locate peace officers' addresses. C.T. 000023, 000243-000244. This Court pointed out in POST that the Commission "offered no evidence that such a scenario is more than speculative, or even that it is feasible." Id. The Court also found that provisions in the Vehicle Code making an officer's home address confidential were sufficient to protect peace officers from persons who might do them harm. Id. at 303.

The hearsay declarations from LBPOA President Steve James and Long Beach Lt. Lloyd Cox, relied on by Appellants here, simply repeat the same speculative assertions about the Internet and addresses that this Court found to be unpersuasive in POST. Indeed, the Court of Appeal noted that the "evidence" relied on by Appellants was "remarkably similar" to the evidence this Court had rejected in POST. Op. at 23.

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The trial court expressly sustained The Times' objections to one of these declarations – the only one properly served on The Times[42] – and held that the declarations did not come close to satisfying the CPRA's requirement of specific "evidence" demonstrating a compelling interest in secrecy. (C.T. 000283, 000288; see also C.T. 000152-000154, 000277.) In making its findings, the trial court relied on the standards set by this Court in POST, that speculative and generalized evidence – including anecdotal evidence about alleged threats to officers in general, unrelated to the release of an officer's name under the CPRA – is insufficient to establish a specific threat to a particular officer. C.T. 000283; Op. at 23-24; see also New York Times Co. v. Superior Court, 218 Cal. App. 3d 1579, 1584 (1990). This

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[42] LBPOA claims that "The Times did not file objections to Lt. Cox's declaration," and it relies heavily on the Cox declaration to support its argument about alleged "safety" concerns. LBPOA O.B. at 7, 26-27. But LBPOA does not disclose that the Cox declaration (filed by the City on the same day The Times filed its opposition papers), was not properly served on The Times. C.T. 000025, 000236, 000242. As the City's proof of service shows, its papers were sent to an incorrect address for The Times' in-house counsel, and The Times' outside counsel was not served at all. C.T. 000245; compare C.T. 000025. The trial court expressly rejected virtually identical evidence submitted by LBPOA. C.T. 000152-000154, 000277. It presumably rejected the Cox declaration as well, given its holding that "[n]either the LBPOA nor the City has supplied anything beyond the generalized and speculative invocation of fear that someone, somewhere ... may ultimately use names that are disclosed as stepping stones to find the officers and hurt them or their families." C.T. 000283.

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finding, which the Court of Appeal strongly affirmed (Op. at 25), is entitled to deference.[43]

Almost two years later, the City simply points again to this unsupported – and insupportable[44] – "evidence" regarding alleged Internet groups who purportedly have threatened officers. City O.B. at 4-5. The City also claims – again without any supporting evidence – that an officer was called at his home and threatened. Id.; see also id. at 34-39. But as the trial court and Court of Appeal properly found, this "evidence" does not come close to meeting the City's burden. General statements or nonspecific anecdotes, like those contained in the City's declarations, do not provide any concrete evidence of danger to officers in any specific case – let alone in every case involving a shooting over a six-year period. C.T. 000021-000023, 000242-000244.[45] A purported anonymous web comment posing the rhetorical comment that an officer's children should see what it felt like to have Christmas without their father shows frustration, anger, or

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[43] Even if this Court declines to adopt the de novo standard of review applied to denials of preliminary injunctions, factual conclusions of the trial court about LBPOA's and the City's declarations are reviewed under a deferential, abuse-of-discretion standard. See Section 4, supra.

[44] The Times was not able to access the website the City references. (City O.B. at 4 n.2), and assumes it has been taken down.

[45] The absurdity of the City's position is demonstrated by the fact that it has not even disclosed the identities of officers who were involved in shootings six years ago – or officers who have died or moved away in the six-year period covered by The Times' request.

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perhaps simply a plea for empathy, but it is not evidence of any concrete threat against any officer. C.T. 000022.[46] Nor is nonspecific graffiti reading "Strike Kill a Cop" evidence of any specific threat against Long Beach officers that would satisfy Appellants' burden. C.T. 000243. It is an unfortunate fact that officers receive threats, and hostile graffiti appears in cities across the nation. But such "generalized, "speculative" and admittedly "vague" (LBPOA O.B. at 27) claims are not proof of any interest that would clearly outweigh the strong public interest in disclosure. C.T. 000280-000283, 000288.

As the Court of Appeal recognized, if an agency can establish that "the disclosure of a particular officer's identity would jeopardize that officer's safety or efficacy," there may have grounds to withhold that officer's name. Op. at 22-23 (emphasis added). But LBPOA urges this Court to go much further, arguing that 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" justifies the unprecedented secrecy Appellants seek. LBPOA O.B. at 27-28. This Court already rejected that argument in POST, 42 Cal. 4th at 301, and there is no change in

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[46] Notably, there is no evidence whatsoever that anyone at the Long Beach Police Department investigated this ambiguous comment, which belies Appellants' attempt to portray it as a serious threat. Officer James did not even provide a link to the Internet site with the supposed comment, making the context of the hearsay statement impossible to determine.

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circumstances in the last five years that warrants revisiting that conclusion now.[47]

In any event, as the trial court pointed out, enjoining release of the names of officers who shoot people while on duty would not be effective to guard against the alleged harm:

> [T]here are other ways for the officers' identities to become known to those who have an axe to grind. For example, if a shooting victim or the victim's family sues (and probably even before a suit is filed), they will be able to get the shooting officer's identification information through police reports (Gov. Code § 6254(f)). Indeed, in a lawsuit in which a Pitchess motion is brought, the person seeking the officer's records must know the officer's name in order to bring the motion. Hence, it is common that those affected by officer-involved shootings or other uses of force learn the officers' names, and this disclosure will have no effect on that.

C.T. 000283. In short, LBPOA's position would not prevent officers' identities from becoming known to the very people that LBPOA claims

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[47] LBPOA also relies on Times Mirror Co. v. Superior Court, 53 Cal. 3d 1325, 1346 (1991). LBPOA O.B. at 29. But as the Court pointed out in POST, the particular security threat to the Governor that was posed by release of the Governor's calendars was established by a declaration from the Governor's security director substantiating that threat. 42 Cal. 4th at 302. Nor is the balance of interests comparable: Times Mirror involved revealing the contents of a daily calendar, which on its face raises more legitimate privacy issues and less compelling public interest than this case, involving the identities of government officials who have shot (and even killed) citizens of this State.

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pose a threat.[48] Under LBPOA's proposed view of the law, only members of the public would be deprived of that information.

Because Appellants have not met their burden of demonstrating a legitimate countervailing interest in secrecy that "clearly outweighs" the profound public interest in evaluating officers' exercises of lethal force, they cannot meet their burden under the CPRA, and the officers' names must be disclosed as a matter of law.

C. The City's New Argument Based On Section 6254(f) Should Be Rejected.

For the first time in its briefing to this Court, the City claims that the names of police officers involved in shootings is covered by the "investigatory files" exemption in Gov't Code § 6254(f). The City's newfound reliance on Section 6254(f) should be rejected, since it was not invoked in the City's response to The Times' CPRA request, nor was it offered in either the trial court or the Court of Appeal as a separate basis for withholding the names of officers involved in shootings. Having waived this argument during the last two years of litigation, the City should not be permitted to raise it at this late stage. Section 1, infra.

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[48] The names of the officers who shot Mr. Zerby were disclosed in November 2011, when the Los Angeles District Attorney's Office released its findings from the investigation into the shooting. See November 3, 2011 report, available at http://www.lbreport.com/news/nov11/zerbyda.pdf.

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In any event, as discussed below, Section 6254(f) does not exempt the information sought by The Times. The City's last-ditch attempt to limit the public's right to information about police shootings should be rejected. Section 2, infra.

1. The City Waived Its Right To Invoke Section 6254(f) By Failing To Properly Raise It Below.

Under the CPRA, the City was required to respond to The Times' CPRA request "within 10 days from receipt of the request, [to] determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and [to] promptly notify the person making the request of the determination and the reasons therefor." See Gov't Code § 6253(c) (emphasis added). This not only requires a responding agency to carefully consider whether there is a legitimate basis for refusing a public records act request, but also ensures that the requester has notice of the alleged justification before it initiates a lawsuit.

Here, the City did not claim that the information sought by The Times was exempt under Section 6254(f). C.T. 000052.[49] Nor did it take that position in proceedings before the trial court; indeed, the only reference

[49] The City never properly responded to The Times' request. Its only response was to advise The Times that it would require additional time to respond, pursuant to Section 6253(c). C.T. 000052. LBPOA filed this lawsuit before the City responded; the City then promptly joined with LBPOA, and never explained the basis for its refusal to disclose the information demanded by The Times. C.T. 000243 ¶ 7.

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to Section 6254(f) was a single line in the City's trial court brief discussion about the need to protect officers' safety: "[S]ection 6254(f) exempts from disclosure 'information which would endanger the safety of a person involved in an investigation.'" C.T. 0000240.

In ANG Newspapers v. Union City, 33 Med. L. Rptr. 2069 (Cal. Super. Ct. 2005), the court held that a city's failure to assert an exemption in response to a CPRA request constituted a waiver of the City's right to raise the exemption for the first time in response to an order to show cause. The result should be the same here; the City should not be allowed to rely on Section 6254(f) now, almost two years after this litigation commenced.

In addition to its failure to comply with the CPRA's plain language, the City waived its right to rely on Section 6254(f) by failing to properly raise this issue in the Court of Appeal. This Court consistently has declined to address arguments that were not properly raised in the intermediate appellate court, or which were abandoned in the proceedings below. Cal. R. Ct. 8.500(c)(1) ("[a]s a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal"); see also Wilson v. 21st Century Ins. Co., 42 Cal. 4th 713, 726 (2007) (refusing to address issue not raised in court of appeal); In Re Joshua S., 41 Cal. 4th 261, 272 (2007) (same).

The City did not address Section 6254(f) at all in the proceedings before the Court of Appeal; nor did LBPOA raise this as a basis for keeping

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officers' names secret. Op. at 8 n.5. The City's desperate attempt to find some ground for its untenable position does not justify its attempt to raise new arguments before this Court.[50]

2. Section 6254(f) Has No Application To The Times' Request.

If this Court consider the City's newfound reliance on Section 6254(f), it should find that this section does not justify keeping secret the names of officers involved in shootings.

Like all statutory exemptions to the CPRA, Section 6254(f) must be "narrowly construed" to the extent that it limits disclosure of public records. Cal. Const. Art. 1, § 3(b); California State University, Fresno Ass'n v. Superior Court, 90 Cal. App. 4th 810, 831 (2001). Under the narrow construction required by California law – indeed, under any construction – Section 6254(f) has no application here.

First, The Times' request for the names of officers involved in shootings does not constitute a request for "investigatory" files or records. By its plain language, Section 6254(f) only limits the dissemination of investigative records and information derived from those records; it does not restrict disclosure of the identities of police officers involved in

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[50] The City's assertion that that the Court of Appeal ruled on this issue (City O.B. 7, 31, 33) is flatly untrue. In a footnote, the Court of Appeal pointed out, in discussing the exemptions at issue, that "Appellants do not claim that the requested information should be withheld" under Section 6254(f). Op. at 8 n.5.

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particular incidents, which are found in a variety of other places. See Section A.5, supra, and note 23. The fact that the name of an officer involved in a shooting may also be found in an "investigatory" file does not magically convert it from non-exempt to exempt. See Section 5.A.4, supra; see also POST, 42 Cal 4th at 290-291; Williams, 5 Cal. 4th at 355.

Second, nothing on the face of the statute suggests that it is intended to apply to the identities of police officers: it references investigating officers only once, in exempting from mandatory disclosure "the analysis or conclusions" of that officer – but not his or her identity – and does not refer at all to officers involved in an investigation in some other capacity.[51]

Third, in any event, the statute expressly allows for the disclosure of "names" of individuals involved in an investigation. Gov't Code § 6254(f) (listing information, including "names," that shall be disclosed "unless the disclosure would endanger the safety of" someone involved in the investigation or "endanger the successful completion" of an investigation). The City has not met its burden of demonstrating that disclosure would put the safety of officers at risk (Section B, supra), and it has never suggested – nor could it – that an internal "investigation" of a shooting would be put at

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[51] Interpreting Section 6254(f) as applying to peace officers would make no sense, given the statute's provision that "names and addresses of persons involved in," or "witnesses to" the "incident" are presumptively disclosed. The "addresses" of peace officers may not be disclosed, by state law. See POST, 42 Cal. 4th at 302 n.13 (discussing statutes).

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risk if the names of officers who shot people were disclosed – so for that independent reason, the provisions of Section 6254(f) do not apply.

In New York Times, the Second District expressly rejected the City's argument that Section 6254(f) applies to the names of officers involved in shootings. 52 Cal. App. 4th at 102-04. There, the sheriff's department insisted that it could withhold the information because "the names of the specific deputies were determined as a result of an investigation...." Id. at 103. The court disagreed, warning that Section 6254(f) could not be construed so broadly without "weaken[ing] and despoil[ing] the Public Records Act." Id. As the court pointed out, "labels of 'personnel records' and 'internal investigation' are captivatingly expansive, and present an elasticity menacing to the principle of public scrutiny of government." Id. Because the court concluded that the deputies' names were not "records of ... [an] investigation[] conducted by" the department, it ordered disclosure. Id.

The City ignores this dispositive opinion. Instead, it raises a red herring, claiming that the department initiates a criminal investigation in connection with every shooting, which allegedly creates a risk of disclosure of information from the criminal investigation in response to a CPRA request. City O.B. at 32. But the City misrepresents the evidence it cites. Lt. Cox did not testify that a criminal investigation is initiated with every officer shooting. Instead, he offered only deliberately vague assertion that

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the officer will be subject to "an administrative and/or criminal investigation." C.T. 000242. There is no evidence that any of the officers implicated by The Times' CPRA request were investigated criminally. C.T. 000242-000244. But in any event, this Section does not justify a blanket non-disclosure rule concerning officer-involved shootings, and the City has failed to meet its burden of justifying secrecy in any specific case.

Finally, even if the names that The Times seeks could be considered information derived from "investigative records" (which they are not), and even if there was some evidentiary basis for the City's assertion that any of the officers involved in shootings were the subject of criminal investigations (which there is not),[52] the City has not established that there was a "concrete and defined" prospect of enforcement proceedings against any of the officers. Williams, 5 Cal. 4th at 356 ("information in public files [becomes] exempt as 'investigatory' material only when the prospect of enforcement proceedings [becomes] concrete and definite") (citation omitted); see also Copley Press, 39 Cal. 4th at 1293 n.15.[53] As the Third

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[52] Neither Mr. Cox nor Mr. James offered testimony to suggest that any shooting resulted in a "concrete and definite" prospect of criminal enforcement. C.T. 000022, 000242.

[53] In Haynie v. Superior Court, 26 Cal. 4th 1061, 1069 (2001), this Court distinguished "[r]ecords of ... investigations," holding that such records are independently exempt, even without a showing of a concrete

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District explained in Dixon v. Superior Court, 170 Cal. App. 4th 1271, 1277 (2009), to prevent an expansive interpretation of the investigatory file exemption, California law clearly limits the exemption "only when there is 'a concrete and definite prospect' of 'criminal law enforcement' proceedings." (Citations omitted.)[54]

Neither LBPOA nor the City relied on the investigatory records exemption in the trial court or Court of Appeal, because it clearly has no application here. Thus, if the Court considers the City's eleventh-hour argument on Section 6254(f), it should find that this section has no application to the information requested by The Times.

6. THE TIMES' ISSUES FOR REVIEW

The Times' Answer Brief presented three issues for review, none of which are addressed in Appellants' Briefs. For the reasons set forth below, this Court should find that employees of public agencies may not bring reverse-CPRA lawsuits that the agency is prohibited from bringing, and that collusive lawsuit between agencies and third parties are prohibited. Filarsky v. Superior Court, 28 Cal. 4th 419 (2002).

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and definite prospect of enforcement proceedings. Here, however, The Times seeks only the names of officers, not any records of the investigations.

[54] Here, to the contrary, LBPOA's counsel asserted that in his experience, every administrative review of a shooting has "come back with a letter from the district attorney to the officer saying for the following reasons we are not going to prosecute you." 1/18/11 R.T. at 4:5-7.

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In the alternative, this Court should find that lawsuits brought by public employees or other third parties to block disclosures of records requested under the CPRA are subject to the fee-shifting and expedited review provisions contained in that Act.

A. This Court Should Find That LBPOA Is Barred From Bringing A Reverse-CPRA Lawsuit.

Allowing third-parties like LBPOA to initiate lawsuits seeking to block disclosure of public records is wholly inconsistent with the CPRA. Indeed, this case is a textbook example of why such suits should not be allowed: they provide agencies with a means of evading their obligations (and controlling law) by orchestrating litigation with supposedly "adverse" third parties, like the City and LBPOA have done here.[55]

In conformance with its stated goal of promoting maximum public access to records, the CPRA requires agencies to make records "promptly available" to requesters like The Times. Gov't Code § 6253(b). Agencies are required to provide a response within 10 days of receipt of a request, but in recognition that public agencies have many other functions, the law permits this time to be extended for an additional 14 days where "good

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[55] Here, the putative "third party" plaintiffs filed their injunction lawsuit without providing notice to the entity (The Times), whose request was the subject of the lawsuit. If the trial court had not sua sponte ordered that The Times be added as a real party in interest, this reverse-CPRA lawsuit would have proceeded with both "parties" seeking to stop disclosure of the information sought by The Times.

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cause" exists. Gov't Code § 6253(c). It is not intended to permit an agency to simply delay disclosure, nor to allow the kind of collusive third-party lawsuit that resulted here.

For example, instead of responding within the statutory period, or making the records "promptly available," the City delayed – apparently for the sole reason that LBPOA needed time to file a conspiratorial lawsuit to "enjoin" the disclosure of records that neither LBPOA or the City wanted released. The City's pretense of being a "defendant" in this case was quickly abandoned, when it made the same arguments as LBPOA against disclosure of the information LBPOA sought to "enjoin." See C.T. 000237; 1/18/11 Hearing Tr. at 9-13. Indeed, even though the trial court issued an order rejecting the "plaintiff's" injunction request, both LBPOA and the City "defendants" appealed.

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

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

Although the circumstances in Filarksy involved a lawsuit initiated by a public agency, rather than a third-party lawsuit to block disclosure of public records, this Court's rationale applies equally here. The CPRA was designed to serve the interests of individuals seeking information from the government; it was not intended to allow public agencies (or their designees) to block members of the public from obtaining records that are ostensibly "public."

Significantly, this Court noted in Filarsky that the federal Freedom of Information Act (5 U.S.C. § 552) expressly permits "reverse" FOIA actions to bar release of public records, but the CPRA does not contain such a provision. Id. at 432. This suggests that third parties may not initiate lawsuits to block disclosure of records requested under the Act. Id.; see also Teamsters Local 856 v. Priceless, LLC, 112 Cal. App. 4th 1500, 1508 n.6 (2003), overruled on other grounds, Int'l Federation, 42 Cal. 4th at 335 ("there is no express authority for a third party to bring an action to preclude a public agency from disclosing documents under the CPRA"; noting that the press agreed to third-party TRO application).

The CPRA also makes clear that a "state or local agency may not allow another party to control the disclosure of information that is otherwise subject to disclosure pursuant to this chapter." Gov't Code §

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6253.3 (emphasis added). Thus, in Los Angeles Police Dep't v. Superior Court, 65 Cal. App. 3d 661 (1977), the court recognized that "a subject person has no right under Act to prevent disclosure of the record to any other person." Id. at 668 (emphasis added) (quoting Black Panther Party v. Kehoe, 42 Cal.App.3d 645 (1974)); see also City of Santa Rosa v. Press Democrat, 187 Cal. App. 3d 1315, 1320 (1986) ("there is no provision for an action by the government agency or for any action to prevent disclosure") (emphasis in original). Thus, consistent with this Court's decision in Filarsky, it should find the plain language of the CPRA only permits a CPRA requester to initiate an action that seeks to resolve whether the public has a right of access to public records.

LBPOA attempted to distinguish Filarsky in the proceedings below, claiming that it was limited to cases where the plaintiffs are seeking declaratory judgment – a limitation that does not appear anywhere in the case. LBPOA Ct. App. O.B. at 34. LBPOA also claimed that Filarsky is somehow distinguishable because LBPOA is seeking only equitable relief, in the form of an injunction. Id.; see also C.T. 000010-000011. But an injunction is a remedy, not a cause of action. See 6 Witkin Cal. Procedure (5th ed.) § 274. "Because a preliminary injunction is an interim remedy, and not a cause of action, a cause of action must exist before an injunction is issued." Id.; see also Major v. Miraverde Homeowners Ass'n, 7 Cal. App. 4th 618, 623 (1992) ("a cause of action must exist before injunctive

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relief may be granted"); Korean Amer. Legal Advocacy Foundation v. Los Angeles, 23 Cal. App. 4th 376, 398-399 (1994) (same).

Here, LBPOA has not identified a cognizable "cause of action." The only legal grounds identified in the First Cause of Action is "the Public Records Act." C.T. 000010 (¶ 16). Yet, as LBPOA admits, the Legislature provided that only a public records requester can bring a cause of action to determine whether a particular record or class of records must be disclosed. LBPOA Ct. App. O.B. at 30-31.

Nonetheless, the Court of Appeal allowed the City to effectively outsource to its employees' union the role of "plaintiffs" in this reverse-CPRA action, thereby evade the protections afforded to requesters under Filarsky and the CPRA. Because this Court has already found that the CPRA does not permit such reverse-CPRA suits by public agencies, it should similarly find that public employees are similarly limited, and that the law cannot be nullified through the use of a collusive third-party suit.

The only authority cited by the Court of Appeal – apart from Filarsky, which supports a contrary result – is County of Santa Clara (Naymark) v. Superior Court, 171 Cal. App. 4th 119 (2009). See Op. at 6 n.2. But that decision also supports The Times' position.

In Naymark, the Court held that the CPRA does not have language that "precludes any type of legal action 'concerning' public records other than whether a particular record or class of records must be disclosed." 171

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Cal. App. 4th at 130 (emphasis added). But this case directly involves the question of whether particular records "must be disclosed." Consequently, Naymark does not support LBPOA's position.

Moreover, in Naymark, the plaintiffs were not seeking to impede the disclosure of public records – unlike LBPOA here – but instead were seeking redress under a specific statute (C.C.P. § 526a) "to enforce the CPRA's provisions." 171 Cal. App. 4th at 130-132 (emphasis added.) The lawsuit sought to prevent several cities and counties from engaging in policies that chilled public access to records, such as requiring requesters to provide driver's licenses, forcing requesters to explain their purpose for seeking records, charging impermissible "research" fees, and the like. Because the lawsuit "furthered," rather than "obstructed," the "purpose of the CPRA," and because it did not involve the question of whether specific public records must be disclosed, the Court of Appeal found that the plaintiffs could pursue the lawsuit. Id.

In contrast, LBPOA's lawsuit directly seeks to prevent the disclosure of records to the public. See id. Accord CBS v. Block, 42 Cal. 3d at 651-652. Thus, the decision in Naymark not only provides it no support, but the principles it sets forth – promoting the values of open government – is wholly inapposite to LBPOA's position.

This Court should act in furtherance of the principles it recognized in Filarsky, and find that third-party lawsuits seeking to block disclosure of

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public records may not be brought by employees of the agencies from whom records are sought, and that collusive third-party lawsuits – like the lawsuit here – are barred.

B. In The Alternative, This Court Should Find That Third Party Reverse-CPRA Suits Are Subject To All Of The Protections Guaranteed By The CPRA.

If this Court allow this reverse-CPRA action, it should make clear that the protections that the CPRA affords to records requesters apply in any action brought to resolve a dispute regarding access to public records. As this Court's decision in Filarsky recognized, the Legislature included specific provisions in the CPRA that were intended to further the public's ability to obtain public records, and to discourage public agencies from interfering with the public's rights of access. Those same provisions should be applied here.

First, third party actions should be subject to the same expedited review processes that are required under the CPRA – including, appellate review by discretionary writ, rather than mandatory appeal. Here, even though the Second District already had the complete record from the trial court,[56] these proceedings were delayed for months while a duplicative Clerk's Transcript was prepared. More than a year passed between the date

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[56] Appellants initially proceeded by filing writ petitions, that included the record below.

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of The Times' CPRA request, in December 2010, and the oral argument in the Court of Appeal.

The Legislature amended the CPRA to provide expedited appellate relief through the writ process "to prohibit public agencies from delaying the disclosure of public records by appealing a trial court decision and using continuances in order to frustrate the intent of the Act." Filarsky, 28 Cal. 4th at 426-427; see also Freedom Newspapers, Inc. v. Superior Court, 186 Cal. App. 3d 1102, 1108 (1986) (citing legislative history stating that "[t]he sponsors of this bill seek to correct an injustice they perceive due to Orange County's delaying tactics, as well as the potential for other public agencies to delay the disclosure of public documents").[57]

The reverse-CPRA lawsuit brought by the union with the encouragement of the City threatens to render this provision of the CPRA a nullity; public agencies can simply encourage third parties like LBPOA to file an injunctive lawsuit and then, if it is unsuccessful, the agency can join the third parties in protracted appellate proceedings, thereby delaying

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[57] In Marken, the Second District held that expedited writ review was not necessary, in part because the Court of Appeal has procedures that can speed appellate review. 202 Cal. App. 4th at 1268. But here, in addition to the lengthy delay caused by the need to obtain a Clerk's Transcript, the Second District denied The Times' Motion for Calendar Preference on appeal (Cal. R. Ct. 8.240). Thus, the normal processes are inadequate to protect the rights of requesters to speedy appellate review. It now has been nearly two years since The Times' December 2010 CPRA request. C.T. 000049.

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disclosure for many months, if not years, until a news organization loses interest. See Powers, 10 Cal. 4th at 111 (goal of expedited appellate proceedings provisions was to prohibit a party "from delaying the disclosure of public records by appealing a trial court decision and using continuances in order to frustrate the intent of the Public Records Act"); Los Angeles Times v. Alameda Corridor Transp. Auth., 88 Cal. App. 4th 1381, 1386 (2001) (the "exclusive purpose" of the provision for review by extraordinary writ "was to speed appellate review").

Second, allowing the parties in reverse-CPRA cases to proceed by ordinary appeal results in an automatic stay, in contravention of the CPRA statutory rule prohibiting automatic stays of a trial court's ruling in favor of a CPRA requester. See Gov't Code § 6259(c) (CPRA ensures that during the appellate process, a stay of a trial court order "shall not be granted unless the petitioning party demonstrates it will otherwise sustain irreparable damage and probable success on the merits"). These CPRA requirements reflect the legislative objectives of preventing proponents of secrecy from "delaying disclosure of the records ... by simply filing an appeal from the trial court's ruling" and by requiring the proponent of secrecy to "make the substantial showing required by the statute" to obtain a stay. Powers, 10 Cal. 4th at 119 (George, J., concurring).

Here, the Court of Appeal construed the petitions for writ of mandate filed by the City and LBPOA as writs of supersedeas (even though

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neither one requested that relief), but it did not make the findings necessary for supersedeas relief (i.e., probable success on the merits, and irreparable harm). Given the ultimate conclusions of both the trial court and the Court of Appeal that the names of the officers involved in the shootings must be disclosed, it is evident that Appellants could not have made the showing that should have been necessary before delaying disclosure of this vital public information.

Third, fee shifting in favor of the CPRA requester is a vital component of the CPRA, which must be available to requesters who are forced to defend their rights under the CPRA. LBPOA conceded below that it will be subject to an attorneys' fee award under the CPRA (Gov't Code § 6259(d)) for bringing this reverse-CPRA lawsuit if the trial court's order is affirmed. LBPOA Ct. App. O.B. at 35-36. See Fontana Police Dep't v. Villegas-Banuelos, 74 Cal. App. 4th 1249, 1253 (1999) (prevailing party in an action that is "the functional equivalent of a proceeding to compel production of" public records under the CPRA is "entitled to recover attorneys' fees despite the fact that he was not denominated 'plaintiff' in the action").

But other third party police unions have taken the opposite position, claiming that the CPRA fee-shifting provision only applies to public agencies, even if the unions are responsible for costly litigation seeking to block disclosure of public records. See Los Angeles Times

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Communications LLC v. Superior Court, Los Angeles Superior Court Case No. BS123076 (RJN, Ex. C). Meanwhile, public agencies claim that if the litigation is caused by an intervening third-party union, the agency should not be held responsible for the fees and costs incurred by the requestor. Id.

Adopting this reasoning, the Second District recently held that "a requesting party who participates in a reverse-CPRA lawsuit would not be entitled to the recovery of attorney fees." Marken, 202 Cal. App. 4th at 1268 (emphasis added). The court justified this conclusion by asserting that "a reverse CPRA action will only be filed when the public agency has decided to provide access to the requested records" and as such, "the requesting party may elect to allow the agency itself to defend its decision," thereby avoiding the need to incur any attorney fees. Id. But the suggestion that a requester can rely on a public agency to defend the public's right to receive records is simply untenable.[58] This case proves the point; the City "defendant" not only failed to vindicate The Times' rights, it affirmatively joined with the plaintiff in opposing release of the information The Times requested.

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[58] Public agencies often are reluctant to release information that might adversely reflect on the agency. For example, a recent report concluded that the LAPD's stated explanation for an increase in officer shootings relies on inaccurate data. See Intradepartmental Correspondence, dated June 27, 2012, available at http://media.nbclosangeles.com/documents/ InspectorGeneralReport.pdf.

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Allowing this kind of maneuver erodes the CPRA's mandatory fee recovery for prevailing public records requesters, which is a necessary "incentive[] for members of the public to seek judicial enforcement of their right to inspect public records subject to disclosure." Filarsky, 28 Cal. 4th at 427. Without a reasonable prospect of receiving attorneys' fees, requesters will be precluded or deterred from fighting to vindicate their access rights. Consequently, if this Court finds that third-party reverse-CPRA actions are permitted, it should find that such suits are subject to all of the protections afforded by the CPRA.[59]

7. CONCLUSION

Accountability is a critical component of California's constitutional system. If the peace officers of this state are permitted to exercise the ultimate sanction against citizens, then the public interest mandates that the names of the officers be disclosed. As the Court of Appeal stated in New York Times, "[d]isclosure is all the more a matter of public interest when those officers use deadly force and kill a suspect." 52 Cal. App. 4th at 105. LBPOA's and the City's efforts to keep secret forever the identities of government officials who exercise lethal force against civilians jeopardizes the accountability demanded by the CPRA and Article I, § 3 of the

[59] At a minimum, if this action is allowed, the public agency also should be jointly and severally liable for the requesters' fees incurred in defending the public's right of access.

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California Constitution. And permitting them to do so in a reverse-CPRA action threatens to undermine the protections the Legislature intended to provide to members of the public who seek access to government records. For all these reasons, The Times respectfully requests that this Court reject LBPOA's and the City's appeals, affirm the trial court's order in its entirety, and award The Times its attorneys' fees incurred in these appellate proceedings.

Respectfully submitted,

Dated: July 9, 2012

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court 8.204(c) and 8.486(a)(6), and by Order of this Court dated June 8, 2012, the undersigned certifies that the text of this Respondent's Brief, including footnotes and excluding the table of contents, tables of authorities, and this Certificate, consists of 20,977 words in 13-point Times New Roman type as counted by the Microsoft Word 2003 word-processing program used to generate the text.

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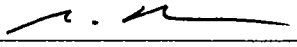
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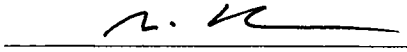

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