Supreme Court Case No. S200872

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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

Plaintiffs and Appellants,

vs.

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

Defendants and Appellants.

LOS ANGELES TIMES COMMUNICATIONS LLC.,

Real Party in Interest and Respondent.

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

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

REPLY BRIEF OF CITY OF LONG BEACH

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

The City of Long Beach submits its Reply Brief in response to the Answer Brief of Real Party in Interest and Respondent Los Angeles Times Communications LLC.

I. INTRODUCTION

The Los Angeles Times ("Times") is in the business of selling stories, so it comes as no surprise that it alleges collusion and malfeasance between the City of Long Beach ("City") and the Long Beach Police Officers Association ("LBPOA") in what it paints as a collaboration to maintain a secret police squad that indiscriminately kills civilians, shrouded by the protection of anonymity. But this case is not about collusion, indiscriminate killing or a secret death squad. It is about the City, an independent holder of the privilege governing police officer personnel records, asserting this privilege, in accordance with this Court's decision in *Copley Press, Inc. v. Superior Court* (2006) 39 Cal. 4th 1272 ("*Copley Press*"). The City has not released the names of officers involved in shootings in response to a request under the California Public Records Act ("Act" or "CPRA") since *Copley Press* was decided. (C.T. 00242).

The Times' depiction of the Long Beach Police Department as consistent with a dictatorial police state completely mischaracterizes the facts and ignores the City's position that the name of a police officer, when connected to a critical incident that is investigated, is not a matter of public record pursuant to statutory exemptions under the CPRA. The Times

contorts the City's position and accuses the City of attempting to add police officers' names to the Pitchess statutes as a stand alone category of confidential police officer personnel records. This is not the City's intention.

Aside from contorting the City's position, the Times proceeds to besmirch the City, alleging that it failed to properly serve the Times in the initial proceeding and then intentionally delayed in filing its appeal, thereby causing further delay in the release of the officers' names.[1] Yet the record is clear that the City filed a petition for writ of mandate in the California Court of Appeal in accordance with the requirements under the Government Code. The Long Beach Police Officer's Association ("LBPOA") also filed a writ petition along with a Notice of Appeal. The Court of Appeal court ultimately treated the matter as an appeal.

Following the hearing on appeal, the Court of Appeal upheld the lower court's decision to deny the LBPOA's request for injunctive relief. The City respectfully requests this Honorable Court reverse the Court of Appeal decision and instead hold that the California Public Records Act does not require the City, as the co-holder of the privilege to disclose the name of a police officer when that name is directly linked to a critical incident such as an officer involved shooting.

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[1] The City served the Times' in house counsel as it was not aware the Times had outside counsel. The day of the hearing, the City learned the Times had outside counsel and at that point, prior to the hearing commencing, it hand served outside counsel with its papers. The Times actively participated in all phases of this litigation and first raised the issue of improper service in its Answer Brief to this Court. Its assertion has no impact on the previous or instant proceeding.

II. THIS COURT DID NOT GRANT THE TIMES' ISSUES FOR REVIEW

California Rules of Court, rule 8.516 authorizes the Supreme Court to specify the issues to be briefed and decided on review. Absent an order to the contrary, the parties must limit their arguments to those issues specified. (Cal. Rules of Ct., rule 8.516.) In the instant case, this Honorable Court granted Petitioners' requests for review and authorized the briefing of the issues contained within those petitions. The Times did not file a Petition seeking review, and instead, attempted to piggyback on Petitioners' request for review, adding issues relating to "reverse-CPRA" actions. These additional issues fall outside the purview of whether a police officer's name, when linked to a request for disclosure of public records, is a matter of public record or protected as confidential information. Accordingly, the City did not brief these additional issues. If this Honorable Court desires briefing on the Times' "additional issues presented for review", the City respectfully requests notice and additional time to do so.

Case law is in accord. In *Pearson Dental Supplies, Inc. v. Superior Court*, this Court declined to consider whether a one-year statute of limitations provided in an arbitration agreement was unlawful because that issue was not presented in the petition for review. It relied on California Rules of Court, rule 8.516(b) in declining to consider the issue. (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal. 4th 665, 683, fn. 5). In this case, neither Petitioner raised the issues the Times now attempts to put before this Court, and the Times did not file an independent Petition for Review. As such, the Times' issues are not before this Court.

III. LEGAL ARGUMENT

A. The Names of Officers Involved in a Shooting Are Exempt From Disclosure Under The California Public Records Act, Which Incorporates The Pitchess Statutes Into Its Exemptions.

Since this case began, the City has asserted that an officer's name, when linked to a critical incident such as a shooting, is exempt from disclosure in response to a request for public records. The City, as the employer, is duty bound to protect police officer personnel information as that information is confidential. (*Hemet v. Superior Court* (1995) 37 Cal. App. 4th 1411, 1430.) This is not to say the name of a police officer who is involved in a shooting should not be made public; it is simply that the City cannot release the officer's name in response to a request under the CPRA.

The City's position is based on *Copley Press v. Superior Court* (2006) 39 Cal. 4th 1272 (*"Copley Press"*) and *Commission on Peace Officer Standards & Training v. Superior Court* (*"POST"*) (2007) 42 Cal. 4th 278. In *Copley*, this Court found that confidentiality in police officer personnel records outweighs the public interest in openness. (*Copley Press v. Superior Court* (2006) 39 Cal. 4th 1272, 1298-1299.) In *POST*, this Court concluded that it was "unlikely that the Legislature contemplated that the identification of an individual as a peace officer, *unconnected to any of the information* it defined as part of a personnel record, would be rendered confidential by § 832.8." (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal. 4th 278, 295-296) (emphasis added.) This Court further suggested that disclosing an officer's name in connection with a particular incident could constitute a basis for

nondisclosure. (*Id.* at 302, fn.12.) An officer's name, when linked to a critical incident that is under investigation is the type of information that is intended to be treated as confidential police personnel information and should not be subject to disclosure under the CPRA.

The Times is intent on mischaracterizing the City's argument by expanding the City's position and accusing the City of attempting to have this Court re-write the Pitchess statutes and add a new category of protected information- police officers' names. Essentially, the Times asserts the City wants this Court to disregard its own holding in *POST*.[2] This is not so. The City is simply performing its duty to protect its police officers' personnel records as required by the Pitchess statutes which were adopted with the expressed intent to protect the confidentiality of police officer personnel information.

The Times and the City agree that the purpose behind the Pitchess statutes is twofold: (1) to prevent public agencies from destroying police personnel records, and (2) to provide a procedural mechanism for criminal defendants and civil litigants to obtain information about police officer conduct while protecting officers' rights against fishing expeditions into their personnel files. However, the Times illogically asserts that if an officer's name is not disclosed under the CPRA for use in the Pitchess process, it would impose a "Catch-22" under Pitchess. The City respectfully disagrees. The Times confounds the CPRA with Pitchess.

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2 In *POST,* this Court held that police officers names, employing departments, and dates of employment that are not sought in conjunction with any of the personal or sensitive information protected by Pitchess are not "personal data" within the meaning of Penal Code section 832.8(a). *Commission on Peace Officer Standards & Training v. Superior* Court (2007) 42 Cal. 4th 278, 290.

There is no "Catch-22" or "deprivation of information" under the CPRA as it relates to Pitchess motions because a criminal defendant or civil litigant is properly able to use the tools of discovery to obtain relevant information. Litigants do not need to employ the CPRA as a method of procuring an officer's name. In short, the Times' assertion is baseless. The City's intent is not to frustrate the intent of the CPRA. The City, as a holder of the privilege, is simply performing its due diligence in protecting its police officers' confidential personnel information, when such information is requested under the CPRA.

1. The California Public Records Act and the Pitchess statutes must be read in conjunction.

A fundamental legal tenet is that every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118-1119.) Importantly, "statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com* (1987) 43 Cal.3d 1379, 1387.) The court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes. (*County of Santa Clara v. Perry* (1998) 18 Cal.4th 435, 442.)

The CPRA is codified in Chapter 3.5 of the California Government Code and spans from section 6250 through section 6276.48. It was initially adopted in 1968 and has expanded over the years to detail the statutory parameters for disclosure of public records and corresponding protections permitted for privacy. Courts recognize the obvious tension between disclosure of information to the public and an employee's right to privacy.

The Pitchess statutes were adopted ten years later in 1978, and provide privacy protections for police officers throughout the state of California. While Pitchess legislation did not speak specifically to requests under the CPRA, "section 832.7's statutory language demonstrates that the Legislature was intending to recognize the confidentiality of peace officer personnel records regardless of the context in which the records were sought." (*San Diego Police Officers Association v. City of San Diego Civil Service Commission* (2002) 104 Cal.App.4th 275, 284–285, citing *City of Richmond v. Superior Court* (1995) 32 Cal. App. 4th 1430.)

The plain language of the Pitchess statutes illustrates the Legislature's intent to create a privilege for all information in peace officers' personnel files. (*Hackett v. Superior Court* (1993) 13 Cal.App.4th 96, 100). This Court recognized this privilege in *Copley,* stating, "[i]n enacting and amending sections 832.5, 832.7, and 832.8, the Legislature, though presented with arguments similar to Copley's, made the policy decision 'that the desirability of confidentiality in police personnel matters *does* outweigh the public interest in openness.'" (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal. 4th 1272, 1298, citing *Hemet v. Superior Court (Press Enterprise Co.)* (1995) 37 Cal. App. 4th 1411, 1428, fn. 18). Certainly, if a requestor were able to obtain information that is protected under Pitchess via a request under the CPRA, the Pitchess statutes would be rendered useless.

In this case, the City urges this Court to harmonize the provisions of the CPRA with the provisions of Pitchess, and upon so doing, find the name of an officer, when connected to a critical incident, exempt from disclosure under the CPRA.

2. The City's position comports with rules of statutory construction.

The Times erroneously asserts the City ignores the rules of statutory construction which require narrow construction of exemptions under the CPRA. It relies on *Sacramento County Employees' Retirement System v. Superior Court ("Sacramento")* to illustrate its point. (*Sacramento County Employees' Retirement System v. Superior Court* (2011) 195 Cal. App. 4th 440.) The court in *Sacramento* held that Government Code section 31532 did not provide an express exemption for the release of county employees' names and pension information, and could not be incorporated into section 6254(k).

The Times reliance on this case is misplaced. Section 31532 was construed to allow for the disclosure of public employees' names and pension information because such information is in fact, a matter of public record. Payroll information cannot be kept confidential unless explicitly made so by statute. (*International Federation of Professional & Technical Eng., Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal. 4th 319, 346.) Moreover, the language at issue in section 31532 (individual information) was ambiguous and required interpretation. This is unlike the terms that protect police officer personnel information (e.g. citizen complaint, appraisal, and investigation into complaint), the plain meaning of which is clear- and does encompass an officer's name.

Notably, the rule of narrow construction does not require the City to waive its statutory privileges. The legislative history of Penal Code section 832.7, which governs police officer personnel records, confirms the Legislature's intent to "prohibit any information identifying the individuals

involved from being released, in an effort to protect the personal rights of both the citizens and the officers." (Assem. Com. on Public Safety, Republican Analysis of Assem. Bill No. 2222 (1989-1990 Reg. Sess.) Sept. 2, 1989).

In construing statutes, the courts aim to "adopt the construction that best effectuates the purpose of the law." (*Hassan v. Mercy American River Hospital* (2003) 31 Cal. 4th 709, 715.) Courts look to the words of the statute "because the statutory language is generally the most reliable indicator of legislative intent." (*Id.*) It is only when the text of a statute is ambiguous that courts look to legislative history and historical circumstances behind its enactment." (*Mejia v. Reed* (2003) 31 Cal. 4th 657, 663.) If there is uncertainty about a statute's meaning, the court considers the consequences that will flow form a particular interpretation. (*Id.*)

Here, the City relies on the plain language of California Government Code section 6254 (k) which incorporates the Pitchess statutes by exempting from disclosure records which are legally exempt or privileged. (California Government Code § 6254(k).) This language is abundantly clear. The Legislative intent behind California Government Code is also instructive in that it detailed the exemptions contained under the California Public Records Act. (California Government Code § 6275.) The stated legislative intent of section 6275 is "to assist members of the public and state and local agencies in identifying exemptions to the California Public Records Act. It is the intent of the Legislature that, after January 1, 1999, each addition or amendment to a statute that exempts any information contained in a public record from disclosure pursuant to subdivision (k) of Section 6254 shall be listed and described in this article. The statutes listed

in this article may operate to exempt certain records, or portions thereof, from disclosure. The statutes listed and described may not be inclusive of all exemptions. The listing of a statute in this article does not itself create an exemption. Requesters of public records and public agencies are cautioned to review the applicable statute to determine the extent to which the statute, in light of the circumstances surrounding the request, exempts public records from disclosure." (*Id.*) The Act was concurrently expanded to include an alphabetized list of statutory exceptions as referenced in Government Code section 6254(k). The section relevant to the instant case is California Government Code section 6276.34 which explicitly references Penal Code sections 832.7 and 832.8, exempting from disclosure peace officer personnel records. (California Government Code § 6276.34.) Looking at the plain language of the statute and the legislative intent, it is clear the Legislature intended to exempt confidential police personnel records from disclosure, as provided in Penal Code sections 832.5 and 832.8.

3. Police officers' names, when contained in citizen complaints, reports or findings relating to such complaints are exempt from disclosure pursuant to Penal Code section 832.5.

Under California Penal Code section 832.7, peace officer personnel records or information obtained from those records are confidential and can only be disclosed by discovery pursuant to sections 1043 and 1046 of the California Evidence Code. There are two broad categories of information governed by section 832.7: (1) citizen complaints as defined in California Penal Code section 832.5, and (2) police personnel records as defined in Penal Code section 832.8. (California Penal Code § 832.7).

The Times asserts that the disclosure of the name of an officer who is also the subject of a citizen complaint does not disclose whether or not a complaint was made by a member of the public. (Times' Answer Brief, hereinafter, "A.B." p 33, fn. 19). This argument ignores the confidentiality protections afforded to police officers under section 832.5. Currently, the City is not at liberty to disclose the names of officers who are subject to citizen complaints, as doing so would violate section 832.5. (California Penal Code § 832.5.) Under Penal Code section 832.5, all complaints and any reports or findings relating to these complaints are maintained either in the police officer's general personnel file or in a separate file designated by the department. (California Penal Code § 832.5 (b).) These complaints are deemed personnel records for purposes of the CPRA and Pitchess. (California Penal Code § 832.5 (c).) As used in section 832.5, "general personnel file" means the file maintained by the agency containing the primary records specific to each peace or custodial officer's employment, including evaluations, assignments, status changes, and imposed discipline. (California Penal Code § 832.5 (d)(1).)

Clearly, Penal Code section 832.5 prohibits the City from disclosing the names of officers who are subject to a citizen complaint. The Court of Appeal recognized this fact, but expressly declined to extend the same protection to the name of an officer who is under investigation, but who is not the subject of a citizen's complaint. The Court of Appeal's finding results in the inconsistent disclosure of information—namely, an officer who is the subject of a citizen's complaint and under investigation will not have his or her name released in response to a request for public records, but an officer who is not the subject of a citizen's complaint will.

This simply cannot be. It is not uncommon for there to be multiple officers involved in one incident where all officers shoot, but only one becomes the subject of a citizen complaint. The officer who is subject to the citizen complaint would be protected by Pitchess through the exemption under 6254(k), which incorporates the protections of Penal Code section 832.5, but the other officers would not. It would be inconsistent for the officers who are not the subject of a complaint to have their name released while the officer who is the subject of a complaint would maintain privacy in his or her connection to the incident. This inconsistent result could not have been intended by the Legislature. This Court has rejected interpretation of a statute that leads to absurd results. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1156 (rejecting interpretation of timber statute because it "could lead to absurd results").)

The Times alleges the Legislative history does not speak to protecting the names of officers involved in shootings. (A.B. at 34). Its assertion ignores the Legislature's stated intent as to complaints against police officers, which prohibits an agency from releasing identifying information about the officer and only allows the release of summary data. (California Penal Code § 832.7(c).) In short, the name of a police officer who is the subject of a citizen complaint is not disclosable under the CPRA and the name of an officer who is under investigation, but not subject to a citizen complaint should be treated likewise.

4. Police officers' names, contained in an investigation report of a shooting, are exempt from disclosure under Penal Code section 832.8.

California Penal Code section 832.8 defines personnel records as "any file maintained under that individual's name by his or her employing

agency and containing records relating to...employee appraisal...[or] investigations of complaints, concerning an event or transaction in which he or she participated...and pertaining to the manner in which he or she performed his or her duties." (California Penal Code § 832.8(d) and (e)).

Penal Code section 832.8(d) governs employee appraisal. As indicated by the Times, "[a]n appraisal is an evaluation or estimation of worth." (A.B. at 28, citing Black's Law Dictionary (8th ed.) at 110.) The City conducts an immediate appraisal of each police officer who is involved in an on-duty shooting, evaluating his or her actions preceeding the shooting, and during the shooting. (C.T. 000242.) This appraisal is then reviewed by the City's Shooting Review Board, which determines whether or not the shooting is in policy. If the Shooting Review Board determines the shooting is not in policy, the officer's actions are reviewed by Internal Affairs. Both the Shooting Review Board evaluation, including the initial investigation report which constitutes an appraisal, and the Internal Affairs investigation form part of an officer's personnel file. These documents contain the involved officer's name and are not a matter of public record.

Under Penal Code section 832.8 (e), any records relating to complaints, or investigations of complaints, concerning an event or transaction in which an officer participated, or perceived, and pertaining to the manner in which he or she performed his or her duties constitute protected personnel records. (California Penal Code § 832.8 (e).) It stands to reason that the word "complaint" in subsection (e) is broader than just a citizen complaint as enumerated in section 832.5. Otherwise, the word "complaint" would be surplusage. It is a maxim of statutory construction that courts must strive to give meaning to every word in a statute to avoid

constructions that render words, phrases or clauses superfluous. (*People v. Trevino* (2001) 26 Cal. 4th 237, 245-246.) Under general rules of statutory interpretation, an interpretation which has the effect of making statutory language null and void is to be avoided. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1010.) If the Legislature intended for the word "complaint" in subsection (e) to mean only citizen's complaint, it would have inserted the word "citizen's" before the word complaint. But it didn't. Therefore, the word "complaint" must be construed broadly.

It is reasonable to assume that individuals who are shot would have a complaint against the officer who performed that action. It is also reasonable to construe the word "complaint" to include the investigations the Los Angeles County District Attorney's Office conducts into officer involved shootings, as that office represents the People of the State of California.[3] As such, all complaints, including citizen complaints, legal complaints, and outside agency complaints should be governed by this section.

The Times argues that the disclosure of the name of an officer who is apprised following a shooting "says nothing about how an officer is being appraised or evaluated- or even whether the officer has been evaluated at all." (A.B. at 28-29).[4] Following the Times' logic, an agency

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3 In the Protocol For District Attorney Officer Involved Shooting Response Program booklet, the stated objective of the program is to "accurately, thoroughly, and objectively investigate all relevant evidence and to determine the potential criminal liability, or lack thereof, of any party." *http://da.lacounty.gov/pdf/prtclfin.pdf*

4 The record is clear that all officers are investigated and their performance is evaluated immediately following a shooting. (C.T. 00242.) Accordingly, the Times insinuation that officers may not be appraised must be disregarded.

would have to provide the names of all officers who have been disciplined because the provision of the officer's name would not divulge any information about how the officer was disciplined, even though discipline is a category of information protected by Penal Code section 832.8(d). Per the Times, disclosure of the names would not inform the public about whether the discipline took the form of a letter of reprimand or resulted in termination of employment. It would not reveal the basis for the discipline or the facts surrounding the discipline. According to the Times, it is proper to disclose officers' names in response to this type of request because what is produced is "just a name," even though it is connected to an enumerated category of protected police personnel information. Taking the Times' argument to its logical conclusion, one could request the name of a police officer connected to any of the enumerated categories of information in the Pitchess statutes, and disclosure would be appropriate, provided the agency only disclosed the officer's name. The Times would have this Court render the privilege employers hold with respect to police personnel records superfluous and would effectively have this Court chisel away at the statutory protections afforded to officers.

The Court of Appeal found that the disclosure of the name of an officer who was involved in a shooting does not reveal any information about the officer's advancement, appraisal or discipline, and therefore, his or her name is not protected by Penal Code section 832.8(d). (*Long Beach Police Officers Association v. City of Long Beach* (2012) 203 Cal.App.4th 292, 312). However, the Court of Appeal proceeded to cite to *Copley* and the California Attorney General Opinion on point, which described *Copley's* holding as "a peace officer's name may be kept confidential when it is sought in connection with information pertaining to a confidential

matter such as an internal investigation or a disciplinary proceeding." (*Id.*) The Attorney General opinion expressly refers to an internal investigation, like the internal investigations the City conducts immediately following an officer involved shooting. (C.T. 000242). The Court of Appeal relied on this opinion, but seemingly ignored the reference to internal investigation. The lower court's reasoning appears inconsistent.

Moreover, and similar to the instant case, in *Davis v. City of San Diego,* the City of San Diego and its District Attorney's office conducted independent investigations following each officer involved shooting. *Davis v. City of San Diego* (2003) 106 Cal. App. 4th 893, 896. In one particular shooting which involved multiple officers, the department and the District Attorney's office concluded the shooting was lawful. (*Id.*) The City's shooting review board prepared a written report of its conclusions which included the officers' names. The City Manager determined that he was going to release the report to the public under a City policy, even though this report contained the names of the officers who were involved. (*Id.* at 897.) The officers appealed and the court found that the narrative reports did, in fact, constitute police personnel records. (*Id.* at 898.) The Court found that the internal affairs reports and the shooting review board reports constituted personnel records under Penal Code section 832.8(e). (*Id.* at 900). There is absolutely no mention of any "complaint" in the *Davis* case. Instead, the facts presented demonstrate that the department conducted an internal investigation which was presented to the City's shooting review board, and the Court held disclosure of the names of the involved officers was improper. This is precisely what the City of Long Beach does immediately following every officer involved shooting. The Court, relying on *Hackett v. Superior Court* (1993) 13 Cal App. 4th96, 100, stated, it is ...

clear from its plain language [that the statute] was intended to create a privilege for *all* information in peace officers' personnel files." (*Id.* at 902).

The department's internal investigations into officer involved shootings are inextricably linked to the officer who was involved in the shooting. The investigation details the officer's performance of his duties and is used as the basis to review his or her performance. The investigation reports are forwarded to the department's Shooting Review Board to determine whether or not the shooting was in or out of policy. When a shooting is out of policy, the report is forwarded to internal affairs for review. Regardless of the route the internal investigation report takes, it is part of the police officer's personnel file and is exempt from disclosure under the CPRA in so much as it is both an appraisal and an investigation into a complaint.

If portions of protected information from an officer's personnel file are subject to disclosure under the CPRA, the protections of the Pitchess statues become entirely useless in that Pitchess could be circumvented by simply making a request under the CPRA. By way of example, a member of the public could ask the City for the names of officers involved in a use of force on a particular date, and those names would need to be disclosed, because according to the Times, the disclosure of a name, even one linked to a critical incident, does not reveal details about what is contained in the personnel record itself. But it does. It reveals the officer's involvement in a particular incident upon which he or she is evaluated and investigated.

In this case, the Times claims it made a sweeping request but it actually segregated out the officers who were involved in the Zerby shooting by requesting "the names of Long Beach police officers involved in the December 12 officer involved shooting in the 5300 block of East

Ocean Blvd." (C.T. 000050.) A request under the CPRA should not circumvent the statutory protections provided to police officers by Pitchess; and a City should not be faulted for attempting to protect the confidentiality of statutorily protected information. (*County of Los Angeles v. Superior Court* (1993) 18 Cal. App. 4th 588, 600) (Evidence Code procedures detailing the disclosure of police officer personnel records would be nullified if the same information or information leading to it could be obtained through the CPRA and the court declined to construe 6254 to require adherence to the Evidence Code.)

Finally, the law does not speak to revealing portions of a personnel file based on the amount of detail or lack of detail contained therein. Instead, it provides a blanket protection for police personnel information, including an officer's name when linked to a personnel record. If the Times had its way, the City, as a holder of the privilege, would violate that privilege. In sum, a department's investigative report containing an officer's name and the facts surrounding the circumstances of a shooting constitutes both an appraisal and an investigation into a complaint. Both of these categories of information are privileged personnel information.

5. The placement of information is not determinative of whether or not it is a personnel record.

The Times asserts the City failed to provide evidence that the names of police officers are solely found in personnel files. It goes without saying that police officers' names are located in other areas, including on their identification badges which are worn in public. In fact, the City routinely provides the names of its police officers in response to requests for public records seeking the names of officers who are employed by the City. This is consistent with this Court's decision in *POST*. The fact that police

personnel information may be contained in a source other than a personnel file does not render the information which is contained in the personnel file subject to disclosure under the CPRA. (*POST* (2007) 42 Cal. 4th 278, 296, fn. 5, citing *Department of Defense v. FLRA* (1994) 510 U.S. 487.)

The City does not dispute that police personnel information may become available from a source other than the officer's personnel records. By way of example, the Los Angeles County District Attorney released the names of the officers who were involved in the Zerby shooting after conducting their investigation.[5] Additionally, those officers are the subject of civil litigation which is publically available through the courts. And, as the Times states in its papers, an officer involved shooting could be captured by a bystander on tape and the incident could be posted on line, thereby making the officer's identity known to the public. (A.B. at 47).

Regardless of these realities, the City's obligation remains. As co-holder of the privilege governing police personnel information, it cannot waive that privilege. The fact that a name or incident may already be in the public eye does not void the City's responsibility to protect police personnel records. Case law is in accord. In *Copley*, this Court found the reasoning in the *New York Times* case inapplicable to the case before it because under California Penal Code section 832.7, specified records "and information obtained from [those] records" do not lose protection to which they are otherwise entitled simply because they were at some time,

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5 Summary reports on the Los Angeles County District Attorney website include the names of involved officers and the office's findings. See e.g., *Report on The Officer-Involved Shooting of Anthony Dwayne Lee* (Acrobat PDF 1.1 MB) http://da.co.la.ca.us/jsid.htm#oishootings

available from another source. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal. 4th 1272, 1293.)

The Times' hypothetical argument that information from a police personnel file which is discussed at lunch time or around the police station automatically becomes a matter of public record is inconsistent with the state of the law. The fact that information may have already been publically discussed or disseminated does not relieve the City of its obligation to protect police personnel information under Pitchess. Just because the potential exists for police personnel information to make its way to the public from a source other than the employer does not serve to convert that information into public information under the Act. (*POST* (2007) 42 Cal. 4th 278, 296, fn. 5, citing *Department of Defense v. FLRA* (1994) 510 U.S. 487.)

The Times takes it a step further and relies on a wholly unsupported and detailed assertion that Long Beach police officers' names are contained within duty logs, incident reports, radio transmissions, video devices, and public safety statements, none of which are contained in an officer's personnel file. It cites to an "Office of Independent Review Report". (A.B. pages 49-50). The so-called evidence the Times relies upon is from a report stemming from the City of Pasadena, a municipality that is not a named party in this case. It has nothing to do with the City of Long Beach. (C.T. 000112.)

The Times then asserts the City failed to show that any officer involved in a shooting has been the subject of a citizen complaint, disciplinary action, or criminal charges. It goes without saying that the City has not disclosed such information because it is precisely the type of information which constitutes protected police personnel information.

Finally, the Times relies on *International Federation of Professional & Technical Eng., Local 21, AFL-CIO v. Superior Court ("Federation")* (2007) 42 Cal. 4th 319 to argue that information, such as salary information, which could be found in a police officer's personnel file, but could also be found in other locations is not confidential police personnel information.[6] Salary information is not one of the enumerated categories of information in the Pitchess statutes, unlike information on appraisal, discipline, and citizen complaints. Moreover, it is clearly established that public employee salary information is a matter of public record. (*Id.*)

6. The legislative intent of California Government Code section 6254.21 is relevant to the construction of section 6254.

The Times takes issue with the City's reliance on Section 6254.21. This section must be harmonized with the other sections of the CPRA. (See *infra* Section III, A. 1.) Section 6254.21 is direct evidence of the Legislature's concern for public safety officers' protection.[7] (California Government Code § 6254.21). The purpose behind this legislation is to protect law enforcement and their families from attack at home because of their occupations. In fact, according to Assembly Member Evans, the author of Assembly Bill 1595, "[a]nyone with internet access can find the home address and telephone numbers of public safety." (Sen. Com. on

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[6] *Federation* analyzes 6254 (c) and 6255 (a), both which require a balancing of interests. Neither one of these sections are the focus of the City's argument.

[7] In 2004, the Public Safety Officials Home Protection Act Advisory Task Force reported to the Legislature about the importance of safeguarding those involved in law enforcement and their families.

Public Safety, Assem. Bill 1595 (2005-2006 Reg. Sess.) June 30, 2005). "Those who serve their fellow citizens should be able to do so without their families at home becoming the target of intimidation or attack. Sadly, this threat is very real." (*Id.*) Clearly, by using the name of an individual, one can obtain home address and phone numbers with relative ease. The intent behind this section fits squarely within the Legislative intent behind Pitchess which was enacted to protect police officer's confidential personnel information.

7. Police officers have constitutional and statutory privacy rights that are unique to them, which trump the competing public interest in disclosure.

The Times insists there is a compelling interest in having the public know the names of the officers involved in on duty shootings, but appears to limit this interest to shootings where a suspect is unarmed, not in situations where there is a "firefight" between the police and a suspect. (A.B. at 57). But the plain language of the California Constitution does not guarantee the public access to police personnel records in cases where a suspect is unarmed as the Times suggests. Nor does it guarantee the public access when there is a firefight.

Article I, Section 3 (b) (1) of the California Constitution guarantees "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and writings of public officials and agencies shall be open to scrutiny." (Cal. Const., Art. I, § 3 (b) (1).) But Article I, Section 3 (b) (3) tempers this right by providing nothing in that 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 information concerning the official performance or professional qualifications of a peace officer." (Cal. Const., Art. I, § 3 (b) (3).) By the plain language of the Constitution, the public is not entitled to access statutorily protected information concerning police officer personnel information.

The Times relies on *City of Los Angeles v. Superior Court* (1996) 41 Cal. App. 4th 1083, 1089 to support its position that the public has a compelling interest in knowing the names of officers involved in shootings. In *City of Los Angeles v. Superior Court,* a requesting party sought the release of deposition transcripts relating to claims of excessive force via police dogs. Deposition transcripts are not part of a police officer's personnel record, nor were any of the exemptions at issue in this case part of the court's analysis in *City of Los Angeles, supra.* In fact, the exemption sought in that case was the litigation exemption, which only applies during the litigation, and had concluded at the time of the request. (*City of Los Angeles v. Superior Court* (1996) 41 Cal. App. 4th 1083, 1089.) As such, the Times reliance on *City of Los Angeles* does not support its argument that the name of a police officer who is involved in a shooting and whose information is contained within his personnel file should have his name released in response to a request under the CPRA.

The Times proceeds to allege the LBPD's practices are questionable and compares the Zerby shooting, which was deemed valid by the L.A. County D.A.'s investigation, to notorious police misconduct cases such as the Rodney King beating and the L.A.P.D. Rampart scandal. The Times brands the Long Beach Police Department as an agency that is out of

control by citing to incidents that occurred in another agency decades ago.[8] The Times fails to explain how, if it had the name of an officer who was involved in an on duty shooting, it would be able to scrutinize the officer's conduct. The City can achieve the goal the Times desires by informing the public about an incident without compromising its investigation, or violating the Pitchess Statutes.

B. Government Code Section 6254(f) Prevents The City From Releasing The Names of Officers Who Are Under Investigation.

1. The Supreme Court has the discretion to consider newly raised issues provided they were raised in the petition and extensively briefed, as they were in this case.

The Times urges this Court to reject the City's argument which is premised on California Government Code section 6254(f) because the City did not raise the issue in the trial court or Court of Appeal. It asserts the City's failure to raise this exemption constitutes a waiver and relies on a Superior Court case in support of its position. California Rules of Court, rule 8.1115 prohibits courts or parties from relying on unpublished decisions absent limited exceptions. (Cal. Rules of Court, Rule 8.1115.)[9]

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[8] These unsubstantiated allegations against the LBPD are tantamount to the City analogizing the law firm of Davis, Wright Tremaine LLP to another law firm that has been plagued with scandal, unethical practices and attorney disbarments. It is an inflammatory comment, wholly unsupported by evidence.

[9] Assuming this Court finds an applicable exemption under California Rules of Court, Rule 8.1115(b), the Times failed to provide the City

Assuming arguendo the City's actions constitute a waiver; this Court has broad discretion as to the issues it considers.[10] California Rules of Court, rule 8.500(c) (1) grants this Court the power of discretion which extends to any issue presented by the case. (*People v. Braxton* (2004) 34 Cal. 4th 798, 809; California Rules of Court, rule 8.500.) Importantly, even when an issue is not raised by a party in the lower courts, as long as it is "squarely raised in the petition for review and [is] a legal issue of widespread importance", it can be considered by this Court. (*Cedars Sinai Medical Center v. Superior Court (Bowyer)* (1998) 18 Cal. 4th 1, 6.) The City raised and extensively briefed this issue in its Petition for Review as it is an issue of widespread importance that will continue to result in litigation until resolved by this Court. The City respectfully requests this Court disregard the Times' request to bypass the issue raised under California Government Code section 6254(f) and that it review the issue, as indicated in its grant of review.

2. Under section 6254(f) the City cannot disclose the names of police officers who are under investigation by their own department, as that information is an integral part of the investigatory material.

The Times attempts to exclude an officer's name as being "derived from" an investigation file under section 6254(f) by claiming the name may

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with a copy of the referenced Superior Court decision, *ANG Newspapers v. Union City* ("*ANG*").

[10] The Times use of *ANG*, an unpublished case, to compare waiver in an order to show cause hearing handled at the trial court level is inapplicable to the instant situation where this Court has the discretion to grant review of issues that were not raised in the lower court.

be found in a variety of other locations. Again, the fact that an officer's name can be found in other places does not mean it does not derive from the investigation file. (*POST* (2007) 42 Cal. 4th 278.) Nor does that fact strip an officer's name of the protections of section 6254(f). The Times proceeds to argue that even if the names it seeks could be information derived from investigative records, which they are, the City has not established there is a "concrete and definite" prospect of enforcement proceedings as explained by *Williams v. Superior Court*, (1993) 5 Cal.4th 337, 356. "Prospect" means potential or possibility. In this case, as in other similar situations, the potential for enforcement proceedings against the involved officer exists as the result of an investigation including an investigation by the District Attorney's office. (See *infra*, III, A. 4, fn.3).

In *Office of Inspector General v. Superior Court*, the Office of the Attorney General launched an investigation into the parole supervision of an inmate in a high profile case. *Office of Inspector General v. Superior Court* (2010) 189 Cal. App 4th 695. Its task was to determine if policy was followed in that case. Various arms of the media requested information under the CPRA and the agency denied their requests. (*Id.* at 699.) The media outlets filed a writ which was granted and the trial court ordered the OIG to prepare a list of documents for in camera review. The OIS petitioned for extraordinary writ and an immediate stay to compel the superior court to vacate its order compelling production of OIG's investigative files. Review was granted.

The Court found that based on the fact that an investigation was launched to review compliance with policy, the prospect of enforcement proceedings was concrete and definite at the moment the investigation was launched. (*Id.*) Similarly, the LBPD conducts its own investigations into its

employee's conduct, which, if found to be in violation of policy or the law, could result in administrative or criminal penalties. Simultaneously, the L.A. County District Attorney's office launches an investigation as well. As such, the prospect of enforcement proceedings against an officer involved in a shooting is similarly concrete and definite once the investigation commences.

The Court also reviewed the statutory framework which revealed the confidential nature of OIG investigative materials pursuant to Penal Code section 6126.3. That section provides that confidential interviews with CDCR employees and identifying information of persons initiating an investigation into improper government activity are not public records unless, in the case of the latter, disclosure is necessary in the interests of justice. (*Id.* at 708.) That section is analogous to the confidentiality provisions in the Pitchess statutes.

In OIG, the materials sought were compiled and used primarily, if not exclusively, in the conduct of OIG's investigation of CDCR. As such, this Court found them exempt from disclosure under section 6254(f). (*Office of Inspector General v. Superior Court* (2010) 189 Cal. App 4th 695, 710.) Similarly, this Court should find the City's investigative materials exempt from disclosure in response to a request under the CPRA.

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IV. CONCLUSION

Police officers are granted authority to use force that is reasonably necessary. This can include deadly force. The use of force is not a "sanction" or "punishment" against citizens as the Times asserts, but a means of protecting the public at large. When an officer is involved in a shooting, his or her actions are immediately appraised, evaluated, and investigated after the incident. This is the type of information that is statutorily protected by the Pitchess statutes and includes not only the evaluation and investigation but the name of the officer who is evaluated. To find otherwise would nullify the protections of Pitchess, and allow it to be circumvented via the CPRA.

Dated: July 27, 2012

Respectfully submitted,

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By: _____

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that the enclosed Petition for Review was produced using 13-point Times New Roman type, including footnotes, and contains approximately 7792 words, which is less than the 8,400 words permitted. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: July 27, 2012

ROBERT E. SHANNON, City Attorney

By: 

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PROOF OF SERVICE BY MAIL

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

On July 27, 2012, I served the within:

REPLY BRIEF OF CITY OF LONG BEACH

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

SEE ATTACHED SERVICE LIST

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

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

Executed on July 27, 2012, at Long Beach, California.

Karen J. McCormick

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