No. S200872

SUPREME COURT OF THE STATE OF CALIFORNIA

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

Plaintiffs and Appellants,

v.

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

Defendants and Appellants,

LOS ANGELES TIMES COMMUNICATIONS LLC,

Real Party in Interest and Respondent.

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

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REPLY BRIEF ON THE MERITS

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I. INTRODUCTION.

To reiterate, Intervenor-Respondent Los Angeles Times Communications LLC (The Times) seeks disclosure pursuant to the

California Public Records Act, Cal. Gov't Code §§ 6250-6270 (West 2008 & Supp. 2012) (the CPRA), of the names of all City of Long Beach police officers involved in shooting incidents within the last five years. Plaintiff-Appellants Long Beach Police Officer Association (LBPOA) and Does 1-150 (Plaintiffs) assert that for three reasons that information is declared to be confidential and therefore exempt from disclosure pursuant to section 6254(k) of the Act,[1] which exempts from disclosure records declared confidential by other laws. Plaintiffs additionally assert that the information is exempt from disclosure pursuant to section 6254(c) of the Act,[2] which exempts from disclosure of information that would constitute an invasion of personal privacy. The Times has challenged Plaintiffs' arguments at great length, and Plaintiffs now respond to The Times' challenge and defend their arguments herein.

II. THE ISSUES PRESENTED HEREIN ARE SUBJECT TO INDEPENDENT REVIEW.

But before all else, the standard of review must be revisited. The Times succeeds in muddying the waters on this score, and a brief

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

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

clarification is therefore necessary.

Thus, although The Times makes much of the deferential review applicable to an appeal from the denial of a preliminary injunction, (see Answer Br. at 15), Plaintiffs do not argue otherwise. Plaintiffs readily concede that this Court reviews the ruling deferentially. See Ass'n for L.A. Cnty. Deputy Sheriffs v. Cnty. of L.A., 166 Cal. App. 4th 1625, 1634, 83 Cal. Rptr. 3d 494, 502 (2008). "A reviewing court shall not disturb a trial court's decision to grant or deny a preliminary injunction absent a showing that the trial court abused its discretion." Id. However, where (as here) the issue of whether the plaintiff is likely to prevail on the merits turns upon a question of law or the construction of a statute rather than upon the evidence of the case, "the standard of review is whether the superior court correctly interpreted and applied the law", which this Court reviews de novo. People ex rel. Dep't of Alcoholic Beverage Control v. Miller Brewing Co., 104 Cal. App. 4th 1189, 1194, 178 Cal. Rptr. 2d 861, 864 (2002). And that is all there is to that.

Similarly, The Times attempts to fast shuffle the deference due to the factual findings of the Superior Court into deference to that court's "weighing of [the] evidence". (Answer Br. at 16.) If by weighing the evidence The Times means resolving issues of credibility and reaching

conclusions as the historical or physical context of the action, see Crocker Nat'l Bank v. City & Cnty. of S.F., 49 Cal. 3d 881, 888, 762 P.2d 278, 281, 264 Cal. Rptr. 139, 142 (1989) ("Questions of fact concern the establishment of historical and physical facts . . . ."), then Plaintiffs have no quarrel with The Times in this regard. The factual findings of the Superior Court must be upheld if they are supported by substantial evidence. See Times Mirror Co. v. Superior Court (State), 53 Cal. 3d 1325, 1336, 813 P.2d 240, 246, 283 Cal. Rptr. 893, 899 (1991); CBS, Inc. v. Block, 42 Cal. 3d 646, 651, 725 P.2d 470, 473, 230 Cal. Rptr. 362, 365 (1985).

But if, as appears to be the case, The Times means to say that the central question of whether disclosure is warranted under the circumstances is also a question of a fact subject to deferential review, then it is far off base. The application of the CPRA to undisputed facts presents a question of law subject to de novo appellate review. See, e.g., L.A. Unified Sch. Dist. v. Superior Court (City of Long Beach), 151 Cal. App. 4th 759, 767, 60 Cal.Rptr. 3d 445, 450 (2007) ("The interpretation of the Public Records Act, and its application to undisputed facts, present questions of law that are subject to de novo appellate review.") (internal quotation omitted); BRV, Inc. v. Superior Court (Dunsmuir Joint Union High Sch. Dist.), 143 Cal. App. 4th 742, 750, 49 Cal. Rptr. 3d 519, 523 (2006) (same); Versaci v.

Superior Court (Palomar Cmty. College Dist.), 127 Cal. App. 4th 805, 812, 26 Cal. Rptr. 3d 92, 96 (2009) (same); Cal. State Univ. v. Superior Court (McClatchy Co.), 90 Cal. App. 4th 810, 824, 108 Cal. Rptr. 2d 870, 879 (2001) (same); CBS Broad. v. Superior Court (State Dep't of Soc. Servs.), 91 Cal. App. 4th 892, 906, 110 Cal. Rptr. 2d 889, 900 (2001); Lorig v. Med. Bd., 78 Cal. App. 4th 462, 467, 92 Cal. Rptr. 2d 862, 866 (2000) (same).

In particular, the outcome of the balancing of interests mandated by section 6254(c) of the CPRA is reviewed as a question of law (de novo). "[A] reviewing court should weigh the competing public interest factors de novo . . . ." Michaelis, Montanari & Johnson v. Superior Court (City of L.A. Dep't of Airports), 38 Cal. 4th 1065, 1072, 136 P.3d 194, 198, 44 Cal. Rptr. 3d 663, 667 (2006); see Times Mirror, 53 Cal. 3d at 1383, 813 P.2d at 246, 283 Cal. Rptr. at 899 ("we shall conduct an independent review of the trial court's ruling"); CBS, Inc., 42 Cal. 3d at 651, 725 P.2d at 473, 230 Cal. Rptr. at 899 ("this court must conduct an independent review of the trial court's statutory balancing analysis"). Simply stated, this Court must "undertake the weighing process anew". Cnty. of Santa Clara v. Superior Court (Cal. First Amend. Coal.), 170 Cal. App. 4th 1301, 1323, 89 Cal. Rptr. 3d 374, 380 (2000). What could be more clear?

At the end of the day, then, the obfuscations offered by The Times

must be disregarded. This Court must independently review the construction and application of the CPRA by the Superior Court and must decide for itself whether that court ruled correctly.

III. THE NAMES OF POLICE OFFICERS INVOLVED IN SHOOTING INCIDENTS ARE EXEMPT FROM DISCLOSURE.

A. Preface.

As noted, section 6254(k) exempts from the ambit of the CPRA records whose disclosure is exempted or prohibited pursuant to federal or state law. See id. For three reasons, Plaintiffs contend that disclosure of the names of police officers involved in shootings is prohibited pursuant to California law governing law enforcement personnel records.

B. Section 832.7(c)[3]

1. Plaintiffs' Argument Restated.

First, Penal Code section 832.7(c) evinces an overt intent to protect the confidentiality of the identity of an officer involved in a critical incident such as a shooting, an intent that was honored and effectuated in Copley Press v. Superior Court (Cnty. of San Diego), 39 Cal. 4th 1272, 141 P.3d 288, 48 Cal. Rptr. 3d 183 (2006) [hereinafter Copley Press]. There, this

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[3] Cal. Penal Code § 832.7(c) (West 2007).

Court declared that the Court of Appeal "erred in finding that [the deputy's identity] is not confidential under section 832.7". 39 Cal. 4th at 1297, 141 P.3d at 304, 48 Cal. Rptr. 2d at 202. The language of section 832.7(c) limiting the information that may be disclosed pursuant to that provision "demonstrates that [the statute] is designed to protect, among other things, 'the identity of officers' subject to complaints". Id. (quoting City of Richmond v. Superior Court (S.F. Bay Gaurdian), 32 Cal. App. 4th 1430, 1440 n.3, 38 Cal. Rptr. 2d 632, 638 n.3 (1995)). "The legislative history of [section 832.7(c)] confirms the Legislature's intent to 'prohibit any information identifying the individuals involved from being released, in an effort to protect the personal rights of both citizens and officers'". Id. (quoting legislative history). "Given the statutory language and the legislative history," the name of an officer involved in a critical incident is immune from compelled disclosure. 39 Cal. 4th at 1297, 141 P.3d at 304, 48 Cal. Rptr. 2d at 202.

Comm'n on Peace Officer Standards & Training v. Superior Court (L.A. Times Cmmuc'ns LLC), 42 Cal. 4th 248, 165 P.3d 462, 64 Cal. Rptr. 3d 661 (2007) [hereinafter POST], is not to the contrary. POST upheld compelled disclosure of peace "officers' identities as such", see 42 Cal. 4th at 298, 165 P.3d at 474, 64 Cal. Rptr. 3d at 675, or, otherwise stated, "the

basic fact of their employment", see id. at 295, 165 P.3d at 472, 64 Cal. Rptr. 3d at 673. POST, unlike Copley Press, did not "involve the identification of an individual as the officer involved in an incident that was the subject of a complaint or disciplinary investigation". Id. at 299, 165 P.3d at 474, 64 Cal. Rptr. 3d at 676.

In a nutshell, all officer involved shootings are subject to a disciplinary investigation, which may result in the filing of an administrative complaint if warranted. And Copley Press holds that section 832.7(a) of the Penal Code[4] renders the identity of the involved officers confidential.

2. The Times Answered.

The Times responds to this argument but briefly. The essence of The Times' position is found in a statement that "[r]eleasing 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". (Answer Br. at 33 n.20 (emphasis in the original).) Perhaps not, but the statute flatly forbids identification of the individuals involved, whether or not doing so reveals anything about the substance of the

[4] Cal. Penal Code § 832.7(a) (West 2008)

complaints or even whether complaints have been directed against any particular officer.

In sum, section 832.7(a) as read by this Court in Copley Press renders the name of an officer involved in a shooting incident confidential. And because the names of such officers are confidential, they are immune from disclosure.

C. Section 832.8(c)[5]

1. Plaintiffs' Argument Restated.

Second, section 832.8(c) of the Penal Code affords confidentiality to records relating to employee appraisal or discipline. Should Plaintiffs' reliance upon Copley Press be misplaced, this provision independently establishes that the identity of officers involved in shootings is confidential.

There can be no doubt that police officers involved in shooting incidents are subject to appraisal, if not discipline. (See V. Compl. para. 7, at 2-3; 1 C.T. 6-7) (stating that the requested information involves shooting incidents that were investigated by the Long Beach Police Department in both an administrative and a criminal content); Decl. of Steve James para.3, at 2; 1 C.T. 22 (stating that a criminal and administrative shooting review occurs following an officer involved shooting); Decl. of Lloyd Cox para. 1,

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[5] Cal. Penal Code § 832.8(c) (West 2008).

at ii; 2 C.T. 242 (stating that all officer involved shootings are subject to criminal and administrative investigations); see also Reply Br. of the City of Long Beach at 13 (describing the review process that follows an officer involved shooting).) The records "relating to" these appraisals are personnel records and are exempt from disclosure ("confidential") pursuant to section 832.7(a) of the Penal Code. Moreover, "information obtained from those records "is expressly rendered confidential." Id.

The reports and the conclusions of the officers and the civilian investigators who review a shooting incident are self-evidently records relating to an appraisal. And the identity of the shooter, probably the first factual datum to appear in those records, is obviously information obtained from the confidential records generated by the review process (appraisal). Common sense thus dictates that the names of police officers involved in shootings are confidential.

2. The Times Answered.

The Times responds that name of the officer can be disclosed because the name of the involved officer says nothing about how the officer is be appraised or evaluated. (See Answer Br. at 29-30.) But the plain language of section 832.8(c) renders confidential the records of an appraisal and information therefrom, i.e., the fact of the appraisal itself as well as its

results.

In sum, section 832.8(c) also renders the name of a police officer involved in a shooting incident confidential. And because the names of such officers are confidential, they are immune from compelled disclosure.

D. Section 832.8(e)[6]

1. Plaintiffs' Argument Restated.

Third, section 832.8(e) of the Penal Code renders confidential records relating to "[c]omplaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties". The provision has a shooting incident review written all over it: records relating to an event the officer perceived or participated in with an eye toward how he or she performed his or her duties. And, indeed, Plaintiffs assert that this provision renders their identities confidential.

2. The Times Answered.

But no, says The Times, the records relating to the investigation of a complaint do not encompass the names of the police officers involved in the shooting. (See Answer Br. at 30-32.) The Times contends that disclosing

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[6] Cal. Penal Code § 832.8(e) (West 2007).

the names of officers involved in a shooting does not reveal whether complaints were made about the conduct of those officers on that particular occasion or the substance of any complaints and that only those subjects are rendered confidential. (See id. at 32.)

The Times' argument flies in the face of reality. The very first thing that an investigation of a complaint of a shooting would discover would be the identity of the shooter, and the records relating to that investigation would necessarily contain that information. The scope of the shroud of confidentiality expressly extends to "information obtained from [the] records" of an investigation of a complaint involving a shooting, and that information would include the names of the shooting officers if it would include anything. Thus, the names of officers involved in shootings most certainly **do** fit within the class of materials made confidential by section by 832.8(e).

The Times throws up several arguments to avoid this conclusion. None of these arguments have merit, however.

Thus, The Times complains that the "identity of a shooting officer can be converted into confidential information merely because an agency may decide to initiate an internal investigation". (See Answer Br. at 42.) But such is the inescapable effect of Copley Press, which unequivocally

states that the identity of peace officers "subject to complaints" is confidential. See 39 Cal. 4th at 1297, 141 P.3d at 304, 48 Cal. Rptr. 3d at 202. Dismayed though The Times may be, the statutes forbid "the identification of an individual officer as the officer involved in an incident that was the subject of a complaint or disciplinary investigation". POST, 42 Cal. 4th at 299, 165 P.3d at 474, 64 Cal. Rptr. 3d at 676.

The fact that an employer chooses to investigate officer involved shootings (it could hardly do otherwise) is quite beside the point. When an investigation occurs, it creates a privileged personnel file, which includes the name of the officer involved in the incident; when no investigation occurs, no such file is created. Thus, the CPRA applies in the same manner to comparable records maintained by comparable governmental entities, as it should. See Int'l Fed'n of Prof'l & Technical Eng'rs., Local 21 v. Superior Court (Contra Costa Newspapers), 42 Cal. 4th 319, 336, 165 P.3d 488, 497, 64 Cal. Rptr. 3d 693, 704 (2007). If an incident triggers an investigation, then the identity of the officer involved in the incident is confidential; if not, it is not.

Also, The Times seeks to sidestep the confidentiality accorded to peace officers subject to complaints or to a disciplinary investigation by arguing that the names it requests are also to be found in other records

outside the officers' personnel file such as incident reports, duty logs, and the other materials reflecting the operations of a police department and are therefore subject to disclosure. (See Answer Br. at 45-52.) No evidence is offered to support the assertion that the names actually are included in these documents, and its accuracy is open to doubt.

But, in any event, the notion that information otherwise privileged can be obtained because it also exists outside the privileged file has been rejected out of hand. "[T]here is nothing in the statutory scheme or its history suggesting a legislative intent to exclude from the privilege[] information which happens to be available elsewhere." Hackett v. Superior Court (Glin), 13 Cal. App. 4th 96, 99, 16 Cal. Rptr. 2d 405, 406 (1993) (emphasis in the original).

More fundamentally, just as Copley Press rejected the idea that protecting information from disclosure in legal proceedings did not preclude disclosure of that information under the CPRA, see 39 Cal. 4th at 1286, 141 P.3d at 296, 48 Cal. Rptr. 3d at 192, the same inexorable logic requires that this Court scuttle The Times' theory. There is "'little point'" in protecting information (names) linked with a particular incident, as Copley Press dictates, if the same information must be disclosed because it can be found in or derived from other documents not included in the

officers' personnel files. Id. (quoting City of Richmond v. Superior Court (S.F. Bay Guardian), 32 Cal. App. 4th 1430, 1440, 38 Cal. Rptr 2d 632, 638 (1995)). The protection of section 832.7(a) would be "wholly illusory" unless it is read to mean that information contained in a personnel file and exempt from disclosure directly remains exempt if it is found in some other document. Id.

The Times defends its theory by invoking the principle that disclosure cannot be avoided by merely placing a record in a file marked "personnel" and arguing by analogy that the identity of an officer involved in a shooting cannot be converted into protected information merely because it may be reflected in the officers' personnel file or because his employer chooses to initiate an investigation of the shooting. But the identity of the officer is not merely "reflected" in the personnel file—it is information that is inherently at the heart of the file that the Legislature has decreed be privileged. See POST, 42 Cal. 4th at 295, 165 P.3d at 472, 64 Cal. Rptr. at 673 ("Under the statute, a personnel record is, by definition, linked to a particular individual.").

Further, The Times argues that the practical implications of Plaintiffs' theory would be illogical because a public agency would be barred from confirming information already public or from releasing any

details of an officer involved shooting. (See Answer Br. at 39-41.) The short, but entirely sufficient, answer is that Plaintiffs' theory is not that the identity of officers involved in a shooting is deemed confidential simply because their names appeared in their personnel records; rather Plaintiffs' theory is that the Legislature intended that the names of officers subject to complaints or disciplinary investigations be withheld from disclosure. See discussion supra Part III.B.1. Under this theory, the one Plaintiffs actually advance, information regarding a shooting incident may well be disclosed, provided that it "does not identify the individual involved". Penal Code § 832.7(c).

By way of addendum, the opinion of the Attorney General heavily relied upon The Times, (see Answer Br. at 43-44), must be mentioned. That opinion reads Copley Press as holding only that "a peace officer's name may be kept confidential when it is sought *in connection with* information pertaining to a confidential matter such as an internal investigation or a disciplinary proceeding". 91 Ops. Cal. Att'y Gen., slip op. at 6 (No. 07-208 May 19, 2008) (emphasis in the original) (footnote omitted). But, as explained herein, officer involved shootings are always investigated, and an officer's name is thus connected with information pertaining to the investigation. Be that as it may, contrary to the Attorney

General's assertion, Copley Press holds that the identity of an officer involved in an incident that was the subject of a complaint or a disciplinary investigation is in and of itself confidential, whether or not the name is sought in connection with other information regarding the incident. Because an opinion of the Attorney General, while entitled to respectful and careful consideration, does not bind this Court, see Kern Cnty. Water Agency v. Watershed Enforcers, 185 Cal. App. 4th 969, 984 n.11, 110 Cal. Rptr. 3d 876, 886 n.11 (2010), it should pay no heed to the opinion's misreading of Copley Press.

In sum, the records relating to the investigation of a complaint against a police officer involved in a shooting, including the name of the officer, are confidential. See Davis v. City of San Diego, 106 Cal. App. 4th 893, 900-01, 121 Cal. Rptr. 2d 266, 271 (2003). And consequently the name of the officer is immune from disclosure.

IV. A BRIEF WORD ON BALANCING OF INTERESTS.

The Times argues at some length that the balancing of interests required by section 6254(c) of the CPRA can only be struck in its favor. (See Answer Br. at 53-63.) The Times' arguments are forceful, but one salient question must be asked. That is, what is this case all about? Why do

the Plaintiffs care so much that they are willing to risk insolvency to fight this case all the way to this Court?

The answer is that Plaintiffs' very lives are at stake. However much The Times may denigrate the threats to these officers involved in shootings as speculative, they are real enough to those officers. Unless this Court demands that the threat become concrete, i.e., that an officer's identity leads to or facilitates an attempt on his life, the balancing process must give controlling weight to what is at stake—the lives of our law enforcement officers.

Viewed in that light, the evidence submitted as to the risk becomes compelling. Hence, for the reasons already stated, the balance tips in favor of keeping names of officers involved in shootings confidential.

V. PLAINTIFFS HAD EVERY RIGHT TO BRING THIS ACTION.

A. But First, A Procedural Objection.

Finally, the Times addresses the three issues that it presented in its Answer to the petitions for review, which boil down to a contention that the LBPOA may not bring this action to vindicate its members' right to privacy. (See Answer Br. at 71.) The Times notes that neither the LBPOA nor the City mentioned this contention in their briefs on the merits, (see id.), but

there is good reason for their silence. Namely, The Times' additional issues are not properly before this Court.

This Court accepted this case with the following order: "The petitions for review are granted". (See Order (Apr. 18, 2012).) The petitions for review were granted, not the Answer or the additional questions it presented. The latter were not mentioned and were denied sub silentio. Consequently, these questions are simply not before the Court.

Admittedly, this Court could have specified the issues to be briefed or argued when it granted review or subsequently. See Cal. R. Ct. 8.516(a)(1). Further, this Court may on reasonable notice order oral argument on fewer issues or on additional issues than those thus specified. (See id. R. 8.516(a)(2). When deciding the case this Court may resolve any issues that are raised by or fairly included in the petition or answer, (see id. R. 8.516(b)(1)), and it may resolve an issue that is neither raised by nor fairly included in the petition or answer if the issue is presented by the case on reasonable notice to the parties and upon an opportunity to brief and argue it, (see id. R. 8.516(b)(2)).

But this Court did not specify the issues to be briefed, nor has it limited or expanded oral argument. And while the Court may resolve the case as it deems fit, the parties must confine their briefing to the issues

presented. (See id. R. 8.520(b)(3).) The Times' additional issues do not qualify.

B. Of Rights and Remedies.

Turning to the merits of the additional issue,[7] assuming arguendo that it may be reached, The Times invokes Filarsky v. Superior Court (City of Manhattan Beach), 28 Cal. 4th 429, 49 P.3d 194, 121 Cal. Rptr. 2d 844 (2002), as the tentpole of its argument. (See Answer Br. at 73-75.) Ignoring the express refusal of Filarsky to address whether a third party may bring a so-called "reverse" CPRA action to preclude a public agency from disclosing documents, see 28 Cal. 4th at 431, 49 P.3d at 200, 121 Cal. Rptr. 2d at 851, The Times asserts that the case establishes that "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", (Answer Br. at 75).

But this action differs fundamentally from Filarsky in that the Declaratory Judgment Act, Cal. Civ. Proc. Code §§ 1060-1062.5 (West 2007), permits the trial court to refuse relief "where an appropriate procedure has been provided by special statue and the court believes that

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[7] Although The Times presented three issues for review, (see Answer Br. at 1-2), they boil down to one very stark issue: May Plaintiffs bring this action?

more effective relief can and should be obtained through this procedure". Filarsky 28 Cal. 4th at 433, 49 P.3d at 201, 121 Cal. Rptr. 2d at 853. Such was the case in Filarsky inasmuch as the CPRA authorizes a record requester to seek declaratory relief to enforce his right to access to the records in question and facilitates the action with special procedures. See Cal. Gov't Code § 6258 (West 2008). No comparable qualification limits the Plaintiffs' claim for equitable relief.

The question thus reduces to whether this Court should read section 6258 of the Government Code, which provides that one who requests documents under the CPRA may bring an action to enforce his right to access them, as implicitly precluding in general any other action raising that issue and precluding in particular an action by a third party to prevent disclosure of those documents. For reasons both of fundamental principle and of statutory exegesis the answer is negative.

C. The Fundamental Principle.

The fundamental principle is a familiar one, that for every wrong there is a remedy. See Cal. Civ. Code § 3523 (West 2007). Here, the wrong is the threatened invasion of Plaintiffs' right to privacy, and the remedy is this action.

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1. Plaintiffs' Right to Privacy.

The right to pursue and obtain privacy is amongst the inalienable rights possessed by the people of this state. See Cal. Const. art. I, § 1. And "one does not lose his right to privacy upon accepting public employment". Braun v. City of Taft (Polson), 154 Cal. App. 3d 322, 347, 201 Cal. Rptr. 654, 662 (1984). Hence, however important the public's right to know may be, see Cal. Gov't Code § 6253(a) (West 2008) ("every person has a right to inspect any public record"), it must be balanced against the constitutional right to privacy. See Braun, 154 Cal. App. 3d at 347, 201 Cal. Rptr. at 662. The careful legislative balancing of those interests found in the CPRA thus has a constitutional dimension. See id. Otherwise put, the many exceptions to the Act's mandate for disclosure are its necessary counterpoint. See POST, 42 Cal. 4th at 288, 165 P.3d at 467, 64 Cal. Rptr. 3d at 667.

Amongst those exceptions is the confidentiality conferred upon police personnel records. Penal Code section 832.7[8] creates a "general privilege" for police personnel records subject to a limited exception for disclosure when due process so requires. City of Hemet v. Superior Court (Press Enter. Co.), 37 Cal. App. 4th 1411, 1427, 44 Cal. Rptr. 2d 532, 543 (1995); see Hackett v. Superior Court (Glin), 13 Cal. App. 4th 96, 98, 16

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[8] Cal. Penal Code § 832.7 (West 2008).

Cal. Rptr. 405, 406 (1993) (holding that the relevant statutes create a conditional privilege). The officer is a holder the privilege, see Garcia v. Superior Court (City of Santa Ana), 42 Cal. 4th 63, 76, 163 P.3d 939, 948, 63 Cal. Rptr. 3d 948 958 (2007), as is the employing agency, see City of Hemet, 37 Cal. App. 4th at 1430, 44 Cal. Rptr. 2d at 545. In order that the privilege may have meaning, it has been construed to create a right of confidentiality enforceable by the officer himself. See id.; see also S.F. Police Officers' Ass'n v. Superior Court (City & Cnty. of S.F.), 202 Cal. App. 3d 183, 189, 248 Cal. Rptr. 297, 301 (1988) (quoting the pertinent legislative history stating that the statutes give the peace officer **and** the employing agency the right to refuse to disclose any information concerning the officer).

The CPRA looks in the same direction. The Legislature, while giving members of the public broad access to information in the possession of public agencies, was mindful of the right of individual privacy, when it enacted the CPRA. See Copley Press, 39 Cal. 4th at 1282, 141 P.3d at 295, 48 Cal. Rptr. 3d at 189 (2006). This "'dual concern'" for disclosure and privacy appears throughout the Act. Id. (quoting Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 652, 117 Cal. Rptr. 106, 110 (1974)). In the same vein, judicial construction of the Act has sought to balance the

public's right of access to information and the individual's right to privacy as well as the government's need to preserve confidentiality. See id.

2. And Its Vindication.

Vindicating privacy interests is thus as important to the operation of the Act as is implementing the public's right to know. But the judicial remedy contained in the Act "is available *only* to a person or entity who is seeking disclosure of public records and *only* where the public entity is allegedly improperly withholding those records". County of Santa Clara v. Superior Court (Naymark), 171 Cal. App. 4th 119, 127, 89 Cal. Rptr. 3d 520, 526 (2009) (emphasis in the original). "The [Act's] judicial remedy is limited to a requestor's action to determine whether a particular record or class of records must be disclosed." Id. at 130, 89 Cal. Rptr. 3d at 529. The Act "provides no judicial remedy for any other person or entity". Id. at 126, 86 Cal. Rptr. 3d at 526.

Consequently where a party seeks to protect its constitutional privacy interest, the remedy must be found outside the Act. Otherwise, despite the dual concern of the Act for both disclosure and privacy, see Copley Press, 39 Cal. 4th at 1282, 141 P.3d at 295, 48 Cal. Rptr. 3d at 189, only one of those concerns will be vindicated. Here, then, as in County of Santa Clara, the purpose of the Act is "*furthered*, not obstructed" by actions such as this

one seeking to vindicate a claimed privacy interest. 171 Cal. App. 4th 126, 89 Cal. Rptr. 3d at 529 (emphasis in the original) (upholding citizen suits under section 526a of Code of Civil Procedure[9] to enforce the provisions of the CPRA).

There is thus a "fundamental difference[ ]" between a reverse CPRA action such as this one and the preemptive strike utilizing declaratory relief found wanting in Filarsky. Marken v. Santa Monica-Malibu Sch. Dist., 202 Cal. App. 4th 1250, 1265, 136 Cal. Rptr. 3d 395, 408 (2012). Namely, unlike the situation in Filarsky where a comprehensive procedure for resolution of the CPRA issue existed, "absent an independent action . . . , no judicial forum will exist in which a party adversely affected by [a threatened] disclosure can challenge the lawfulness of the agency's action". Marken, 202 Cal. App. 4th at 1268, 136 Cal. Rptr. 3d at 410. Simply stated, because no other remedy exists to obtain judicial review of an agency's decision to improperly release records, and because such a remedy **must** exist if the constitutional and statutory privacy rights of the party are to be meaningful, a third party action to block release of records is not only proper, but also necessary, Filarsky notwithstanding.[10] See Marken, 202

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[9] Cal. Civ. Proc. Code § 526a (West 2011)

[10] The Times repeatedly asserts without a shred of evidence that the City of Long Beach conspired with the LBPOA to permit it to bring this

Cal. App. 4th at 1268, 136 Cal. Rptr. 3d at 408.

D. Statutory Exegesis.

Moreover, this Court strongly suggested as much when it bumped into the issue in Filarsky. There, this Court observed that the federal Freedom of Information Act, like the CPRA, "provides only a cause of action to compel disclosure—not an action to prohibit disclosure". 28 Cal. 4th at 431, 49 P.3d at 200, 121 Cal. Rptr. 2d at 854. Nevertheless, third party actions to review an agency decision to disclose information under the federal act have been held to be authorized by the federal Administrative Procedure Act, which provides that a person adversely affected by or aggrieved by agency action is entitled to seek judicial review. See Marken, 202 Cal. App. 4th at 1266, 136 Cal. Rptr. 2d at 408 (quoting 5 U.S.C. 702 (2006)). "This statutory authorization for judicial review of federal agency actions is not functionally different . . . from the right of a beneficially interested party to seek a writ of mandate . . . to compel a state or local agency to comply with governing law." Id. Thus, parallel construction of the FOIA and the CPRA, see Bd. of Trustees v. Superior Court (Copley

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action. (See, e.g., Answer Br. at 72-73.) These allegations are baseless and insulting. Like Louis XIV, who refused to end the War of the Spanish Succession by using the French army to depose his own grandson as King of Spain, the City merely chose to fight a stranger rather than a friend when confronted with litigation no matter which position it adopted.

Press, Inc.), 132 Cal. App. 4th 889, n.5, 34 Cal. Rptr. 3d 82, n.5 (2005) (stating that because of the federal roots of the CPRA, construction of the federal act may be used in its construing), compels the conclusion that, despite the absence of any overt recognition of an action to prohibit disclosure in either act, such actions are not precluded by the CPRA.

E. An Alternative Statutory Hybrid.

1. This Court's Authority.

In the alternative, The Times contends that the protections that the CPRA affords to record requesters should apply to any action brought to resolve a dispute regarding access to public records including third party actions such as this one. (See Answer Br. at 78.) To do so would require this Court to strong arm the special procedures contained in the Act to make them applicable to a mandate petition or to an action seeking injunctive relief to protect constitutional privacy rights with no statutory warrant or other basis for such action. Whether this Court has the authority to rewrite the CPRA to render it applicable to actions it does not address is open to grave doubt.

2. Expedited Review.

Be that as it may, the policies embodied by the three specific provisions of the CPRA that The Times would import into third party

actions are not seriously threatened by permitting these actions to take their normal course. First, as to expedited review, (see Answer Br. at 78-80), while the action is in the Superior Court either the requested documents will be disclosed or their disclosure will be enjoined, in which case the action wold proceed on an accelerated schedule. See Marken, 202 Cal. App. 4th at 1268, 136 Cal. Rptr. 2d at 410 (citing Cal. Civ. Proc. Code § 527 (West 2010)). And on appeal, the Court of Appeal enjoys apparently limitless authority to expedite an appeal where expedition is truly in order.[11] See Cal. R. Ct. 8.240. Thus, as a practical matter a third party action could race through the judicial system as or almost as quickly as a CPRA action.

3. Automatic Stay.

Second, as to automatic stays on appeal, (see Answer Br. at 80), the Times' concerns are fanciful. As The Times itself stated earlier in this battle, a request to block disclosure of requested documents and thus to preserve the status quo whilst an appeal is pursued is "not" one for a mandatory injunction which would trigger an automatic stay. (Prelim.

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[11] That the Court of Appeal refused to expedite in this very case does not demonstrate that the normal process are inadequate to protect the rights of records requesters to speedy appellate review, as The Times asserts. (See Answer to Br. at 79 n.57.) This Court could easily provide guidance to the Courts of Appeal that would make expedition the norm rather than the exception in cases of this sort.

Opp'n at 48 n.30 (emphasis in the original).) Such relief seeks to prevent the public entity "from disclosing records, not to force [it] to take some kind of action". (Id.) "No automatic stay should result from an appeal from the denial of [a] prohibitory injunction request." (Id.) Precisely! Thus, again, as a practical matter The Times' concern is baseless.

4. Fee Shifting.

Third, The Times worries that the mandatory fee shifting provision provision of the CPRA, Cal. Gov't Code § 6259(d) (West 2008), may be avoided. (See Answer Br. at 81-82.) But this provision may be applied and may mandate a fee award even though the issue of whether the release of documents was required did not reach the Court as a result of a proceeding brought pursuant to the Act. See Fontana Police Dep't v. Villegas-Banuelos 74 Cal. App. 4th 1249, 1253, 88 Cal. Rptr. 2d 641, 643-44 (1999) ("Because the proceeding . . . was the functional equivalent of the proceeding to compel production . . . under the Public Records Act and Appellant was the prevailing party in the proceeding, he is entitled to recover attorney's fees despite the fact that he was not denominated 'plaintiff' in the action.").

Admittedly, Marken concludes the opposite, albeit without analysis or mention of Fontana Police Department. See 22 Cal. App. 4th at 410, 136

Cal. Rptr. 2d at 1268. But, as Marken observes, the issue will arise only in those rare instances (of which this action is one) where a requesting party must intervene and actively defend its right to disclosure. See id. Thus, once again, as a practical matter The Times' concerns are overblown.

5. Very Faint Praise.

But when all is said and done, the LBPOA is not opposed in principle to engrafting the procedural policies contained in the CPRA to third party actions such as this one. After all out of an abundance of caution, the LBPOA initially pursued appellate remedies by way of a writ petition within the time limitations of the Act. But the need for so doing is dubious to say the least, and the authority of this Court to do so is open to serious question. Plaintiffs therefore believe that this Court should reject The Times' invitation to rewrite the Code of Civil Procedure.

V. SECTION 6254(f) RENDERS THE NAMES OF OFFICERS INVOLVED IN SHOOTINGS CONFIDENTIAL.

In addition, the City of Long Beach now argues that the names of officers involved in shootings are exempt from disclosure pursuant to section 6254(f) of the CPRA.[12] (See City of Long Beach's Opening Br. on

[12] Cal. Gov't Code § 6254(f) (West 2008).

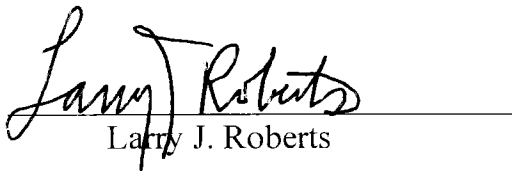
the Merits at 30-34.) The issue has been fully briefed, (see Answer Br. at 67-71 (arguing the merits); Reply Br. of the City of Long Beach at 25-27) (same), and for the reasons ably articulated by the City, (see Reply Br. of the City of Long Beach at 24–25), that argument should be considered by this Court. Plaintiff hereby joins in and adopts the City's argument.

VI. CONCLUSION.

In sum, for the reasons stated herein, as well as for the reasons originally stated, the names of the officers involved in shooting incidents are confidential and cannot be disclosed. Accordingly, the judgment of the Superior Court should be reversed, and a contrary judgment should be entered.

Dated: 14 August 2012

Respectfully submitted,

By: 
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CERTIFICATE OF COMPLIANCE

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

Petitioners LONG BEACH POLICE OFFICERS ASSOCIATION and DOES 1-150 certify that their brief is in a proportionately spaced type face (Times New Roman) of 13 point, that it is double spaced, and that it contains 6,751 words.

Dated: 14 August 2012

By: _____
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

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

That on August 14, 2012, I served the foregoing document described as: **REPLY BRIEF ON THE MERITS** on all interested parties as follows:

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

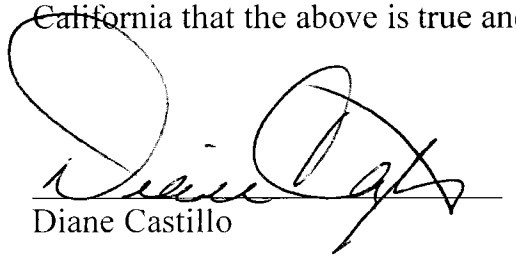
SEE ATTACHED SERVICE LIST

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

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

Executed on August 14, 2012 at Fullerton, California.

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



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