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 ...