IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NATIONAL LAWYERS GUILD, SAN FRANCISCO BAY AREA CHAPTER, Petitioner, vs. CITY OF HAYWARD, et al., Respondents.	)	No. **No. S252445** Court of Appeal No. A149328 Alameda County Superior Court, Case No. RG15-785743 (Hon. Evelio Grillo)

AFTER A DECISION OF THE COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION THREE

PETITIONER'S OPENING BRIEF ON THE MERITS

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The National Lawyers Guild, San Francisco Bay Area Chapter submitted California Public Records Act requests to the City of Hayward seeking copies of police camera videos taken at a political demonstration protesting police killings of two unarmed black men. The City agreed to produce copies of the videos after it redacted out certain portions. It sent the Lawyers Guild a bill for labor costs that exceeded the direct cost of duplication. The Court of Appeal held that requiring a requester to pay the costs for redacting an electronic record is permitted by the Public Records Act.

The questions presented for review are:

1. Whether a year 2000 amendment to the California Public Records Act (Gov. Code section 6253.9, subd. (b)) allows a public agency to shift the cost of redacting electronic records to a requester, when the cost of redaction cannot be imposed for paper records?

2. If the statutory language of the amendment is ambiguous, as found by the Court of Appeal, does Article I, section 3(b) of the California Constitution compel a construction in this case that does not limit access to redacted electronic records by the ability to pay?

STATEMENT OF THE CASE

I. *Nature of the Action, Relief Sought, and Judgment of the Superior Court*

This is an appeal from a judgment ordering the clerk of the Alameda County Superior Court to issue a writ of mandate directing the City of Hayward to refund to plaintiff National Lawyers Guild, San Francisco Bay Area Chapter labor costs previously charged and collected for the disclosure of electronic records under the California Public Records Act. JA 663.[1] JA 660. Defendants appealed, JA 671. The Court of Appeal reversed. *National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward* (2018) 27 Cal.App.5th 937.

II. *Finality and Appealability of the Judgment*

Judgment was entered on July 21, 2016. JA 663. Notice of entry of judgment was served on July 22, 2016. JA 670.

Defendants filed a timely notice of appeal on August 8, 2016 (JA 671), within 60 days of notice of entry of judgment. Cal. Rules of Court, Rule 8.104 (a)(1)(B).

III. The Proceedings Below

The Lawyers Guild filed its petition for Declaratory and Injunctive Relief and a Writ of Mandate in the Superior Court on September 15, 2015. JA 4. City employees Roush and Perez were

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[1] Throughout this brief JA followed by a number refers to the parties' joint appendix.

deposed by the Lawyers Guild. JA29, 32-161. Based on the City's admissions in its Answer to the Petition and the deposition testimony, the Lawyers Guild moved for a peremptory writ of mandate. JA 23. Following an initial hearing, and following the superior court's suggestion, Perez was deposed a second time. JA 575-615.

The court held a further hearing on March 29, 2016. JA 617. After the hearing the court issued an order granting the Petition for a Writ of Mandate, directing the clerk to order Hayward to refund $3,246.47, covering payments made by the Lawyers Guild for redacted copies of electronic records, videos of a political demonstration in Berkeley, captured by police body worn cameras. JA 619.

The court said that a public agency cannot charge a requester for the cost of removing information from an existing record. JA 628-629. "The phrase 'data compilation, extraction, or programming to produce the record' [used in section 6253.9(b)(2)] therefore logically refers to the construction or production of data to be produced to the recipient, and not to the creation of a redacted version of a previously existing public record." JA 630.[2]

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[2] With respect to the City's contention that its charges were justified by Gov. Code section 6255(a), the court held "as a matter of law that under Government Code 6255, the CPRA's catch-all exemption, a public agency asserting that 'the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record' may consider the expense and inconvenience of all aspects of responding to the CPRA request,

(continued...)

The superior court concluded that "Hayward therefore could not condition production of the redacted videos on payment both of the $1 direct cost of production and $3,246.47 in staff time related to redacting the videos." JA 621.

Judgment was subsequently entered on July 21, 2016. JA 663. The writ was issued by the clerk on the same day. JA 660. The City appealed and the Court of Appeal reversed and remanded.

The Court of Appeal correctly stated the facts, which are not in dispute. The Court of Appeal correctly stated the principal issue: "Is the City entitled under section 6253.9, subdivision (b) (section 6253.9(b)) to recoup from the Lawyers Guild certain costs it incurred to edit and redact exempt material on otherwise disclosable police department body camera videos prior to the electronic public records' production?" Slip Opinion at 4. The Court of Appeal said that "at bottom, the parties dispute over what costs are recoverable by a public agency under section 6253.9, subdivision (b)(2) hinges on the statutory definition of the term 'extraction.'" Slip Opinion at 9. After finding the term ambiguous, Slip Opinion at 10, the court relied on an interpretation of legislative history that is directly contrary to this Court's finding that the Legislature did not address the cost of

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[2](...continued)
including the cost of redacting public records." JA 620. However, the court went on to find that "Hayward has not demonstrated that its CPRA compliance imposed an undue burden over and above the regular expected burden." JA 621.

redacting records in section 6253.9(b). *Sierra Club v. Superior Court* (2013) 57 Cal. 4th 157, 175.

Following the Lawyers Guild's petition for rehearing the court modified its opinion, stating that the City may charge "to construct a copy of the police body camera video recordings for disclosure purposes, including the cost of special computer services and programming (e.g., Windows Movie Maker software) used to extract exempt material from these recordings in order to produce a copy thereof to the Guild." Order Modifying Opinion and Denying Rehearing; No Change in Judgment at 2. The Court of Appeal remanded to the trial court to determine precisely which costs, among those billed, the City is entitled to recover under section 6253.9(b). *Id.*

This Court granted review.

IV. Summary of Significant Facts

The Hayward Police Department provided mutual aid to the City of Berkeley in policing protests and demonstrations in December 2014 in connection with the killing by police officers of Michael Brown in Ferguson, Missouri, and Eric Garner in Staten Island, New York. The killings received national attention, precipitating and renewing increased scrutiny of police conduct. The demonstrations resulted in injuries and arrests. JA 6, 14, 26.

Pursuant to the California Public Records Act the Lawyers Guild requested copies of records related to the Hayward police department's actions at the protests and demonstrations. The records

included paper records and video captured by Hayward police officers who wore body cameras. JA 7, 14.

Hayward produced the paper records and identified relevant body worn camera videos, which had previously been uploaded to a cloud based storage system known as "Evidence.com." JA 43, 96-97. The videos were stored in an MP4 digital format and later produced in MP4 format. JA 50, 53.

However, before disclosing copies of the videos the City redacted out some portions, claiming the redacted information was exempt by law. The City charged the Lawyers Guild $3,247.44 for time spent by its employees locating the videos, reviewing the videos, the time spent making the redactions, and for the copies of the videos. JA 153-54, 157.

The City did not charge for the cost of redacting the paper records. JA 145-46.

City employee Nathaniel Roush identified the relevant videos.[3] He took 4.9 hours for this task. JA 53-56. The Lawyers Guild then narrowed its request to about six hours of video, covering five police officers and three time periods. JA 7, 15. Adam Perez, the Police Department's records administrator, then edited the videos by redacting portions the City believed were exempt by law from mandatory disclosure. JA 81-148. Perez redacted out information

[3] According to Roush, the City of Hayward IT manager for public safety, the City accumulated approximately 1,093 hours of police video per month, as of February, 2016. JA 254.

pertaining to security measures and video depicting medical information. JA 109-110. The security measure information was redacted from some audio portions because it included "radio traffic" and some "officers' communication" with each other. JA 107. The medical information pertained to two incidents. Because it was captured in several videos, it was redacted from each video. JA 607. According to Perez, this information was redacted so that it would not "violate HIPAA laws or anything like that." JA 107, 109. The Lawyers Guild did not challenge the City's claim that the redactions were exempt from mandatory disclosure.

Perez had never previously edited video and had not worked on redacting exempt portions of video. He found a publicly available computer application on the internet known as Microsoft Windows Movie Maker. JA 102-103.[4] He had never used Movie Maker before. JA 131-132. After working his way through the project, he ended up with redacted videos with the exempt portions of video and audio removed. JA 22-33. Perez took about 35.3 hours both learning and using Movie Maker to produce the disclosed videos. JA 164. The edited videos totaled 232 minutes. JA 26.

The City charged $2,939.58, using the time spent by Roush and Perez, multiplied by their hourly salaries and benefits. JA 164. The Lawyers Guild paid the charges under protest and received the videos. JA 7-8,15-16, 26.

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[4] Movie Maker is a relatively simple program. Instructions for using Movie Maker are in the record. JA 178.

Subsequently, the Lawyers Guild requested additional video footage. JA 26-27. The City edited the responsive footage, which was less than the first batch, made copies. It gave the Lawyers Guild a bill for $308.89. JA 26, 75. The Lawyers Guild paid the charges under protest again and received two videos totaling 65 minutes. JA 26-27.

The City of Hayward's workflow, which resulted in the charges to the Lawyers Guild for both sets of videos, therefore, consisted of: identifying the responsive video tapes out of a larger set; reviewing the tapes to figure out what needed redaction; selecting software to perform the redactions; learning how to use the software; redacting audio and video; reviewing the remaining video to verify the process; and, finally duplicating the result. JA 114-115, 126, 129-130.

The Lawyers Guild paid the requested charges so that it could promptly obtain the copies. JA 26. It then sued for return of the money. JA 4.[5]

ARGUMENT

I. The Standard of Review

The trial court's interpretation of the California Public Records Act is reviewed de novo. *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387. This is true of any legal decision

[5] A requester may pay a challenged fee in order quickly to obtain copies of public records and then file suit under the Public Records Act seeking judicial review of the fee. *North County Parents Organization For Children with Special Needs v. Department of Education* (1994) 23 Cal.App.4th 144, 148.

regarding disclosure of records under the Act. *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651.

The fundamental task is to determine the Legislature's intent. A court must first examine the language of the statute, giving it a plain and commonsense meaning. The language must be examined in the context of the entire statutory scheme, including the significance of every word, phrase, sentence, and part of an act. If the statutory language permits more than one reasonable interpretation, courts may consider the statute's purpose, legislative, history, and public policy. *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616-617; *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165-166. "To the extent this examination of the statutory language leaves uncertainty, it is appropriate to consider 'the consequences that will flow from a particular interpretation.'" *Commission of Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278, 290 (internal citations omitted).

When any portion of the California Public Records Act is under review, "this standard approach to statutory interpretation is augmented by a constitutional imperative." *City of San Jose*, 2 Cal. 5th at 617. Article I, Section 3, subd. (b)(2) of the California Constitution requires that "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, *shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access*." *See City of*

San Jose, 2 Cal.5th at 617, 620; *Sierra Club*, 57 Cal.4th at 166 (emphasis added).

II. *Introduction: The Overriding Purpose of Art. I. section 3 of the Constitution and of the Public Records Act is to Make Public Records, Including Electronic Records of Police Activities, Accessible to Everyone*

"Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651.

Like several other recent Public Records Act cases decided by this Court, "[t]his case concerns how laws, originally designed to cover paper documents, apply to evolving methods of electronic communication." *City of San Jose v. Superior Court,* 2 Cal. 5th at 615 (public access to communications about the conduct of the public's business located on government employees' private devices); *American Civil Liberties Union Foundation v. Superior Court* (2017) 3 Cal. 5th 1032 (access to automatic license plate reader data); *Sierra Club v. Superior Court*, 57 Cal.4th 157 (access to GIS database). Persons seeking to inspect and copy paper records can do so knowing that the only costs that can lawfully be imposed on them are the direct costs of duplication (*North County Parents Organization For Children with Special Needs v. Department of Education,* 23

Cal.App.4th at 148), or a specific statutory fee. *Shippen v. Department of Motor Vehicles* (1984) 161 Cal.App.3d 1119.

In 1981 the Legislature strengthened the Public Records Act by amending former Gov. Code section 6257, the predecessor to Gov. Code section 6253(b), to limit costs to the direct costs of duplication of records. This important limitation was affirmed in the *North County Parents Organization for Children with Special Needs* case, 23 Cal.App.4th at 147.[6]

Agencies had to absorb the other expenses such as the labor costs of redacting out exempt portions of the records. "Thus it can be seen that the trend has been to limit, rather than to broaden, the base upon which the fee may be calculated. A 'reasonable fee' or the 'actual cost of providing the copy' could be interpreted to include the cost of all the various tasks associated with locating and pulling the file, excising material, etc. When these phrases are replaced by the more restrictive phrase "direct costs of duplication," only one conclusion seems possible." *Id*. at 147-48. The limit on cost shifting is a key factor in the Public Records Act living up to its goal of being

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[6] "The original wording, adopted in 1968 (Stats.1968, ch. 1473, § 39, p. 2948), was that 'a reasonable fee' could be charged. In 1975 an amendment limited the 'reasonable fee' to not more than $.10 per page. (Stats.1975, ch. 1246, § 8, p. 3212.) An amendment in 1976 deleted 'reasonable fee' and inserted instead 'the actual cost of providing the copy.' (Stats.1976, ch. 822, § 1, p. 1890.) Finally, the present version of the statute was adopted in 1981 limiting the fee to the 'direct costs of duplication.' (§ 6257.)" *North County Parents Org.*, at 147.

a mechanism that all Californians can use to keep government open and transparent.

Most government records today are kept in electronic databases, not filing cabinets and drawers. If, as the City of Hayward contends, a 2000 amendment to the Public Records Act, Gov. Code section 6253.9(b) now permits an agency to charge labor costs for redacting electronic records, the ground rules will fundamentally change. This seismic shift will disfavor organizations and individuals who cannot afford to pay hundreds or thousands of dollars beyond the cost of duplication of the record. See fn. 26, *post*.

The "right of access to information"is enshrined in the California Constitution. Cal. Const. art. 1, section 3(b)(1). It is no less a right than any other right guaranteed to the people of this State. In addition to this constitutional right, the Public Records Act "establishes a presumptive right of access to any record created or maintained by a public agency that relates in any way to the business of the public agency[.]" *Sander v. State Bar* (2013) 58 Cal.4th 300, 323. The Act itself provides "that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Gov. Code section 6250; *see Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1335.

As this Court has recognized, this "right of access" is especially salient when the subject is law enforcement: "In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers." *Commission on Peace Officer*

Standards & Training v. Superior Court, 42 Cal.4th at 297. *See Pasadena Police Officers Association v. Superior Court* (2015) 240 Cal.App.4th 268, 283 "Given the authority with which they are entrusted, the need for transparency, accountability and public access to information is particularly acute when the information sought involves the conduct of police officers." *Id.* And, as the Legislature recently recognized, when it passed legislation requiring access to certain peace officer personnel records,

> The public has a strong, compelling interest in law enforcement transparency because it is essential to having a just and democratic society.

Stats. 2018, Chap. 988, Sec. 4, added by Sen. Bill No. 1421, 2017-2018 Reg. Session (amending Pen. Code sections 832.7 and 832.8, effective January 1, 2019). *See also*, Stats. 2018, Chap. 960, Sec. 1, Assem. Bill 748, 2017-2018 Reg. Session (amending Gov. Code section 6254(f) (requiring access to police camera videos of a "critical incident")).

Access to these electronic records is essential to hold law enforcement agencies and police officers accountable to the public they serve because police officers "'hold one of the most powerful positions in our society; our dependence on them is high and the potential for abuse of power is far from insignificant.' (*City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1428, 44 Cal.Rptr.2d 532.)" *Commission on Peace Officer Standards & Training v.*

Superior Court at 299–300. Peace officers are the only public officials authorized to use force or threaten to use force in their work.[7]

The City of Hayward differentiated between electronic records and paper records, charging for one and not the other. Whether this is permissible under the Public Records Act turns on the meaning of Gov. Code section 6253.9(b).

Government Code section 6253.9, as we will show, does not allow police or other agencies to require a requestor to bear the cost of segregating out information that an agency chooses to withhold from public disclosure. "[C]ase law recognizes that the CPRA should be interpreted in light of modern technological realities." *American Civil Liberties Union Foundation v. Superior Court*, 3 Cal. 5th at 1041. Subsection (b)(2) is limited to extraordinary computer processes necessary to produce a record from a broad set of data.

Inasmuch as government recordkeeping has changed and police technology has advanced over the past several decades, these changes and advances require an interpretation of section 6253.9 that is faithful to the text of the statute, but consistent with the purpose of the Act.[8] This interpretation must take into account practical realities,

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[7] *See* Bittner, the Function of the Police in Modern Society (1970) pp. 38-39, U.S. Department of Justice, National Institute of Justice <https://www.ncjrs.gov/pdffiles1/Digitization/147822NCJRS.pdf> (as of February 7, 2019).

[8] In August 2017, a study by the Urban Institute noted that

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including the restrictive effect a broad interpretation of section 6253.9(b)(2) would have on the fundamental right of access of all people - rich and poor - to information in this State.

The Court of Appeal's broad interpretation of section 6253.9(b) to include an agency's costs of redacting videos is infinitely expandable because all electronic records are by definition the product of computer manipulations, including word processing software, portable electronic document (pdf) applications, and the like, as well as digitized photos and videos. Unlike paper records, it is impossible to redact electronic records manually. Yet the Court of Appeal has effectively given an open ended license to charge for the redaction of electronic records, including videos of police activity. This will in turn make access to such records unaffordable to all but affluent requesters and provides an indirect means of allowing an agency to "close its doors to all those who do not have a full purse." *Murdock v. Pennsylvania* (1943) 319 U.S. 105, 112.

So long as there are portions of an electronic record that can be digitally redacted, the Court of Appeal opinion turns the Public Records Act on its head by making transparency accessible only to

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[8](...continued)
"Police body-worn cameras (BWCs) are being rapidly and widely adopted by law enforcement." Urban Institute, *How Body Cameras Affect Community Members' Perceptions of Police* (August 2017) (https://www.urban.org/sites/default/files/publication/91331/2001307-how-body-cameras-affect-community-members-perceptions-of-police_4.pdf) (as of Nov. 2, 2018)

those who can afford it. The digital divide that will price out many requesters when it comes to electronic records is a sharp and dramatic break from the core principles of the statute.

III. *The Statutory Framework Governing Production of Electronic Records*

A. *The Overall Framework*

The Public Records Act defines the term "public record," to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Gov. Code section 6252(e). A "writing" is defined as "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." Gov. Code section 6252(g). *See City of San Jose*, 2 Cal.5th at 617. Electronic records, including police videos, are clearly "writings" covered by the Act. Gov. Code session 6252(e) (writings include "pictures" and "sounds"). In electronic form, data is a component of a record. *Cf. American Civil Liberties Union v. Superior Court*, *supra*, 3 Cal. 5th 1032.

The Act requires that "[e]xcept with respect to public records exempt from disclosure by express provisions of law, each state or

local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so." Gov. Code section 6253(b).

Ordinarily, an agency must respond to a request for public records within 10 days. Gov. Code section 6253(c). In "unusual circumstances," the time limit prescribed may be extended by written notice to the person making the request, setting out the reasons for the extension and the date on which a determination is expected to be made. "[U]nusual circumstances" includes language similar to section 6253.9(b)(2). "Unusual circumstances" means the following, but only to the extent reasonably necessary to the proper processing of the particular request:

> . . . .
>
> (4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data."

Id.

The Act contemplates that some records will need to be redacted to delete exempt information. Therefore, the Legislature said that "any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law." Gov. Code section 6253(a). *See Los Angeles County Board of Supervisors v. Superior Court*

(2016) 2 Cal.5th 282, 300*; Northern California Police Practices Project v. Craig* (1979) 90 Cal.App.3d 116, 124.

"There is nothing in the Public Records Act to suggest that a records request must impose no burden on the government agency." *State Board of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1190 fn. 14. Therefore, government agencies absorb most of the cost. It is well settled that charges for the direct costs of duplication are limited to "the cost of copying" the records. *North County Parents Organization For Children with Special Needs,* 23 Cal.App.4th at 147. This restriction on copying costs applies regardless whether a whole record is produced or a redacted (segregated) copy is produced. The Act makes no distinction. Gov. Code section 6253(b). The clear trend is to make records more accessible by reducing costs. *Cf. Rubio v. Superior Court* (2016) 244 Cal.App.4th 459, 482 (observing that the Legislature over time narrowed the basis for charging for copies of public records, citing the recurring amendments to former Gov. Code section 6257 and then section 6253 in connection with charges for copies of public records).

However, under limited circumstances, special rules govern charges for the production and construction of electronic records. Government Code section 6253.9 provides, in part (with emphasis added):

> (a) Unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that

> information available in an electronic format when requested by any person and, when applicable, shall comply with the following:
>
> (1) The agency shall make the information available in any electronic format in which it holds the information.
>
> (2) Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. The cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format.
>
> (b) Notwithstanding paragraph (2) of subdivision (a), *the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when either of the following applies:*
>
> (1) In order to comply with the provisions of subdivision (a), the public agency would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals.
>
> (2) *The request would require data compilation, extraction, or programming to produce the record*.

The language of section 6253.9 says that an agency is limited to charging the direct costs of duplication "if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies." Gov. Code section 6253.9(a)(2). Subsection (b) then provides an exception to subparagraph (a)(2) ("notwithstanding paragraph (2) of subdivision (a)"). It allows the

agency to charge the requester the cost of producing a copy when, among other things, "the request would require data compilation, extraction, or programming to produce the record." In other words, subsection (a) says that when an existing identifiable public record is disclosed, an agency may only charge the cost of duplication. Subsection (b) says that when a new record is constructed or produced through compilation, extraction, or programming, an agency can charge additional costs.[9]

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[9] In some cases, this Court has looked for guidance in the federal Freedom of Information Act (FOIA). But in this case FOIA does not shed light on the interpretation of section 6253.9(b). FOIA treats agency costs differently than California.

FOIA, Title 5 U.S.C. section 552(a)(4)(A)(i), requires agencies to promulgate regulations "specifying the schedule of fees applicable to the processing of requests" for information, including when "such fees should be waived or produced." Section 552(a)(4)(A)(ii)(I) limits fees "to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use." Section 552(a)(4)(A)(ii)(II) limits fees "to reasonable standard charges for document duplication" when fees are sought for a non-commercial use by an educational or scientific institution or a representative of the news media (as defined). Section 552(a)(4)(A)(ii)(III) limits fees "to reasonable standard charges for document search and duplication" for any other type of request.

Additionally, "[d]ocuments shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the

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The primary purpose of the legislation adding Gov. Code section 6253.9 to the Public Records Act is to "'to ensure quicker, more useful access to public records.'" *Sierra Club v. Superior Court*, 57 Cal.4th at 174, quoting from Assem. Com. on Governmental Organization, Analysis of Assem. Bill 2799 (1999–2000 Reg. Sess.) as introduced Feb. 28, 2000, p. 2 [hereafter AB 2799].

But in its published opinion the Court of Appeal held in this case that the text of Gov. Code section 6253.9(b) permits an agency to charge labor and other costs of redacting exempt information from an otherwise existing electronic record, effectively making redacted records less accessible to those who cannot afford the price. Slip Opinion at 14.

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[9](...continued)
commercial interest of the requester." 5 U.S.C. section 552(a)(4)(A)(iii).

"Fee schedules shall provide for the recovery of only the *direct* costs of search, duplication, or review. Review costs shall include only the *direct* costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section." 5 U.S.C. section 552(a)(4)(A)(iv).

In other words, under FOIA, an agency may not charge for the labor costs of redacting exempt from non-exempt information, only for the initial review. *See Hall & Assocs. v. E.P.A.* (D.D.C. 2012) 846 F. Supp. 2d 231, 239-240.

Government Code section 6253.9(b) is not nearly as broad as the Court of Appeal's construction. While California Constitution, art. I, section 3(b)(2), is intended to "further the right of access" and the preamble to the Public Records Act, expressly says "that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state" (Gov. Code section 6250), the Court of Appeal significantly reduced access. It did so by allowing agencies to impose a price on such rights, a result that was not intended for routine redactions by the addition of section 6253.9 to the Public Records Act. The language of section 6253.9(b) and the entire scheme of the Public Records Act support a narrow reading of the cost exception found in section 6253.9(b)(2).

B. *In Context, the Text of Government Code Section 6253.9(b)(2) Limits Charges for Redacting Existing Records*

In the context of other sections of the Public Records Act, section 6253.9(b) does not permit the charges for redactions of the police videos in this case.

An agency is limited to charging the direct costs of duplication of an electronic record "if the requested *format* is one that has been used by the agency to create copies for its own use or for provision to other agencies." Gov. Code section 6253.9(a)(2) (emphasis added). *See Sierra Club v. Superior Court*, 57 Cal.4th at 177.

However, an agency can only make the requestor bear the "cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary

to produce a copy of the record" when "[t]he request would require data compilation, extraction, or programming to produce the record." Gov. Code sections 6253.9(b), 6253.9(b)(2).

First, section 6253.9(a) restricts fees to the cost of duplication when they are requested in the same "format" as the agency keeps them for its own use. Here, the police videos were kept in video format and the Lawyers Guild requested them in video format. There was no manipulation required to produce them in another format. There was no compilation, extraction, or programming required. And, the superior court made a factual finding that the burden imposed by the request was not more than "the regular expected burden." JA 621.

Second, the use of the word "extraction," in section 6253.9(b), which is the sole basis for Hayward's position charging labor costs for redaction of exempt information, does not appear in isolation. All three terms ("compilation, extraction, [and] programming") in section 6253.9(b)(2) are interrelated to signify complex, non-routine processes, that transform machine readable data into a tangible record or format. When words in a statute, such as these, share a common purpose, their meaning may be determined from the series of words associated together. *See Commission on Peace Officer Standards & Training v. Superior Court*, 42 Cal. 4th at 294*; People v. Prunty* (2015) 62 Cal.4th 69, 73 (applying the noscitur a sociis canon of construction—implying that a word literally "is known by its associates."); *Grafton Partners v. Superior Court* (2005) 36 Cal. 4th 944, 960. In this sense, the word "extraction" takes its meaning "from

the company it keeps." *People v. Drennan* (2000) 84 Cal. App. 4th 1349, 1355.

The *Commission on Peace Officer Standards & Training* opinion illustrates the point. In that case, the Court applied Gov. Code section 6254(k) of the Public Records Act, which incorporates privileges and confidentiality required by other statutes. It interpreted the statutory terms "employment history" to determine what was exempt from disclosure under Pen. Code section 832.7 and 832.8, subd. (a), pertaining to the confidentiality of peace office "personnel records." The Court did not interpret the terms "employment history" in isolation, but looked instead to the surrounding language of section 832.8 for meaning. 42 Cal. 4th at 294.[10]

Looking to the text of section 6253.9(b)(2), the question is: "extraction" for what purpose? The statutory language plainly says that charging the costs in excess of the costs of duplication is only permitted when "[t]he request would require data compilation, extraction, or programming *to produce the record*." Gov. Code section 6253.9(b)(2)(emphasis added). Charging for production, not

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[10] The term "employment history" is used in the context of "Personal data, including marital status, family members, educational and employment history, home addresses, or similar information." Pen. Code section 832.8(a). The Court noted that this type of information does not arise out of current employment and is generally considered sensitive and confidential. *Id*.

reduction, of the record is supported by the text of section 6253.9(b)(2).

The term "extraction" is used in the context of language addressing "the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record." The key words, here, are "construct" and "produce." Gov. Code section 6253.9(b). An agency can charge for the cost of extraction, i.e. pulling information out, when the extraction constructs a record or it produces a record. The agency cannot charge when it removes information and therefore does not construct or produce a record, that is, when the original record is maintained.

The language of the text says that the agency may only charge when "The request would require . . . extraction, . . . to produce the record." When Hayward produced the redacted videos in this case it did not generate a record that never existed in that format, it simply reproduced the videos with the exempt portions deleted. It rendered the videos in the exact same MP4 format so that they could be viewed by the Lawyers Guild or any other person. See Deposition of Adam Perez, November 9, 2015, JA 130.[11]

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[11] Q: Were the videos produced from the Property and Evidence Bureau in MP4 format?
A. They were, yes.
Q. And the audio was in MP3?
A. After I extracted the audio from the video,

(continued...)

Third, section 6253.9(b) addresses electronic data ("[t]he request would require *data* compilation, extraction, or programming") (emphasis added). Data is plainly different from an electronic *record*. The Legislature intended to allow additional charges when the request requires pulling data out of an electronic database in order to generate a record. Data is bits of information; a record is "a writing" in tangible form, including a video recording. See Gov. Code section 6252(g) (a writing, includes a "recording upon any tangible thing any form of communication or representation").

The Legislature underscored the distinction between data and records in other sections of the Public Records Act. Section 6253(c), which was added by the same legislation as section 6253.9(b), sets a ten day deadline for responding to a request for records. Stats 2000, ch. 982, sec. 1 (Assem. Bill No. 2799 [hereafter AB 2799]); California Bill Analysis, Senate Floor, 1999-2000 Regular Session, AB 2799 (July 6, 2000). However, in "unusual circumstances," the time may be extended an additional fourteen days.

One of the few "unusual circumstances" listed is "[t]he need to compile *data*, to write programming language or a computer program,

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[11](...continued)

yes, and·used the MP3.

Q. It was all packaged back together and then through Windows Movie Maker in the MP4 format?

A. Correct.

Id. at 130. "It started [sic] MP4 and was converted back to an MP4. Correct." *Id.* at 106.

or to construct a computer report to *extract data*." Gov. Code section 6253(c)(4) (emphasis added). In other words, a search for "records" is different from compilation, programming or extraction of "data" to generate a record or records that are subject to disclosure. *See* Gov. Code section 6253(b). The language shows that compilation, programming, and extraction of data is viewed as "unusual" and potentially burdensome. Given the number of exemptions in the Public Records Act, redaction is not unusual at all, but rather a relatively routine part of the disclosure process. Therefore, the Legislature allowed more time to produce the resulting records, if necessary, for compilation, programming, or extraction of data.[12]

Fourth, Hayward and the Court of Appeal equated the terms "extraction" and "redaction" (segregating out exempt information from non-exempt information). But these critical terms have established meanings that are different.

In 1999 *Black's Law Dictionary* defined "redaction" as "1. The careful editing (of a document), esp. to remove confidential

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[12] Hayward never asserted the need to compile data, write a program, or to construct a computer report to extract data as a reason to extend the initial ten day response time required by Gov. Code section 6253(c)(4). If this had been the reason, the Act requires it to have given this reason in writing. Gov. Code section 6253(c) ("the time limit prescribed in this section may be extended by *written notice* by the head of the agency or his or her designee to the person making the request, *setting forth the reasons for the extension* and the date on which a determination is expected to be dispatched.") (emphasis added).

references or offensive material. 2. A revised or edited document." Garner, Black's Law Dictionary (Seventh Ed. 1999), p. 1281. "Redaction" is a legal term of art which was well known in 2000 when section 6253.9(b) was added to the Public Records Act. *See* e.g., *People v. Fletcher* (1996) 13 Cal.4th 451, 464; *Poway Unified School Dist. v. Superior Court (Copley Press)* (1998) 62 Cal.App.4th 1496, 1506 (In a Public Records Act case "the District has the power to address privacy concerns by redacting released materials.").[13] Moreover, the Legislature has continued to use the term redaction when it means to permit agencies to delete confidential information from otherwise disclosable records. The Legislature has not used the term extraction to mean deletion. *See* Gov. Code section 6254.4.5(b)(2), added by Assem. Bill 459 (2017-2018 Reg. Session) (clarifying that confidential information in police audio and video recordings may be protected by "redacting the recording to obscure images showing intimate body parts and personally identifying characteristics of the victim or by distorting portions of the recording containing the victim's voice, provided that the redaction does not prevent a viewer from being able to fully and accurately perceive the events captured on the recording."); Gov. Code section 6254(f)(4)(B)(i)[eff. July 2019), added by Stats. 2018, ch. 960 (2017-2018 Reg. Session (Assem. Bill No. 748) (allowing that police

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[13] A Westlaw search of reported California opinions issued prior to 2000 shows 117 cases that use the terms "redact" or "redaction" as a legal term.

agencies "may use redaction technology, including blurring or distorting images or audio, to obscure those specific portions of the recording that protect" privacy interests.). And*, see* section 6254(f)(4)(B)(ii) which also uses the terms "redacted" and "redaction" in the context of keeping specified information confidential.

The Legislature additionally used the terms "redact" and "redaction" in the context of "photographic, audio, and video evidence" pertaining to specified police incidents. Pen. Code sections 832.7(b)(2), 832.7(b)(5), and 832.7(b)(6), added by Stats. 2018, ch. 988 (2017-2018 Reg. Session) (Sen. Bill No. 1421). The Legislature could have used the term "extract" or "extraction" in any of the recent statutes addressing disclosure of police videos, but it chose not to do so because the term extraction clearly has a different meaning than redaction.

In 2000, when section 6253.9 was enacted, the Legislature chose the term extraction. It is true, as the Court of Appeal noted, that "extract" "ordinarily means remove or take something out." Slip Opinion at 9. But that is only the starting point for determining the meaning in the context of section 6253.9(b)(2). The issue, as we have said, is what is done with the extract? Is it removed forever? Or is it used to "construct" or "produce" something else?

An extract is something taken out of a large set of information, such as an extract from a book, or an extract from a legal opinion, in

order to stand by itself. Merriam-Webster Dict ["'- Noun. 1 : a selection from a writing or discourse : excerpt."][14]

For example, one says "he or she extracted a credit card from a wallet," not "he or she redacted a credit card from a wallet." One speaks of extracting information out of something larger, such as creating or producing an excerpt. We speak of a confession being extracted from a suspect or the essence of a flower extracted to produce perfume. An extraction is used to create, construct, or produce; a redaction, on the other hand, is something that results in reduction.

The Legislature's use of the terms extract and extraction in dozens of other statutes also supports this distinction between extraction and redaction. *See, e.g.*, Bus. & Prof. Code section 3640(c)(1) ("extracts of food" "botanicals and their extracts"); Comm. Code section 9320(d) ("A buyer in ordinary course of business buying oil, gas, or other minerals . . . after extraction takes free of an interest arising out of an encumbrance."); Corp. Code section 1601(b) ("the right of inspection includes the right to copy and make extracts"); Ed. Code section 17510 (lease for "extraction and taking of gas not associated with oil"); Fish & G. Code section 8075 (permits "to take

[14] Merriam Webster Dictionary On-Line <https://www.merriam-webster.com/dictionary/extract> (accessed Nov. 15, 2019).

and use fish by a reduction or extraction process"); Water Code section 12879.2(e) ("facilities for groundwater extraction').[15]

The language of section 6253.9(b) is consistent with this usage. The agency may only charge when "The request would require . . . extraction, . . .to produce the record." When Hayward produced the redacted videos in this case it did not generate a record consisting of extractions; it simply copied the videos with segregable portions deleted.

The terms "compilation" and "extraction" had been used by the court of appeal in a 1993 in a case that involved pulling non-exempt information out of an otherwise exempt record. In *County of Los Angeles v. Superior Court (Kusar)* (1993) 18 Cal.App.4th 588, the requestor sought records pertaining to all arrests made by two deputy sheriffs. The court held that Gov. Code section 6254(f) – generally

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[15] California Rule of Court, Rule 10.500, "Public Access to Judicial Administrative Records," uses the term "extraction" in the context of electronic records. It includes an explanatory clause that states that a requester must pay "direct costs of producing a record" when *data* is produced in record form that would not ordinarily be required by the Rule. Rule 10.500(i)(2)(B) allows such charges, when "[p]roducing the requested record would require *data* compilation or extraction, or any associated programming that the judicial branch entity is not required to perform under this rule but has agreed to perform in response to the request." (Emphasis added.)

known as the law enforcement investigatory records exemption[16] – broadly exempted the arrest records from disclosure. *Id.* at 599. The court noted that section 6254(f) "does not authorize the release of 'records' and 'files' containing the information sought ..., but only of 'information' extracted from the records." *Id.* at 601. By statute the county could only charge the cost of duplication of the information actually produced. The court observed that "[t]his is a restriction which is both reasonable and appropriate where the mandatory disclosure is limited to current records of contemporaneous activity, but totally unreasonable and inappropriate where both generation and compilation of information from historical archives is required." *Id.*[17] Stated differently, the court suggested – years before section 6253.9(b) was enacted – that generation, compilation, and the process of extraction might justify more than charging costs of duplication.

Kusar had used the term "extracted" prior to the enactment in section 6253.9(b), in the context of pulling something out of an otherwise exempt record. In using the terms for extraction and compilation, the court said nothing about redacting out exempt information from an otherwise non-exempt record or file. It is

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[16] *See Williams v. Superior Court* (1993) 5 Cal.4th 337, 348.

[17] The substantive holding in *Kusar* was overruled by *Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 232-233 in light of later amendments to Gov. Code section 6254(f).

reasonable to assume the Legislature used the term "extract" in the same manner.

Finally, the Act requires that non-exempt portions of records must be disclosed to a requestor. Gov. Code section 6253(a). The Legislature used the language "reasonably segregable portion of a record," to describe the non-exempt part of the record that must be disclosed. *Id.* There is no distinction in the Act between segregable portions of written records and segregable portions of electronic records. If information is not exempt, and segregable, it must be disclosed.

Section 6253.9(b)(2), allowing additional charges for data compilation, extraction, and programming of electronic records must therefore refer to something other than "segregation" of exempt and non-exempt information found in a record. When the Legislature uses different terms in a statute, "it is presumed that different meanings are intended." *Las Virgenes Mun. Wat. Dist. v. Dorgelo* (1984) 154 Cal.App.3d 481, 486. *See Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 565. If the Legislature had intended "extraction" to mean "segregation" with respect to electronic records, it would have used the Public Records Act's statutory term "segregation." It did not.

Had the Legislature used the term segregation in section 6253.9(b), then the process described by section 6253(a) (the segregation requirement) and 6253.9(b)(2) (the provision allowing additional processing charges) would be consistent. Instead, the

Legislature used different terms with different meanings. "It is a well recognized principle of statutory construction that when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded." *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 725; *Songstad v. Superior Court* (2001) 93 Cal.App.4th 1202, 1208-09 ("The use of a term in a statute addressing a subject, and omitting that term and using a different term in a similar statute addressing a related subject, shows a different meaning was intended in the two statutes.").

If the Legislature had intended section 6253.9(b) to equate extraction with the process of redaction it would have said so with far more clarity.[18]

[18] The Supreme Court of Wisconsin reached a similar conclusion in interpreting its Public Records Law to prohibit charges for redaction of computer aided dispatch records sought by news reporters. *Milwaukee Journal Sentinel v. City of Milwaukee* (2012) 341 Wis. 2d 607, 623-624, 815 N.W.2d 367, 375-376. The Court also observed that "[i]ncreasing the costs of public records requests for a requester [by allowing charges for redactions] may inhibit access to public records and, in some instances, render the records inaccessible."

IV. *The California Constitution Compels a Narrow Construction of Section 6253.9(b)(2), Which Promotes Access to Electronic Records*

The Court of Appeal found the text of Gov. Code section 6253.9(b)(2) ambiguous as to the question whether the Legislature has permitted agencies to require requesters to bear the cost of redacting electronic records. If there is an ambiguity, Proposition 59, which added Article I, Sec. 3(b) to the California Constitution, resolves any ambiguity: "To the extent [a] standard is ambiguous, the PRA must be construed in 'whichever way will further the people's right of *access.*'" *Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 292 (emphasis added), quoting *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1190. This constitutional rule of construction, was reaffirmed in *Sierra Club v. Superior Court*, 57 Cal.4th at 166 ("to the extent that legislative intent is ambiguous, the California Constitution requires us to 'broadly construe[ ]' the PRA to the extent 'it furthers the people's right of access' and to 'narrowly construe[ ]' the PRA to the extent 'it limits the right of access.' (Cal. Const., art. I, section 3, subd. (b)(2).)").

This Court has repeatedly and emphatically explained that Article I, Sec. 3(b)(2) must be applied to resolve ambiguities, unless the resulting construction would be implausible in light of all other indicia of statutory meaning, a situation which is not present in this

case.[19] This Court has described the application of the constitutional provision to be "imperative." *American Civil Liberties Union Foundation v. Superior Court,* 3 Cal. 5th at 1039 (describing the "constitutional imperative to construe CPRA in a manner that furthers disclosure"); *City of San Jose v. Superior Court,* 2 Cal.5th at 617 ("constitutional imperative").

While the Court of Appeal did include art. I, sec. 3(b)(2) in its introductory list of interpretive tools (Slip Opinion 6-7), it did not apply the constitutional imperative in the course of its statutory analysis. Rather, after determining that the statute is ambiguous, the Court turned to "extrinsic sources such as the legislative history (Slip Opinion at 10), completely disregarding the constitutional imperative. *Sierra Club v. Superior Court* illustrates the deficiency in the Court of Appeal's analysis. In the *Sierra Club* opinion this Court carefully delineated the rules of statutory interpretation. It noted, as did the Court of Appeal, that if the statutory language permits more than one reasonable interpretation, courts may consider "'other aids, such as the statute's purpose, legislative history and public policy.'" *Id*. at 166. However, this Court did not stop there:

> In this case, our usual approach to statutory construction is supplemented by a rule of interpretation that is specific to the case before us. In 2004, California voters approved Proposition 59, which amended the state constitution to provide a right of access to public records.

Id.

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[19] *Compare Ardon v. City of Los Angeles,* 62 Cal.4th at 1190.

The Court went on to summarize the provisions of Proposition 59, including the constitutional mandate to construe statutes "broadly if it furthers the people's right of access, and narrowly construed if it limits the right of access." But the Court did not just recite this rule in its discussion of interpretive principles. Unlike the Court of Appeal, it went on to apply the "interpretive rule" of Article 1, sec. 3(b)(2) to the facts of the case. *Sierra Club* at 175-76. It held:

> "To the extent that the term 'computer mapping system' is ambiguous, the constitutional canon requires us to interpret it in way that maximizes the public's access to information unless the Legislature has *expressly* provided to the contrary. (citation omitted) (emphasis by the court)….Our holding simply construes the terms of section 6254.9 in light of the constitutional mandate that a statute will be narrowly construed if it limits the right of access." Cal. Const. Art 1, sec 3(b)(2)

In the *City of San Jose* case, this Court applied the constitutional imperative to the facts of the case: "The City's narrow reading of CPRA's local agency definition is inconsistent with the constitutional directive of broad interpretation." *Id*. at 620. Also, the importance of the constitutional mandate to this Court's holding in the recent *American Civil Liberties Union Foundation* opinion is manifest: "In light of our constitutional obligation to broadly construe the CPRA in a manner that furthers the people's right of access to the conduct of governmental operations, we disagree with the trial court and the Court of Appeal that the APLR scan data at issue here are

subject to sec. 6254(f)'s exemption for records of investigation." *Id.* at 1037.

Had the Court of Appeal properly applied the constitutional imperative, it would have given section 6253.9(b) a narrow interpretation, instead of relying on a faulty reading of legislative history.

V. *As this Court Previously Recognized, the Legislative History of Section 6253.9(b)(2) Does Not Support the City's Position or the Court of Appeal's Interpretation*

The primary purpose of the legislation adding Gov. Code section 6253.9 to the Public Records Act is to "'to ensure quicker, more useful access to public records.'"*Sierra Club v. Superior Court*, 57 Cal.4th at 174, quoting from Assem. Com. on Governmental Organization, Analysis of AB 2799 (1999–2000 Reg. Sess.) as introduced Feb. 28, 2000, p. 2.[20]

This Court examined the legislative history of AB 2799 in the *Sierra Club* opinion.[21] It found that the legislative history did *not*

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[20] The entire legislative history is part of the record filed in the Court of Appeal in this case. The Court of Appeal took judicial notice at the City's request.

[21] The *Sierra Club* case addressed the issue whether electronic records in a GIS format were public records within the meaning of section 6254.9(a) of the Public Records Act, which excludes computer software. 57 Cal.4th at 165. However, in addition of the legislative history of that statute, the Court separately reviewed and discussed the legislative history of section 6253.9(b) to "help resolve

(continued...)

address some agencies' concerns about the cost of redacting electronic records. In its analysis of the history, this Court said:

> [Some] agencies expressed concern that because the bill would require electronic disclosure of "massive databases," it would require significant amounts of staff time to redact nondisclosable information and would increase the risk of unintentional release of nondisclosable information when compared with nonelectronic production. (Assem. Com. on Governmental Organization, Analysis of Assem. Bill 2799 (1999–2000 Reg. Sess.) as amended Apr. 27, 2000, pp. 2–3.) *The Legislature does not appear to have adopted any amendments in response to this concern, and documents in the Governor's Chaptered Bill File suggest that these concerns remained in effect through the final enrolled bill.* (See, e.g., Dept. of Information & Technology, Enrolled Bill Rep. on Assem. Bill 2799 (1999–2000 Reg.Sess.) Sept. 25, 2000, p. 2.).

Sierra Club v. Superior Court, 57 Cal.4th at 174-175 (emphasis added).

The *Sierra Club* analysis does not discuss the issue of who bears the cost of redaction. But the analysis certainly says that the history of AB 2799 does not provide a basis to infer that the language of section 6253.9(b)(2), with respect to compilation, extraction, and computer programming, covers the cost of redacting electronic records.

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[21](...continued)
the matter[]" because it covers electronic records. *Id*. at 174.

But despite this Court's previous finding that AB 2799 did not address concerns about the cost of redacting electronic records, the Court of Appeal held that the legislative history provided a definitive answer to the ambiguity it found in the statutory language.[22] Its holding is founded on some indications of opposition to AB 2799 on the ground that it would make redaction of electronic records "time consuming and costly" for agencies. The court then reasoned that because "most" opposition was eventually withdrawn, the Legislature as a whole must have amended the statutory language to address all previous opposition. Slip Opinion at 10-13.

The heart of the Court of Appeal's holding relies on the bill author's various statements, statements from outside interested parties, and enrolled bill reports. But there is nothing to support the inference that these documents may have been read and considered by the Legislature as a body. "[T]he statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation." *Quintano v. Mercury Casualty* Co. (1995) 11 Cal.4th 1049, 1062. *See Quelimane Co. v. Stewart Title Guar. Co.* (1998) 19 Cal. 4th 26, 46, fn. 9 (statements admissible if "it is reasonable to infer that all members of the Legislature considered them when voting on the

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[22] The Court of Appeal dismissed this Court's analysis in a footnote, finding that the Lawyers Guild's reliance was misplaced. Slip Opinion at 14, fn. 10.

proposed statute.") "If the views of particular legislators are not admissible for this purpose, then letters written to those legislators in the attempt to influence those views must also be disregarded." *Quintano* at 1062, fn.5.

Letters to individual legislators, including an author, do not show legislative intent. *Altaville Drug Store, Inc. v. Employment Dev. Dep't* (1988) 44 Cal. 3d 231, 238.[23] Further, "it is not reasonable to infer that enrolled bill reports prepared by the executive branch for the Governor were ever read by the Legislature." *McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1161–1162, fn. 3. As this Court recently reiterated "we do not consider the motives or understandings of individual legislators who voted for a statute when attempting to construe it. (*Ross v. RagingWire Telecommunications, Inc*. (2008) 42 Cal.4th 920, 931, 70 Cal.Rptr.3d 382, 174 P.3d 200.) This is true even when the legislator who authored the bill purports to offer an opinion. This rule exists because there is " ' "no guarantee ... that those who supported [the] proposal shared [the author's] view of its compass." ' " (*Id*. at p. 931, 70 Cal.Rptr.3d 382, 174 P.3d 200, quoting *California Teachers Assn. v. San Diego Community College Dist*. (1981) 28 Cal.3d 692, 700, 170 Cal.Rptr. 817, 621 P.2d 856.) A contrary rule would allow an individual legislator to characterize an enactment in ways he or she might have preferred or intended but for which there

[23] The Court of Appeal quoted from letters from the San Bernardino Sheriff's Department and the County of Los Angeles. Slip Opinion at 12, fn. 8.

was not sufficient legislative support." *California Bldg. Indus. Ass'n v. State Water Res. Control Bd.* (2018) 4 Cal. 5th 1032, 1042–43. The same is true of letters from outside parties. Their letters cannot authoritatively characterize the meaning of legislation.

The Court of Appeal's logic might be persuasive if it was reflected in a committee report, a report of legislative counsel, or in another form of report to the Legislature on the whole. Instead, it is reflected in statements of the author, lobbyists' statements, and enrolled reports prepared after the Legislature voted on the final bill. It ignores the reality of negotiation. Sponsors and objectors obtained some of what they wanted, but not necessarily all of what they sought. Reading an amendment to a bill to mean the objectors obtained exactly what they wanted, without regard to the language of the amendment, is unwarranted.

The Court of Appeal cited to a letter from the California Newspaper Publishers Association (Slip Opinion at 12), for the proposition that extra effort burdens are covered by section 6253.9. But the California Newspaper Publishers did not vote on the bill. Likewise, the Court of Appeal's reference to a letter from the California Association of Clerks and Election Officials (Slip Opinion at 12), stating that that organization supported the final bill because an amendment addressed the costs of redaction, is nothing more than this organization's interpretation of the bill's language. The organization is not the Legislature or a court.

Nothing in the Court of Appeal's analysis of the legislative history shows that the Legislature meant to allow an agency to charge costs of redacting an existing record. In fact, as this Court recognized in the *Sierra Club* opinion there is nothing the legislative history that shows that the legislation was amended to addresses redaction and the burden of disclosing existing electronic records.

Accordingly, as this Court previously noted, the only relevant message that comes from the history of the legislation is an important one: AB 2799 was designed to increase access to electronic records, not to restrict access. *Sierra Club* v. *Superior Court*, 57 Cal.4th at 174.[24]

VI. *If Any Remaining Uncertainty Exists, Then the Practical Consequences of A Decision Allowing Agencies to Charge for Redacting Public Records Favor a Narrow Construction of Section 6253(b)*

If there is any remaining uncertainty, then consideration must be given to the consequences that will flow from a particular interpretation. *Commission on Peace Officer Standards & Training v. Superior Court*, 42 Cal.4th at 290; *Dyna-Med, Inc. v. Fair Employment & Hous. Com*. (1987) 43 Cal. 3d 1379, 1387. *See*

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[24] The Senate Judiciary Committee added the language concerning charges for electronic records. See AB 2799, as amended in the Senate June 22, 2000, Appellant's Request for Judicial Notice at pdf index pp. 19-20. The bill analysis says that the purpose was to make electronic records easily available in order to mitigate the cost of production of paper copies. Sen. Judiciary Com., Bill Analysis, Assem. Bill No. 2799 (1999-2000 Reg. Session), June 27, 2000. JA 193; Appellant's Request for Judicial Notice at pdf index p. 182.

Jameson v. Desta (2018) 5 Cal. 5th 594 (recognizing the legal consequence of a litigant's inability to afford a private court reporter in a civil case). This includes recognition "that the CPRA should be interpreted in light of modern technological realities." *American Civil Liberties Union Foundation v. Superior Court*, 3 Cal. 5th at 1041. Inasmuch as government recordkeeping has changed and police technology has advanced over the past several decades, these changes and advances call for examination of the provision for costs of electronic records in light of the practical consequences.

A. *The Court of Appeal's Interpretation Limits Access to Electronic Records to Those Who Can Afford to Pay the Labor Costs of Government Employees*

The Court of Appeal's resolution of this case has broad implications that directly affect public access to all electronic records far beyond police videos. The impact of the Court of Appeal's decision seriously undermines the core purposes of the Public Records Act. Every time that a requester receives a cost bill for the redaction of electronic records that he or she cannot afford, that means that the requester and the public are deprived of access to records that are not exempt and that belong in the public arena.

In this case the videos were redacted to delete information pertaining to medical injuries and information pertaining to police tactics. But there are many possible reasons why videos may be redacted in the future. Police agencies are obligated to produce "any reasonably segregable" part of a video "after deletion of the portion exempt by law." Gov. Code section 6253(a). In the police context this

may include deletion of portions that would invade an individuals' right to privacy, which are exempt pursuant to Gov. Code section 6254(c)), ongoing investigations, which are exempt by section 6254(f); images of undercover officers, section 6254(f), images of victims of human trafficking, Gov. Code section 6245(f)(1)(B), and juveniles taken into custody, Gov. Code section 6254(k), Welf. & Inst. Code section 827.9. In the context of other types of electronic records, portions may be deleted that cover, for example, private "personnel, medical or similar" information, exempt by Gov. Code section 6254(c), or preliminary drafts and information received in confidence, exempt by section 6254(d). Information related to an agency's deliberative process, or the work product of its attorneys, may be exempted by section 6254(p). The list of potentially segregable exempt information that may be redacted out of otherwise disclosable electronic records is countless. *See* Gov. Code section 6255(a) ("the catch-all exemption"[25]).

But every time an agency decides to redact something out of an electronic record, as permitted by the Court of Appeal, the agency could require the requester to pay the price. Depending on the number of redactions, the number and length of the electronic records, and the process used to make the redactions, and the efficiency of the technician, the labor cost could make access to obtain the reasonably

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[25] *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal. 4th 319, 337.

segregable portions completely unaffordable for the requester, including government accountability associations, the media, and members of the public. The price could easily and quickly become so excessive that it would undermine the entire purpose of the Public Records Act, and AB 2799, to make electronic public records readily available to "every person in this state." Gov. Code section 6250.

"The Public Records Act does not differentiate among those who seek access to public information." *State Bd. of Equalization v. Superior Court*, 10 Cal.App.4th at 1197. "Access to information concerning the conduct of the people's business is a fundamental and necessary right of every person," whether they are rich or poor, whether they are large companies working to enhance their businesses, or government watchdogs. Gov. Code section 6250. Information must be made available regardless of the identity of the requestor. *City of Santa Clara v. Superior Court* (2009) 170 Cal.App. 4th 1301, 1324; *State Board of Equalization v. Superior Court*, 10 Cal.App. 4th at 1190; c*f. Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 656 ("public officials may not favor one citizen with disclosures denied to another.").

Requesters will not even be able to challenge the legal basis of electronic redactions if they cannot afford access to the unredacted portions in order to see whether the redactions would be worth the legal fight, and whether the redactions appear to be supported by law in the context of the record as a whole. Without payment of the agency charges for the redactions, the requester will in many

instances be unable to assess whether the redactions were proper, or exaggerated, or whether (as in this case) the redactions were not worth challenging.

Inequality of financial means should not be the basis for denial of *constitutional and fundamental rights*, including access to electronic information. Those who cannot afford to assert their rights, will lose their rights. *See Jameson v. Desta*, *supra*. (inability to afford a private court reporter in a civil case); *cf. Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 285 ("the statutory scheme before us is all the more invidious because its practical effect is to deny to poor women the right of choice guaranteed to the rich.").

An interpretation of section 6253.9(b)(2) that permits an agency to charge labor costs whenever it segregates exempt information from existing non-exempt electronic records, would increase the cost of access to public records merely because they are kept in electronic form. Excess charges will become routine. The Public Records Act would be undermined by the price of access to electronic records.

Agencies will impose "redaction" fees that will put police videos and other electronic records out of the reach of all but well heeled commercial interests and news media with funds available to pay for their right of access. The charge will discourage and impede access to critical government information in areas where the public

interest is greatest, such as learning how police wield their vast powers, including the authority to use force.[26]

The two cost bills in this case, totaling $3,248.47, would be beyond the budgets of most individuals and many community and grassroots organizations. Inequality of financial means can not be the basis for denial of constitutional and fundamental rights, including access to electronic information.

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[26] The Court of Appeal decision has already had its impact in creating a new and very expensive hurdle to public access to law enforcement records because police agencies are now charging substantial "redaction" costs to requesters.

See, e.g., Cowan, The New York Times, "**Why is the San Diego Sheriff's Department Is Charging $350,000 for Records?"** (February 15, 2019) <https://www.nytimes.com/2019/02/15/us/california-today-san-diego-sheriffs-department-records.html?em_pos=large&emc=edit_ca_20190215&nl=california-today&nlid=404429edit_ca_20190215&ref=headline&te=1> (as of February 15, 2019); Mento, KPBS News, February 13, 2019, "**Sheriff's Department Says It'll Cost $354K To Provide Police Records**" <https://www.kpbs.org/news/2019/feb/13/sheriffs-department-say-itll-cost-least-354k-provi/> (as of February 14, 2019); Fernandez, KTVU News, February 14, 2019, "**Burlingame Charging More than $3,000 to Fulfill Public Records Request over Fired Officer**" <http://www.ktvu.com/news/burlingame-charging-more-than-3-000-to-fulfill-public-records-request-over-fired-officer> (as of February 14, 2019); San Roman, Orange County Weekly, February 1, 2019, "**Anaheim to OC Weekly: Pay $17,920 For Police Shooting Audio, Video Files**" <https://ocweekly.com/anaheim-to-oc-weekly-pay-17920-for-police-shooting-audio-video-files/> (as of February 14, 2019).

B. *The Court of Appeal's Interpretation Will Lead to Absurd Results Because Paper Copies of Records Will Not Incur A Redaction Charge, While the Same Records in Electronic Form Will Incur a Redaction Charge*

Prior to the Court of Appeal's decision in this case, it has been settled law that with respect to paper records "an agency may be forced to bear a tangible burden in complying with the Act absent legislative direction to the contrary." *Connell v. Superior Court* (1997) 56 Cal.App. 4th 601, 615. *See e.g.*, *CBS Broadcasting Inc. v. Superior Court* (2001) 91 Cal.App.4th 892, 909 ($43,000 cost of compiling an accurate list of names was not "a valid reason to proscribe disclosure of the identity of such individuals.").

Paper records may well require substantial labor with respect to their disclosure, with or without redactions. As for paper records, the government agency is expressly limited to charging only for the direct costs of duplicating the records. Gov. Code section 6253(b). Taking exempt information from a record kept in PDF electronic format, for example,[27] would incur labor costs, exceeding the direct cost of duplication, to produce the record. This would mean that the records kept by public agencies in electronic PDF or word processing format

[27] Adobe Acrobat, the Adobe Pdf conversion application, includes a redaction tool. See JA 506-539. An electronic file in word processing format, such as Microsoft Word, can be redacted with a redaction tool or by simply identifying information to redact and replacing it with a black mark, similar to a marking pen.

that require redaction would cost more than printed paper copies of the same records redacted in the old-fashioned way with a black felt marking pen. *Compare* Gov. Code section 6253(b) (limiting copies to the direct cost of duplication or a statutory fee, regardless of redactions).

Because the paper version of a redacted government record would be accessible to a requester for the cost of duplicating the paper, without charge for the cost of redaction, while the same record in electronic form would bear a price tag that puts it out of reach, the result of the Court of Appeal's interpretation of the statute "would lead to arbitrary and anomalous results." *Commission on Peace Officer Standards & Training v. Superior Court*, 42 Cal. 4th at 290. *See Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1291-1292 (looking to the effect of an interpretation in order to avoid unreasonable results).

The price charged for production of the record would be arbitrarily dependent on the circumstance of its production or the format in which it was requested. See Gov. Code section 6253.9(a) ("any agency that has information that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format *when requested by any person*" (emphasis added)).[28]

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[28] At best, the agency can inform the requester the information is available in both paper and electronic format, but the rational

(continued...)

The result would be absurd.[29] Conceivably, a requester could be sent a bill for redacted electronic records and then, instead of paying the bill, request records in another format, such as paper, in which the bill would be solely limited to the cost of duplication under Gov. Code section 6253(b). "When a statute is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity and the other consisting of sound sense and wise policy, the former should be

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[28](...continued)
choice, given the price of redaction, would be to request a paper format. See Gov. Code section 6253.9(d) ("If the request is for information in other than electronic format, and the information also is in electronic format, the agency may inform the requester that the information is available in electronic format."). The agency could not force the requester to take the record only in electronic format. See Gov. Code section 6253.9(e) ("Nothing in this section shall be construed to permit an agency to make information available only in an electronic format.").

[29] Under the Court of Appeal's interpretation, a request for film, such as a motion picture in the old Super 8 format, would not incur costs beyond the cost of duplication, even if portions needed to be redacted. Analog film is not an electronic record. [Super 8 is a film format invented in 1965. See L. Kelly, *Digital Review*, "What Makes 'Super 8' So Super, And Why Is Kodak Bringing It Back?", January 2016 <https://www.digitalrev.com/article/kodak-super-8-revival> (as of February 7, 2019).]

The redacted Super 8 frames could be redacted with a black marker or simply cut out of the film strip, which would then be spliced with tape or another adhesive. However, if the same images were captured on electronic video the agency could charge for the redactions due to the Court of Appeal's interpretation of section 6253.9(b)(2).

rejected and the latter adopted." *People v. Ventura Refining Co.* (1928) 204 Cal. 286, 292.

This result would also set back government efficiency as requesters would seek nonelectronic records to avoid paying the cost of redaction, putting a resulting strain on government resources.

If a request for an electronic record becomes excessive then the government agency is not without a remedy. It may invoke the catch-all balancing test of Gov. Code section 6255(a) to demonstrate that the public interest in nondisclosure clearly outweighs the interest in disclosure due to the labor necessary. *Connell v. Superior Court,* 56 Cal.App.4th at 615-616*; American Civil Liberties Union Foundation of Northern California v. Deukmejian* (1982) 32 Ca1.3d 440, 452-453 and fn. 13. *See Fredericks v. Superior Court*, 233 Cal.App. 4th at 238.

VII. Hayward Failed to Justify All the Time Charged

Hayward argued in the Court of Appeal that it is entitled to charge the Lawyers Guild for the time spent redacting exempt information from the original body worn video footage. But even if Hayward's interpretation of Gov. Code section 6253.9(b)(2) had been correct, Hayward employee Nataniel Roush did not redact any records. JA 32-69. See Appellants' Opening Brief in the Court of Appeal at 9 ("Roush did not review any videos to determine if they included exempt or nondisclosable material as this is not his 'area of expertise.'"). Roush simply searched for, and located, the records in the database previously uploaded to Evidence.com by the Hayward

police. *Id.* Hayward charged for Roush's time, but did not assert any justification for the charge. JA 154.

CONCLUSION

Access to electronic information is necessary and fundamental. The Court should construe Gov. Code section 6253.9(b)(2) in a manner that precludes agencies from charging for the cost of redacting records that already exist in tangible form.

The judgment of the Court of Appeal should be reversed with directions to affirm the judgment of the Superior Court.

Dated: February 15, 2019

Respectfully submitted,

by: Amitai Schwartz

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National Lawyers Guild,
San Francisco Bay Area Chapter

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c))

The text of the foregoing Petitioner's Opening Brief on the Merits consists of 12,971 words as counted by the Corel WordPerfect X8 word-processing program used to generate the brief.

Dated: February 15, 2019

/s/Amitai Schwartz
Amitai Schwartz
Attorney for Respondent

PROOF OF SERVICE BY MAIL

Re: *National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward, et al.*, California Supreme Court, No. S252445

I, Amitai Schwartz, declare that I am over 18 years of age, and not a party to the within cause; my business address is 2000 Powell Street, Suite 1286, Emeryville, CA 94608. I served a true copy of the

Petitioner's Opening Brief on the Merits

on the following, by placing a copy in an envelope addressed to the party listed below, which envelope was then sealed by me and deposited in United States Mail, postage prepaid at Emeryville, California, on February 15, 2019.

Michael Lawson, City Attorney
Justin Nishioka, Deputy City Attorney
City of Hayward
777 B St
Hayward, CA 94541

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

Executed on February 15, 2019.

Amitai Schwartz
Amitai Schwartz