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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

SAN FRANCISCO POLICE OFFICERS' ASSOCIATION,

Petitioner/Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO; and DOES 1 through 20, inclusive,

Defendants.

ACLU OF NORTHERN CALIFORNIA, REFUGIO AND ELVIRA NIETO, JOSE MANUEL GÓNGORA PAT, FATHER RICHARD SMITH, AND MARTHA TORRES,

Intervenors.

Case No. CPF-19-516573

INTERVENORS' OPPOSITION TO PLAINTIFF'S PETITION FOR PEREMPTORY WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES

[Filed concurrently with Declarations of Intervenors and Request for Judicial Notice]

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I. INTRODUCTION

In its Petition for Peremptory Writ of Mandate, Plaintiff reprises a spurious claim that police unions across the state have made: S.B. 1421 cannot be applied to records created or conduct occurring before January 1, 2019. Unsurprisingly, every court to have considered the merits of this argument has rejected it.[1] For example, in an exhaustive 32-page order, Judge Charles S. Treat of the Contra Costa Superior Court found this argument "legally unmeritorious." RJN Ex. A at 21.[2] ("The Court is holding—not taking a tentative view, or predicting, but holding—that the Unions' contention is legally unmeritorious, and the Unions are not entitled to an injunction or any other form of relief . . . [T]he Court is concluding as a matter of law that the Unions have no probability of success on the merits.") Notwithstanding a steady accumulation of rulings rejecting their claim, Plaintiff advances no new arguments that those prior courts failed to consider or even attempts to explain why those courts erred and this Court should come to a contrary conclusion. Indeed, as explained *infra*, this Petition should likewise be denied and the stay this Court has issued should be dissolved.

A. S.B. 1421 Background

For decades, California had the most restrictive laws in the country on public disclosure of records concerning police killings and misconduct. Family members such as Intervenors Refugio and Elvira Nieto, Jose Góngora Pat and Martha Torres, and community members such as Intervenor Father Richard Smith, were kept in the dark about how and why their loved ones were killed, and the

[1] This includes trial courts in Orange County (RJN, Ex. G), Los Angeles (RJN Exs. C and D), Santa Barbara (RJN Ex. F), San Diego (RJN Ex. H), Contra Costa (RJN, Ex. A.) and San Bernardino (RJN, Ex. I). Two Courts of Appeal have rejected the Unions' request for supersedeas relief --- including the First District Court of Appeal, which on March 12, 2019, denied the Contra Costa Unions' request for supersedeas relief in a written order. *See fn. 2, infra;* Decl. Kathleen Guneratne ISO RJN, ¶¶ 3, 6. The California Supreme Court denied the Los Angeles PPL Union's request for review of denial of supersedeas. Decl. Guneratne at ¶ 6. Additionally, the Attorney General has publicly rejected the Unions' interpretation. RJN, Ex. E, 82-83. A judge in Ventura County, by contrast, issued a preliminary injunction without apparently reaching the merits. Cf. RJN, Ex. B, 54.

[2] Intervenors here reference the Feb. 8, 2019 *Decision Denying Preliminary Injunctions* issued in *Walnut Creek Police Officers' Ass'n v. City of Walnut Creek*, No. N19-0109 (together with Nos. N19-0097, N19-0166, N19-0167, N19-0169, N19-0170), (Super. Ct. Contra Costa County, 2019), petn. for writ of supersedeas denied by written order, No. A156477. RJN, Ex. A, 10-41.

public wondered how and why abusive and dishonest officers could continue to victimize the community.

To restore public trust in law enforcement and promote public safety, the Legislature passed "The Right to Know Act," S.B. 1421, Chapter 988 (Cal. 2018) ("S.B. 1421"). Effective Jan. 1, 2019, the Act guarantees disclosure of critical information concerning police use of serious force and sustained findings of sexual assault or dishonesty. As the Legislature found, "[c]oncealing crucial public safety matters such as officer violations of civilians' rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety…The public has a strong, compelling interest in law enforcement transparency because it is essential to having a just and democratic society." S.B. 1421 §§ 1(b), 4.

Plaintiffs claim that S.B. 1421 cannot be applied to records created or conduct occurring before Jan. 1, 2019. This is wrong. S.B. 1421 operates prospectively to require agencies to disclose records maintained at the time of the request, not retroactively to punish officers. The statute has not "…changed the legal consequences of past conduct by imposing new or different liabilities based on such conduct." *Robertson v. Rodriguez,* 36 Cal. App. 4th 347, 356 (1995); *see also Tapia v. Superior Court*, 53 Cal. 3d 282, 288 (1991) ("A statute is not made retroactive merely because it draws upon facts existing prior to its enactment."). Although the records were created prior to 2019, the event necessary to trigger application of the new law – a request for records maintained by an agency – necessarily occurs after the law's effective date. The "critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date." *People v. Grant*, 20 Cal. 4th 150, 157 (1999). Thus, in a public-records suit, "the relevant event for assessing retroactivity . . . is the disclosure of the withheld data, which is a potential future event, not a past, completed event." *City of Chicago v. U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms,* 423 F.3d 777, 783 (7th Cir. 2005).[3]

[3] Federal judicial interpretations of FOIA may be used in construing the PRA, which is modeled on its federal counterpart. *See, e.g., City of San Jose v. Superior Court*, 74 Cal. App. 4th 1008, 1016 (1999); *Am. Civil Liberties Union of N. California v. Superior Court*, 202 Cal. App. 4th 55, 79, (2011) (citations omitted).

B. Intervenors' Interest in Prompt Disclosure of These Records

Intervenors know that transparency is desperately needed to rebuild trust between police and their communities. Intervenors understand first-hand the pain of being kept in the dark about how and why their loved ones were killed. For example, when San Francisco Police killed Alex Nieto on March 21, 2014 in Bernal Heights Park in a hail of 59 bullets, his mother and father, Intervenors Refugio and Elvira Nieto, had to wait ten months before police would even release the names of the officers who killed him. *See* Decl. Elvira Nieto at ¶7.

Intervenor Martha Torres has been left wondering every day why San Francisco Police officers, many of whom she heard were rookies, fired ***ninety-nine rounds*** at her nineteen-year-old brother in 2018, who was hiding in the trunk of a car, and why no one has been prosecuted for his killing. She and her family have been demanding answers from the District Attorney, Chief of Police and Department of Police Accountability, but so far has gotten "no clarity as to how events unfolded that day." *See* Decl. Martha Torres at ¶¶ 2-6.

Intervenor Jose Góngora Pat wants the public to see the police investigation into the San Francisco police killing of his brother in 2016, whom eyewitnesses say was "sitting on the ground, bothering no one, minding his own business, when the police rushed at him and began striking him with bean bag rounds followed by seven live rounds." *See* Decl. Jose Góngora Pat at ¶¶ 3-5.

Finally, Intervenor Father Smith has been seeking answers since two plain-clothed San Francisco police officers killed Amilcar Perez Lopez in 2016, not far from his church. He wants to know whether prior accusations of violence against these police officers are true. He sought release of a redacted version of the District Attorney's initial investigative report into Amilcar's killing but the prosecutor refused. Four years ago he filed a complaint with the Department of Police Accountability, but he has received no word as to the status of that investigation. *See* Decl. Father Smith at ¶¶ 9-12.

Intervenors requested public records of S.B. 1421 materials in January 2019 and anxiously await disclosure. Both the courts and the Legislature have recognized that "the *timeliness* of disclosure often is of crucial importance in actions brought under the Public Records Act." *Wilder v. Superior Court*, 66 Cal. App. 4th 77, 84 (1998). The Legislature has therefore mandated that public-

records cases be resolved quickly both in the trial and appellate courts. A superior court hearing a PRA case must set the "times for responsive pleadings and for hearings in these proceedings … with the object of securing a decision as to these matters at the earliest possible time." Gov't Code § 6258.

Disclosure of this information is time-sensitive for families impacted by police violence. Intervenors such as Jose Góngora Pat, the Nietos and Father Smith have been waiting years for the public to learn about the quality of the investigation the San Francisco Police Department did into its officers who killed their loved ones. These records now belong the public and it is time to stop the obstruction of their disclosure. For this reason, Intervenors ask that the Court dismiss this Petition and immediately dissolve the stay.

II. ARGUMENT

"Openness in government is essential to the functioning of a democracy." *Int'l Fed'n of Prof'l & Tech. Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 319, 328 (2007). The California Public Records Act ("PRA") guarantees that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person." Govt. Code § 6250. The public interest in information covered by S.B. 1421 is compelling. *Long Beach Police Officers Ass'n. v. City of Long Beach*, 59 Cal. 4th 59, 74 (2014) ("*Long Beach*") (noting that in "officer-involved shootings, the public's interest in the conduct of its peace officers is particularly great because such shootings often lead to severe injury or death"); *Comm'n on Peace Officer Standards & Training v. Superior Court*, 42 Cal. 4th 278, 299 (2007) ("*POST*") ("Peace 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.") (citation and quotation marks omitted).

Under the PRA, the public has long had the right to obtain personnel records concerning investigations of public employees that reflected serious public concern. *BRV, Inc. v. Superior Court*, 143 Cal. App. 4th 742, 758 (2006); *Bakersfield City Sch. Dist. v. Superior Court*, 118 Cal. App. 4th 1041, 1046-47 (2004); *AFSCME v. Regents*, 80 Cal. App. 3d 913, 918 (1978). Before S.B. 1421, however, the *Pitchess* statutes gave peace officers a special immunity against such disclosure, although "the public has a far greater interest in the qualifications and conduct of law enforcement

officers" than those of many other public employees. *POST*, 42 Cal. 4th at 297. With S.B. 1421, the Legislature removed that immunity for critical records in which the public has a compelling interest. Nothing argued by Plaintiff justifies depriving the public of the full range of records covered by S.B. 1421.

A. S.B. 1421 Applies Prospectively to Records Currently Maintained by Agencies.

Courts look to a statute's language in its full context to determine its purpose and effect. *Sierra Club v. Superior Court*, 57 Cal. 4th 157, 165 (2013). Taken in context with the PRA, the plain language of S.B. 1421 applies prospectively to require disclosure of all covered records maintained by agencies regardless of when those records were created or when the underlying conduct occurred.

Subject to specified limitations, S.B. 1421 mandates that certain "records ***maintained*** by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act." Penal Code § 832.7(b)(1) (emphasis added). It mandates disclosure of "any" and "all" covered records:

> (A) A record relating to the report, investigation, or findings of ***any*** of the following:
>
> (i) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.
>
> (ii) An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury.
>
> (B)(i) ***Any*** record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public….
>
> (C) ***Any*** record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer … directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer ….

Penal Code § 832.7(b)(1)(A)-(C) (emphases added). Furthermore, the statute specifies that "[r]ecords that shall be released pursuant to this subdivision include ***all*** investigative reports" and similar records, and it defines the relevant "personnel records" as "***any*** file maintained under that individual's name." Penal Code §§ 832.7(b)(2), 832.8(a) (emphasis added).

The Legislature's direction to disclose "any" and "all" records covered by S.B. 1421 demonstrates clear intent that the statute shall apply to all such records in an agency's possession or control. *Delaney v. Superior Court,* 50 Cal. 3d 785, 798 (1990) ("[T]he word 'any' means without limit and no matter what kind."); *In re E.A.*, 24 Cal. App. 5th 648, 661 (2018) ("[T]he ordinary meaning of the word 'any' is clear, and its use in a statute unambiguously reflects a legislative intent for that statute to have a broad application.") (citation and quotation marks omitted); *Joshua D. v. Superior Court,* 157 Cal. App. 4th 549, 558 (2007) ("[B]ecause the word 'all' means 'all' and not 'some[,]' [t]he Legislature's chosen term leaves no room for judicial construction."). The plain language of S.B. 1421 thus applies prospectively to all covered records in existence as of its effective date. *See, e.g., In re E.J.,* 47 Cal. 4th 1258, 1272 (2010) (holding "plain language" of law requiring "any person" subject to lifetime registration to comply with new parole condition "*prospectively* applied" to those "released from custody on parole" after statute's effective date even if they were convicted prior to enactment).[4]

The context of S.B. 1421 reinforces that conclusion. "Statutes must be construed with reference to the system of laws of which they are a part." *People v. Hernandez*, 46 Cal. 3d 194, 201 (1988). S.B. 1421 mandates disclosure of covered records "***pursuant to the California Public Records Act***." Penal Code § 832.7(b)(1) (emphasis added). The PRA requires that an "agency, ***upon a request*** for a copy of records, shall … determine whether the request … seeks copies of disclosable public records ***in the possession of the agency***" and shall disclose all requested records not expressly exempt from disclosure. Govt. Code § 6253(c) (emphasis added). Furthermore, the

[4] The statutory omission of any temporal limit on the scope of disclosures is particularly telling because the Legislature has shown that it knows how to exclude pre-existing records when it eliminates an exemption to the PRA. For example, when it expanded access to the Governor's records in 1975, it simultaneously narrowed the definition of a public record so as to exclude records created before that year. *See* Stats. 1975, ch. 1246, § 3, p. 3209 (amending Gov. Code § 6252(e) so that "'Public records' in the custody of, or maintained by, the Governor's office means any writing prepared on or after January 6, 1975"); *Times Mirror Co. v. Super. Ct.*, 53 Cal. 3d 1325, 1336-37 (1991) (discussing expansion of access to Governor's records). The failure to include any similar limitation—with respect to time of record preparation in S.B. 1421—shows that the Legislature did not intend to restrict access to pre-existing records. *See 1550 Laurel Owner's Ass'n v. Appellate Div. of Super. Ct.*, 28 Cal. App. 5th 1146, 1154–55 (2018).

PRA defines "public records"—which includes the records covered by S.B. 1421—as any records "prepared, ***owned***, used, or ***retained*** by" an agency, with no applicable limit based upon when the records were created or when the underlying conduct occurred. Govt. Code § 6252(e) (emphasis added).

Under the PRA's plain language, the triggers for PRA coverage are when a request is pending and whether records are in the agency's possession or control. Accordingly, the PRA applies to all of an agency's "existing records" whenever they were created or whenever the underlying conduct occurred. *Sander v. Superior Court,* 26 Cal. App. 5th 651, 665 (2018). By mandating disclosure pursuant to the PRA of "any" and "all" covered records, S.B. 1421 clearly requires production of all such records regardless of when they were created or when the conduct occurred.

The legislative history confirms the Legislature understood S.B. 1421 would require disclosure of all covered records currently maintained by agencies. The Senate Public Safety Committee explained that a police union objected to the bill because it would mean that "records are available for public inspection irrespective of whether or not they occurred prior to the effective date of SB 1421."[5] Sen. Comm. on Pub. Safety, Analysis of S.B. 1421 at 16 (April 17, 2018). The Legislature knew of the objection yet did not restrict the law to records created or conduct occurring after January 1, 2019. The Legislature thus intended the law to apply to all covered records. When the Legislature is warned that a bill may have a particular effect but enacts the law without making changes to avoid that effect, it intends for the law to have that effect. *Brown v. Superior Court*, 63 Cal. 4th 335, 349 (2016) (where Legislature was "warned" that law might create short time period but "did not respond by expanding the time allowed," it intended that short period); *Lucent Techs.,*

[5] The objection was not a mere "lobbyists' letter," because it was included in official committee reports, which are "appropriate sources from which legislative intent may be ascertained." *Mt. Hawley Ins. Co. v. Lopez*, 215 Cal. App. 4th 1385, 1401 (2013). In addition, the Senate recently endorsed a letter from the author of S.B. 1421 confirming that it "applies to all disclosable records whether or not they existed prior to the date the statute went into effect," consistent with "the standard practice for public records legislation." Senate Daily Journal, 2019-2020 Regular Session, at 125 (Jan. 31, 2019); *cf. In re Marriage of Bouquet*, 16 Cal. 3d 583, 588 (1976) (considering letter written by author of legislation and endorsed by Senate to determine legislative intent).

Inc. v. Bd. of Equalization, 241 Cal. App. 4th 19, 39 (2015) (adopting broad view of law in part because "the statutes' legislative history indicates that the Board warned the Legislature of how broadly the statutes could be construed, and the Legislature enacted the statutes anyway"); *cf. Albertson v. Superior Court*, 25 Cal. 4th 796, 806-07 (2001) (relying on statement in opposition letter incorporated into Assembly Committee on Public Safety's analysis that revision to SVPA would allow disclosure of confidential medical conversations to conclude that Legislature intended to permit such disclosure).

Taken together, the language, context, and legislative history of S.B. 1421 are consistent with the settled principle that in a public records case, "the relevant event" for determining whether a statutory amendment applies to particular documents "is the disclosure of the withheld data," not the creation of the documents or occurrence of the underlying conduct. *City of Chicago v. U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms,* 423 F.3d 777, 783 (7th Cir. 2005). As multiple courts have held, when public records laws or amendments thereto require disclosure of "all" records or disclosure of "records" without reference to date, they apply prospectively to all covered records regardless of when the records were created, or the underlying conduct occurred.[6]

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[6] *State ex rel. Beacon Journal Pub. Co. v. Univ. of Akron,* 64 Ohio St. 2d 392, 396 (1980) (rejecting argument that applying public records act amendment making law enforcement records public to records created before its effective date was retroactive, and holding that Ohio's public record law "speaks in terms of 'all public records' and makes no distinction for those records compiled prior to its effective date" and "[s]ince the statute merely deals with record disclosure . . . only a prospective duty is imposed upon those maintaining public records."); *Haw. Org. of Police Officers v. Soc'y of Prof.'l Journalists*, 927 P.2d 386, 398-99 (Haw. 1996) ("No distinction is made, nor is there any exemption, based upon the date that the record was created" and therefore the law "applies prospectively requiring disclosure of records maintained by State agencies regardless of when the records came into existence."); *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976) (holding "it is clear that the [Texas public record] Act is intended to apply to all records kept by governmental bodies, whether acquired before or after the Act's effective date. No exception is made for records which were considered confidential prior to [enactment]" and rejecting argument that previous confidentiality created vested right); *Fla. Hosp. Waterman, Inc. v. Buster,* 984 So. 2d 478, 487 (Fla. 2008) ("'The use of the word 'any' to define the scope of discoverable records … and the broad definition of 'patient' … expresses a clear intent that the records subject to disclosure include those created prior to the effective date of the amendment'"); *Cellular S., Inc. v. BellSouth Telecomm, LLC*, 214 So. 3d 208, 216 (Miss. 2017) (recognizing that even if records were confidential prior to public record act amendments, the records "belong to the public" and must (cont'd)

In this case, "the last act or event necessary to trigger application" of S.B. 1421 is an agency's review of Intervenors' pending requests for covered records, which occurred "after the statute's effective date." *People v. Grant*, 20 Cal. 4th 150, 157 (1999). Therefore, S.B. 1421 does not apply "retroactively." Instead, it applies prospectively to any request pending after its effective date and requires agencies to disclose covered records regardless of when they were created, or the underlying conduct occurred.

B. Applying S.B. 1421 to Pre-Existing Records Is Not Retroactive Because It Does Not Change the Legal Consequences of Past Conduct.

Applying S.B. 1421 to existing records does not mean the law is being applied retroactively, because doing so will not "change[] the legal consequences of past conduct by imposing new or different liabilities based upon such conduct." *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223, 231 (2006). "A statute is retroactive if it substantially changes the legal effect of past events. A statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment." *Kizer v. Hanna*, 48 Cal. 3d 1, 7 (1989) (citations omitted); *see also Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, 86 Cal. App. 4th 534, 550 (2001) ("A statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment [citation], or upsets expectations based on prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events *completed* before its enactment.").

S.B. 1421 does not "increase a party's liability for past conduct." *Myers v. Philip Morris Companies, Inc.*, 28 Cal. 4th 828, 839 (2002). "Nothing [an officer] might lawfully do before

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be disclosed); *Mollick v. Twp. of Worcester*, 32 A.3d 859, 870 (Pa. Commw. Ct. 2011) (rejecting argument that production of records prior to the enactment of open records law was "retroactive" application and holding that "the applicability of the [Law] is not specifically limited to public records created after its . . . effective date, but only to requests for information made after the effective date," thus it "applies to information . . . even if created prior to that date."); *Biden v. Camden-Wyom. Sewer & Water Auth.* No. 11C-08-004 (RBY), 2012 WL 5431035, at *5 (Del. Super. Ct. Nov. 7, 2012) (rejecting claim that absence of applicable time period in public records act amendment rendered application to pre-enactment records "retroactive," and holding that in the absence of time frame "the duty to produce records under [Delaware's] FOIA applies to any and all applicable records existing on the date the request was made.").

[S.B.1421] is unlawful now." *Californians for Disability Rights*, 39 Cal. 4th at 232. Instead, S.B. 1421 merely guarantees the public a right to know what police officers have done in certain circumstances where the public's interest in disclosure is at its zenith. By prospectively requiring disclosure of records after its effective date, it properly governs "the conduct of proceedings following the law's enactment without changing the legal consequences of past conduct." *Id.* at 232.

S.B. 1421 does not "operate retroactively" merely because it requires disclosure of records about conduct that "came into existence prior to its enactment." *Kizer*, 48 Cal. 3d at 7. A leading case provides a clear analogy. As the California Supreme Court held, a statute designed "to prevent future discrimination in connection with the rental or sale of publicly assisted housing" presented "no problem of retroactivity" when applied "to housing which began receiving public assistance prior to the effective date of the act." *Burks v. Poppy Const. Co.*, 57 Cal. 2d 463, 474 (1962). The statute did not "penalize past conduct" but only imposed "sanctions upon conduct occurring after the effective date of the statute." *Id.* As the court confirmed, "a statute is not retroactive merely because it draws upon antecedent facts for its operation," and therefore it did not "operate retroactively merely because it may apply in some instances to housing which was receiving public assistance when the statute was enacted." *Id.* Similarly, S.B. 1421 does not penalize past conduct. Instead, it requires disclosure of all covered records in an agency's possession. Similarly, S.B. 1421 applies to requests made after its effective date and does not apply retroactively merely because it requires disclosure of covered records about conduct occurring before that time. *See People v. McClinton*, 29 Cal. App. 5th 738, 753 (2018) (statute permitting discovery of "treatment records" was "applied prospectively, not retroactively" to require disclosure of records generated before effective date).

Here, S.B. 1421 deprives officers of no rights against discipline or termination. Instead, it merely requires public disclosure of certain information. The agency's possession of records is merely an antecedent fact that determines whether the agency has a duty to disclose covered records. It does not convert that prospective duty into a "retroactive" law.

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C. Applying S.B. 1421 to Pre-Existing Records Is Not Retroactive Because It Impinges No "Vested Right" To Privacy

Applying S.B. 1421 to pre-existing records is not retroactive because it does not infringe on any "vested" right to privacy. While the Legislature previously afforded a measure of confidentiality to officer personnel records, that flowed from statutes that the Legislature was free to amend at any time. What the Legislature giveth, it can take away. Public employees have no perpetual right to keep records of official misconduct hidden from public view. Nor is there any respectable constitutional argument to the contrary.[7]

1. There Can Be No Right to Perpetual Application of a Superseded Statute

It has long been settled that such a "remedy dependent on a statute falls with a repeal of the statute" because these purely "statutory remedies are pursued with full realization that the Legislature may abolish the right to recover at any time." *Callet v. Alioto*, 210 Cal. 65, 67-68 (1930); *see also Plotkin v. Sajahtera, Inc*., 106 Cal. App. 4th 953, 962-63 (2003) (recognizing that "[c]ommon law rights were classified as 'vested'; rights created by statute were not" and there is no "vested right" to "right of action" that is purely "a creature of statute"). Indeed, in a case about disclosure of official information, the court noted "[i]t is presumed that a statutory scheme is not intended to create private contractual or vested rights" against such disclosure and held "there is no deprivation of a vested right" arising from amendment of the relevant statute to require disclosure. *Doe v. Cal. Dep't. of Justice,* 173 Cal. App. 4th 1095, 1106-07 (2009) (citation and quotation marks omitted). While the *Pitchess* statutes previously conferred certain rights on officers to object to disclosure, *City of Hemet v. Superior Court,* 37 Cal. App. 4th 1411, 1431 (1995), the Legislature was free to modify those rights at any time. Therefore, any previous right to object to disclosure of records covered by S.B. 1421 derived solely from the previous *Pitchess* statutes and has been lost with their amendment. Although cases such as *City of Hemet* stated the law in effect at the time, that law has been changed.

[7] The new law protects officers who have legitimate privacy interests by requiring redaction of parts of records that contain certain sensitive or confidential information. Penal Code §§ 832.7(b)(5)(C), (b)(6).

The California Supreme Court upheld this principle in holding that a statute controlling the availability of official records did not create a vested right. At one point, a statute allowed "courts, on petition, to order the destruction of all records of arrests or convictions for possession of marijuana, held by any court or state or local agency." *Younger v. Superior Court*, 21 Cal. 3d 102, 108 (1978). After an individual obtained such an order, "the Legislature changed the law," removing "authorization for destruction of marijuana arrest or conviction records by court order." *Id.* Recognizing that "the proceeding is wholly dependent on statute," because there was no "common law right" to destruction of the records and "the power to grant or withhold such a remedy rests exclusively with the Legislature," the court vacated the order based on the principle that "all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time." *Id.* at 109.

Similarly, peace officers have no common law right against disclosure of records concerning their official conduct. Their previous right to object to disclosure of certain personnel records was grounded solely in statutes that the Legislature was free to modify at any time, as it did in S.B. 1421.

2. The California Constitution Does Not Enumerate A Right to Privacy in Peace Officer Personnel File Information, As Even A Cursory Review of The Text Shows

The California Constitution creates no right to perpetual concealment of records covered by S.B. 1421. Public employees have no right to conceal comparable records. *BRV*, 143 Cal. App. 4th at 758; *Bakersfield City Sch. Dist.*, 118 Cal. App. 4th at 1046-47; *AFSCME*, 80 Cal. App. 3d at 918. A police officer has no "constitutional right to privacy" against disclosure of personnel records in circumstances allowed by statute when "the statutory scheme makes it clear that the right to privacy in the records is limited" by allowing "disclosure of the records in a variety of investigations" and "for purposes of litigation." *Michael v. Gates*, 38 Cal. App. 4th 737, 745 (1995). In other words, an officer may not reasonably rely on an alleged right to conceal official records where the law already permits disclosure in some circumstances. Given that such records could have been disclosed under the previous statutes in the context of litigation, and that *Pitchess* statutes never applied in federal litigation, *Kelly v. City of San Jose*, 114 F.R.D. 653, 655-56 (N.D. Cal. 1987), there is no perpetual right to conceal those records.

Moreover, Article I, section 3 of the California Constitution does not enumerate a right to privacy in peace officer personnel file information, as even a cursory review of the text shows. In relevant part, it directs that statutes granting public access should be interpreted broadly and those limiting access should be interpreted narrowly, with the reservation that this does not "affect the construction of any statute . . . to the extent that it . . .govern[s] discovery or disclosure of information concerning the official performance . . . of a peace officer." Cal. Const. art. I, § 3(b)(3). That provision is merely an aid for statutory interpretation; it does not create any freestanding constitutional right. It does not say that the Legislature cannot amend the law. Moreover, in view of S.B. 1421's unambiguous articulation of what records must be produced in response to a PRA request, a court needs no interpretive aid. Plaintiff is therefore utterly and obviously wrong to suggest that proper application of S.B. 1421 "directly contradicts this Constitutional mandate." MPA at 9. It does not. Of course, by not disputing that S.B. 1421 applies to records related to conduct after Jan. 1, 2019, Plaintiff implicitly concedes that no constitutional right to privacy prevents release of those records.

For similar reasons, other cases have held that statutory amendments requiring disclosure of information apply to preexisting records, notwithstanding allegations prior confidentiality provisions. The California Supreme Court recently rejected a retroactivity argument founded on an individual's assertion that revoking the confidentiality of doctor-patient communications would be an "unfair change [to] the rules after he had already participated in treatment." *People v. Superior Court (Smith)*, 6 Cal. 5th 457, 466 (2018). The court rejected defendant's claimed reliance on the "complete[] confidential[ity]" of these records, recognizing that even though prior law prohibited prosecutors from accessing treatment records not included in a shared evaluation, the possibility that some records could be disclosed within that evaluation thus provided "no assurance that any individual communication in connection with his treatment would be protected from disclosure"—essentially holding defendant's reliance unreasonable. *Id*. at 466; *see also Doe*, 173 Cal. App. 4th at 1106 (fear of disclosure of information from official records "does not constitute justifiable reliance" on previous version of statute allowing government to withhold information); *see Landau v. Superior Court,* G056050, 4th DCA, Div. 3 (2019) (rejecting retroactivity argument in context of

disclosure of confidential records). Therefore, any purported reliance on the confidentiality of personnel records was unreasonable as a matter of law.

3. S.B. 1421 Covers Records to Which the *Pitchess* Statutes Never Applied

Police officers have no right to privacy in records that were never subject to the *Pitchess*[8] statutes. Those statutes only applied to "personnel records" as specifically defined by Penal Code § 832.8(a). They never applied to other records covered by S.B. 1421, such as incident reports and non-disciplinary investigations. *Long Beach*, 59 Cal. 4th at 71 ("[M]any records routinely maintained by law enforcement agencies are not personnel records. For example, the information contained in the initial incident reports of an on-duty shooting are typically not 'personnel records' as that term is defined in Penal Code section 832.8."); *Pasadena Police Officers Ass'n. v. Superior Court*, 240 Cal. App. 4th 268, 285, 290 (2015) (noting *Pitchess* statutes applied only to "personnel records" and holding "portions of the Report, including the CID investigation, which do not constitute or relate to employee appraisal" were not covered by *Pitchess* statutes). While non-*Pitchess* records covered by S.B. 1421 might previously have been exempt from disclosure under the PRA, for example as investigative records, Govt. Code § 6254(f); *Haynie v. Superior Court*, 26 Cal. 4th 1061, 1071 (2001), the right to assert such exemptions belonged to the agency, not the officer, and the agency was free to waive it. *Am. Civil Liberties Union Found. v. Deukmejian*, 32 Cal. 3d 440, 458 (1982) ("Even where the Public Records Act permits nondisclosure, it does not require withholding the requested information.").

S.B 1421 requires disclosure "pursuant to the California Public Records Act" of any and all "records maintained by any state or local agency" that relate to "discharge of a firearm at a person by a peace officer or custodial officer" or "the use of force by a peace officer or custodial officer against a person [that] resulted in death, or in great bodily injury," not merely "personnel records" on those subjects. Penal Code § 832.7(b)(1). For covered incidents, it requires disclosure of "all investigative reports; photographic, audio, and video evidence; transcripts or recordings of interviews; autopsy reports; all materials compiled and presented for review to the district attorney or to any person or

[8] *Pitchess v. Superior Court,* 11 Cal. 3d. 531 (1974).

body charged with determining whether to file criminal charges against an officer in connection with an incident." *Id.* Many of those documents were never "personnel records," Penal Code § 832.8(a), and agencies were always free to disclose such records if they wished. Therefore, officers have no right to conceal these kinds of records now that S.B. 1421 requires disclosure pursuant to the PRA.

CONCLUSION

After decades of secrecy, S.B. 1421 finally affords some measure of transparency into police killings and misconduct. Families of those slain by police, such as Alex Nieto, Luis Góngora Pat, Jesus Adolfo Delgado Duarte and Amilcar Perez Lopez, and so many others, have been waiting years for answers. They do not deserve to wait even weeks more. For the foregoing reasons, Intervenors respectfully request that the Court deny the Petition for Writ of Mandate and immediately dissolve the temporary stay.

Dated: March 15, 2019

Respectfully submitted

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