

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

DEPARTMENT 97E

HON. KENT HAMLIN, JUDGE

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AMERICAN CIVIL LIBERTIES)
UNION OF SOUTHERN CALIFORNIA,)
a non-profit corporation,)

Petitioner,)

v.)

Case No. 24CECG01635

CITY OF FRESNO,)

Respondent.)

Fresno, California

January 8, 2025

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

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1 SESSIONS

2 WEDNESDAY, January 8, 2025

3 AFTERNOON SESSION

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TRANSCRIPT OF PROCEEDINGS

January 08, 2025

1 FRESNO, CA; WEDNESDAY, JANUARY 8, 2025

2 SESSIONS

3 DEPARTMENT 97E HON. KENT HAMLIN, JUDGE

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5 THE COURT: Thank you, please be seated.

6 All right. We're in session in the American
7 Civil Liberties Union versus City of Fresno. You can
8 state your appearances.

9 MS. HARRIS: Good afternoon, Your Honor. Shayla
10 Harris on behalf of the petitioner, ACLU of Southern
11 California.

12 MR. SAIN: Good afternoon, Your Honor. Tony Sain
13 on behalf of respondent, City of Fresno.

14 THE COURT: All right. Well, first, as I think
15 just a general statement of principle here, I think you
16 would both agree that no judge could give you a ruling
17 from the bench at the conclusion of your arguments
18 today. This is far more complicated than that, and far
19 more detailed analysis is required before I can give any
20 kind of a decision here.

21 For example, I look at the prayer for relief
22 in the petition, and there is absolutely no way I could
23 just recite the language in the prayer. It would give
24 no one any direction. The City of Fresno, at least
25 apparently, believes that everything that they're

1 required to produce has been produced, and the ACLU
2 simply disagrees on a lot of points. And I think
3 there's some very principled arguments one way or the
4 other on much of the items.

5 But if I were to just say -- let me get to
6 the prayer here. All right. You're to immediately
7 disclose all nonexempt requested public records or parts
8 thereof in your possession. You're to produce all
9 disclosable records and reproduce records absent the
10 proper redactions forthwith. It gives you absolutely no
11 direction. And it means nothing. So, obviously, a far
12 more thorough undertaking is required before I can
13 render a decision here.

14 I don't believe this case should have been
15 assigned to a limited civil department that has the
16 calendars that this department has. I surfaced from
17 yesterday's calendar and completed chambers work and
18 went home and found this case on my calendar this
19 morning. And rather than have folks who've flown in
20 from elsewhere and who've prepared for this hearing to
21 just turn around and come back again, when the record
22 reflects that already happened to you once, you came
23 here and Judge Stark was here when Judge Brickey was
24 not, or Commissioner Brickey -- I'm just not going to
25 shrug my shoulders and say, well, I'm only paid

1 part-time, and I'm not going to take it on. I'm happy
2 to take it on. And -- I shouldn't say happy. I'm
3 willing to take it on, but it is going to require a
4 whole lot more inquiry on my part.

5 So let me just highlight for each of you
6 what I think are some of the most important points of
7 contention that I may be able to resolve with some help.
8 And then I'm going to ask if, with respect to some of
9 the redactions, whether there might be a stipulation
10 that the City of Fresno could submit a delta document to
11 me that shows that proposed redactions in the original
12 documents in camera so that I can review it and make an
13 informed decision. Does the redacted material, in fact,
14 warrant redaction in part or in whole?

15 That means that the City of Fresno would
16 communicate the entire file of documents that they
17 located that were arguably responsive to the request but
18 were withheld for reasons that they assert in their
19 responses, which, basically, come down to right of
20 privacy, work product, attorney/client and some other
21 minor points. And so that's something for you to think
22 of as we go forward here.

23 But what I'm going to do when we're done
24 today is I'm going to set the case out for further
25 briefing so that you'll have an opportunity to address

1 what I think are these minor points and these more
2 specific points so that you can have a sense of where I
3 think the issues are.

4 I absolutely -- I could not say -- based on
5 what I've seen by way of argument and what I've seen by
6 way of records disclosed, I could not say without
7 further inquiry, yep, city's given you everything you're
8 entitled to. There's no way. Nor could I say, you need
9 to give them all responsive documents, because certainly
10 some of these privileges do apply and some of these
11 issues can be addressed by redaction and some can only
12 be addressed, perhaps, by withholding of the document in
13 its entirety.

14 So that's where I'm at. This is a
15 complicated bunch of questions here that's going to
16 require some additional briefing, and it's going to
17 require a great deal more investigation and review than
18 I've been able to give it. And I have spent hours here,
19 but, you know, when you've got a 906-page declaration,
20 it's a little hard to just flip on through that. And I
21 didn't want to just come out here and say, well, you
22 know, Brick's not here; come back again. Knowing what
23 he has on his plate here and his lack of experience with
24 these kinds of cases, I think that's unfair to him and
25 each of you.

1 So that's why I'm going to try to eat this
2 elephant one bite at a time, and I'm going to need your
3 help to do that.

4 I'm a little confused about the statement
5 that there was only -- that nothing was provided
6 in 2021. I got eight applications of force in a table
7 listed in 2021. And maybe none of the documents that
8 were provided and redacted formally address those, but
9 there's clearly some applications of force by K-9s in
10 that year. So I'm a little confused as to why, if
11 that's the case, there would be nothing provided with
12 respect to those.

13 I'm just going to give you a laundry list.
14 You're going to get a transcript here, and so am I.
15 But, um, I'm just going to run down the things that I
16 think require further development and further inquiry.

17 I have a note here, only one complaint of
18 K-9 force, March 26th of '21. I'm not sure where I got
19 that. So you can help elucidate that question. Are
20 there events in 2021, nothing provided, and we'll focus
21 more completely on the briefing on why those would be
22 excluded.

23 I see these lists of various items that are
24 PDFs or recordings that are mentioned or listed in
25 reports, but, of course, none of them are provided. So

1 I'm looking at civil liability recording, civil
2 statement, application report, K-9 civil statement, K-9
3 liability statement, body camera footage, use-of-force
4 report. These are all -- I don't know what they are, I
5 don't know what they reveal, and I don't know why they
6 would not be within the scope of what's requested. So I
7 need a definition or understanding of what those various
8 things are, and I think that can be given without
9 disclosing any of their contents or violating any
10 privilege. But I need to have a sense of why this
11 entire block of items, PDFs or recordings, can't be
12 provided.

13 One of the events, I saw the entire list was
14 redacted. The other lists include things like names of
15 officers, I think. One is Escada civil liability, Ochoa
16 civil liability, and, if the concern is privacy, we
17 certainly aren't expecting that we'd be disclosing
18 officers' names. So maybe they're not officers' names,
19 but I'm seeing those disclosed. And yet, on the other
20 hand, I'm seeing some of the reports everything is
21 redacted. It doesn't mention whether there are civil
22 statements, whether there is a UOF report, whether there
23 is a K-9 civil statement, whatever that is. So in order
24 to know whether you can properly withhold those items
25 under some work product or other privilege, I need to

1 know what they are.

2 I want to know what I get from the
3 legislative history. I got this great declaration with,
4 you know, the whole length of legislative history, but,
5 you know, some of the language in this -- these statutes
6 are pretty clear. And you don't resort to analysis of
7 legislative history unless there's something unclear.
8 But I don't know the purpose of that. I don't have an
9 opportunity to grasp what was significant about the
10 legislative history of the senate bill that
11 amended 832.7.

12 But, to me, 832.7 is kind of the -- kind of
13 the center of the dispute. While the plaintiff says it
14 should be read broadly and the intent of that is to make
15 all of this stuff available, the defense -- not
16 plaintiff and defense. I'm sorry. The petitioner
17 believes that it is to be construed broadly in favor of
18 disclosure. Defense -- the respondent believes
19 otherwise. So I guess I'd like a little bit of
20 articulation as to why all that's provided and what the
21 significance is of it and what I should conclude from it
22 or not.

23 And I guess I need -- to me, if the City of
24 Fresno believes that every use-of-force report is
25 protected, because it didn't seem that I saw anything

1 that wasn't either completely redacted, the group of
2 gray boxes that the petitioner talks about, or so
3 redacted that I couldn't make sense of it or get
4 anything from it. And, um, I just -- if that's the
5 position, then I need a better explanation of why these
6 use-of-force reports are protected.

7 Now, it wouldn't be attorney/client
8 privilege necessarily. Perhaps parts of it would be.
9 It may be work product if the use-of-force report is
10 generated for the purpose of, perhaps, anticipated civil
11 litigation. And perhaps that's where we have a little
12 disagreement, is what is this privilege that we're
13 talking about that protects from disclosure for that and
14 for this subject of investigative reports -- or
15 investigatory reports.

16 Certainly, the officers' initial reports
17 from the field are not entirely protected from
18 disclosure, and yet, as I go through, I can't see
19 anything that looks like, "Officer Jones and I came on
20 this location and this guy pulled a gun or he refused to
21 show his hands and I asked" -- I saw one report, I
22 think, like that. And it seems to me there has to be a
23 great deal more that's not protected by privilege that
24 ought to be included in the disclosure. So there's
25 essentially what I'm thinking in that sense, whether

1 something is protected indefinitely if it is indeed
2 investigatory reports.

3 And, you know, I don't think that
4 "investigatory reports" refers only to matters being
5 investigated for possible criminal prosecution. I
6 believe that the purpose of that language is
7 investigatory reports including administrator inquiries
8 where there's a report made in connection with the
9 information available to determine whether an officer,
10 in fact, properly applied force. That would be my
11 impression, but I saw some briefing and argument that
12 suggested that there -- there was disagreement about
13 that.

14 As far as the GBI issue goes, I think that's
15 defined, and I don't know why we wouldn't use the
16 definition for great bodily injury that's in -- that's
17 been used for years in the criminal context, that's
18 defined in the CALCRIM instructions. That, I think, is
19 the GBI, the great bodily injury, we're talking about.
20 It is a different standard than serious bodily injury,
21 and they should not be confused. And it seems that this
22 sticking point of "this ought to be revealed if it
23 involves great bodily injury or death" hasn't been well
24 articulated in what has and hasn't been provided or, at
25 least, not that I've seen to this point. And I --

1 again, I'll confess. I've done what I can with the time
2 I have. But, in any event, I think we need to get with
3 the idea GBI is as defined in the long-established
4 definition of the criminal law. It's more than minor,
5 trivial. It's serious or it's -- not -- I think
6 "serious" is not the word, but it's significant bodily
7 injury. Doesn't have to be, you know, permanently
8 defacing or lead to permanent disability or pain. It's
9 a vague concept, honestly. I've given it to 50 juries,
10 but somehow they all seem to be able to figure it out.
11 And they seem to be able to render a decision that great
12 bodily injury was or wasn't conflicted. So I think
13 that's where we need to stay, but you might otherwise
14 persuade me otherwise.

15 All records in response to Categories 10
16 to 12 or 10 through 13, nondisclosable, I'm unclear how
17 that -- all records would be nondisclosable, and under
18 what theory? Why wouldn't we at least get the officers'
19 original narratives, perhaps, with redactions to protect
20 the privacy of the parties involved, the officers,
21 whatever, but that's a question I'm left with. I have
22 no context at all for what occurred in the redacted
23 reports.

24 It's just, you know, we got a name or an
25 officer's name or something, an address that's partially

1 redacted and then just a big, blank, gray square. And I
2 just have to believe that more can be provided that
3 doesn't run afoul of the officers' privacy rights, the
4 victim's privacy rights, the work product privilege,
5 attorney/client privilege, and otherwise. So these are
6 the areas I'm going to need to understand more fully.

7 Yeah. Some aspects of these reports, I
8 think, can be produced even if the objections of
9 privilege or privacy or work product are warranted. I
10 still think some aspects of some of these reports could
11 be produced, and that might actually involve the delta
12 document I spoke of.

13 I think that, really, the way to handle this
14 is to have you brief it, have me define at the
15 conclusion of that briefing in another hearing whether
16 entire categories of documents are prohibited from
17 disclosure and articulate the reasons, and then, as to
18 those that are not entirely protected but perhaps should
19 be subject to some redaction, then we might get to the
20 subject of the delta document where I could actually see
21 whether redactions are. Because, certainly, the
22 redactions have to be narrowly tailored to only protect
23 those interests, and I don't think just big gray squares
24 meets that test.

25 Yeah. So the question is: How does a right

1 of privacy, for instance, merit withholding an entire
2 report and not just a portion of it? It seems
3 that 832.7(b)(6) is kind of a -- where do we draw the
4 line there and where it stops when these other rights
5 take over, I think, is kind of where the rubber meets
6 the road. And I think there has to be a more thorough
7 balancing of these competing rights before I can give a
8 definitive ruling on the petition.

9 So there you go. I don't know that there's
10 any point in entertaining argument, necessarily, today,
11 but I would certainly give you a right to sketch out a
12 few of these things if you feel you came prepared to
13 answer them. But I think most of it, I would like to
14 set out a date that's a reasonable period of time for
15 you to complete some of your briefing on the subjects
16 and actually -- you know, instead of the string side of
17 cases that say this in five words, I'd like to see a
18 more in-depth analysis of what is or isn't disclosable
19 under 832.7 sub (b) and what is. So there you go.

20 Yes, sir.

21 MR. SAIN: Your Honor, if I may. Tony Sain on
22 behalf of respondent, City of Fresno. There are two
23 preliminary issues that I think the Court might be able
24 to address today on the record, and then I think, if we
25 are given the opportunity, both parties are probably

1 able to address many of these questions, if not all of
2 them, because they were the subject of briefing. So if
3 the Court gives an opportunity, I think we can address
4 this.

5 As to the two preliminary items that I'm
6 speaking out of turn on, but I don't think that they
7 are -- they're basically administrative -- the first is
8 that the Court may want to put on the record that both
9 parties have consented for Your Honor to substitute on
10 this case.

11 THE COURT: Thank you for reminding me. Yeah.
12 Because it says all over the place, "assigned for one
13 purpose." Yes. This case was assigned for one purpose
14 to Commissioner Brickey after it had been previously
15 assigned to Judge Culver Kapetan. And on a previous
16 occasion, I think it was -- was it -- minute order, it
17 was on October 23rd that you were here and Judge -- or
18 Commissioner Brickey wasn't. And Judge Tharpe did what
19 most sane judges who don't have this assignment arguably
20 would have done, which is to say, I can't hear it.

21 But, on the other hand, I knew that you all
22 had already been continued once for that reason, and I
23 knew that at least one of you is coming from well out of
24 the area. The other, perhaps, not exactly around the
25 corner. And so I did want to see if there was any way I

1 could take over the case, and, honestly -- and this is
2 no slight on Daniel Brickey. He is a fine lawyer, and
3 he's going to be a good judge. But I know he's never
4 handled a writ like this, and he doesn't have the time.

5 Yesterday I was in small claims until --
6 well, I had a calendar supposed to conclude by noon.
7 And, you know, it ended at 2:30 when I then prepped for
8 my CMC calendar. And that's just typical of what they
9 do over here, you know. Court trials, we had, what, two
10 scheduled for today and three motion matters that could
11 have taken some time. There's just -- that one cleared
12 up quickly because somebody didn't show and somebody
13 else worked out a deal, but, I mean, the point being
14 that there's just not enough time and energy available
15 for him to devote to the case.

16 So that's the reason I stepped in. And
17 thank you both for agreeing that I could hear it and --
18 or I should say maybe can you reconsider, but I do think
19 that it's better assigned to a judge who can give it the
20 time. And, you know, I have the time as long as we have
21 a briefing schedule and then I have my time. The court
22 can put me in a dark hole somewhere while I do the last
23 bit of research and write a statement of decision. And
24 there's just no way that his calendar affords that. So
25 thank you both for agreeing to have it for today.

1 MR. SAIN: Yes, Your Honor.

2 The second administrative item that I think
3 we can take care of before, if we are permitted to,
4 present some answers to some of the questions you've
5 raised.

6 THE COURT: Sure.

7 MR. SAIN: As I believe the respondent's request
8 for judicial notice was unopposed, so if the Court would
9 like to enter an order to accepting judicial notice of
10 those issues, that would be appropriate.

11 THE COURT: You're talking about the lodging of
12 the legislative history?

13 MR. SAIN: Yes, Your Honor.

14 THE COURT: I mean, whether or not it applies is
15 another subject, and you can argue that the Court ought
16 not get wrapped up in statements made by legislatures if
17 the language of the statute is clear or whatever. But
18 certainly I can take judicial notice of that and receive
19 that.

20 MR. SAIN: Thank you, Your Honor.

21 Then as to a lot of these questions, Your
22 Honor, depending on how you would like to go, but I
23 certainly would like the opportunity to answer a bunch
24 of them because I think that we can.

25 THE COURT: Okay.

1 MR. SAIN: However, I am not petitioner. So I
2 recognize that I probably need to go second. I will
3 defer to my esteemed adversary over here, but if the
4 Court is so willing, I believe that probably all these
5 questions, and certainly the most important ones, we can
6 address here for you today.

7 THE COURT: Well, that would be great. I think in
8 part, just because there was such volume, I didn't have
9 a level of confidence that I was as well prepared as I
10 would have been for this if I was given civil assignment
11 and this were assigned to me. And I could see it
12 coming. And I could spend some time looking at it as
13 opposed to just cramming what I can in three hours. But
14 that may be the case, Counsel, that I might be able to
15 hear argument from both of you and might be able to be a
16 little more clear on why a particular privilege or
17 exception would apply in a given setting.

18 So it is your petition. You can go first.

19 MS. HARRIS: Your Honor, Shayla Harris, again, on
20 behalf of the petitioner, ACLU of Southern California.

21 I also want to acknowledge, I feel like most
22 of Your Honor's questions are probably best addressed to
23 the respondent, but there are some that I certainly can
24 speak to.

25 THE COURT: Okay.

1 MS. HARRIS: I share a lot of the questions and
2 would like to hear respondent's answers to those, so I
3 would also appreciate a chance to hear him speak today.

4 THE COURT: And I will just tell you now, even if
5 y'all just make it just as crystal clear as it can be,
6 I'm not ruling from the bench. I got to give you a
7 statement of decision if I grant, and if I deny I'm
8 going to want to give you a statement of decision as to
9 why I denied it. So...

10 MR. SAIN: And, Your Honor, we're fine coming back
11 for further hearing, but since we're here I thought we
12 might as well do our best.

13 THE COURT: Absolutely. Let's get done what we
14 can because I don't know exactly when I'll be back and
15 when you folks will be available. So let's see what we
16 can learn.

17 MS. HARRIS: Okay. So I will try to, hopefully,
18 crystalize some things.

19 THE BAILIFF: Hold on. Just to let you know,
20 those mics do move. If you want to pull them down to
21 where you -- just for an accurate record.

22 MS. HARRIS: Thank you.

23 THE COURT: I think she's got you pretty clear.
24 You both speak pretty clearly. I've had a lot of courts
25 where a microphone wouldn't make a difference because

1 people articulated so poorly that you couldn't
2 understand them. But I don't think we have that problem
3 today. So go ahead.

4 MS. HARRIS: Thank you, Your Honor.

5 So to summarize, we're here because the City
6 of Fresno is hiding information that the public has a
7 right to see. And no one disputes that the documents
8 requested by the ACLU are public records within the
9 meaning of that term in PRA. The dispute arises over
10 whether any of the PRA's exceptions apply. And Fresno
11 bears the burden of proving that an exemption applies.
12 They have to do that by showing overbalance on the side
13 of confidentiality. So it's their burden. And
14 initially they asserted a range of different exemptions,
15 as Your Honor mentioned, including attorney/client
16 privilege and work product protection. But sort of
17 since the original disclosures, they've kind of honed in
18 on the investigatory records exemption. So I understand
19 that to be the main exemption that they're now relying
20 on to redact these documents or withhold whatever
21 documents have been withheld. And the bulk of the
22 briefing, then, revolved around one of the exceptions to
23 that exemption, which is the exception for records where
24 use of force resulted in great bodily injury.

25 So I would like to speak a little bit

1 about -- I'll get to the great bodily injury discussion,
2 and I think -- and Your Honor mentioned that in
3 introducing the topic. But I also want to speak about
4 the investigatory records exemption more broadly as sort
5 of the initial step.

6 THE COURT: Okay.

7 MS. HARRIS: And our position is that these
8 records are not investigatory records. So that
9 exemption does not apply to them in the first place, and
10 we don't even need to get to the issue of whether any
11 exceptions to that exemption apply because the exemption
12 itself doesn't apply. The records that we're talking
13 about are use-of-force reports and other reports
14 documenting police K-9 fights and the resulting
15 injuries.

16 And these reports are all administrative
17 records that are kept in the regular course of police
18 business. They're used to help police ensure that
19 they're complying with internal policy and that they're
20 complying with state reporting requirements. And they
21 are not investigatory records in the same sense as -- of
22 the investigatory records cited in the briefings and the
23 case law.

24 Those were records about investigations into
25 public officials or internal affairs investigations into

1 police officers' conduct. So these records are not sort
2 of target inquiries into a particular event or a
3 particular breach of the law. These are records that
4 are just generated anytime an officer uses reportable
5 force. So there are a very different nature than the
6 investigatory records -- that the exemption is made to
7 protect.

8 And even if these records could conceivably
9 be included in some type of investigatory, like, record
10 as sort of parts of an investigation, those types of
11 files only become exempt as investigatory when the
12 prospect of enforcement proceedings is concrete and
13 definite. And here Fresno hasn't provided any evidence
14 to us that these reports are related to some concrete
15 and definite enforcement proceedings, for example, like,
16 enforcement proceedings where they're actually are
17 investigating one of the officer's uses of force that's
18 in these reports.

19 THE COURT: Okay.

20 MS. HARRIS: We have no evidence of that. So they
21 haven't carried their burden in that regard to prove
22 that these are investigatory records.

23 THE COURT: Yes. And I'll concede that that's
24 kind of why I scratched my head because I can't even
25 tell what the reports are because of what I got. So go

1 ahead.

2 MS. HARRIS: Yes. So did -- I'm not sure how Your
3 Honor would prefer us to structure the argument.

4 THE COURT: I'm just going to let you go for a
5 while and let him go for a while.

6 MS. HARRIS: Okay. So even if the records are
7 properly exempt as investigatory records, there are
8 still a couple of exceptions to that exemption that
9 would render the narrative information in those records
10 still mandatorily disclosed. So the first exemption is
11 in the Section 7923.610 of the Government Code, which
12 says that notwithstanding the exemption for
13 investigatory records, the factual circumstances
14 surrounding an arrest still need to be disclosed.

15 And, granted, not every one of these uses of
16 force involves an arrest, but many of them do. And
17 that's one of the pieces of information that is still in
18 some of the records, is the information about whether
19 the person who was -- the force was used against was
20 arrested. So for all of those records where there's
21 documentation about the factual circumstances
22 surrounding an arrest, that should still be disclosed
23 because the statute -- the statute carves that out of
24 the exemption and says you still have to disclose this
25 even if it's investigatory record.

1 And Fresno responds to this point in their
2 opposition brief, and their response is to say that they
3 don't have to produce that part of the record because
4 the request did not specifically ask for arrest records.
5 But the PRA doesn't include any condition about
6 requesting arrest records in order to receive this
7 information. The PRA just says if the report or the
8 record is responsive to their request, it has to be
9 produced unless there's an exemption.

10 And here, regarding the factual
11 circumstances surrounding the arrest, there is no
12 exemption, and that information is responsive to our
13 request. So our position is that Fresno needs to
14 produce that information. And that would include sort
15 of the narrative information that Your Honor was
16 mentioning about my partner and I showed up to the
17 scene; the suspect or victim was in this location,
18 et cetera.

19 And then the second exception to the
20 exemption is the great bodily injury exception.
21 That's -- this is what most of the briefing was about.
22 This is the Penal Code 832.7 exception. And, again, I
23 mean, our position is that great bodily injury means
24 great bodily injury, which is defined in the Penal Code.
25 There is a whole body of case law surrounding that term,

1 and we know that dog bites can cause and often do cause
2 very severe injuries.

3 They can tear muscle away from the bone,
4 cause lacerations, cause bruising, swelling, infection,
5 nerve damage, chronic pain. So there's a whole range of
6 injuries that commonly result from dog bites. And our
7 position is not that a dog bite, per se, leads to great
8 bodily injury, but it also doesn't, per se, not cause
9 great bodily injury.

10 And I think Fresno's transgression here is
11 that they've treated dog bites as categorically unable
12 to cause GBI and, therefore, redacted information from
13 all of these records rather than going through the
14 records one by one as the PRA requires and assess was
15 there GBI in this case. If so, that information needs
16 to be disclosed.

17 And as to your points about the prayer for
18 relief, I acknowledge that Fresno has a different
19 conception of what the PRA requires than the ACLU does.
20 So I see your point that that prayer for relief might
21 not help guide further inquiry, but I also think that,
22 with the Court's guidance on what GBI is, that could
23 actually change the way that Fresno would go about
24 conducting a search and producing records. We obviously
25 have different ideas of what that terminology means, and

1 I think Fresno's productions have been pursuant to their
2 standard. And so if the Court can clarify that standard
3 for them, I think that would also benefit the overall
4 effort to produce documents.

5 Now, I guess I'll leave it at that for now.

6 THE COURT: Okay. And I didn't mean to suggest
7 your prayer was defective. I mean, it depends how you
8 plead. You don't get everything that's going to develop
9 in the case, and you can't say, make them provide this
10 and that and the other thing because you don't even know
11 what some of those things are because of their position.
12 So I didn't mean to suggest that there was anything
13 wrong with it, but I think my point was, boy, did that
14 go well. I sure as hell can't do all that no matter
15 what I see because it just doesn't give anybody any
16 direction at all.

17 And that's -- I'd like it to be well-defined
18 in what it is that I think you must or must not produce,
19 and if I decide that there's more that needs to be
20 produced, I would like to really zero in on it and not
21 just say, well, yeah, those objections are not well
22 taken, but give it up. I think there are -- there is a
23 balance here. Some of these items that haven't been
24 produced probably can be produced subject to redaction
25 if that's my decision. So, you know, we'll get to that

1 bridge when we get there.

2 All right. Mr. Sain.

3 MR. SAIN: Thank you, Your Honor.

4 I'd like to boil down Your Honor's questions
5 to three areas, if I may, that I think will greatly aid
6 Your Honor in analyzing both existing briefing and any
7 future briefing.

8 The first point is: Are these investigative
9 records? The second point is: Why does the legislative
10 history matter? The third point is: How should we
11 construe GBI relative to the CPRA?

12 With regard to are these investigatory
13 records, what the ACLU completely neglects to put before
14 this Court is that police K-9s are only used as part of
15 an investigation. Records of use of force are related
16 to some investigation. Therefore, all uses-of-force
17 records are investigatory records, and there's case law
18 that we cite in our briefing that says so. So the idea
19 that these are not investigatory records is simply not
20 consistent with the case law.

21 Petitioner argued just a moment ago that in
22 order for the investigatory records exemption to apply,
23 there has to be a clear and definite prospect of
24 criminal prosecution. Not so. That is exactly opposite
25 to what the case law says. The case law that we cite in

1 our opposition, including parentheticals that explain
2 the Court's thinking, makes it very clear.

3 You don't know, as an officer going out, how
4 the investigation's going to turn out. You might think
5 that you're going to have a big investigation. Turns
6 out it was just a false alarm. But all of those records
7 are still treated as investigatory records protected by
8 the exemption from public disclosure. So this issue
9 that -- the idea that these are not investigatory
10 records is completely contrary to the facts and the law.

11 The other issue that they raise was a
12 subexemption -- or subexception for the disclosure of an
13 arrestee information. Now, that exemption is older than
14 Senate Bill 1421, but it doesn't apply here because
15 that's an exemption that applies to very narrow sets of
16 information, not to the disclosure of all the facts of
17 the arrest. It's about 13 specific categories of
18 information that are disclosable under that exception,
19 and that is about disclosing the information about the
20 arrestee to the arrestee. It's not about to the general
21 public.

22 But turning to the other and the bigger
23 issue, I don't think that the case law -- and I think
24 that your review, Your Honor, will show that it's very
25 clear that the question of are these investigatory

1 records, the answer is very clearly yes. The more
2 challenging issue that I think the Court is going to
3 embrace is whether or not the exception from SB-1421 to
4 that exemption applies.

5 Your Honor pointed out that your instinct is
6 to say, well, GBI is a very well-defined term, and we
7 just turned to the Penal Code definition of GBI.
8 Petitioner a moment ago pointed to you that in
9 construing that term, they want you to look at the case
10 law, but the doctrines of statutory construction that
11 are binding on this Court from our California Supreme
12 Court tell you that when you're construing the statute,
13 you don't follow the plain meaning of the statute when
14 it would lead to absurd results, when that result seems
15 to be contrary to the legislative intent.

16 That's why the legislative intent here is so
17 important, because the CPRA does not specifically define
18 great bodily injury in the context of what it means to
19 disclose police records. That term has a different
20 meaning when it comes to police use of force than it
21 does when considering a sentencing enhancement, which is
22 where the GBI case law that you're familiar with comes
23 from. Those are completely different bodies of law.

24 When it comes to police use of force, the
25 case law and the statutes tell us that the term "great

1 bodily injury" means essentially the same thing as
2 serious bodily injury. And the legislative intent tells
3 us that the legislature here was not trying to embrace
4 the Penal Code definition of GBI because, if it was, a
5 few things would not make sense. They would be absurd.

6 First, the penal code definition of GBI says
7 that great bodily injury can include anything all the
8 way down to physical pain. That is very clearly stated
9 in the case law associated with Penal Code GBI, which
10 would mean, if that was what the legislature intended
11 here, any use of force that caused any physical pain,
12 scratch, scrape, bruise, punch, anything would be
13 disclosable.

14 It would be the broadest version of this
15 disclosability statute imaginable, but everything that
16 we know from the legislative history tells us that they
17 were trying to narrow, not broaden, the scope of
18 disclosability. The original version of 1421, Your
19 Honor, would have included not only the language for
20 uses of force that result in death or great bodily
21 injury but also would have included tasers, batons and
22 K-9s.

23 But now, during the committee process, that
24 was reduced. Tasers, K-9s and batons were taken out of
25 the language. It was narrowed. And in narrowing it,

1 the senate committee stated that the reason for doing so
2 was it only wanted to make disclosable investigative
3 records pertaining to the most serious complaints. They
4 only wanted this exception they were creating to apply
5 in the, quote, very limited, end quote, circumstances.

6 Additionally, we know that SB-1421, which is
7 in the Penal Code as 832.7, we know that this was much
8 narrower than the petitioner is trying to argue because
9 the sponsor of 1421 came back and tried to pass a bill,
10 Senate Bill 776, to expand the scope of disclosability
11 to include tasers and batons. There would be no need to
12 expand the scope of disclosability if GBI was as broad
13 as petitioner contends.

14 What you're seeing here, Your Honor, in
15 reality, is the ACLU trying to broaden by litigation
16 what they failed to broaden by legislation. GBI, in
17 police use-of-force law, is the same thing, essentially,
18 and there's case law that says this, that this is
19 interchangeable with serious bodily injury. It would
20 lead to an absurd result if we were to assume that in
21 trying to narrow the scope of disclosability, they
22 somehow broaden it to all uses of force, including uses
23 of force that cause mere physical pain without injury,
24 which is what GBI, according to the case law, can be.

25 Similarly, if one looks at the history of

1 what kinds of force can result in GBI, when we look at
2 police use-of-force law, there is a great distinction
3 between GBI and non-GBI, and that distinction helps
4 decide what a level of force is. All uses of force in
5 police use of force are broken down into, basically,
6 three levels.

7 One is nondeadly low. This would be things
8 like a taser in dry-stun mode. Striking someone with an
9 empty hand, control holds, things of that nature. And
10 that's what the case law tells us. Nondeadly
11 intermediate, this would be things like tasers in dark
12 mode, K-9 dog bites, impact weapons below the head,
13 chemical agents like pepper spray, and deadly force.
14 The case law tells us very clearly that officers are
15 authorized to use deadly force in response to a threat
16 to them -- an immediate threat of death or great bodily
17 injury.

18 If plaintiff's -- petitioner's contention
19 that GBI, when it comes to use of force, means the same
20 thing as it did in Penal Code when it comes to that
21 sentencing enhancements, then that automatically would
22 mean that officers are now authorized to use deadly
23 force when they face no more than a threat of physical
24 pain. That is not consistent with the legislative
25 history. It is a truly absurd result.

1 Clearly, the legislature distinguished GBI
2 when it comes to uses of force and disclosure related to
3 uses of force according to the normal terminology for
4 what GBI is in that context. GBI in the context of CPRA
5 cannot be the Penal Code sentencing enhancement version
6 because that doesn't make any sense.

7 Now, there were a couple of other questions
8 that Your Honor asked. The case law is very clear that
9 once, as is the case here, the law enforcement
10 investigatory records exemption applies, that exemption
11 is permanent. There is no sunset date.

12 What plaintiff did in their petition is they
13 conflated two very different things, and it's easy to
14 see why this conflation happens because the CPRA is
15 extremely subtle and extremely confusing. There are
16 people who have written whole books to try to help other
17 people understand just how to make sense of this,
18 because it's that hard to follow.

19 But here's how it goes: You start with the
20 premise that all public records are disclosable.
21 Step 1. Step 2 is then there are exemptions that
22 restore some public records to nondisclosability.
23 Step 3, then there are some exceptions to those
24 exemptions that make those records disclosable again.
25 And then, Step 4, sometimes there are caveats to those

1 exemptions that restore the records to
2 nondisclosability. And if you're already scratching
3 your head, trust me, the rest of us are right there in
4 that boat with you.

5 The time limits that petitioner mentioned in
6 their briefing apply to a very small, narrow caveat that
7 applies to when you can withhold otherwise-disclosable
8 records in response to an investigation being opened.
9 It has nothing to do with the fact that if that caveat
10 doesn't apply because the exemption doesn't apply that
11 the exemptions somehow has a time limit. That's not how
12 it works. You don't get down to Step 4 if you stop at
13 Step 2.

14 Now, as to some of the Court's specific
15 questions about why certain records were withhold and
16 some were produced with only redactions. The city was
17 well within its rights for most of these records because
18 they are investigatory records. They are records of
19 uses of force pertaining to a police investigation.
20 That's when uses of force occur. People don't just walk
21 around and have officers just sic dogs on them. That's
22 not how it works.

23 There's an investigation. Force occurs as
24 part of that investigation. The records of that force
25 are, therefore, investigatory records. But while the

1 city could have withheld the entirety of those records,
2 in trying to facilitate a dialog and trying to reduce
3 the risk of litigation, they decided to produce in
4 redacted format some of those records.

5 Now, I will clarify that as to -- as it
6 pertains to the redactions, there was some
7 back-and-forth. And I completely understand how this
8 could have been missed because it's buried in a footnote
9 in our opposition. But the nature of those redactions
10 was not attorney/client privilege or attorney work
11 product. So that is not really an issue if the Court
12 decides to review in camera, and we are certainly hoping
13 to produce any records the Court wants in camera.

14 The nature of those redactions was that some
15 of the exempt records that the city chose to produce
16 were redacted to protect the third-party privacy of
17 witnesses. So these are records we didn't even have to
18 hand over in the first place. But information that we
19 decided to redact from it was exempt, including that
20 privacy information.

21 So with regard to a lot of these issues, I
22 don't think that it's actually the kind of examination
23 that requires the in camera review. I don't think it's
24 that detail oriented. I don't think that the Court or
25 anybody else needs to sit and look at each and every

1 document because the real issue is not that. It's not
2 just a very hard to follow and hard to apply exemption
3 apply, like attorney/client privilege or work product or
4 privacy. It's very simple. What's GBI? Because there
5 is really no question that these are investigatory
6 records.

7 And so the whole question that this Court
8 and I suspect Courts above this are going to have to
9 decide one day, because it is confusing, is in the
10 context of police uses of force, what is great bodily
11 injury? Petitioner's contention, as I mentioned, does
12 not comport with legislative history, does not comport
13 with legislative intent. And the doctrines of statutory
14 construction tell us that when you have an
15 interpretation on a statute that doesn't comport with
16 legislative history, that doesn't comport with
17 legislative intent, that that's not the correct
18 interpretation.

19 And the interpretation that we've provided,
20 that they must have meant for GBI to be defined
21 according to the way it's normally defined in police
22 uses of force, is more consistent with the constant
23 narrowing of disclosability that we saw in the amendment
24 process and the fact that after this statute was passed,
25 a broader statute was also defeated.

1 So on this record, certainly, we are happy
2 to provide additional briefing on any question that the
3 Court would like to pose, but I do believe that on the
4 briefing that's already been submitted, it's very clear
5 that these records are not disclosable and the city was
6 well within its right to withhold disclosure production
7 of them to petitioner.

8 With that, we submit, Your Honor.

9 THE COURT: Yeah. And I guess, in my defense,
10 there seem to be occasions when it was sort of strung
11 together. That these are withheld because of this,
12 this, this. And I may have just mashed it all together
13 as I was reading it, but I think I have a better
14 understanding of what your logic is as to what's not
15 produced and the redactions. But I get that I may have
16 conflated those various concepts.

17 Would you agree, Counsel, that if it is
18 serious bodily injury that we're looking at, that the
19 standard is the definition in criminal law? You were
20 talking about, you know, concussions, extensive
21 suturing. I don't remember all the other requirements.

22 MR. SAIN: Yes. And here's why, Your Honor. Two
23 reasons.

24 One, the case law has told that when it
25 comes to evaluating police uses of force, you evaluate

1 serious bodily injury and great bodily injury the same.
2 So we have definitions of serious bodily injury that are
3 clearer in California law, including in the recently
4 revised Penal Code Section 835a. And that definition is
5 the one that you just mentioned. That Penal Code
6 definition.

7 There's another one that's a little bit
8 disfavored, but the one when it comes to use of force is
9 the correct one. And it's the one that you just stated,
10 Your Honor. Because all the case law makes it very
11 clear that GBI when it comes to use of force and SBI are
12 the same thing, and there is clarity as to what
13 constitute SBI. And that version of what constitutes
14 SBI is consistent with the legislative history and
15 intent here.

16 Yes, Your Honor. We would concede that that
17 is the appropriate dividing line to figure out which
18 types of police reports are disclosable under CPRA. If
19 the force was deadly or caused death, those are
20 disclosable. That's not these. The city did not
21 withhold records where somebody died because of the use
22 of force. If the use of force caused serious bodily
23 injury, that's disclosable. That did not occur here.

24 The city reviewed these records, found that
25 they did not result in SBI, or what we believe is GBI,

1 and withheld. If they had, they would have produced.
2 They did not. But, yes, Your Honor, we agree that that
3 is the dividing line.

4 THE COURT: Yeah. I guess there -- it's sort of,
5 perhaps, indicative of what any of us who have been in
6 the courts for a while have known, which is that just
7 because you read it in a news report doesn't necessarily
8 make it true. So I guess your argument would be that
9 while some news reports said that someone's bone was
10 crushed or they were -- you know, had the force
11 equivalent of being run over by a car or whatever, that
12 doesn't necessarily mean that that's the case.

13 I think that is a situation, though, that
14 arguably may be -- I mean, this is a fine line. You
15 know, what is serious bodily injury? I don't -- I mean,
16 just because your report shows that somebody was injured
17 and taken to the hospital and then no significant
18 information about what treatment they received doesn't
19 necessarily mean they didn't get suturing or some other
20 treatment that suggests that it's serious bodily injury.

21 MR. SAIN: And, Your Honor, that is a fair point.

22 I think that the city's position would be
23 that, in general, when it comes to defining what
24 constitutes serious bodily injury and looking at this
25 from a perspective of how case law defines K-9 force,

1 K-9 force is presumed to cause punctures, lacerations.
2 Those are the typical injuries.

3 And there's case law that says that when it
4 comes to defining the levels of force, even though a
5 certain type of force could theoretically cause an even
6 greater injury than is normally expected, that doesn't
7 change that force. It doesn't cause that force to be
8 elevated to the next level. You don't define a level of
9 force by what could happen; you define a level of force
10 by what is generally likely, substantially foreseeable
11 to happen based to be on what typically happens.

12 K-9s certainly -- obviously, there's all
13 kinds of hypothetical scenarios that we could all create
14 where a K-9 kills somebody, but that's not happening.
15 That's not generally what's happening. It's not
16 expected to happen. It's not reasonably foreseeable.
17 And that's why Courts have always put K-9 force and
18 other immediate force in that same ban of nondeadly,
19 immediate force.

20 The issue that this Court or another may
21 need to examine is whether or not there should be, if
22 we're adopting the respondent's position and basically
23 saying that, when it comes to this type of nondeadly,
24 intermediate force, this force that only results in
25 great bodily injury, is it enough that we categorically

1 say, well, this level of force typically results only in
2 these kind of injuries and, therefore, all reports
3 regarding this level are not disclosable, a categorical
4 type of force base distinction; or is some Court going
5 to say, no, you have to look at each of these reports in
6 this level and see if any of them actually resulted in
7 SBI?

8 THE COURT: Well -- and that's really my question.
9 I mean, you get somebody and they've got some
10 significant lacerations and puncture wounds. And so you
11 take them to the hospital. I mean, you put them on an
12 ambulance, and then that officer's investigation is
13 closed. So do we know whether that person needed
14 suturing? I mean, do we know whether that person really
15 suffered a more serious injury than your observations at
16 the time that you loaded them on the ambulance?

17 I don't know if that's part of your
18 investigative process when you're reviewing use of
19 force, but that would be something that I think would be
20 a qualifier, because I don't think it's enough to say,
21 yeah, well, yeah, it don't look very good. Better take
22 him to the hospital. And really ignore whether, in
23 fact, that led to more serious consequences than we
24 thought.

25 MR. SAIN: And, Your Honor, certainly if there are

1 two approaches to this -- and there's no case law that
2 guides us to which approach is correct -- I think the
3 case law is very clear on the SBI/GBI issue. But
4 assuming that force did result in SBI/GBI, the open
5 question that nobody has briefed and that I don't think
6 anyone outside of this courtroom has really spent a
7 great deal of time thinking about is whether or not
8 categorically force that typically only results in not
9 GBI, not SBI, is -- remains nondisclosable even if it
10 does result in GBI/SBI; or do you have to look at each
11 report and each incident on a case-by-case basis?

12 THE COURT: Right.

13 MR. SAIN: I don't think we know the answer to
14 that. I will tell you, though, that that my
15 understanding -- and certainly the Court is ordering us
16 to do further briefing. I can get clarification from my
17 client -- is that their review of these reports that
18 were withheld, did not result -- did not result in
19 serious bodily injury, great bodily injury.

20 But certainly we can clarify that point, and
21 then the Court can decide which of those two models it
22 views as being the most appropriate, because I think
23 that it's a fair six of one, half a dozen approach.

24 THE COURT: You know, I would think -- and, again,
25 now, this does move into the area of work product, but

1 let's say we're aware of a serious dog bite incident.
2 The guy's got serious injuries. Well, serious. Again,
3 serious, great, significant, more than minor, whatever.
4 But he gets loaded on the ambulance and off he goes. Is
5 that the end of the inquiry? Or does, you know,
6 someone, Larry Donaldson or whoever, go, wow, that looks
7 pretty serious; we better follow up and see if this guy
8 was really hurt, and then go get records from the
9 hospital, that kind of thing? And is that in the file?
10 And would that be subject to work product nondisclosure
11 if that was the case?

12 MR. SAIN: I would certainly love to give it some
13 thought, Your Honor, to imagine how attorney work
14 product would apply to that.

15 THE COURT: Well, if it's gathered in anticipation
16 of litigation...

17 MR. SAIN: Then that would be more of a privilege,
18 though, but that's not usually how it works. My
19 understanding, having worked with Fresno for a number of
20 years and other agencies, of comparable procedures is
21 that when there is a dog bite, when there is a taser
22 injury, they send people to the hospital, they get them
23 evaluated, and then results are reported back through
24 the police report.

25 It's not typical that they get a medical

1 record attached to the police report, although I have
2 seen that in some instances. They get what they call
3 the "OK to book" medical clearance, and you're not going
4 to get that if somebody has an injury that's above a
5 certain level. So, in my experience, the end of the
6 report is what kind of injuries resulted from that use
7 of force. And if it was something that was more of a
8 serious bodily injury, it's supposed to be documented in
9 there.

10 But that is an issue that -- where it's a
11 little bit more granular, that if the Court would like
12 additional briefing, I think that we can do that.

13 THE COURT: Well, you know, I know, for instance,
14 if a guy is facing a PC 69 for fighting with the cops
15 and he's got all kinds of injuries and y'all are
16 concerned, then, you know, we would probably get that
17 back in the context of a criminal investigation, that he
18 was taken to the hospital and we took photographs of his
19 injuries, whatever.

20 But a dog bite, you know, if nobody's
21 charged, is just the dog ran off and bit somebody, or
22 we're in the course of an investigation and we conclude
23 there's no criminal activity other than whatever
24 prompted the dog and whether that is or isn't criminal,
25 it doesn't get filed with the Court. It doesn't wind up

1 with the detective. So do we know, how would we know,
2 whether there was more serious injury than what we
3 received at the time?

4 MR. SAIN: Well, Your Honor, that is actually
5 something we do have information about. So the idea
6 that police-trained K-9s are just running around biting
7 people at random is overblown, to say the least, but we
8 do have accidental bite reports. So this normal
9 situation that's going to happen in any agency,
10 including Fresno Police Department, is that when you
11 have an investigation of some sort, some criminal
12 activity is being investigated, ultimately results in
13 the use of force.

14 If that force, that bite, was not
15 authorized, that's documented on an accidental bite. So
16 that would be a rare occasion when the K-9 handler did
17 not direct the K-9 to bite, did not deploy the K-9 in a
18 bite situation. Those accidental bites, however, are
19 still part of the investigative process. They're still
20 investigative records.

21 I think the question that the Court may want
22 some additional briefing on is whether or not in
23 evaluating -- agencies evaluating whether or not they
24 need to disclose any of those records, if there is a
25 categorical approach, which is that all of this level of

1 force typically does not result in these kind of
2 injuries and, therefore, we don't have to disclose it,
3 or is it a granular case-by-case approach. Did you look
4 at the injuries in these specific reports to see if they
5 resulted in a GBI/SBI as respondent has defined it and
6 as we believe is consistent with the case law.

7 THE COURT: Precisely.

8 MR. SAIN: I don't know the answer to question. I
9 think there's fair arguments on both sides. Before
10 today I don't think we've had a lot of discussion on
11 that, to be honest with you. And, Your Honor, I've been
12 teaching on the subject for five years, and that's the
13 first time someone's posed that question to me.

14 THE COURT: Been around.

15 MR. SAIN: That said, it is a fair question, and
16 if you want additional briefing, I think that's proper.

17 THE COURT: Well -- and that's what I'll do is
18 ultimately, in the course of this additional briefing,
19 you can submit declarations like that to clear up any
20 issues that you think perhaps I might have, you know,
21 concern about, because I do think it's easy enough to,
22 you know, send the person off to the hospital and not
23 really know. And if, in fact, the injuries were
24 significant enough to require some kind of surgical
25 intervention or extensive suturing or something like

1 that, that would arguably reach the standard of SBI.
2 And that would be something that would be disclosable.

3 And so I think for me to have comfort that
4 the City of Fresno is, in fact, making an individualized
5 determination on each case as to whether it is or isn't
6 GBI as you have defined it, then that would give me some
7 level of assurance that it's not just a categorical
8 approach. So if that's something you can produce, that
9 might be something that would help your case.

10 MR. SAIN: Yes, Your Honor.

11 THE COURT: But I'll let you decide that.

12 All right. You're the petitioner. You get
13 one last shot at me for today, and I guarantee you this
14 is not your last shot. You can send me your briefing
15 whenever you like, and I will read it carefully. I will
16 have the time to read it carefully. You know, I am
17 mostly retired. And so I actually found this case
18 interesting enough that I was willing to take it on.
19 And I certainly promise you that if I get briefing and
20 additional declarations and I need to do additional
21 research or whatever, I will take the time to do it.

22 And if I grant, I will give you a detailed
23 statement of decision. I might just give you a detailed
24 statement of decision whichever way I go simply because
25 this means enough to both of you and future cases that

1 we ought to show that at least one jurist has given it a
2 careful look. So I'll give you a last chance for some
3 final argument today.

4 MS. HARRIS: Thank you, Your Honor.

5 To return to the point about whether these
6 are investigatory records. I understand the
7 respondent's point that these are records that were
8 created in most cases when officers are out and about on
9 an investigation and then end up using force. However,
10 interpreting the definition of investigatory records so
11 broadly could render pretty much anything officers do
12 and any records that they ever produce an investigatory
13 record.

14 It could render records like -- I don't
15 know -- clocking in and clocking out for an investigator
16 an investigatory record because, obviously, that's a
17 record having to do with when this person is doing their
18 investigation activities. So this exception is meant to
19 be -- must be construed narrowly, as all exceptions to
20 the PRA must be. And the Courts recognize that it has
21 potential to kind of swallow the rule because most of
22 the what officers do day-to-day is related to
23 investigations.

24 So though I understand respondent's point, I
25 think that the interpretation is too broad because these

1 records are not by their nature records of
2 investigations. They are records of uses of force. And
3 they are administrative records that are kept for
4 internal compliance purposes rather than investigatory
5 purposes. The information that's in these reports can
6 be disclosed to us without compromising an
7 investigation. And that's what makes them not
8 investigatory records.

9 The exemption for investigatory records, the
10 purpose of that exemption, doesn't actually apply to the
11 records here because it's not going to lead to
12 destruction of evidence or witness tampering or things
13 like that because they can already delete witnesses'
14 names and are there other less egregious forms of
15 redaction that can adequately protect those interests.

16 And then to the part about great bodily
17 injury and the absurdity of interpreting great bodily
18 injury to mean great bodily injury. The Penal Code
19 definition is not any pain; the Penal Code definition is
20 significant or substantial injury. And the jury
21 instruction actually says specifically, it is not minor;
22 it is not trivial harm. So a scratch or some pain would
23 not, in fact, rise to the level of great bodily injury,
24 and the case law elucidates that.

25 In the cases where there is great bodily

1 injury, it's often multiple serious contusions and
2 swelling and bruising. It's not just a paper cut. So
3 great bodily injury isn't a vacuous term. It doesn't
4 mean any form of pain. It is a standard. There are
5 things that don't meet that standard. And there are
6 probably dog bites that don't meet that standard, but
7 there are also probably many dog bites that do.

8 As for the legislative history, the original
9 version of 1421 used the term "serious bodily injury,"
10 so the legislature actually consciously considered and
11 consciously rejected that terminology and instead
12 adopted "great bodily injury." The whole purpose
13 of 1421 was to bring more light to these types of
14 records. It was called the Right to Know Act.

15 So to twist the legislature's intent into
16 making the narrowest extension possible doesn't really
17 align with the history. The history is that the
18 legislature wanted to bring more documents to light, and
19 they did that by adopting a standard that is defined in
20 the same code and is well flushed out in the case law to
21 make it clear to agencies who are being asked to produce
22 what they're being asked for.

23 And then, lastly, on the subject of the
24 whole police use-of-force law, the police are restricted
25 to using deadly force only when there is a threat of

1 death or serious bodily injury. So no matter what the
2 case law on that says, there's a statute 835a in the
3 Penal Code that sets a standard for police use of deadly
4 force. So regardless of how we interpret great bodily
5 injury in this case, it's not going to change the
6 standard for when police can use deadly force. That is
7 a standard that's set by statute, and the case law to
8 the contrary predates that statute. So it's outdated
9 case law, and it's not relevant to whether officers can
10 use deadly force in a given scenario.

11 And what we're talking about here isn't the
12 level of force used. We're not asking whether K-9 bites
13 or K-9 force is deadly, moderate or low force. We're
14 asking whether the injury that resulted is a great
15 bodily injury or not, and that does require
16 case-by-case, matter-by-matter analysis. It's a very
17 fact-bound inquiry. And I acknowledge that it's
18 inconvenient, but there are not categorical, per se,
19 rules in this area.

20 But the case law makes clear that there are
21 simply not categorical, per se, rules in this area. And
22 it's the City of Fresno's burden to go through their
23 documents, if they choose to redact them, case by case
24 and ask whether there are great bodily injuries
25 resulting from police use of force in a given case. If

1 Fresno needs further guidance on what constitutes great
2 bodily injury, we are also happy to provide additional
3 briefing fleshing out that standard with the case law
4 that is readily available, but I have no doubt that
5 Fresno is capable of conducting that type of analysis
6 and under further guidance from the Court would be able
7 to do so.

8 THE COURT: All right. Well, thank you, both.
9 You've helped to sort of expand my understanding of some
10 of the dispute. I'm not resolving disputes today. I'm
11 getting a better understanding of the nature of the
12 dispute, and I think it's been very helpful for that.
13 What I would like to do, if we could, is go off the
14 record briefly and talk about scheduling. And I'll give
15 you a date when I'm not otherwise gone or in a court.

16 (Whereupon, a recess was taken.)

17 THE COURT: It will give me a chance to carefully
18 examine these points a little more carefully that I've
19 seen and heard today, look at what you've got, and then
20 my clock will tick from that date. And either I'll rule
21 then, or I will take it under submission. But that's
22 always a concern when you're retired and you're trying
23 to spend the time you're not in court traveling around
24 the world.

25 MR. SAIN: Thank you, Your Honor. Before we go

1 off the record for the scheduling piece, now that the
2 Court has heard the arguments, which hopefully address
3 some of the Court's questions, does the Court want to
4 revise the questions you want addressed in the
5 supplemental briefing?

6 THE COURT: Well, I think you know you can. I've
7 told you that I think I get it as far as where the
8 disagreements are. If you think it's fully briefed in
9 what we've already got, then I don't think you need to
10 go any further except to just cite me to, you know,
11 Pages 6 through 8 of our initial brief and opposition to
12 the motion or something like that. If there's a little
13 more clarity you can provide, if there's a little deeper
14 analysis in the cases, if there's an articulation of
15 what you've explained today as to why this legislative
16 history in your view is so important, then those things,
17 obviously, you'll want to brief.

18 I'm not expecting really lengthy briefs
19 here. I'm not really expecting that they're going to
20 make a whole lot of difference, but, as I say, there was
21 the one question about whether there's a particularized
22 inquiry about the level of injury. I think a
23 declaration can clear that up. And then, beyond that, I
24 think we've got the issues pretty well outlined. And so
25 you don't have to regurgitate what's already been argued

1 in the screen cites that are there, but I think if you
2 want to open those cases to a little deeper analysis --
3 in this case, these were these facts and the Court went
4 this way, and in this case they went the other way kind
5 of stuff -- that might be helpful. But, yeah, it's
6 really sort of just a wrap-up at this point.

7 MR. SAIN: Other than the declaration, did the
8 Court want to set a page limit so you're not getting
9 more than you need?

10 THE COURT: You know what? I've always believed
11 that the best argument is brief, so if you want to
12 rattle off for 40 pages, it's not going to help you. If
13 you give me a nice, clear, succinct description of what
14 you think the points of contention are and, as I
15 articulated my assessment of them, um, you shouldn't
16 need a page limit. Thank you, though.

17 I would just remember Judge Creede when I
18 was in criminal trial in front of him as a prosecutor
19 and one of the lawyers came in and he handed him a
20 decision in a civil case and he said -- and only those
21 who are old as me know Judge Creede -- he would say,
22 well, I'm sorry I didn't have time to write a shorter
23 opinion. And so in my view, any argument, no matter how
24 complex, can be stated in less than 20 pages. But
25 that's -- he writes down 20. But I can just tell you

1 that that's fine. I'm really -- this is more about
2 giving me a better chance to completely review what
3 you've already submitted and start my clock 30 days from
4 now instead of today. And I don't mean to delay a
5 decision here. I know it's important to you, but let's
6 face it. If I make a decision that says this is or
7 isn't that, the aggrieved party may very well want to
8 take that up. And we may be actually making decisions
9 about this CPRA that nobody's ever made before. And if
10 that's the case, I want to do the best I can.

11 MR. SAIN: And we appreciate that, Your Honor.

12 THE COURT: All right.

13 MR. SAIN: From a due process procedural
14 perspective, one, when do you want these supplemental
15 briefings? And is it going to be petitioners do
16 supplemental and then respondent gets to do something
17 else or responding to their supplemental, or you're
18 requiring us do it at the same time? How does the Court
19 wish to proceed?

20 THE COURT: Why don't you just each cull a
21 supplemental briefing, and I'll give you a date by which
22 to file it. And you'll logically wait till that date so
23 the other guy doesn't see what you're arguing. And
24 that's fine. That's the whole process of the adversary
25 of litigation, so --

1 MR. SAIN: So simultaneous, Your Honor?

2 THE COURT: I like simultaneous. I give you a
3 date, and it would be about -- I don't know. I don't
4 think you need more than about three weeks. And we'll
5 set the hearing in about four weeks. Something like
6 that. So let's go off the record. Let me find out
7 exactly when I'm available, and from there we can get
8 things squared off.

9 MR. SAIN: Thank you, Your Honor.

10 THE COURT: We're of the record.

11 (Whereupon, a recess was taken.)

12 THE COURT: Back on the record. We're going to
13 have briefs due by the 7th of March. And, again, it
14 doesn't need to be terribly extensive. But I have made
15 clear -- you know, a lot of judges don't give you a view
16 inside their brain, but I did. So you kind of know what
17 I came here with by way of confusion and questions, and
18 you kind of know what I would like to see additional
19 briefing on. And other than that, you've both done a
20 complete job of providing information. And just as I
21 say, a lot of this was just simply the result of it
22 being so much I could drink out of a firehose in three
23 hours. So we will look forward to seeing you at 1:30 on
24 March 21st in Department 53 for assignment. Thank you.

25 MS. HARRIS: Thank you.

1 MR. SAIN: Thank you, Your Honor.

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5 (The proceedings concluded at 2:56 p.m.)

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1 STATE OF CALIFORNIA)
2 COUNTY OF FRESNO) ss.

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4
5 I, VICTORIA L. THOMAS, a Certified Shorthand
6 Reporter of the State of California, do hereby certify
7 that the foregoing pages numbered 1 to 59, inclusive,
8 contain a full, true and correct transcript of my
9 shorthand notes, and a full, true and correct statement
10 of the proceedings had and testimony given as reflected
11 herein.

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14 Dated January 14, 2025.

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Victoria L. Thomas

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VICTORIA L. THOMAS
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