DAVID LOY, Cal. Bar No. 229235
KHRYSTAN POLICARPIO, Cal. Bar No. 349170
FIRST AMENDMENT COALITION
534 4th Street, Suite B
San Rafael, CA 94901-3334
Telephone: 415.460.5060
Email: dloy@firstamendmentcoalition.org
kpolicarpio@firstamendmentcoalition.org

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
TENAYA RODEWALD, Cal. Bar No. 248563
MATTHEW G. HALGREN, Cal. Bar No. 305918
1540 El Camino Real, Suite 120
Menlo Park, California 94025-4111
Telephone: 650.815.2600
Email: trodewald@sheppardmullin.com
mhalgren@sheppardmullin.com

Attorneys for Petitioner/Plaintiff BRIAN HOWEY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

BRIAN HOWEY,

Petitioner/Plaintiff,

v.

CITY OF FRESNO and PACO BALDERRAMA, IN HIS OFFICIAL CAPACITY AS CITY OF FRESNO CHIEF OF POLICE,

Respondents/Defendants.

Case No. 23CECG01468

[Assigned for All Purposes to: Hon. Stephanie Negin, Dept. 404]

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT

[Notice of Motion and Motion, Loy Declaration and Howey Declaration filed concurrently herewith]

Date: August 2, 2023
Time: 1:30 p.m.
Dept: 404
Judge: Stephanie Negin

Petition Filed: April 18, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

In a tragic incident, Michael Sanders died after several Fresno police officers used Tasers on him at least ten times, inflicting at least eleven puncture wounds and burning him in the groin—literally carbonizing his skin. Pursuant to the California Public Records Act ("CPRA"), Petitioner Brian Howey asked the City of Fresno ("City") to disclose records related to the use of force on Mr. Sanders. Under landmark legislation that took effect in 2019, adopted as Senate Bill 1421 and codified at Penal Code § 832.7, subdivision (b), the City must disclose the requested records because they relate to use of force that resulted in great bodily injury, regardless of whether the force was later investigated or deemed justified. Despite repeated attempts by Mr. Howey and his counsel to explain why the records must be disclosed, the City has consistently refused to produce them, violating California law and defeating the Legislature's intent to promote transparency in law enforcement. As a result, Mr. Howey brought this action to protect the public's right to disclosure of records relating to any use of force by police officers that results in death or great bodily injury. The City's reasons for withholding the records are groundless, and the Court is respectfully requested to order their immediate disclosure.

II. FACTUAL BACKGROUND

On August 20, 2004, Mr. Sanders died following an incident in which Fresno police officers used Tasers on him at least ten times, inflicting up to fourteen electric cycles and at least eleven puncture wounds as well as severe burns to his groin.

As reported in a federal court decision, Mr. Sanders was "shot five times … with Taser darts, drive stunned 5 times … and had a maximum of fourteen 5-second cycles applied to him," including "several drive-stuns to [his] groin area." (*Sanders v. City of Fresno* (E.D. Cal. 2008) 551 F.Supp.2d 1149, 1160 (*Sanders*).)

Three officers used their Tasers on Mr. Sanders. The first officer fired his Taser in dart mode three times, hitting Mr. Sanders in the upper body, left arm, and back; these three shots consisted of four electric cycles. (*Id.* at pp. 1158-1159, 1168.) The second officer fired his Taser in dart mode twice, initially into Mr. Sanders' stomach for one cycle and then into his back, holding the trigger down for up to four more cycles. (*Id.* at pp. 1159, 1174.) The third officer executed five

Taser drive-stuns to Mr. Sanders's groin, each for a five-second cycle. (*Id.* at pp. 1160, 1175.) The officers' actions thus resulted in ten Taser strikes with fourteen electric cycles, nine in dart mode and five in drive-stun mode.

As noted in the Fresno County Coroner's autopsy report, Mr. Sanders suffered at least eleven puncture wounds from the Tasers, including four "on the front of the right groin, with one that 'show[ed] surrounding carbonization" or charring of his flesh; two on the left thigh; and two "in the left flank area." (Howey Decl. ¶ 3 & Ex. A.)

Lavette Sanders, Michael Sanders's widow, sued the City and various officers for wrongful death in federal court, alleging the force used on Mr. Sanders was unjustified. The court ultimately granted summary judgment against her after discussing the facts of the case in detail, relying in large part on the officers' deposition testimony. (*Sanders*, *supra*, 551 F.Supp.2d at pp. 1155-1162, 1182-1183.)

On June 6, 2022, Mr. Howey submitted a request to the City for the following records related to the use of force on Mr. Sanders:

a. "Recordings and transcripts of all interviews of Lavette Sanders by investigators with the Fresno Police Department and any other public agency between August 20-21, 2004, related to the investigation of the August 20 in-custody death of Michael Sanders."

b. "The recordings and transcripts of all other interviews of the family and friends of Michael Sanders by detectives or investigators conducted on August 20-21, 2004, related to the investigation of the aforementioned incident."

c. "Police reports and CAD files related to the aforementioned incident."

(Howey Decl. ¶ 4 & Ex. B.) In response, the City disclosed only an "event report," which resembles a computer aided dispatch log. (Howey Decl. ¶ 5 & Ex. C.) The City refused to disclose any of the other requested records. (Howey Decl. ¶ 5.)

On June 21, 2022, in response to further correspondence from Mr. Howey, the City took the position that "the requested records are not subject to disclosure pursuant to Penal Code Section 832.7 (Senate Bill 1421) as the City did not conduct an Internal Affairs investigation into

the referenced incident" and "the records are not required to be disclosed under the investigatory records exemption" and they "contain information protected by a constitutional right to privacy." (Howey Decl. ¶¶ 6–7 & Ex. D–E.) Mr. Howey responded that under Penal Code section 832.7, subdivision (b), "the creation of an IA report is in no way required in order for a record related to a police use of force incident" to be disclosed. (Howey Decl. ¶ 8 & Ex. F.)

Two days later, on June 23, 2022, Mr. Howey spoke with an assistant city attorney, who contended the requested records were not subject to disclosure because the coroner's report listed Mr. Sanders's cause of death as cocaine intoxication rather than use of force. (Howey Decl. ¶ 9.) However, as Mr. Howey noted in response, "uses of force by police officers need not lead to death in order for related records to become public under SB 1421," because "use of force incidents resulting in 'great bodily injury' also qualify" for disclosure of records under the statute. (Howey Decl. ¶ 10 & Ex. G.) Mr. Howey noted the coroner's findings that Mr. Sanders suffered "at least 11 puncture wounds," with four to the right groin including one with "surrounding carbonization" or "charring" to his flesh. (Howey Decl. ¶ 10 & Ex. G.) As Mr. Howey explained, these injuries amounted to "great bodily injury," which "does not require the victim to suffer a long-term or permanent injury." (Howey Decl. ¶ 10 & Ex. G.)

In response, the City reiterated its previous reasons for refusing to disclose the requested records and added the assertion that "there was no report, investigation, or finding of an incident involving the use of force against a person by a peace officer that resulted in death or great bodily injury." (Howey Decl. ¶ 11 & Ex. H.) Between June 23, 2022, and July 15, 2022, Mr. Howey made several calls in an attempt to resolve the matter, but he received no response. (Howey Decl. ¶ 12 & Ex. I.) Counsel for Mr. Howey sent a detailed letter to the City on July 19, 2022, explaining why the requested records were subject to disclosure and any alleged right to privacy did not bar their release. (Loy Decl. ¶ 2 & Ex. J.) In response, the City stood on its previous position without any additional explanation or justification. (Loy Decl. ¶ 3 & Ex. K.) Thus, the City still refuses to provide the transcripts of the interviews it conducted with Mr. Sanders's friends and family as well as other records related to the incident.

Mr. Howey filed the Petition in this matter on April 18, 2023. In its Answer, the City admits "it is in possession of records pertaining to the Incident," in which Fresno police officers "deployed their TASERs against Mr. Sanders multiple times," but the City denies the disputed records are subject to disclosure. (Answer ¶¶ 1, 2, 3, 7, 43, 44.)

III. THE LEGISLATURE HAS MANDATED DISCLOSURE OF THE REQUESTED RECORDS UNDER THE CPRA.

A. The CPRA Protects the People's Right to Open Government.

"Openness in government is essential to the functioning of a democracy." (*International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328 (*Local 21*).) To that end, access to public records is a constitutional mandate. "The people have the right of access to information concerning the conduct of the people's business, and, therefore … the writings of public officials and agencies shall be open to public scrutiny…. In order to ensure public access to … the writings of public officials and agencies …, each local agency is hereby required to comply with the California Public Records Act." (Cal. Const., art. I, § 3, subd. (b)(1), (7).)

The CPRA reflects "legislative impatience with secrecy in government" and "safeguard[s] the accountability of government to the public, for secrecy is antithetical to a democratic system of 'government of the people, by the people [and] for the people.'" (*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 771-772 (*San Gabriel Tribune*).) As the CPRA declares, "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code § 7921.000.)

B. The City Must Disclose the Requested Records Unless It Can Prove They Are Covered by a Narrowly Construed Exemption from Disclosure.

The City is subject to the CPRA and therefore must provide public records upon request. (Gov. Code §§ 7920.510, subd. (b), 7920.525, subd. (a), 7922.530, subd. (a).) A public record is "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Gov. Code § 7920.530, subd. (a).) "This definition is intended to cover every

conceivable kind of record that is involved in the governmental process." (*San Gabriel Tribune*, *supra*, 143 Cal.App.3d at p. 774.) In particular, records relating to police use of force are public records. (*Pasadena Police Officers Assn. v. Superior Court* (2015) 240 Cal.App.4th 268, 288.) Therefore, the requested documents are public records.

The CPRA requires the City to disclose the requested records unless they fall within an express exemption from disclosure. (Gov. Code §§ 7922.000, 7922.525, 7922.530, subd. (a).) An agency that withholds requested records bears the burden of demonstrating that an exemption applies. (Gov. Code § 7922.000; *Local 21*, *supra*, 42 Cal.4th at p. 329.) Because the party opposing disclosure bears the burden of proof, any "doubtful cases must always be resolved in favor of disclosure." (*Essick v. County of Sonoma* (2022) 81 Cal.App.5th 941, 950 (*Essick*))

When a court is "determining whether the CPRA applies, or whether an exemption has been established, the California Constitution instructs that a statutory provision 'shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.'" (*Edais v. Superior Court* (2023) 87 Cal.App.5th 530, 538 [quoting Cal. Const., art. 1, § 3, subd. (b)(2)].)

C. To Promote Transparency in Law Enforcement, the Legislature Has Mandated Disclosure of Records Relating to Any Use of Force Resulting in Great Bodily Injury, Including the Records Requested by Mr. Howey.

In Senate Bill 1421, the Legislature adopted landmark reforms promoting transparency in law enforcement. As the Legislature found:

> Peace officers help to provide one of our state's most fundamental government services. To empower peace officers to fulfill their mission, the people of California vest them with extraordinary authority – the powers to detain, search, arrest, and use deadly force. Our society depends on peace officers' faithful exercise of that authority. Misuse of that authority can lead to grave constitutional violations, harms to liberty and the inherent sanctity of human life, as well as significant public unrest.

(Stats. 2018, ch. 988, ("S.B. 1421") § 1(a).) (Loy Decl. ¶ 4 & Ex. L). For these reasons, "[t]he public has a strong, compelling interest in law enforcement transparency because it is essential to having a just and democratic society." (S.B. 1421, § 4.) Accordingly, "[t]he public has a right to know all about … officer-involved shootings and other serious uses of force." (S.B. 1421, § 1(b).) To conceal records of such 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." (*Ibid.*)

Before S.B. 1421 took effect, California was "one of the most secretive states in the nation in terms of openness when it comes to officer misconduct and uses of force," and "the legislative intent behind Senate Bill 1421 was to provide transparency regarding instances of an officer's use of significant force." (*Ventura County Deputy Sheriffs' Assn. v. County of Ventura* (2021) 61 Cal.App.5th 585, 593 [holding Senate Bill 1421 applies to records created before its effective date].) Accordingly, the Legislature mandated, in relevant part:

> Notwithstanding subdivision (a), subdivision (f) of Section 6254 of the Government Code, or any other law, the following peace officer or custodial officer personnel records and records maintained by a state or local agency shall not be confidential and *shall be made available* for public inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code):
>
> (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 involving the use of force against a person by a peace officer or custodial officer that resulted in death or in great bodily injury*.
>
> (iii) A sustained finding involving a complaint that alleges unreasonable or excessive force.
>
> (iv) A sustained finding that an officer failed to intervene against another officer using force that is clearly unreasonable or excessive.

(Pen. Code § 832.7, subd. (b)(1) [emphasis added].)[1] Thus, agencies must disclose any record relating to the report, investigation, or findings of any incident involving the use of force against a person by a peace officer that resulted in great bodily injury, regardless of the type of force used to inflict such injury. (Pen. Code § 832.7, subd. (b)(1)(A).)

The term "relating to" imposes a broad obligation of disclosure. (*San Diego Unified School Dist. v. Yee* (2018) 30 Cal.App.5th 723, 733 [noting "broad" meaning of "relating to" as "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or

---

[1] The CPRA was reorganized by A.B. 743, which took effect January 1, 2023. The changes are "entirely nonsubstantive." Gov. Code § 7920.100. Former Government Code section 6254, subdivision (a) is now section 7927.500, and the relevant part of former section 6254, subdivision (f), is now section 7923.600.

connection with"].) Records "relating to the report, investigation, or findings of … [a]n incident involving the use of force against a person by a peace officer … that resulted in death or in great bodily injury," (Pen. Code § 832.7, subd. (b)(1)(A)), include records of interviews relating to the report or investigation or findings of any such use of force incident. Indeed, the statute provides, in relevant part, "Records that shall be released pursuant to this subdivision include all … transcripts or recordings of interviews" such as those requested by Mr. Howey. (Pen. Code § 832.7, subd. (b)(3).)

The requested records are therefore subject to disclosure if they relate to an incident involving use of force that resulted in death or great bodily injury. It is irrelevant whether that force was legally unjustified. The requested records must be disclosed if the force used resulted in death or great bodily injury, regardless of whether the force was later deemed justified.

It is undisputed that officers used force on Mr. Sanders by striking him with their Tasers in dart mode five times, drive stunning him five times, and subjecting him to fourteen electric cycles of five seconds each, resulting in at least eleven puncture wounds and severe burns to his groin. The question is whether these repeated Taser strikes cumulatively resulted in death or great bodily injury. Although the numerous Taser strikes may have contributed to Mr. Sanders' death, the Court need not address that issue, because there is no question they inflicted great bodily injury.

A Taser can be used in "dart-mode" or "drive-stun mode." (*Mattos v. Agarano* (9th Cir. 2011) 661 F.3d 433, 443 (*Mattos*).) In the former, the Taser uses "compressed nitrogen to propel a pair of 'probes'" at the target, which deliver an electrical charge that "instantly overrides the victim's central nervous system, paralyzing the muscles throughout the body, rendering the target limp and helpless." (*Ibid.*) "When a taser is used in drive-stun mode, the operator removes the dart cartridge and pushes two electrode contacts located on the front of the taser directly against the victim. In this mode, the taser delivers an electric shock to the victim." (*Ibid.*; see also *Sanders*, *supra*, 551 F.Supp.2d at p. 1160 & n.22 ["A drive stun or contact stun is when the darts from a Taser are removed and the Taser is placed in direct contact with the subject and then electricity is cycled through. In other words, the electricity goes directly from the Taser to the subject without the conduit of wires…. Drive stun mode is considered a last resort and should rarely be used."].)

The use of a Taser in dart mode causes "excruciating pain that radiates throughout the body." (*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, 824.) In drive-stun mode, a Taser also inflicts "extreme pain," (*Mattos*, *supra*, 661 F.3d at p. 443), or "an extremely painful burning sensation." (*Andrews v. Williams* (M.D. Ala. Sept. 30, 2015) No. 2:13cv136-MHT, 2015 U.S. Dist. LEXIS 132015, *5). In this case, Mr. Sanders was subjected to fourteen electric cycles of five seconds each—nine in dart mode and five in drive-stun mode. Thus, he was subjected to fourteen bouts of extreme, debilitating pain. This extreme or excruciating pain is certainly relevant, if not dispositive, but the Court need not decide whether such pain by itself constitutes great bodily injury, because the facts of this case also involve significant physical harm beyond the infliction of pain.

Not only did the use of force subject Mr. Sanders to an extraordinary number of bouts of excruciating pain, but the multiple Taser strikes on Mr. Sanders in both dart and drive-stun mode also caused at least ***eleven*** puncture wounds and burned the flesh of his groin to a crisp—literally carbonizing his skin. That is more than enough to establish great bodily injury for purposes of disclosing public records about the conduct of police officers.

The Legislature expressly adopted the term "great bodily injury," and one may not "rewrite a statute to posit an unexpressed intent" or "speculate that the Legislature meant something other than what it said." (*California State University, Fresno Assn., Inc. v. County of Fresno* (2017) 9 Cal.App.5th 250, 266.) Although the Legislature did not define "great bodily injury" in Penal Code section 832.7, subdivision (b), it has done so elsewhere, and this Court must presume "the Legislature intended that similar phrases be accorded the same meaning, particularly if the terms have been construed by judicial decision." (*People v. Wells* (1996) 12 Cal.4th 979, 986 [citations and quotation marks omitted].) When "a term has developed a particular meaning in the law, we generally presume the legislative body used the term in that sense." (*In re Friend* (2021) 11 Cal.5th 720, 730.) In other words, the Legislature is presumed to adopt previous judicial constructions of terms it uses. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1046; *People v. Weidert* (1985) 39 Cal.3d 836, 845-846; *Brooks v. Mercy Hospital* (2016) 1 Cal.App.5th 1, 7.)

Elsewhere, the Legislature has defined "great bodily injury" as "a significant or substantial physical injury." (Pen. Code § 12022.7, subd. (f).) This definition "contains no specific requirement that the victim suffer 'permanent,' 'prolonged' or 'protracted' disfigurement, impairment, or loss of bodily function." (*People v. Escobar* (1992) 3 Cal.4th 740, 750; see also, e.g., *People v. Saez* (2015) 237 Cal.App.4th 1177, 1188 [great bodily injury "need not be permanent or cause lasting bodily damage"].) Great bodily injury may derive from "the cumulative result of the course of conduct" rather than a "single act." (*People v. Odom* (2016) 244 Cal.App.4th 237, 247.) Proof that "injury is 'great'—that is, significant or substantial within the meaning of section 12022.7—is commonly established by evidence of the severity of the victim's physical injury, the resulting pain, or the medical care required to treat or repair the injury." (*People v. Cross* (2008) 45 Cal.4th 58, 66.) However, great bodily injury does not "*require* a showing of necessity of medical treatment." (*People v. Wade* (2012) 204 Cal.App.4th 1142, 1150.)

As construed by courts, "great bodily injury" includes pain, wounds, burns, and bruising similar to those suffered by Mr. Sanders as a result of the officers' course of conduct in using Tasers on him ten times with fourteen electric cycles. (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1047-1048 [noting "some physical pain or damage, such as lacerations, bruises, or abrasions" can qualify as great bodily injury]; *People v. Jung* (1999) 71 Cal.App.4th 1036, 1042 ["Abrasions, lacerations, and bruising can constitute great bodily injury."]; *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1755 [holding "multiple abrasions, lacerations, and contusions" were great bodily injury]; *People v. Harvey* (1992) 7 Cal.App.4th 823, 827 [holding "blistering second degree burns" were great bodily injury]; *People v. Wallace* (1993) 14 Cal.App.4th 651, 665 [transient burning in victim's eyes, vagina, and anus from insecticide-like substance was great bodily injury].)

Similarly, courts have recognized that using a Taser in drive-stun mode inflicts significant injuries similar to those experienced by Mr. Sanders, especially in a sensitive area such as the groin. (*United States v. Quiver* (10th Cir. 2015) 805 F.3d 1269, 1272 ["As the burn marks to Officer Friday's thigh show, a Taser in drive-stun mode is capable of causing serious bodily injury if applied to a sensitive spot …."]; *Morris v. Town of Lexington* (11th Cir. 2014) 748 F.3d 1316,

1320 ["While Morris was on the floor, Bowers used a taser on him in 'drive stun mode, leaving numerous burn marks on [his] back.'"].) Therefore, in light of the foregoing case law, Mr. Sanders' undisputed injuries qualify as "great bodily injury" for purposes of disclosing public records about use of force by Fresno police officers.

In case of any doubt on that point, the "constitutional canon" requires this Court to construe great bodily injury broadly in a way "that maximizes the public's access to information unless the Legislature has *expressly* provided to the contrary," which it has not done. (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 175 [citing Cal. Const., art. I, § 3, subd. (b)(2)].) Indeed, the Legislature has done exactly the opposite by mandating disclosure of many records relating to use of force by peace officers in the interest of promoting transparency, accountability, and community trust in law enforcement.

Moreover, because the City bears the burden of proof to justify withholding the requested records, it must prove they do *not* relate to an "incident involving the use of force against a person by a peace officer … that resulted in … great bodily injury" (Pen. Code, § 832.7, subd. (b)(1)(A)(ii)), and any doubts on that issue must be "resolved in favor of disclosure." (*Essick, supra*, 81 Cal.App.5th at p. 950.) Accordingly, the Court should order disclosure of the requested records because the City cannot prove they do not relate to an incident in which use of force by officers resulted in great bodily injury for purposes of disclosure under the CPRA and S.B. 1421.

D. The City's Justifications for Withholding the Requested Records Are Meritless.

In correspondence with Mr. Howey, the City proffered three justifications for denying his request: (1) the records are "investigatory records"; (2) the City conducted no "Internal Affairs" investigation; and (3) the records "contain information protected by a constitutional right to privacy." Each is meritless.

First, by the terms of Penal Code section 832.7, subdivision (b), the investigatory records exception does not apply to the requested records. As the statute provides, "Notwithstanding … subdivision (f) of Section 6254 of the Government Code, or any other law," such records must be disclosed. (Pen. Code § 832.7, subd. (b)(1).) The Legislature thus expressly overrode the

"investigatory records" exemption, formerly codified at Government Code section 6254, subdivision (f) and now at Government Code section 7923.600, *et seq.*, as to records relating to use of force resulting in great bodily injury.

Second, an "Internal Affairs" investigation is not necessary for disclosure of records relating to use of force resulting in great bodily injury. Section 832.7, subdivision (b)(1) provides that "*records maintained by any state or local agency* shall not be confidential and shall be made available for public inspection" if they fall into one of the categories listed in the statute, including any "record relating to the *report*, investigation, or findings" of an incident in which the use of force by an officer resulted in death or great bodily injury. (Pen. Code § 832.7, subds. (b)(1) and (b)(1)(A)(ii) [emphasis added].) The plain text of the statute thus makes it clear: an agency must disclose any record relating to any report of a covered incident (*as well as* any record relating to any investigations or findings), if the agency maintains a copy of that record anywhere in its files. The agency must do so regardless of whether any investigations have been conducted, and irrespective of whether there was a finding that the use of force was unreasonable or against policy. The plain language of the statute mandates disclosure of the records at issue.

This is reinforced by the fact that for certain *other* kinds of records, the statute requires a "sustained finding" of misconduct following an administrative investigation in order for the records to be disclosed. (See, e.g., Pen. Code § 832.7, subd. (b)(1)(A)(iii) [requiring disclosure of records related to a "sustained finding involving a complaint that alleges unreasonable or excessive force"]; Pen. Code § 832.8, subd. (b) [defining "sustained" as "final determination … following an investigation and opportunity for administrative appeal"].) However, as explained above, the Legislature included no such requirement for records relating to use of force resulting in great bodily injury (or for officer-involved shootings or incidents resulting in death). (Pen. Code § 832.7, subd. (b)(1)(A)(i) and (ii).) The Legislature's omission must be respected as intentional, and a court may not rewrite the statute to insert omitted terms. (*Cornette v. Dept. of Transp.* (2001) 26 Cal.4th 63, 73; *People v. Johnson* (2022) 79 Cal.App.5th 1093, 1112.) Therefore, the

requested records must be disclosed regardless of whether the City conducted any internal affairs investigation into the use of force on Mr. Sanders.[2]

Third, the "constitutional right to privacy" does not preclude disclosure of the requested records, certainly not in their entirety. "The constitutional right to privacy has never been absolute; it is subject to a balancing of interests." (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 961). "Even nonconstitutional interests can outweigh constitutional privacy interests." (*Ibid.*) The CPRA's "strong public policy supporting transparency in government" can override asserted privacy interests in appropriate circumstances. (*Marken v. Santa Monica-Malibu Unified School Dist*. (2012) 202 Cal.App.4th 1250, 1271.)

The public interest in police conduct is especially compelling, as the Legislature found in S.B. 1421 and courts have long confirmed. As the California Supreme Court has explained, "The public's legitimate interest in the identity and activities of peace officers is even greater than its interest in those of the average public servant. Law enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the state. In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers." (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 297 [citation and quotation marks omitted].)

The City did not specify whose asserted privacy interests were allegedly implicated in the requested records. Certainly, the officers involved in the incident can claim no right to privacy against disclosure of records required by law. (Pen. Code § 832.7, subd. (b)(6)(A) [disallowing redaction of "names and work-related information of peace and custodial officers"]; *Michael v. Gates* (1995) 38 Cal.App.4th 737, 745 [holding police officer had no "constitutional right to privacy" against disclosure of official records pursuant to statute].)

[2] Indeed, any other conclusion would also contravene the expressed purpose of the statute. S.B. 1421 was enacted because "[t]he public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force." (S.B. 1421, § 1.) Thus, the stated purpose of the statute would be frustrated if records of uses of force resulting in great bodily injury (or records of officer-involved shootings or force resulting in death) could be withheld simply because the City chose not to do any subsequent investigation.

It is questionable whether anyone else's constitutional right to privacy could be implicated by the facts of this case, but the Court need not decide that issue. (Cf. *Alarcon v. Murphy* (1988) 201 Cal.App.3d 1, 6-7 [holding that where plaintiff alleged privacy violation due to "disclosure of facts that were a part of a public record," plaintiff "had no objectively reasonable expectation that this information would not be disclosed by police"].) Any right to privacy that Mr. Sanders might have had in public records concerning the officers' use of force against him did not survive his death or inure to his survivors. (*Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1485; *Flynn v. Higham* (1983) 149 Cal.App.3d 677, 683.) Also, given that Ms. Sanders placed the incident at public issue by filing suit against the City and its officers, any right to privacy she might once have enjoyed concerning the incident and related records cannot preclude disclosure of the requested records. (See *Register Div. of Freedom Newspapers v. County of Orange* (1984) 158 Cal.App.3d 893, 902 ["By making his personal injury claim, Clemens placed his alleged physical injuries, and medical records substantiating the same, in issue. Furthermore, by voluntarily submitting these records to the County for the purpose of reaching a settlement on his claim, Clemens tacitly *waived* any expectation of privacy regarding these medical records."].) To the extent names of individuals involved in the incident have already been reported in court decisions, their identities are already public, and no reason appears to redact them from records otherwise subject to disclosure.

In any event, any alleged privacy interests that might be implicated can be addressed by appropriate redaction. The statute provides for redaction of certain private information when necessary (Pen. Code § 832.7, subd. (b)(6)), but an agency may not withhold records in their entirety merely because they might contain some private information. (Gov. Code § 7922.525, subd. (b) [requiring disclosure of any "reasonably segregable portion of a record … after deletion of the portions that are exempted by law"]; *Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 292 [noting agencies must "use the equivalent of a surgical scalpel to separate those portions of a record subject to disclosure from privileged portions"].) Therefore, the City may not assert any alleged right to privacy to withhold the records requested by Mr. Howey in their entirety.

IV. REQUEST FOR ATTORNEY FEES AND COSTS

A petitioner prevailing in a CPRA case is entitled to an award of costs and reasonable attorney fees. (Gov. Code § 7923.115, subd. (a); *Filarsky v. Sup. Ct.* (2002) 28 Cal.4th 419, 427.) The petitioner prevails if public records are disclosed by court order or the lawsuit motivated the defendant to disclose the records. (*Ibid.*; *L.A. Times v. Alameda Corridor Trans. Authority* (2001) 88 Cal.App.4th 1381, 1391; *Belth v. Garamandi* (1991) 232 Cal.App.3d 896, 901.) Thus, if the Court rules in his favor or the City discloses requested records as a result of this litigation, Mr. Howey will be the prevailing party entitled to costs and fees, to be determined on later motion.

V. CONCLUSION

For the foregoing reasons, Mr. Howey respectfully requests that the Court grant his motion, issue a writ of mandate, and enter judgment in his favor as specified herein and in the Notice of Motion filed herewith.

Dated: June 14, 2023

FIRST AMENDMENT COALITION

By *__/s/ David Loy__*
DAVID LOY
Attorney for Petitioner BRIAN HOWEY