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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

FIRST AMENDMENT COALITION; KQED INC. Plaintiffs, v. XAVIER BECERRA, Attorney General of the State of California; CALIFORNIA DEPARTMENT OF JUSTICE, Defendants.	Case No.: CPF-19-516545 **FIRST AMENDED** **VERIFIED PETITION FOR WRIT OF MANDATE TO ENFORCE CALIFORNIA PUBLIC RECORDS ACT** Action filed: February 14, 2019 Trial date: None set.

Plaintiffs First Amendment Coalition ("FAC") and KQED Inc. ("KQED") (collectively, "Plaintiffs")[1] petition this Court for a writ of mandate requiring defendants California Department of Justice (the "Department") and Xavier Becerra, Attorney General of the State of California (the "Attorney General") (collectively, "Defendants") to promptly comply with newly enacted Senate Bill 1421, which requires state and local agencies to disclose new categories of records related to peace-officer conduct under the California Public Records Act ("CPRA").

SUMMARY OF ALLEGATIONS

1. Before this year, public access to peace-officer personnel files and other documents related to the conduct of California peace officers was extremely limited. But on January 1, 2019, Senate Bill 1421 took effect, requiring disclosure of certain peace-officer personnel files relating to officers' discharge of a firearm, use of force resulting in death or serious injury, sexual misconduct, or dishonesty in certain contexts. These records "shall be made available for public inspection pursuant to the California Public Records Act," "notwithstanding ... any other law." Penal Code § 832.7(b)(1), as amended by Stats. 2018, ch. 988 § 2 (Senate Bill 1421).

2. Soon after this law went into effect, Plaintiff FAC requested some of these newly available records from Defendant Department. Likewise, Plaintiff KQED requested some of these newly available records from Defendant Department through a joint request with other news organizations acting collectively as the California News Coalition.

3. Although the language of this statute, the law's legislative history, and longstanding legal principles – including California's constitutional command that statutes that further public access be "broadly construed" — make it clear that these new provisions apply to all existing records regardless of when the records were created, the Department has refused to release any of the records that Senate Bill 1421 mandates to be disclosed, if those

[1] This Petition refers to the parties as Plaintiffs and Defendants as authorized by Code of Civil Procedure § 1063.

records "pre-date" January 1, 2019. In attempting to justify its refusal to disclose pre-2019 records, the

Department does not claim that the new law excludes these records; instead, it argues that because a handful of police unions have sued to prevent the release of records under the new law, and some courts have granted temporary orders to preserve the status quo, it can refuse to release any records "until the legal question of retroactive application of the statute is resolved by the courts."

4. However, the CPRA requires an agency that receives a CPRA request to determine whether the requested records are exempt from disclosure within strict deadlines and to promptly release all non-exempt records. It does not allow an agency to deny access while purporting to indefinitely postpone making this determination, as the Department has done here.

5. The Department also asserts it will not release records it obtained from other agencies. However, the law does not allow a government agency to refuse to release records in its possession simply because they were created by another agency. Indeed, the CPRA defines a public record to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, ***or retained*** by any state or local agency." Gov't Code § 6252(e) (emphasis added). It requires a government agency to release all non-exempt records "***in the possession*** of the agency." *Id.* § 6253(c) (emphasis added).

6. As the Attorney General has conceded, the Department's refusal to release any records covered by S.B. 1421 runs counter to S.B. 1421's broad statutory command to disclose "any" records concerning certain categories of police misconduct — and is anathema to the new law's purpose of increasing transparency. As the Legislature found when it enacted S.B. 1421, the "public has a strong, compelling interest in law enforcement transparency because it is essential to having a just and democratic society." S.B. 1421 § 4. Already, the release of records under this new law has revealed serious peace-officer misconduct that had long been hidden. For example, pre-2019 records released under the

S.B. 1421 have shown that "[t]hree Fairfield police officers engaged in sexual misconduct with members of the public. Four others had sustained findings of dishonesty — they withheld evidence, committed forgery or falsified reports." Megan Cassidy, *Multiple Fairfield Police Officers Disciplined for Sexual Advances, Records Show*, San Francisco Chronicle, Jan. 31, 2019.[2] There is no indication that the Legislature intended to allow records showing this type of malfeasance to remain secret, simply because they were created – or relate to conduct that occurred — in the past. To the contrary, the context of the law's enactment, its statutory language, and statements by the bill's author and in committee reports demonstrate the legislature's intent to require disclosure of records of past misconduct.

7. Plaintiffs therefore bring this suit to compel Defendants to comply with the law and release these important records to the public.

PARTIES

8. Plaintiff FAC is a non-profit corporation that is dedicated to advancing free speech rights, ensuring open and accountable government, and promoting public participation in civic affairs. FAC, which is based in Marin County, has long fought to ensure access to public records in California and was active in supporting S.B. 1421. FAC is a member of the public under Government Code §§ 6252 and is beneficially interested in the outcome of these proceedings; it has a clear, present and substantial right to the relief sought herein and no plain, speedy and adequate remedy at law other than that sought herein.

9. Plaintiff KQED is a community-supported media organization providing coverage of news and culture to Northern California via radio, television, and digital media. To fulfill its mission to inform the public, KQED depends on access to public records. As such, KQED is within the class of persons beneficially interested in Defendants' performance of its legal duties under the CPRA.

[2] Available as of March 1, 2019 at https://www.sfchronicle.com/crime/article/Multiple-Fairfield-police-officers-disciplined-13578919.php

10. Defendant California Department of Justice is a state agency that employs approximately 500 sworn peace officers and maintains records relating to those officers and to other California peace officers.

11. Defendant Xavier Becerra is the Attorney General of the State of California. Under Article 5, § 13 of the California Constitution, he is the "chief law officer of the State." He is the head of the Department of Justice and ultimately responsible for its actions. Gov't Code § 12510, 15002.5.

12. Defendants are state agencies under Government Code § 6252(f).

13. Defendants maintain, use, and possess the records sought by this Petition; the Department created some of them. Indeed, the Attorney General has gone on record stating that the Department possesses "thousands" or even "millions" of potentially responsive personnel records. *See* Xavier Becerra, interview with Scott Shafer and Katie Orr, KQED, July 12, 2018.[3] Moreover, the California Commission on Peace Officer Standards and Training recently disclosed a list of police officers who have been convicted of crimes, which demonstrates instances of misconduct, including sexual assaults of suspects, that fall within S.B. 1421's disclosure requirements. Robert Lewis and Jason Paladino, *California Keeps A Secret List Of Criminal Cops, But Says You Can't Have It,* East Bay Times, Feb. 27, 2019[4]; Deanna Paul, *These journalists have a list of criminal cops. California is trying to keep it secret*, Washington Post, March 2, 2019[5].

14. Disturbingly, the Attorney General has threatened journalists who lawfully received this public record with legal consequences unless they destroy the records (*id.*) — a threat that appears to constitute an attempted prior restraint, and which would therefore violate

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[3] Available as of March 1, 2019 at https://www.kqed.org/news/11680365/attorney-general-xavier-becerra-on-californias-legal-battles-with-the-trump-administration.

[4] Available as of March 1, 2019 at https://www.eastbaytimes.com/2019/02/26/california-keeps-a-secret-list-of-criminal-cops-but-says-you-cant-have-it/

[5] Available as of March 4, 2019 at https://www.washingtonpost.com/nation/2019/03/02/these-journalists-have-list-criminal-cops-california-is-trying-keep-it-secret/?utm_term=.dc996dd0af70

the right to free speech under long-established First Amendment principles. The Attorney General's attempt to muzzle journalists who lawfully received public records about police misconduct suggests that Defendants' refusal to produce misconduct records to Plaintiffs here is part of a bad-faith pattern of attempting to frustrate public access about matters of the utmost public importance.

JURISDICTION AND VENUE

15. This Court has jurisdiction under Government Code §§ 6258, 6259, Code of Civil Procedure §§ 1060 and 1085, and Article VI section 10 of the California Constitution.

16. Venue is proper in this Court; because the California Attorney General has an office located in the City and County of San Francisco, any suit against the Defendants that may be brought in Sacramento may also be commenced and tried in this Court. Code Civ. Pro. § 401(1). The records in question, or some portion of them, are situated in the County of Sacramento, meaning that suit may be brought in that County. Gov't Code § 6259(a); Code Civ. Pro. § 401(1).

THE CALIFORNIA PUBLIC RECORDS ACT AND S.B. 1421'S NEW DISCLOSURE REQUIREMENTS

17. Under the California Public Records Act, Government Code §§ 6250 *et seq*., all records "containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency" must be made publicly available for inspection and copying upon request, unless they are exempt from disclosure. Gov't. Code §§ 6253(a) and (b), 6252(e). If documents contain both exempt and non-exempt material, the government must disclose all non-exempt material. *Id*. § 6253(a).

18. The CPRA contains strict deadlines for the government's responses to a request for records. An agency that receives a request "shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor." Gov't Code § 6253(c).

19. "In unusual circumstances," as defined by the statute, the agency may extend this time limit "by written notice ... to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days." *Id.*; *see id.* § 6253(c)(1)-(4) (defining "unusual circumstances").

20. The CPRA also requires an agency to reasonably assist a member of the public in making a focused request, including, to the extent reasonable under the circumstances: "assist[ing] the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated" and "[p]rovid[ing] suggestions for overcoming any practical basis for denying access to the records or information sought." Gov't Code § 6253.1

21. Before the enactment of S.B. 1421, CPRA requests for peace officer personnel records – defined as all records related to the "advancement, appraisal and discipline" of peace officers – were exempt from disclosure. Penal Code §§ 832.7, 832.8; Gov't Code § 6254(k). This exemption included personnel records regarding investigations into police shootings and other serious uses of force, or allegations of serious misconduct, even when the agency had concluded that the officer had engaged in misconduct. *City of Hemet v. Superior Court*, 37 Cal. App. 4th 1411, 1431 (1995). As a result, Californians were unable to obtain the vast majority of records relating to the most egregious forms of police misconduct.

22. In 2018, reacting to public outcry concerning specific past events of police misconduct, the Legislature enacted Senate Bill No. 1421 to address this situation, emphasizing that "[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." Stats 2018 Chapt. 988 § 1 (declarations and findings).

23. This new law, effective January 1, 2019, provides broad public access to records that were previously released only in limited circumstances.

24. Specifically, the law amended Penal Code § 832.7(b)(1) to require that "[n]otwithstanding ... any other law, the following peace officer or custodial officer personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act ...:

(A) A record relating to the report, investigation, or findings of any of the following:

(i) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.

(ii) An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury.

(B) (i) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.

….

(C) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

25. The new law specifies that agencies must release a broad range of records relating to these incidents. *See* Penal Code § 832.7(b)(2).

26. At the same time, S.B. 1421 allows, and in some cases requires, agencies to redact – but not withhold – records when necessary to protect personal privacy or when the

public interest in non-disclosure clearly outweighs the public interest in disclosure. *See* Penal Code § 832.7(b)(5)(7).

27. The law additionally allows the government to withhold records in order to protect the integrity of pending investigations and prohibits the release of complaints that are frivolous or unfounded. Penal Code § 832.7(b)(7), (8).

28. The new law has already led to much-needed scrutiny of misconduct by peace officers. For instance, the San Mateo County District Attorney's Office is investigating criminal charges against a former Burlingame police officer — who was fired for soliciting sex from a suspect — after KQED and The Bay Area News Group reported that records released under S.B. 1421 revealed that two additional women had accused the officer of similar misconduct. Alex Emslie, Sukey Lewis, and Thomas Peele, *San Mateo County DA Renews Criminal Inquiry After Release of Police Misconduct Records*, KQED, Jan. 8, 2019.[6] The San Mateo District Attorney specifically credited S.B. 1421's disclosure requirement as a vehicle for bringing attention to hidden officer misconduct, stating that KQED's reporting about information released under the new law prompted the District Attorney's Office to reopen an inquiry into the former Burlingame officer and "[i]f there are police agencies around this state that have not been turning over potentially criminal conduct and just kept it behind closed doors, then this law is going to be a very good sunlight provision." *Id.* Documents released under S.B. 1421 also have shined light onto excessive force and

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[6] Available as of March 4, 2019 at https://www.kqed.org/news/11716654/san-mateo-county-da-renews-criminal-inquiry-following-release-of-police-misconduct-records

potential perjury by officers in Rio Vista,[7] and embezzlement of tens of thousands of rounds of police ammunition by a San Bernadino Sheriff's deputy[8].

PLAINTIFFS' REQUESTS AND DEFENDANTS' RESPONSES

29. On January 4, 2019, FAC Legal Fellow Glen Smith emailed a letter to Defendants on behalf of FAC, requesting records under S.B. 1421. Attached hereto as **Exhibit A** is a true and correct copy of FAC's January 4, 2019 request. Specifically, Mr. Smith requested "records relating to a report, investigation or finding (as those terms are used in Penal Code § 832.7(b)(1)(A)&(B)) of any of the following:

(1) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer;

(2) An incident in which the use of force by a peace officer or custodial officer against a person resulting in death or in great bodily injury; and/or

(3) An incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.

See Exhibit A.

30. KQED submitted a similar request for records on February 4th, 2019 through a joint request with the California News Coalition. Attached hereto as **Exhibit B** is a true and correct copy of the February 4th, 2019 request by KQED through the California News Coalition.

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[7] Sukey Lewis, Nadine Sebai, Alex Emslie, and Thomas Peele, *Excessive Force, False Reports Detailed in Rio Vista Police Misconduct Files*, KQED, Jan. 29, 2019 (available as of March 4, 2019 at https://www.kqed.org/news/11721801/bad-arrests-excessive-force-and-false-reports-detailed-in-release-of-rio-vista-police-misconduct-files); Sukey Lewis and Thomas Peele, *Impact: DA Dismisses Charges Against Woman Mauled by Rio Vista Police Dog*, March 4, 2019 (available as of March 4, 2019 at https://www.kqed.org/news/11730477/impact-da-dismisses-charges-against-woman-mauled-by-rio-vista-police-dog).

[8] Thomas Peele and Sukey Lewis, *California Cop Admits Stealing Thousands of Bullets Over 30 Years, Escapes Theft Charges*, KQED, Feb. 14, 2019 (available as of March 4, 2019 at https://www.kqed.org/news/11726097/california-cop-admits-stealing-thousands-of-bullets-over-30-years-escapes-theft-charges).

31. In particular, KQED's request sought:

a. "Records from Jan. 1, 2014 to Dec. 31, 2018 of sustained findings that a peace officer, including those employed by the Ca. Dept. of Justice, committed sexual assault or dishonesty-related misconduct. The response should reasonably include all applicable records specified by statute, including but not limited to: all investigative reports; photographic, audio and video evidence; transcripts and recordings of interviews; all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action"; and

b. "Records from Jan. 1, 2014 to present relating to the report, investigation, or findings of incidents in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury. The response should reasonably include all applicable records specified by statute, including but not limited to: all investigative reports; photographic, audio and video evidence; transcripts and recordings of interviews; autopsy reports; all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or

what discipline to impose or corrective action to take; documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action."

32. KQED also offered to accept index(es) of cases to which responsive records relate, so that KQED could further focus its request with the agency's assistance pursuant to Gov't Code § 6253.1. Exhibit B at pp. 1-2.

33. To the extent the Department maintains existing index(es), database(s), or list(s) of cases to which responsive records relate, KQED separately requested such index(es), database(s), or list(s), subject to any appropriate redactions to remove information exempt from disclosure. Exhibit B at pp. 2-3.

34. On January 14, 2019, the Department emailed Smith to inform him that it was extending its time limit to respond until January 28, based on its need to collect records from separate offices and to consult with different sections within the Department, under Gov't Code § 6253(c). Attached hereto as **Exhibit C** is a true and correct copy of the Department's January 14, 2019 letter.

35. On February 1, the Department informed Smith that it would not disclose any of the requested records, for three distinct reasons. Attached hereto as **Exhibit D** is the Department's February 1, 2019 denial of FAC's Request.

36. The first purported reason for the denial of FAC's Request is the Department's claim that S.B. 1421 and the CPRA do not require it to release peace-officer records in its possession unless those records relate to officers that it employs. *See id.* The Department therefore stated that it "will produce only those non-exempt records, if any, relating to peace officers employed by" it. *Id*.

37. This distinction between records relating to officers employed by the Department and records in its possession relating to other officers finds no support in the law. To the contrary, the CPRA requires an agency to release all records that it "retain[s]", *see* Gov't Code § 6252(e), or that are in its "possession", *see* Gov't Code § 6253(c), regardless of who created them.

38. The second stated reason is based on the Department's novel claim that "until the legal question of retroactive application of the statute is resolved by the courts, the public interest in accessing these records is clearly outweighed by the public's interest in protecting privacy rights," citing Government Code § 6255. *See id.* The Department therefore refused to release any records "at this time."

39. This, too, is wrong. The fact that police unions have brought suit in other jurisdictions to prevent the release of records neither creates a privacy interest in these records nor reduces the public interest in disclosure.

40. The Department's third stated reason cites other sundry exemptions to the CPRA's broad disclosure requirements, *see* Exhibit D, none of which justify its blanket refusal to release some or all of the records requested by FAC.

41. On February 22, the Department emailed the California News Coalition, and denied the request KQED made through the California News Coalition, asserting substantially the same unavailing grounds as in the Department's response to FAC. Attached hereto as **Exhibit E** is the Department's February 22, 2019 denial of KQED's Request. Specifically, the Department attempts to justify its refusal to disclose records to KQED on the following purported grounds (1): "to the extent that the Attorney General has obtained records from other state and local law enforcement agencies, the Attorney General is not the agency that 'maintains' those documents"; (2) Given "ongoing proceedings" concerning S.B. 1421, the Department is "at this time…prepared to disclose only records beginning January 1, 2019"; and (3) "Some of the records you have requested may be exempt from disclosure

because they are protected by the attorney work product doctrine and privileges listed above." *See* Exhibit E.

42. Defendants' refusal to produce responsive records within the time limits prescribed by the CPRA is especially unjustified given that the Office of the Attorney General has stated that the statutory language requires release of ***all*** records that concern the categories of misconduct specified in S.B. 1421 – not just those created before the law took effect on January 1, 2019. In particular, the Attorney General submitted an amicus brief in *Association for Los Angeles Deputy Sheriffs v. Superior Ct.*, Cal. Supreme Ct. Case No. S243855, arguing that the law's application is retroactive. Attached hereto as **Exhibit F** is a true and correct copy of the amicus brief submitted by the Attorney General in *Association for Los Angeles Deputy Sheriffs v. Superior Ct.*

43. Specifically, among other things, the amicus brief acknowledges that "SB 1421 applies to '[a]ny' record relating to certain sustained findings of misconduct" and argues that the bill's goal – "to increase transparency into officer use of force and incidents involving founded, serious misconduct" – "could not be achieved if all records of prior conduct were excluded from the law's coverage." Exhibit F at 11. In other words, the attorney general has conceded that the statutory language of S.B. 1421 imposes a mandatory duty to disclose the records that Defendants are wrongfully withholding from Plaintiffs – and that this wrongful withholding frustrates the very purpose of the law.[9]

44. Neither FAC nor KQED has received any of the records that either Plaintiff has requested from the Department.

45. For the reasons listed above, among others, the Department's refusal to comply with Plaintiffs' records requests is unlawful.

[9] In the same brief, the attorney general stated that its office "has declined to provide pre-2019 record…until the courts have provided greater clarity" in response to lawsuits opposing release of pre-2019 records. Exhibit F at 12. Through this action, Plaintiffs seek exactly this clarity – to confirm the conclusion already conceded by the Attorney General: that S.B. 1421 requires disclosure of all responsive, non-exempt records without further delay.

FIRST CAUSE OF ACTION

For Violations of the California Public Records Act, Penal Code § 832.7(b), and Article I, § 3 of the California Constitution

(Plaintiffs FAC and KQED v. Defendants California Department of Justice and Becerra)

46. Plaintiffs incorporate herein by reference the above allegations, as if set forth in full.

47. The PRA, Penal Code § 832.7(b), and the California Constitution require the disclosure of the records requested by Plaintiffs.

48. Defendants' failure to provide the requested records violates the PRA, Penal Code § 832.7(b), and Article I, § 3 of the California Constitution.

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Plaintiffs therefore request the following relief:

1. That the Court issue a writ of mandate directing Defendants to provide Plaintiffs with all requested records except those records or parts thereof that the Court determines may lawfully be withheld;

2. That Plaintiffs be awarded attorneys' fees and costs under Gov't Code § 6259 and any other applicable statutes or basis;

3. For all other and further relief that the Court deems proper and just.

Dated: March 5, 2019

DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE
BRENDAN CHARNEY

By: _____
THOMAS R. BURKE

Attorneys for Plaintiff KQED INC.

Dated: March 5, 2019

LAW OFFICE OF MICHAEL T. RISHER
MICHAEL T. RISHER

FIRST AMENDMENT COALITION
DAVID E. SNYDER
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By: Michael T. Risher/dg
MICHAEL T. RISHER

Attorneys for Plaintiff FIRST AMENDMENT COALITION

Verification

I, David E. Snyder, am the Executive Director of the First Amendment Coalition and authorized to verify this First Amended Petition as an officer. I have read this First Amended Verified Petition for Writ of Mandate in *First Amendment Coalition v. Becerra and California Department of Justice* and am informed, and do believe, that the matters herein are true. On that ground I allege that the matters stated herein are true.

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

Date: 3-5-19

David Snyder

Verification

I, William Lowery, am the General Counsel and Corporate Secretary of KQED Inc. and am authorized to verify this First Amended Petition as an officer. I have read this First Amended Verified Petition for Writ of Mandate in *First Amendment Coalition v. Becerra and California Department of Justice* and am informed, and do believe, that the matters herein are true. On that ground I allege that the matters stated herein are true.

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

Date: 3/4/19

William Lowery

EXHIBIT A

FIRST AMENDMENT COALITION

January 4, 2019

Public Records Coordinator
California Department of Justice
P.O. Box 944255
Sacramento, CA 94244-2500
PublicRecords@doj.ca.gov

Sent via Email

To the Public Records Coordinator:

On behalf of the First Amendment Coalition ("FAC"), I hereby request the records set forth below. This request is submitted pursuant to the California Public Records Act ("CPRA"), Gov. Code sec. 6250 *et seq*.; the California Constitution, Article I, section 3; and FAC's rights of access under California common law.

FAC requests the following records relating to a report, investigation or finding (as those terms are used in Penal Code § 832.7(b)(1)(A)&(B)) of any of the following:

(1) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer;
(2) An incident in which the use of force by a peace officer or custodial officer against a person resulting in death or in great bodily injury; and/or
(3) An incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.

As you are no doubt aware, public access to these records has been reenforced by Senate Bill 1421, which amended those sections of Penal Code §§ 832.7 and 832.8 that had previously restricted public access to some of these records. FAC is requesting

records for the “incidents” as defined above that occurred in 2016, 2017 and 2018.

Even without SB 1421, when charges or complaints of wrongdoing are made regarding ordinary public employees, the right of access to public records requires disclosure of all “well-founded” complaints, the information upon which they are based, and any discipline imposed. (*American Federation of State, County and Municipal Employees, et al. v. Regents of University of California* (1978) 80 Cal.App.3d 913, 917; *Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th 1041, 1046.) Moreover, in the case of higher-ranking public employees, disclosure of an investigation into misconduct is required even if the charges are found not to be reliable and the official is exonerated. (*BRV, Inc. v. Superior Court* (2006) 143 Cal. App. 4th 742, 759.)

If any portion of the records requested is exempt from disclosure by express provisions of law, Government Code Section 6253(a) requires segregation and redaction of that material in order that the remainder of the information may be released. If you believe that any express provision of law exists to exempt from disclosure all or a portion of the records FAC has requested, you must notify FAC of the reasons for the determination not later than 10 days from your receipt of this request letter. (Cal. Gov’t. Code § 6253(c).) Any response to this request that includes a determination that the request is denied, in whole or in part, must be in writing. (Cal. Gov’t. Code § 6255(b).)

Gov’t. Code section 6253(d) prohibits the use of the 10-day period, or any provisions of the CPRA or any other law, “to delay access for purposes of inspecting public records.”

In addressing this request, please keep in mind that the California Constitution expressly requires you to broadly construe all provisions that further the public’s right of access, and to apply any limitations on access as narrowly as possible. Cal. Const., Art. 1, sec. 3(b)(2). The CPRA recognizes “no limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure.” (Cal. Gov’t Code § 6257.5.)

Please send all responses to my email address below. Please contact me to obtain my consent before incurring copying costs, chargeable to FAC, in excess of $100. Thank you for your timely attention to this request.

Sincerely,

/s/ Glen A. Smith

Glen A. Smith
FAC Legal Fellow
First Amendment Coalition
gsmith@firstamendmentcoalition.org
415-460-5060

cc: Michelle M. Mitchell
Deputy Attorney General
California Department of Justice
P.O. Box 944255
Sacramento, CA 94244
michellem.mitchell@doj.ca.gov

David Snyder
Executive Director
First Amendment Coalition
dsnyder@firstamendmentcoalition.org

EXHIBIT B

Gmail

PRA Coalition <ca.news.coalition.pras@gmail.com>

PRA for Police Disciplinary Records

1 message

PRA Coalition <ca.news.coalition.pras@gmail.com> Mon, Feb 4, 2019 at 11:24 AM
To: Jennifer.Molina@doj.ca.gov

Dear Jennifer Molina,

Dear Jennifer Molina,

This request is being made jointly by KQED News, the Bay Area News Group, and Investigative Studios, a non-profit news organization affiliated with the Investigative Reporting Program at the UC Berkeley.

February 4, 2019

Attn:
Jennifer Molina

Under the **California Public Records Act § 6250 et seq.**, this coalition of organizations engaged in the dissemination of information to the public request access to and copies of the following information in electronic, searchable/sortable format, where applicable. **Each element requested should be considered severable for purposes of invoking a time extension or exemption under either local or state law.**

SUSTAINED FINDINGS:

1. Records from Jan. 1, 2014 to Dec. 31, 2018 of sustained findings[1] that a peace officer, including those employed by the Ca. Dept. of Justice, committed sexual assault[2] or dishonesty-related misconduct[3].

    a. The response should reasonably include all applicable records specified by statute[4], including but not limited to: all investigative reports; photographic, audio and video evidence; transcripts and recordings of interviews; all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take; documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action.

    b. If the Ca. Dept. of Justice would prefer to provide an index of the above cases in compliance with California Government Code Section 6253.1 which requires a public agency to help the requester make a focused request, instead of providing entire case files, that would be acceptable. Such an index should reasonably include, as applicable, the following for each entry:
        i. Any record number used to identify the case
        ii. The date the sustained misconduct took place
        iii. The location the sustained misconduct took place

iv. The name(s) of any officer(s)/employee(s) found to have committed the sustained misconduct
v. A summary description of the misconduct
vi. The specific type of misconduct that was ultimately sustained (e.g. conduct reflecting discredit)
vii. Any recommendations made by an investigating agency as to discipline or corrective action, and the date any such recommendations were made
viii. The ultimate disposition of the case, whether it be discipline, non-disciplinary corrective action, or no action whatsoever and the specific kind of discipline or corrective action that was imposed, if any and the date the case was closed or the date of the last adjudication of the case.
ix. Whether the case file contains video files (yes or no)
x. Whether the case file contains audio files (yes or no)

c. To the extent that the CA DOJ maintains an index, database or list of cases that includes entries of sustained findings of sexual assault-related misconduct and/or dishonesty-related misconduct, that index, list or database is also separately requested. If such an index, list or database contains information about findings of misconduct that are not subject to disclosure, the index, list, or database should be redacted to remove the information that is not subject to disclosure, and the rest of the record should be provided.

USE OF FORCE:

1. Records from Jan. 1, 2014 to present relating to the report, investigation, or findings of incidents in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury[5].

a. The response should reasonably include all applicable records specified by statute[6], including but not limited to: all investigative reports; photographic, audio and video evidence; transcripts and recordings of interviews; autopsy reports; all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take; documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action.
b. If the CA DOJ would prefer to provide an index of the above cases in compliance with California Government Code Section 6253.1 which requires a public agency to help the requester make a focused request, instead of providing entire case files, that would be acceptable. Such an index should reasonably include, as applicable, the following for each entry:
i. Any record number used to identify the incident
ii. The date the use of force took place
iii. The location the use of force took place
iv. The name(s) of any officer(s)/employee(s) involved in the incident
v. A summary description of the incident
vi. Characterization of injury or injuries sustained to the extent that is tracked
vii. The type of force used
viii. Any recommendations made by an investigating agency as to discipline or corrective action, and the date any such recommendations were made
ix. The ultimate disposition of the case, whether it be discipline, non-disciplinary corrective action, or no action whatsoever and the specific kind of discipline or corrective action that was imposed, if any and the date the case was closed or the date of the last adjudication of the case.
x. Whether the case file contains video files (yes or no)
xi. Whether the case file contains audio files (yes or no)

c. To the extent that the CA DOJ maintains an index, database or list of cases that includes entries related to uses of force that resulted in great bodily injury or death, that index, list or database is also separately requested. If such an index, list or database contains information about cases that are not subject to disclosure, the index, list, or database should be redacted to remove the information that is not subject to disclosure, and the rest of the record should be provided.

To the extent the records exist in electronic format, please provide them in that format.

We also draw your attention to **Government Code section 6253.1**, which requires a public agency to assist the public in making a focused and effective request by (1) identifying records and information responsive to the request, (2) describing the information technology and physical location in which the records exist, and (3) providing suggestions for overcoming any practical basis for denying access to the records or information sought. The purpose of this request is to obtain the above referenced documents. Please provide your full compliance with 6253.1 should the need arise.

To the extent that a portion of the information we have requested is not immediately available, we request that whatever documentation is immediately available be turned over first.

Please limit all communications regarding this request to email. Please do not telephone us regarding this matter.

For documents that could be provided in electronic, searchable format, where applicable: We can handle a variety of data formats, and we would be happy to correspond about this request to figure out what would be the easiest or best way to provide the requested records.

Please notify us via email if the responsive records are larger than 15 MB to make arrangements about how to best provide the records.

If this request is denied in whole or part, we ask that you **justify all individual deletions/redactions or withheld records by reference to specific exemptions of the law**. We will also expect you to **release all segregable portions of otherwise exempt material**.

Please contact us by email if you have any questions about this request. We look forward to receiving the required determination within 10 days.

1. “Sustained” finding as defined by Cal. PEN. Code § 832.8(b).
2. “Sexual Assault” as defined by Cal. PEN. Code § 832.7(b)(1)(B)(ii).
3. Misconduct as defined by Cal. PEN. Code § 832.7(b)(1)(C).
4. Cal. PEN. Code § 832.7 (b)(2).
5. Cal. PEN. Code § 832.7 (b)(ii).
6. Cal. PEN. Code § 832.7 (b)(2).

EXHIBIT C

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE

300 SOUTH SPRING STREET, SUITE 1702
LOS ANGELES, CA 90013

Public: (213) 269-6000
Telephone: (213) 269-6226
Facsimile: (213) 897-5775
E-Mail: Amie.Medley@doj.ca.gov

January 14, 2019

By E-Mail
Glen Smith
First Amendment Coalition
534 Fourth Street, Suite B
San Rafael, CA 94901
gsmith@firstamendmentcoalition.org

RE: Public Records Act Request received January 4, 2019

Dear Mr. Smith:

This letter responds to your request under the Public Records Act (Gov. Code, § 6250 et seq.) seeking records relating to a report, investigation or finding of any of the following:

1. An incident involving the discharge of a firearm at a person by a peace officer or custodial officer;

2. An incident in which the use of force by a peace officer or custodial officer against a person resulting in death or in great bodily injury; and/or

3. An incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.

Agencies are required to respond to requests under the Public Records Act within 10 days, but may extend the deadline by up to 14 days under specified circumstances. (Gov. Code, § 6253, subd. (c).) These include:

1. The need to search for and collect records from field offices or other facilities that are separate from the office processing the request.

2. The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request.

3. The need for consultation, which shall be done with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components of the agency having substantial subject matter interest therein.

(*Id.*)

In this instance, an extension is needed both to search for and collect records from separate offices and to consult with different sections within the department having a subject matter interest in the requested records.

Sincerely,

AMIE L. MEDLEY
Deputy Attorney General

For XAVIER BECERRA
Attorney General

ALM:

EXHIBIT D

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE

300 SOUTH SPRING STREET, SUITE 1702
LOS ANGELES, CA 90013

Public: (213) 269-6000
Telephone: (213) 269-6256
Facsimile: (213) 897-5775
E-Mail: Mark.Beckington@doj.ca.gov

February 1, 2019

By E-Mail
Glen Smith
First Amendment Coalition
534 Fourth Street, Suite B
San Rafael, CA 94901
gsmith@firstamendmentcoalition.org

RE: Public Records Act Request received January 4, 2019

Dear Mr. Smith:

This letter responds to your request under the Public Records Act (Gov. Code, § 6250 et seq.) seeking records from 2016, 2017, and 2018, relating to a report, investigation or finding of any of the following:

1. An incident involving the discharge of a firearm at a person by a peace officer or custodial officer;

2. An incident in which the use of force by a peace officer or custodial officer against a person resulting in death or in great bodily injury; and/or

3. An incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.

Penal Code section 832.7, as amended by SB 1421, requires the disclosure of certain personnel records of peace officers and custodial officers, as well as records maintained by any state or local agency as required by Penal Code section 832.5. To the extent that the Attorney General has obtained records from other state and local law enforcement agencies, the Attorney General is not the agency that "maintains" those documents. A requester may properly seek disclosure from the employing agency, which not only maintains the records, but will be best situated to assess any applicable exceptions to the disclosure requirement and any statutorily required redactions concerning sensitive and private information. Further, to the extent that the Attorney General has obtained such records in relation to investigations or proceedings that the Attorney General is conducting, the disclosure provisions in section 832.7 do not apply to the Attorney General under section 832.7, subdivision (a). Thus, the Department will produce only

those non-exempt records, if any, relating to peace officers employed by the Department of Justice. In producing such records, DOJ will redact certain private identifying information, as provided in Penal Code section 832.7, subdivision (b)(5).

Historically, peace officers have had a significant privacy right in their personnel records. Several cases currently pending in the California superior courts raise the issue whether SB 1421 requires the disclosure of records relating to conduct occurring before January 1, 2019, which is the effective date of SB 1421. In two of those cases, the courts have directed local law enforcement agencies not to disclose documents until further proceedings on the issue. (*Los Angeles Police Protective League v. City of Los Angeles* (Super. Ct. Los Angeles County, 2018, No. 18-STCP-03495; *Richmond Police Officers' Association v. City of Richmond* (Super. Ct. Contra Costa County, 2019, No. 19-0169). Therefore, until the legal question of retroactive application of the statute is resolved by the courts, the public interest in accessing these records is clearly outweighed by the public's interest in protecting privacy rights. (Gov. Code, § 6255.) We will not disclose any records that pre-date January 1, 2019 at this time.

Lastly, SB 1421 provides for the disclosure of responsive records "pursuant to the California Public Records Act." (Pen. Code, § 832.7, subd. (b)(1).) Attorney work product, attorney client privilege, deliberative process privilege, and official information privilege are incorporated into the Public Records Act as an exemption from disclosure. (Gov. Code, § 6254, subd. (k); *County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 833.) In particular, the attorney work product exception protects the confidentiality of any writing that is maintained as confidential and that reflects an attorney's impressions, conclusions, opinions, legal research, or legal theories. (Code Civ. Proc. section 2018.030.) Some of the records you have requested are exempt from disclosure because they are protected by the attorney work product doctrine and privileges listed above. These records will not be disclosed.

Sincerely,

MARK R. BECKINGTON
Supervising Deputy Attorney General

For XAVIER BECERRA
Attorney General

MRB:

EXHIBIT E

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE

300 SOUTH SPRING STREET, SUITE 1702
LOS ANGELES, CA 90013

Public: (213) 269-6000
Telephone: (213) 269-6226
Facsimile: (213) 897-5775
E-Mail: Amie.Medley@doj.ca.gov

February 22, 2019

By E-Mail
California News Coalition
ca.news.coalition.pras@gmail.com

RE: Public Records Act Request received February 4, 2019

Dear Sir or Madam:

This letter responds to the request by the California News Coalition under the Public Records Act (Gov. Code, § 6250 et seq.) seeking records relating to a report, investigation or finding of any of the following:

- Records from Jan. 1, 2014 to Dec. 31, 2018 of sustained findings that a peace officer, including those employed by the Ca. Dept. of Justice, committed sexual assault or dishonesty-related misconduct. The response should reasonably include all applicable records specified by statute, including but not limited to: all investigative reports; photographic, audio and video evidence; transcripts and recordings of interviews; all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action.

- Records from Jan. 1, 2014 to present relating to the report, investigation, or findings of incidents in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury. The response should reasonably include all applicable records specified by statute, including but not limited to: all investigative reports; photographic, audio and video evidence; transcripts and recordings of interviews; autopsy reports; all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take; documents setting forth findings or

recommended findings; and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action.

Penal Code section 832.7, as amended by SB 1421, requires the disclosure of certain personnel records of peace officers and custodial officers, as well as records maintained by any state or local agency as required by Penal Code section 832.5. To the extent that the Attorney General has obtained records from other state and local law enforcement agencies, the Attorney General is not the agency that "maintains" those documents. A requester may properly seek disclosure from the employing agency, which not only maintains the records, but will be best situated to assess any applicable exceptions to the disclosure requirement and any statutorily required redactions concerning sensitive and private information. Further, to the extent that the Attorney General has obtained such records in relation to investigations or proceedings that the Attorney General is conducting, the disclosure provisions in section 832.7 do not apply to the Attorney General under section 832.7, subdivision (a).

Historically, under state statute, peace officers have had a significant privacy right in their personnel records. (Pen. Code, § 832.7.) Several cases have recently raised the issue whether SB 1421's amendment to section 832.7 requires the disclosure of records relating to conduct that occurred before January 1, 2019, which is SB 1421's effective date. On January 2, 2019, the California Supreme Court denied a petition asking it to consider whether SB 1421 requires disclosure of pre-2019 documents. Since then, one superior court recently ruled that SB 1421 requires disclosure of pre-2019 records but temporarily stayed the order's effect to allow for a potential appeal, and two other superior courts have directed local law enforcement agencies not to disclose such documents pending further court proceedings. Given the ongoing proceedings, at this time, we are prepared to disclose only records beginning January 1, 2019. (Gov. Code, § 6255.)

Lastly, SB 1421 provides for the disclosure of responsive records "pursuant to the California Public Records Act." (Pen. Code, § 832.7, subd. (b)(1).) Attorney work product, attorney client privilege, deliberative process privilege, and official information privilege are incorporated into the Public Records Act as an exemption from disclosure. (Gov. Code, section 6254, subd. (k); *County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 833.) In particular, the attorney work product exception protects the confidentiality of any writing that is maintained as confidential and that reflects an attorney's impressions, conclusions, opinions, legal research, or legal theories. (Code Civ. Proc. section 2018.030.) Some of the records you have requested may be exempt from disclosure because they are protected by the attorney work product doctrine and privileges listed above. These records will not be disclosed.

In light of the above, we have no records to disclose at this time.

Sincerely,

AMIE L. MEDLEY
Deputy Attorney General

For XAVIER BECERRA
Attorney General

ALM:

EXHIBIT F

In the Supreme Court of the State of California

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS, **Petitioner,** **v.** **SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,** **Respondent.**	Case No. S243855

Second Appellate District, Division Eight, Case No. B280676
Los Angeles County Superior Court, Case No. BS166063
The Honorable James C. Chalfant, Judge

SUPPLEMENTAL BRIEF OF THE ATTORNEY GENERAL AS *AMICUS CURIAE*

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
*AIMEE FEINBERG (SBN 223309)
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Attorneys for the Attorney General

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OTHER AUTHORITIES

The Attorney General respectfully submits this brief in response to the Court's January 2, 2019 order inviting supplemental briefing addressing the enactment of Senate Bill 1421.

SB 1421 amends Penal Code section 832.7, at issue in this case, to provide that certain officer personnel records concerning officer use of force resulting in death or great bodily injury, officer discharge of a firearm, or sustained findings of certain serious misconduct such as sexual assault generally are not confidential and must be made available to the public under the Public Records Act. The new law does not directly address the question presented in this case, which involves the disclosure of officer names to prosecutors to facilitate compliance with *Brady v. Maryland* (1963) 373 U.S. 83 and similar cases. It does reflect, however, a clear legislative recognition that, under certain circumstances, important public interests may warrant the disclosure of even otherwise sensitive personnel information. SB 1421 also makes clear that, as to at least those officers whose personnel files contain records covered by the new enactment, state law does not prohibit law enforcement agencies from communicating those officers' names to prosecutors to enable compliance with *Brady*.

SB 1421 does not, however, resolve or moot the issue presented in this case. SB 1421 applies to certain types of serious misconduct, including sustained findings of dishonesty and sexual assault; but it does not address other sorts of personnel-related information that may bear on officer credibility, competence, or bias. In addition, the plaintiffs in a number of cases now pending in the lower courts have contended that SB 1421 does not apply to records that were created, or that relate to conduct that occurred, before the law's effective date. The Attorney General disagrees with that contention; but if the courts were to adopt it, then SB 1421 would

have no effect on prosecutors' ability to comply with their federal *Brady* obligations with respect to any pre-2019 records or information.

SB 1421's mechanism for public access to some personnel records also does not lessen the need for prosecutors to be notified when an officer has potential impeachment information in his personnel file. Even if a criminal defendant may seek personnel records directly from a law enforcement agency, the categories of information subject to release under SB 1421 are narrower than what the State may have a federal constitutional duty to disclose. In addition, this Court should not adopt any rule that would recognize a defendant's right to submit a Public Records Act request in common with any member of the public, but deny prosecutors the ability to alert defendants to the existence of potential impeachment information in the possession of another member of the prosecution team. Any approach that privileged Public Records Act requests over enabling prosecutors to make the disclosures required in specific cases could not be squared with the U.S. Supreme Court's repeated urging that prosecutors take special care to ensure that their federal constitutional disclosure obligations are satisfied. As explained in the Attorney General's initial amicus brief, the Court should hold that Penal Code section 832.7 permits disclosure of officer names to state prosecutors to facilitate compliance with those obligations, regardless of the amendments made by SB 1421.

BACKGROUND

California's *Pitchess* statutes, originally enacted following this Court's decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, establish a conditional privilege for officer personnel records. Penal Code section 832.7, subdivision (a), provides that "the personnel records of peace officers and custodial officers …, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil

proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code."

Effective January 1, 2019, Senate Bill 1421 amends section 832.7 to provide that, notwithstanding that general confidentiality protection, specified "peace officer … personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act." (Stats. 2018, ch. 988, § 2 (codified at Pen. Code, § 832.7, subd. (b)(1).) The records covered by this provision include those "relating to the report, investigation, or findings of" incidents involving an officer's discharge of a firearm at a person and incidents in which an officer's use of force results in death or great bodily injury. (Pen. Code, § 832.7, subd. (b)(1)(A)(i), (ii).) The statute also applies to "[a]ny record relating to an incident in which a sustained finding was made" that a peace officer sexually assaulted a member of the public or in which a "sustained finding was made … of dishonesty by a peace officer … directly relating to" his official duties, including "any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence." (*Id.*, § 832.7, subd. (b)(1)(B)(i), (C).)

Under the amended statute, law enforcement agencies must redact disclosed records for certain purposes, including to remove personal data, to preserve the anonymity of complainants and witnesses, and where there is a specific reason to believe that disclosure would pose a significant danger to the physical safety of the officer or another person. (Pen. Code, § 832.7, subd. (b)(5)(A), (B), (D).) The statute also requires redaction to "protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct and serious use of force." (*Id.*,

§ 832.7, subd. (b)(5)(C).) Agencies may also redact records when, in a particular case, "the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information." (*Id.*, § 832.7, subd. (b)(6); see also Gov. Code, § 6254, subd. (k) [exemption from disclosure for privileged documents].) Finally, an agency may delay release of records involving the discharge of a firearm or use of force for prescribed periods while an active criminal or administrative investigation or proceeding is ongoing and when other criteria are satisfied. (Pen. Code, § 832.7, subd. (b)(7).)

The statute states that it "does not affect the discovery or disclosure" of personnel information pursuant to a noticed *Pitchess* motion. (Pen. Code, § 832.7, subd. (g).) SB 1421 likewise "does not supersede or affect" generally applicable criminal discovery processes or "the admissibility of personnel records pursuant to [section 832.7,] subdivision (a), which codifies the court decision in Pitchess v. Superior Court (1974) 11 Cal.3d 531." (Pen. Code, § 832.7, subd. (h).)

The Legislature adopted SB 1421 based on a finding that the public "has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force." (Stats. 2018, ch. 988, § 1, subd. (b).) Because peace officers "help to provide one of our state's most fundamental government services," withholding information about officer violations "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." (*Id.*, § 1, subds. (a), (b).)

ARGUMENT

1. SB 1421 does not directly address the question presented in this case. The issue here is whether state law permits law enforcement agencies to disclose to prosecutors, for the purpose of complying with *Brady*, an

officer's name and the fact that his personnel records contain potential impeachment information. SB 1421, on the other hand, provides for public access to certain officer personnel records for the purpose of enhancing transparency and promoting community trust in law enforcement.

SB 1421's provisions do support the conclusion that nothing in the *Pitchess* scheme prohibits law enforcement agencies from communicating to prosecutors at least the names of officers whose personnel files contain records covered by the new law. SB 1421 provides that, notwithstanding prior confidentiality protections, personnel records concerning specified incidents or concerning sustained findings of certain misconduct "shall not be confidential and shall be made available for public inspection pursuant to" the Public Records Act. (Pen. Code, § 832.7, subd. (b)(1).) This disclosure provision applies to records that reveal an officer's identity. (*Id.*, § 832.7, subd. (b)(2) [listing categories of records subject to release]; *id.*, § 832.7, subd. (b)(5)(A) [providing for redaction of personal information "other than the names and work-related information" of officers].) Thus, SB 1421 lifts prior confidentiality protections and permits the public release of certain officer names. *A fortiori*, the law also permits law enforcement agencies to provide the same names to prosecutors to satisfy *Brady*'s disclosure obligations.

SB 1421 specifies that the amendments it makes do "not supersede or affect the criminal discovery process … or the admissibility of personnel records." (Pen. Code, § 832.7, subd. (h); see also *id.*, § 832.7, subd. (g) [section "does not affect" *Pitchess* motion procedures].) The legislative history also reflects that the changes are intended "to give the general public, not a criminal defendant, access to otherwise confidential police personnel records relating to serious police misconduct in an effort to increase transparency." (Assem. Com. on Pub. Safety, Rep. on Sen. Bill 1421 (2017-2018 Reg. Sess.) June 19, 2018, p. 8.) But it would be

unreasonable to hold that state law requires law enforcement agencies to release officer personnel records to any member of the public on request and for any reason, while barring the same agencies from giving the same names to prosecutors so they can discharge their federal constitutional duties in connection with state criminal proceedings. (Cf. *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1286 ["There is little point in protecting information from disclosure in connection with criminal and civil proceedings if the same information can be obtained routinely under [the] CPRA," internal quotation marks and alterations omitted]; *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 290 [statutory construction leading to unreasonable or anomalous results should be avoided].) Any such result would be inconsistent with the Legislature's recognition in SB 1421 that, under certain circumstances, important public interests may warrant the disclosure of even otherwise sensitive personnel information.

2. Although SB 1421 thus permits the disclosure of certain officers' names, it does not resolve or moot this case. *Brady* requires the State to divulge any evidence in its possession that is potentially favorable to the defense and material to either guilt or punishment. (E.g., *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 7-8.) Evidence is material under *Brady* when "'there is a reasonable probability that, had [it] been disclosed to the defense, the result of the proceeding would have been different.'" (*Ibid.*, quoting *United States v. Bagley* (1985) 473 U.S. 667, 682.) Evidence can be material under this standard even if it significantly predates the officer's involvement in the defendant's case. (See *id.* at 12, 14-15 [recognizing *Brady* duty to disclose material impeachment information may extend to officer conduct occurring more than five years before defendant's crime].) And evidence bearing unfavorably on an officer's veracity, credibility, possible bias, or

competence all may be material depending on the facts of a particular case. (See *People v. Gaines* (2009) 46 Cal.4th 172, 184; *Milke v. Ryan* (9th Cir. 2013) 711 F.3d 998, 1006.)

SB 1421 does not address all of this potential impeachment information. As noted, SB 1421 applies to specific classes of personnel-related information, such as incidents involving the use of force resulting in death or great bodily injury and sustained findings of dishonesty or sexual assault. (Pen. Code, § 832.7, subd. (b)(1)(A)(ii), (B), (C).) The statute does not address information concerning, for example, an officer's racial bias, his personal relationship with a witness or victim, sustained findings of dishonesty unconnected to a law enforcement report or investigation, or repeated instances of substandard work performance—all of which may be disclosable under *Brady* depending on the circumstances of the case. In addition, the Los Angeles Sheriff's Department policy at issue in this case calls for disclosure of the names of officers who were found to have violated policies against family violence, accepting gifts, and harassment based on race, religion, and other characteristics. (Opn. at p. 8.) Such conduct likewise would not necessarily be covered by SB 1421.

Moreover, the plaintiffs in a number of cases now pending in the lower courts have contended that SB 1421 does not encompass personnel records that were created, or that relate to conduct that occurred, before the law took effect on January 1, 2019. The Attorney General disagrees with that contention. While this brief is not the place to offer a full analysis of the issue, SB 1421 applies to "[a]ny" record relating to certain sustained findings of misconduct. (Pen. Code, § 832.7, subd. (b)(1)(B)(i), (C).) In addition, SB 1421 was intended to increase transparency into officer use of force and incidents involving founded, serious misconduct. (Stats. 2018, ch. 988, § 1, subd. (b) [legislative finding that public has "right to know all about serious police misconduct"]; *ibid.* [withholding information about

officer misconduct "undercuts the public's faith in the legitimacy of law enforcement"]; Assem. Com. on Pub. Safety Rep., *supra*, at p. 4 [bill's purpose is "'to make sure that good officers and the public have the information they need to address and prevent abuses and to weed out the bad actors,'" quoting author's statement].) That goal could not be achieved if all records of prior conduct were excluded from the law's coverage. (See *Walnut Creek Police Officers' Assn. v. City of Walnut Creek* (Super. Ct. Contra Costa County, 2019, No. N19-0109), at p. 32, petition for writ of supersedeas filed, No. A156477 ["It makes little sense to suppose that the Legislature saw these serious problems and concerns [regarding the withholding of covered information] as applying strongly to police personnel records dating to 2019—but that it viewed the same problems and concerns as categorically inapplicable to police personnel records dating to 2018 or earlier"].) If, however, the courts were to construe SB 1421 as not applying to records or conduct pre-dating 2019, then the enactment itself would provide no access to the names of officers whose files contain pre-2019 records or information.[1]

For all of these reasons, SB 1421 does not fully resolve the broader question presented in this case. With respect to that question, and as explained in the Attorney General's principal amicus brief, the Court should hold that the *Pitchess* scheme permits law enforcement agencies to notify prosecutors when a peace officer has any potential impeachment information in his personnel records.

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[1] Because any public disclosure of personnel records would irrevocably reveal potentially protected information, the Attorney General has declined to provide pre-2019 records in response to Public Records Act requests directed to the California Department of Justice until the courts have provided greater clarity concerning the legal question of SB 1421's application to such records.

3. The Court should reach that conclusion even if SB 1421 also allows criminal defendants to obtain access to some impeachment-related information through a Public Records Act request. As explained, SB 1421 provides for disclosure of a narrower set of information than the State may have a federal constitutional duty to divulge to a defendant. Thus, even if the defense is able to obtain some personnel records by requesting them directly from a law enforcement agency, another mechanism is needed to ensure that all potentially relevant impeachment information is disclosed.

More fundamentally, it would not be sound policy to rely on Public Records Act requests to ensure that the State is satisfying its federal constitutional disclosure obligations. As discussed in the Attorney General's principal amicus brief, it is not clear that a rule shifting to the defense the entire burden for uncovering the existence of *Brady* material would pass constitutional muster. (Attorney General Br. at p. 20.) Such an approach would also be in substantial tension with the U.S. Supreme Court's repeated admonition that prosecutors act diligently to discharge their constitutionally mandated disclosure duties. (*Id.* at pp. 20-21.) This Court should not adopt any rule that relies on a defendant's ability to file Public Records Act requests, while depriving state prosecutors of basic information that they need to alert defendants to the existence of potential impeachment material held by another member of the prosecution team.

4. Finally, the Court should not remand for the Court of Appeal to consider SB 1421's effect on this case in the first instance. The issues presented—the interpretation of Penal Code section 832.7 and the State's disclosure duties under *Brady* and related cases—are purely legal. The Court's resolution of these issues will significantly affect the day-to-day operations of the entire criminal justice system. Only a timely, definitive resolution by this Court can provide the guidance needed by trial courts, prosecuting offices, law enforcement agencies, and criminal defendants

throughout the State. For the reasons explained here and in the Attorney General's principal amicus brief, the Court should hold that California's *Pitchess* statutes allow law enforcement agencies to communicate to prosecutors, for the purpose of complying with *Brady*, an officer's name and the fact that his personnel records contain potential impeachment information of any kind.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: February 20, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL BRIEF OF THE ATTORNEY GENERAL AS *AMICUS CURIAE*** contains 2,857 words as counted by the word-processing program used to prepare the brief and excluding the cover page and the other parts of the brief excluded under rule 8.520, subdivision (c)(3).

Dated: February 20, 2019

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Association for Los Angeles Deputy Sheriffs v. Superior Court**
Case No.: **S243855**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 20, 2019, I served the attached **SUPPLEMENTAL BRIEF OF THE ATTORNEY GENERAL AS AMICUS CURIAE** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 20, 2019, at San Francisco, California.

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