No. A165888

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

FIRST AMENDMENT COALITION; KQED INC.,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO,
Respondent,

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, AND THE CALIFORNIA DEPARTMENT OF JUSTICE,
Real Parties in Interest.

County Superior Court, Case No. CPF-19-516545
The Honorable Curtis E. A. Karnow, Judge

REAL PARTIES' OPPOSITION TO PETITION FOR WRIT OF MANDATE

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

In accordance with Rule 8.208 of the California Rules of Court, Real Parties in Interest Rob Bonta, in his official capacity as Attorney General of the State of California, and the California Department of Justice, by and through their undersigned counsel, hereby certify that there are no interested entities or persons that must be listed in this Certificate.

Respectfully submitted,

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Pursuant to this Court's September 22, 2022 Order, Real Parties in Interest (RPI), Rob Bonta, in his official capacity as Attorney General of the State of California, and the California Department of Justice (together, "the Department"), submit the following memorandum in opposition to Petitioners' petition for writ of mandate.

INTRODUCTION

This is the second time this case is coming before this Court regarding the proper interpretation of Senate Bill (SB) 1421, which requires government agencies to disclose certain peace-officer records in response to requests under the California Public Records Act (CPRA). In the prior appeal, this Court ruled that CPRA exemptions that do not conflict with SB 1421, including the catchall exemption in Government Code section 6255, can be invoked to withhold peace officer records. (*Becerra v. Super. Ct.* (2020) 44 Cal.App.5th 897, 925.) Following the remand, the Department produced thousands of records, but withheld others under Government Code section 6254, subdivision (k) of the CPRA, which exempts records where disclosure "is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." (Petn., ¶¶ 47, 50.)

First Amendment Coalition and KQED, Inc. now ask this Court to reverse the trial court's ruling that the Department appropriately withheld as exempt certain categories of documents protected by explicit statutory proscriptions against disclosure. Petitioners' argument relies on the prefatory language

"[n]otwithstanding . . . any other law" from Penal Code section 832.7, subdivision (b)(1), as amended by SB 1421, contending that this phrase eliminated any confidentiality protections imposed by all other laws as they may apply to officer records. (Petn. at pp. 10–11.) They argue further that even if the Department could invoke CPRA exemptions to withhold certain categories of officer records, the particular statutes in question conflict with SB 1421 and may not be applied in this instance.

But this Court already rejected Petitioners' argument about the statute's prefatory language in *Becerra v. Superior Court* (2020) 44 Cal.App.5th 897 (*Becerra*). As this Court previously held, the expansive reading of SB 1421 proffered by Petitioners is not supported by the statutory text or the legislative history of the bill. Rather, "[t]aken as a whole, that language reasonably reflects the Legislature's intent to preserve, not override, the CPRA but for its investigatory files exemption (Gov. Code, § 6254(f).)." (*Becerra, supra,* 44 Cal.App.5th at pp. 924–925.) Indeed, following this Court's decision in *Becerra*, the Legislature enacted Senate Bill (SB) 16 which affirmed that SB 1421 did not do away with all other privileges and confidentiality protections for officer-related records. SB 16 clarifies the scope of attorney-client privilege applicable to these records, and further provides that "[t]his paragraph does not prohibit the public entity from asserting that a record or information within the record is exempted or prohibited from disclosure pursuant to any other federal or state law." (Pen. Code, § 832.7, subd. (b)(12), as amended by Sen. Bill No. 16, Stats. 2021, ch. 402, § 3).)

Moreover, the specific statutes invoked by the Department—Government Code section 11183, protecting records obtained by investigative subpoena; Penal Code section 6126.3, protecting reports of the Office of the Inspector General; and Unemployment Insurance Code section 1094, protecting records relating to unemployment benefits—serve important government interests that are not contrary to, and do not conflict with, SB 1421.

For the reasons outlined by this Court in *Becerra*, and as further outlined below, the petition should be denied, and the trial court order affirmed.[1]

BACKGROUND

I. SENATE BILL 1421 AND AMENDED PENAL CODE SECTION 832.7 (2018)

Penal Code section 832.7, subdivision (a), generally protects "personnel records of peace officers and custodial officers and records maintained by a state or local agency pursuant to Section 832.5, or information obtained from these records." (Pen. Code, § 832.7, subd. (a).) The confidentiality provisions in section 832.7, subdivision (a), are mandatory duties. (See *Davis v. City of San Diego* (2003) 106 Cal.App.4th 893, 902 ["'the Legislature intended to establish that personnel records are confidential and then created a limited exception in the civil/criminal discovery

[1] In filing this opposition in accordance with the Court's order, the Department has not answered the allegations of the petition paragraph by paragraph. (See Petn., pp. 13-30, ¶¶ 1–77.) The Department understands the Court's September 22 order to call for an opposition and not a formal answer in addition to an opposition at this stage of the proceedings.

context'"], citation omitted.) However, in 2018, the Legislature enacted SB 1421 to curtail confidentiality for a subset of records otherwise designated as confidential under Penal Code section 832.7, subdivision (a), adding subdivision (b) to exempt certain records from the umbrella of privacy provisions in subdivision (a).

Penal Code section 832.7, subdivision (b), provides: "Notwithstanding subdivision (a) [of Penal Code section 832.7], subdivision (f) of Section 6254 of the Government Code, or any other law, [certain categories of] 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." (Pen. Code, § 832.7, subd. (b)(1).) The first two categories are records "relating to the report, investigation, or findings of" an "incident involving the discharge of a firearm at a person by a peace officer or custodial officer" or 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." (Pen. Code, § 832.7, subd. (b)(1)(A)(i), (ii).) Section 832.7 includes additional categories for records 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" or "an incident in which a sustained finding was made by any law enforcement agency or oversight agency involving dishonesty by a peace officer or custodial officer directly relating to the reporting,

investigation, or prosecution of a crime" (*id.*, § 832.7, subd. (b)(1)(B)(i), (C)).[2]

II. PETITIONER'S CPRA REQUESTS AND THE ENSUING LITIGATION (2019)

In January and February 2019, the Department received Petitioners' CPRA requests for all records in the Department's possession subject to disclosure under SB 1421, from 2014 to 2019. (*Becerra, supra,* 44 Cal.App.5th at pp. 910–11.) The Department partially denied the requests, agreeing to produce responsive records concerning peace officers that it employed, but objecting to the production of records that it held concerning peace or custodial officers employed by other agencies which, the Department argued, were themselves obligated under SB 1421 to produce records for officers they employed. (*Id.* at p. 911.) Petitioners filed a petition for writ of mandate, which the trial court granted, ordering the Department to produce all the requested records, except those which may be lawfully withheld. (*Id.* at p. 912.) The Department then petitioned this Court for extraordinary relief from the trial court's order. (*Ibid.*)

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[2] SB 16 (2021) later added additional categories of peace officer records that are subject to disclosure. (See Pen. Code, § 832.7, subds. (b)(1)(A)(iii)–(iv), (b)(1)(D)–(E), as amended by Sen. Bill No. 16, Stats. 2021, ch. 402, § 3.) The present case does not involve these new categories of documents. (See Petn., ¶¶ 29–30.)

III. *BECERRA V. SUPERIOR COURT* (2020)

In *Becerra*, this Court affirmed the trial court's order, finding that Penal Code section 832.7 requires disclosure of all responsive, non-exempt, officer-related records in the Department's possession, regardless of whether the records pertain to officers employed by the Department or another agency. (*Becerra, supra,* 44 Cal.App.5th at p. 934.)

This Court also held that the public interest catchall exemption in the CPRA may apply to officer-related records subject to disclosure under Penal Code section 832.7, as amended by SB 1421. (*Id.* at pp. 924, 934.) In so holding, this Court rejected Petitioners' argument that the prefatory language in subdivision (b)(1) of section 832.7, "notwithstanding . . . any other law," renders all responsive officer-related records nonconfidential regardless of *any* contrary law, including the CPRA and its catchall exemption (*id.* at p. 925), and also rejected their argument that the provisions for redaction and withholding records detailed in section 832.7 prevail over other CPRA exemptions. (*Id.* at p. 924.) Rather, this Court reasoned that the language in section 832.7, subdivision (b)(1), "[t]aken as a whole, . . . reasonably reflects the Legislature's intent to preserve, not override, the CPRA but for its investigatory files exemption (Gov. Code, § 6254(f))." (*Id.* at pp. 924–925.) *Becerra* held that the phrase "'[n]otwithstanding ... any other law' cannot reasonably be read to do away with the entire CRPA[;]" instead, the phrase is a "'term of art' that declares the legislative intent to override all contrary law[,]" making "only those provisions of law that conflict

with section 832.7(b)—not every provision of law— . . . inapplicable." (*Id.* at pp. 925, internal quotations and citations omitted.)

Further, this Court held that the provisions for redaction and withholding records detailed in section 832.7 could be harmonized with the CPRA catchall exemption, and would apply only after the agency determines that responsive records are not otherwise exempt from disclosure. (*Becerra, supra,* 44 Cal.App.5th at pp. 928–929.) "That is, after the agency or the court determines that responsive records may not be withheld under the CPRA catchall exemption (*or any other applicable exemption*), the purpose that section 832.7(b)(6) serves is to authorize redaction of specific information contained in those records when redaction best serves the public interest." (*Id.* at p. 928, italics added.)

Finally, although this Court held that the CPRA catchall exemption in Government Code section 6255 may apply, it held that that the Department failed to demonstrate that it should apply in this case on the facts before this Court. (*Becerra, supra,* 44 Cal.App.5th at p. 934.)

IV. SENATE BILL 16 (2021)

In 2021, after this Court's ruling in *Becerra*, the Legislature enacted SB 16 to amend section 832.7, adding additional categories of officer-related records subject to public disclosure. (See Pen. Code, § 832.7, subds. (b)(1)(A)(iii)–(iv), (b)(1)(D)–(E), as amended by Sen. Bill No. 16, Stats. 2021, ch. 402, § 3.) Additionally, and as relevant to this petition, SB 16 clarified that

the attorney-client privilege does not prohibit the release of factual information in officer-related records subject to disclosure, nor does it prohibit the disclosure of relevant attorney billing records. (*Id.,* subd. (b)(12)(A).) SB 16 further clarified that the application of the attorney-client privilege to officer-related records "does not prohibit the public entity from asserting that a record or information within the record is exempted or prohibited from disclosure pursuant to any other federal or state law." (*Id.,* subd. (b)(12)(B).)

V. THE CURRENT PETITION

Following this Court's ruling in *Becerra*, the Department worked diligently to locate, review, redact, and timely produce responsive, non-exempt records concerning peace and custodial officers employed by other agencies to comply with the writ of mandate. (See, e.g., Petn., ¶ 47; Petitioners' Appen. (PA) 258) The Department also, in accordance with a trial court order, prepared logs of withheld records, detailing why certain responsive records were being withheld from the production. (PA 247–248.) Petitioners filed a motion for judgment to resolve the remaining merits issues in this litigation, asserting that the Department has improperly withheld certain records under Government Code section 6254, subdivision (k), which exempts records where disclosure "is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." (Petn., ¶¶ 49–50.) The categories of records at issue are the following:

(1) records obtained under investigative subpoena by the Department's Civil Rights Enforcement Section ("CRES") that are subject to the heightened confidentiality protections of Government Code section 11183, which imposes criminal penalties on an officer who discloses them;

(2) a record obtained by the Department's Correctional Law Section ("CLS") concerning a confidential report of the Office of the Inspector General, which the Department may not release under Penal Code sections 6126, subdivision (c)(1), and 6126.3; and

(3) records relating to unemployment benefits, which are protected under the Unemployment Insurance Code section 1094.[3]

(Petn., ¶¶ 55–57; 65–66; 71–73.)

In their motion, Petitioners argued that the plain language of Penal Code section 832.7 requires the government to release records falling within its scope notwithstanding any other law, and withholding or redactions may only occur as outlined in that section alone. (PA 272–277.) Additionally, Petitioners argued

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[3] The Department has also withheld: (1) records concerning juveniles in law enforcement custody; and (2) settlement-related Departmental records. The trial court ordered the Department to produce the settlement-related records, finding that the Department failed to meet its burden of proof to show that the records could be withheld, which ruling the Department is not challenging. (PA 800, 804, 808). The trial court determined that the juvenile records are properly withheld (PA 801–803) under the Welfare and Institutions Code, which ruling Petitioners do not challenge in this Petition.

that, even if the Department could rely on provisions other than Penal Code section 832.7 to withhold records, it could not withhold records based on the specific statutory provisions invoked. (*Id*. at 278–284.)

The trial court largely rejected these arguments. (PA 791–277.) Relying on *Becerra,* the trial court held that "the usual (traditional) exemptions [under the CPRA] . . . have not been obliterated by SB 1421." (PA 791–795.) Looking at the specific statutes invoked by the Department under Government Code section 6254, subdivision (k)—Government Code section 11183, protecting records obtained by investigative subpoena; Penal Code section 6126.3, protecting reports of the Office of the Inspector General; and Unemployment Insurance Code section 1094, protecting records relating to unemployment benefits—the trial court found that the Department properly withheld these categories of documents. (PA 798–800.) This petition followed.

STANDARD OF REVIEW

On petition for review of a trial court order supporting the decision of a public official declining to disclose records under the CPRA, this Court "conducts an independent review of the trial court's ruling; factual findings made by the trial court will be upheld if based on substantial evidence." (*Becerra*, *supra*, 44 Cal.App.5th at p. 913, quotations omitted.)

ARGUMENT

I. SB 1421 DID NOT ELIMINATE ALL CPRA EXEMPTIONS, AND THE CPRA EXEMPTION RELIED UPON BY THE DEPARTMENT DOES NOT CONFLICT WITH SB 1421

Petitioners argue that the exemption contained in Government Code section 6254, subdivision (k), which exempts records where disclosure "is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege," conflicts with Penal Code section 832.7, subdivision (b), which declared that responsive records "shall not be confidential" "notwithstanding . . . any other law[.]" (Mem. in Support of Petn., pp. 39–40.) This argument essentially attempts to relitigate the meaning of the phrase "notwithstanding . . . any other law," which was resolved by *Becerra*, and should be rejected.

Petitioners argue that the phrase must be broadly construed to prevent any other law from applying if it might result in nondisclosure of responsive records. (Mem. in Support of Petn., pp. 35–46.) But this Court already rejected this "sweeping construction" proffered by Petitioners. (*Becerra, supra*, 44 Cal.App.5th at p. 925.) Looking at the language and the legislative history of SB 1421, this Court held that "'notwithstanding . . . any other law'" cannot be construed literally and cannot be read to do away with the entire CPRA. (*Becerra, supra*, 44 Cal.App.5th at p. 925.) Instead, this Court held that the phrase is a "term of art," signaling the legislative intent to override all laws that are "directly contrary," and irreconcilably conflict with section 832.7. (*Ibid.*)

The only argument that Petitioners' offer for why Government Code section 6254, subdivision (k), itself, is contrary to SB 1421 is that it allows for nondisclosure of responsive records whereas SB 1421 requires disclosure. (Mem. in Support of Petn., p. 40.) Petitioners assert that this Court's holding in *Becerra* is not controlling on the issue, because it was limited to analyzing whether the Department could rely on the CPRA's catchall provision in Government Code section 6255 which, Petitioners argue, is not a "confidentiality statute." (*Id.* at p. 46.)

Petitioners' strained and limited reading of this Court's decision in *Becerra* is not supportable. First, although the only CPRA exemption at issue when *Becerra* was decided was the catchall exemption, this Court explained in general terms that the text of section 832.7, subdivision (b)(1), "reflects the Legislature's intent to preserve, not override, the CPRA but for its investigatory files exemption" in Government Code section 6254, subdivision (f). (*Becerra, supra*, 44 Cal.App.5th at pp. 924–925.) And while SB 1421 curtailed the applicability of that single CPRA exemption, "there is nothing in the balance of the statutory text [of SB 1421] giving any indication that the CPRA *as a whole* was displaced by section 832.7." (*Id.* at p. 925, italics added.) Moreover, this Court held that the redaction and withholding provisions of Penal Code section 832.7, subdivision (b)(6), may apply "after the agency or the court determines that responsive records may not be withheld under the CPRA catchall exemption (*or any other applicable exemption*)[.]" (*Id.* at p. 928, italics added.)

Additionally, Petitioners' attempt to distinguish Government Code section 6254, subdivision (k), as a "confidentiality statute" unlike the section 6255, is inapt. Petitioners argue that, under *Becerra*, section 6255 is applicable because SB 1421 provided that officer-related records shall be made available pursuant to the CPRA, and section 6255 allows an agency to withhold responsive records "based on the burden of production, regardless of whether they are confidential." (Mem. in Support of Petn., p. 48.) But this Court's reasoning in *Becerra* was not so constrained, and was not focused on confidentiality versus non-confidentiality; indeed, under the reasoning advanced by Petitioners, every CPRA exemption, save for the catchall provision, could be considered a "confidentiality statute" that conflicts with SB 1421—an interpretation already rejected by this Court.

Rather, this Court reasoned that section 6255 recognizes that "there may be competing public interests at stake in a public records request," and the catchall provision "has been used to justify withholding documents based on a range of public interests, including [but not limited to] the expense and inconvenience involved[.]" (*Becerra, supra*, 44 Cal.App.5th at pp. 926–27.) Much like the catchall provision in section 6255, section 6254, subdivision (k)—which does not even use the term "confidential"—recognizes that there may be competing federal or state laws, supported by various public policy interests, that must be considered and may be invoked to exempt records from disclosure under the CPRA. This provision, in and of itself, is not

in conflict with SB 1421 and was not eliminated with its enactment.

Nor is there any merit to Petitioners' contention that the phrase "notwithstanding . . . any other law" is rendered meaningless unless it is construed in the broad manner that Petitioners favor. (See Mem. in Support of Petn., pp. 40, 45.) As this Court outlined in *Becerra*, that language can be read to override the application of any statute that is "directly contrary" to the provisions of SB 1421. (*Becerra, supra*, 44 Cal.App.5th at p. 925.) That would include, for example, another statute like the two expressly referenced in Penal Code section 832.7, subdivision (b)(1)—Penal Code section 832.7, subdivision (a), and Government Code section 6254, subdivision (f)—which render officer-related records confidential because of their status as records related to law enforcement, and for reasons unrelated to other broader public policy interests. Another example would be if an agency sought to withhold a sustained finding of sexual assault involving a member of the public contained in a peace officer's personnel file under Government Code section 6254, subdivision (c), which generally exempts from disclosure under the CPRA personnel records that would constitute an unwarranted invasion of personal privacy. Such withholding would be directly contrary to Penal Code section 832.7 which expressly provides that certain categories of officer personnel records are not confidential. (See, e.g., Pen. Code, § 832.7, subd. (b)(1)(B)(i).)

Further, there is no reason to believe that the operation of the exemption in Government Code section 6254, subdivision (k), in and of itself, will frustrate SB 1421's aim to provide greater transparency around police misconduct. (See Mem. in Support of Petn., p. 44.) Indeed, the Department has already produced over 3,000 discrete records, spanning over 76,000 pages. (See Petn., ¶ 47; PA 330.)

If there were any doubt that SB 1421 preserves other CPRA exemptions, including subdivision (k)—and under *Becerra* there is not—the Legislature recognized their continuing viability when it enacted SB 16 in 2021 to amend section 832.7. Among other things, SB 16 clarified that the attorney-client privilege does not prohibit the release of factual information in officer-related records subject to disclosure, nor does it prohibit the disclosure of relevant attorney billing records, but left intact protections for other attorney-client privileged communications and work product. (Pen. Code, § 832.7, subd. (b)(12)(A).) That is, SB 16 confirmed that agencies may continue to withhold and redact records that are protected by the attorney-client privilege—a ground for nondisclosure that was not mentioned in section 832.7, subdivision (b)—but curtailed privilege protections for factual information. The attorney-client privilege is codified in Evidence Code section 954, and is invoked to prevent disclosure of records under the CPRA through Government Code section 6254, subdivision (k).

SB 16 further added that its exception to the attorney-client privilege for officer-related records "does not prohibit the public

entity from asserting that a record or information within the record is exempted or prohibited from disclosure pursuant to any other federal or state law." (Pen. Code, § 832.7, subd. (b)(12)(B).) Thus, the Legislature expressly provided that, while the attorney-client privilege does not absolutely bar the disclosure of factual information for officer-related records, it may bar disclosure of other information and there may nonetheless be another federal or state law that exempts the disclosure of these records.

Finally, Petitioners' argument that Penal Code section 832.7, subdivision (b)(6) provides the exclusive means for withholding and redaction of records (Mem. in Support of Petn., pp. 48–49) should be rejected, just as it was in *Becerra*. "*[A]fter* the agency or the court determines that responsive records may not be withheld under the CPRA catchall exemption (*or any other applicable exemption*), the purpose that section 832.7(b)(6) serves is to authorize redaction of specific information contained in those records when redaction best serves the public interest." (*Becerra, supra,* 44 Cal.App.5th at p. 928, italics added.)

In sum, the Court should reject Petitioners' interpretation of SB 1421 because it ignores the statute's text, binding precedent, and subsequent legislative developments, all of which confirm that SB 1421 preserved other CPRA exemptions, including Government Code section 6254, subdivision (k).

II. THE DEPARTMENT HAS PROPERLY WITHHELD CERTAIN REMAINING CATEGORIES OF RECORDS UNDER THE CPRA

Turning next to the specific statutes invoked by the Department under Government Code section 6254, subdivision (k), Petitioners argue that these are contrary to SB 1421, and are not properly applied here. But, as outlined below, and as recognized by the trial court, each of the statutes protect important public policy interests that are not directly contrary to SB 1421.

A. Government Code Section 11183 Protects Important Interests and Requires the Department to Withhold Records Obtained by Investigative Subpoena

The first category of documents in dispute are those obtained by the Department pursuant to investigative subpoenas issued under Government Code section 11181. (Petn., ¶¶ 55–57.) These records were obtained from the Bakersfield Police Department in the course of certain pattern-or-practice investigations, and are subject to the confidentiality restrictions contained in Government Code section 11183 and thus exempt from disclosure under the CPRA. (PA 295; PA 445–446 at ¶¶ 20–22.) Because section 11183 serves broader and different interests that are not directly contrary to Penal Code section 832.7, it has not been supplanted by SB 1421.

State executive departments, including the Department of Justice, are granted investigatory powers, including the power to subpoena books and records under Government Code section 11181, subdivision (e). Government Code section 11183 protects

the confidentiality of records and information obtained by investigative subpoena under Government Code section 11181, subdivision (e). In particular, section 11183 provides:

> an officer shall not divulge any information or evidence acquired by the officer from the interrogatory answers or subpoenaed private books, documents, papers, or other items described in subdivision (e) of Section 11181 of any person while acting or claiming to act under any authorization pursuant to this article, in respect to the confidential or private transactions, property or business of any person.

(Gov. Code, § 11183.) Any officer who violates section 11183 is guilty of a misdemeanor and is "disqualified from acting in any official capacity in the department." (*Ibid*.)

Section 11183 is not "an[] other law" eliminated by SB 1421 because it is not directly contrary to that statute. The confidentiality protections afforded by Government Code section 11183 are not in place specifically to shield officer-related records or otherwise hinder government transparency. Instead, these protections serve to encourage cooperation and candid disclosure by the targets of an investigation and enable the Department and other state agencies to engage in more effective oversight. As the trial court recognized, these confidentiality provisions facilitate witness cooperation by obviating privacy objections. (See PA 798, citing *Tom v. Schoolhouse Coins, Inc.* (1987) 191 Cal.App.3d 827, 830.) Indeed, these confidentiality protections are vitally important to ensuring that the Department's investigations may be conducted in as thorough and productive a manner as possible. (PA 442, ¶ 12 [Declaration of Michael L. Newman in Support of Defendant's Opposition to Motion for Judgment].) These

provisions remove many potential barriers to compliance by the agencies under investigation because they have no plausible grounds on which to shield records from the Department based on privacy, sensitive investigation details, or sensitive tactical or security protocols, for example. (*Ibid.*) The provisions also protect the integrity of the Department's investigations and its potential use of confidential informants. (*Ibid.*) Without section 11183, disclosure of records obtained in the Department's investigations could reveal the Department's investigatory strategies and jeopardize future investigations. (*Ibid.*) Reducing the confidentiality of these investigations also opens them to external influence—either to interference with the Attorney General's pursuit of an investigation by slowing the process through repeated CPRA requests; exposure of an incomplete picture of the findings of an investigation prior to full presentation of the investigative findings to the Attorney General or to the Court in seeking a judgment against the subject of the investigation; or third parties and members of the public seeking to unduly influence the integrity or outcome of an investigation (*Ibid.*) These confidentiality restrictions therefore promote important public interests that are fully complementary to the important interests served by SB 1421—SB 1421 promotes public access to information about certain incidents of officer misconduct, and section 11183 enables the Department to identify, and *remedy*, patterns or practices that lead to such misconduct, as well as other types of misconduct or mismanagement not addressed in SB 1421. (PA 442, ¶ 12; PA

445, ¶ 20.) Contrary to Petitioners' assertions, the withholding and redacting provisions in Penal Code section 832.7, subdivision (b)(6), are inadequate to address the interests and concerns outlined above and, in any case, do not apply until after an agency has determined that a responsive record is not otherwise exempt. (See Mem. in Support of Petn., pp. 56–58; *Becerra, supra,* 44 Cal.App.5th at p. 928.)

Moreover, Petitioners' claim that application of section 11183 here would contradict the legislative intent of SB 1421 is unfounded. (See Mem. in Support of Petn., p. 61.) SB 1421 was intended to promote transparency of records maintained by "any state or local agency with independent law enforcement oversight authority," but not all such agencies are vested with the subpoena power authorized under section 11181. That subpoena power, and the corresponding confidentiality restrictions imposed on records obtained under that power, is reserved for certain state agencies. (See Gov. Code, § 11181 [conferring subpoena power on state "department head[s]"].) The fact that section 11183 precludes disclosure of certain records here is a function of the Department's unique role in providing statewide oversight and will not result in local oversight agencies withholding records under section 11183.

Additionally, and as the trial court recognized, the Department's position with respect to the subpoenaed records does not depend on where the records are located. (See Mem. in Support of Petn., pp. 62–63; PA 798.) To the contrary, the application of section 11183 to the records at issue hinges on how

the records were obtained (investigative subpoena) and what the records concern (private information). (See *Weaver v. Super. Ct.* (2014) 224 Cal.App.4th 746, 750 [exemption under the CPRA is determined by "[t]he content of the document at issue"].)

Finally, contrary to Petitioners' assertions, the records qualify as "private" records and information within the meaning of sections 11181 and 11183. The Attorney General has opined that "'private' is broadly understood to refer to things concerning . . . an individual rather than the government or the public." (87 Ops.Cal.Atty.Gen. 181 (2004), 2004 WL 2971140 at p. 4.) Records need not be received under a subpoena issued to an *individual* to qualify as "private" under section 11183. (See *State Water Resources Control Board v. Baldwin & Sons, Inc.* (2020) 45 Cal.App.5th 40, 47–48 [indicating that information provided in response to a subpoena issued to several *business entities* by the State Water Resources Control Board would receive "protection from public disclosure" under Government Code section 11183].)

Here, the subpoenaed records fall under section 11183 because they are "things concerning . . . an individual rather than the government or the public." (87 Ops.Cal.Atty.Gen. 181, *supra*, at p. 4.) An individual's employment or personnel files fall under this definition, and in other contexts, such files are generally considered to be private in nature. (See *Associated Chino Teachers v. Chino Valley Unified School District* (2018) 30 Cal.App.5th 530, 541 ["The CPRA recognizes the right of privacy in one's personnel files by the exemption in section 6254,

subdivision (c)"].) And other subpoenaed records that may be responsive to Petitioners' requests, such as incident reports, also include "private" information concerning individuals. While the subpoenaed records at issue were received from a government entity, the records contain "private" information "concerning . . . an individual" (87 Ops.Cal.Atty.Gen. 181, *supra*, at p. 4)—e.g., the peace or custodial officers under investigation.

Because the records that Petitioners seek contain private information obtained by investigative subpoena, they are subject to Government Code section 11183. Department officials potentially face criminal and civil penalties for violating section 11183. Thus, the records are made exempt through Government Code section 6254, subdivision (k).

B. The Department Has Properly Withheld Records of the Office of the Inspector General under the Penal Code

The next category of documents in dispute is one record that is part of the Office of the Inspector General's investigation of an incident involving the Department of Corrections and Rehabilitation, which the Department withheld under Penal Code sections 6126, 6126.3, 6126.4, and 6128. (Petn., ¶¶ 71–73.)

Penal Code section 6126.3 provides that, with respect to records of the Inspector General, "[a]ll reports, papers, correspondence, memoranda, electronic communications, or other documents that are otherwise exempt from disclosure" are "not public records" subject to disclosure under the CPRA, and disclosure of such records is a misdemeanor (Pen. Code, §§ 6126.3, subd. (c)(1); 6126.4) Generally, under section 6126.3,

all books, papers, records, and correspondence of the Office of the Inspector General pertaining to its work *are* public records, *except* for the limited categories outlined in subdivision (c). Following an *in camera* review, the trial court found that the record was appropriately withheld under Penal Code section 6126.3. (PA 799–800.) The Legislature amended section 6126.3 in 2019, after SB 1421 was enacted, and left its confidentiality provisions intact. (See Sen. Bill. No. 112, Stats. 2019, ch. 364, § 14.) Thus, there is no reason to believe that SB 1421 was intended to override the confidentiality provisions contained in these statutes which, like Government Code section 11183, serve different and broader public interests aimed at facilitating thorough investigations, witness cooperation, and candid disclosure, that are not contrary to the goals of SB 1421. (See, e.g., Pen. Code, § 6126.5, subd. (d) [authorizing Inspector General to require any employee of the Department of Corrections and Rehabilitation to be interviewed on a confidential basis]; *id.*, § 6128, subd. (c) [encouraging reports of improper governmental activity to the Inspector General and requiring that all information from any person initiating a complaint shall not be disclosed].)

C. The Department Has Appropriately Withheld Records Related to Unemployment Benefits

The last category of documents in dispute are records in the Department's possession related to unemployment benefits, which the Department withheld under Unemployment Insurance Code section 1094. This section provides that such records are "confidential, not open to the public, and shall be for the exclusive use and information of the director in discharge of his or her

duties." This provision is not directly contrary to section 832.7, subdivision (b), because it advances distinct public interests. Section 1094 "manifest[s] a clear legislative purpose to preserve the confidentiality of information submitted to the Department of Employment" (*Crest Catering Co. v. Superior Ct. of Los Angeles County* (1965) 62 Cal.2d 274, 277, citing *Webb v. Standard Oil Co.* (1957) 49 Cal.2d 509, 513), which is needed to encourage applicants for unemployment insurance to "make full and truthful declarations" "without fear that [their] statements will be revealed or used against [them] for other purposes" (*Webb v. Standard Oil Co., supra*, at p. 513).

Petitioners make no argument as to how or why this section is contrary to SB 1421, except for the fact that it allows for nondisclosure where SB 1421 calls for disclosure. (PA 799; Mem. in Support of Petn., pp. 55–56.) This broad reading of the Penal Code section 832.7, subdivision (b), has already been, and should again be, rejected by this Court.

CONCLUSION

For the reasons outlined above, the petition should be denied, and the trial court order affirmed.

October 24, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **Real Parties' Opposition to Petition for Writ of Mandate** uses a 13 point Century Schoolbook font and contains 5,707 words.

October 24, 2022

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: ***First Amendment Coalition v. Rob Bonta***
Case No.: **A165888**

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 collecting and processing electronic and physical correspondence. 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. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On October 24, 2022, I electronically served the attached **REAL PARTIES' OPPOSITION TO PETITION FOR WRIT OF MANDATE** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on October 24, 2022, I placed 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 and the United States of America the foregoing is true and correct and that this declaration was executed on October 24, 2022, at San Francisco, California.

M. Mendiola
Declarant


Signature

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