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; 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' RETURN TO ORDER TO SHOW CAUSE BY WAY OF ANSWER TO PETITION AND RESPONSE

ROB BONTA (SBN 202668)
Attorney General of California
THOMAS S. PATTERSON (SBN 202890)
Senior Assistant Attorney General
MARK R. BECKINGTON (SBN 126009)
Supervising Deputy Attorney General
JOHN D. ECHEVERRIA (SBN 268843)
Deputy Attorney General

*NATASHA SAGGAR SHETH (SBN 282896)
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3818
Fax: (415) 703-5480
Natasha.Sheth@doj.ca.gov

Attorneys for Real Parties in Interest Rob Bonta, in his official capacity as Attorney General of the State of California, and California Department of Justice

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

REAL PARTIES' RETURN TO ORDER TO SHOW CAUSE

Real Parties in Interest Rob Bonta, in his official capacity as Attorney General of the State of California, and the California Department of Justice (together, "the Department"), submits the following answer to the Petition for Writ of Mandate in return to the Court's February 6, 2023 Order to Show Cause.
(Cal. Rules of Court, rule 8.487(b).)

INTRODUCTION

The introduction to the Petition contains legal argument, to which no response is required. To the extent a response is required, the Department denies the allegations contained in the Introduction.

VERIFIED PETITION FOR WRIT OF MANDATE

1. The Department admits that this Petition seeks public records under the California Constitution and the California Public Records Act (CPRA). Except as expressly admitted, the Department denies the remaining allegations of Paragraph 1.

A. Parties

2. The Department admits that First Amendment Coalition (FAC) is a member of the public under Government Code section 6252, is beneficially interested in the outcome of these proceedings, and has no plain, speedy and adequate remedy at law other than that sought herein. The Department lacks sufficient information to admit the

allegations pertaining to FAC's organizational status and the nature of its work, and denies these allegations on that basis. Except as expressly admitted, the Department denies the remaining allegations of Paragraph 2.

3. The Department admits that KQED, Inc. is within the class of persons beneficially interested in Defendants' performance of their legal duties under the California Public Records Act. The Department lacks sufficient information to admit the allegations pertaining to KQED's organizational status and the nature of its work, and denies these allegations on that basis. Except as expressly admitted, the Department denies the remaining allegations of Paragraph 3.

4. The Department admits the allegations of Paragraph 4.

5. The Department admits the allegations of Paragraph 5.

6. The Department admits the allegations of Paragraph 6.

B. Jurisdiction, Venue, and Mandatory Writ Review

7. The Department admits the allegations of Paragraph 7 with the exception that former Government Code sections 6258 and 6259 have been repealed and renumbered.

8. The Department admits the allegations of Paragraph 8.

9. The Department admits the allegations of Paragraph 9 with the exception that former Government Code section 6259, subdivision (c), has been repealed and renumbered.

10. The Department admits the allegations of Paragraph 10.

11. The Department admits the allegations of Paragraph 11.

12. The allegations in Paragraph 12 cite case law, which authorities speak for themselves, and to which no response is required.

13. The Department denies the allegations of Paragraph 13.

C. Standard of Review

14. The allegations in Paragraph 14 cite case law, which authorities speak for themselves, and to which no response is required.

D. Burden of Proof

15. The allegations in Paragraph 15 cite case law, which authorities speak for themselves, and to which no response is required.

16. The allegations in Paragraph 16 cite case law, which authorities speak for themselves, and to which no response is required.

17. The allegations in Paragraph 17 cite case law, which authorities speak for themselves, and to which no response is required.

E. Authenticity of Exhibits

18. The Department lacks information and belief to fully admit or deny the allegations of Paragraph 18, and on that

basis denies the allegations, but, for purposes of this proceeding, does not contest whether a document in the record is a true copy unless specifically identified as such in the accompanying memorandum of points and authorities or other filing.

F. Legal Background: the CPRA, *Pitchess* Statutes, *and* SB 1421

19. The allegations in Paragraph 19 cite statutory and case law, which authorities speak for themselves, and to which no response is required.

20. The Department admits the allegations in Paragraph 20, with the exception that the Department denies any implication that only three exceptions are relevant to this case.

21. The allegations in Paragraph 21 cite a statute, which authority speaks for itself, and to which no response is required.

22. The allegations in Paragraph 22 cite statutory and case law, which authorities speak for themselves, and to which no response is required.

23. The allegations in Paragraph 23 cite statutory and case law, which authorities speak for themselves, and to which no response is required.

24. The allegations in Paragraph 24 cite statutory and case law, which authorities speak for themselves, and to which no response is required. To the extent a response is

required, the Department denies the allegations of Paragraph 24.

25. The Department admits that SB 1421 was enacted in 2018. The remaining allegations of Paragraph 25 cite legislation and case law and attempt to characterize what SB 1421 was intended to accomplish. These authorities speak for themselves, and no response is required. To the extent a response is required, the Department denies the allegations of Paragraph 25.

26. The allegation in Paragraph 26 cite to case law, which authority speaks for itself, and to which no response is required.

27. The allegations in Paragraph 27 cite to legislation and a statute and attempt to characterize what SB 1421 was intended to accomplish. These authorities speak for themselves, and no response is required. To the extent a response is required, the Department denies the allegations of Paragraph 27.

28. The Department admits the allegations of Paragraph 28.

29. The allegations in Paragraph 29 cite to legislation and statute and attempts to characterize what SB 1421 was intended to accomplish. These authorities speak for themselves, and no response is required.

30. The Department admits the allegations of Paragraph 30.

31. The allegations in Paragraph 31 cite legislation, and its effect on the organization of a statute. The authority speaks for itself, and no response is required. To the extent a response is required, the Department denies the allegations of Paragraph 31.

32. The allegations in Paragraph 32 cite case law, which authority speaks for itself, and to which no response is required.

G. Procedural Background

33. The allegations in Paragraph 33 characterize the Court's opinion in *Becerra v. Superior Court* (2020) 44 Cal. App. 5th 897, which authority speaks for itself, and to which no response is required. Otherwise, the Department admits the allegations of Paragraph 33.

1. Stage One: Litigating the scope of SB 1421

34. The Department admits the allegations of Paragraph 34.

35. The Department admits the allegations of Paragraph 35.

36. The Department admits the allegations of Paragraph 36.

37. The Department admits the allegations of Paragraph 37.

38. The Department admits the allegations of Paragraph 38.

39. The Department admits the allegations of Paragraph 39.

40. The allegations of Paragraph 40 refer to the superior court's order in the record, which record speaks for itself, and to which no response is required.

41. The Department admits the allegations of Paragraph 41.

42. The allegations of Paragraph 42 refer to this Court's ruling in *Becerra v. Superior Court* (2020) 44 Cal. App. 5th 897. That ruling speaks for itself, and no response is required to the allegations characterizing that ruling.

43. The allegations of Paragraph 43 refer to this Court's ruling in *Becerra v. Superior Court* (2020) 44 Cal. App. 5th 897. That ruling speaks for itself, and no response is required to the allegations characterizing that ruling.

44. The allegations of Paragraph 44 refer to this Court's ruling in *Becerra v. Superior Court* (2020) 44 Cal. App. 5th 897. That ruling speaks for itself, and no response is required to the allegations characterizing that ruling.

2. Stage Two: Litigating the Attorney General's withholding of records.

45. The Department admits the allegations of Paragraph 45.

46. The allegations of Paragraph 46 refer to an order of the superior court, which order speaks for itself, and to which no response is required.

47. The Department admits the allegations of Paragraph 47.

48. In response to Paragraph 48, the Department admits that it produced withhold logs. Except as expressly admitted the Department denies the allegations of Paragraph 48.

49. The Department admits the allegations of Paragraph 49.

50. The Department admits the allegations of Paragraph 50.

51. In response to Paragraph 51, the Department admits that Plaintiffs made allegations of this type. Except as expressly admitted, the Department denies the allegations of Paragraph 51.

H. The Superior Court's Order at Issue

52. The Department admits the allegations of Paragraph 52.

53. The allegations of Paragraph 53 refer to an order of the superior court, which order speaks for itself, and to which no response is required.

54. The allegations of Paragraph 54 refer to an order of the superior court, which order speaks for itself, and to which no response is required.

55. The allegations of Paragraph 55 that refer to an order of the superior court, and require no response, as the order speaks for itself. The Department admits that Petitioners

are challenging certain parts of the superior court's order by this writ petition.

1. Subpoenaed Records

56. The allegations in Paragraph 56 cite to a statute, which authority speaks for itself, and to which no response is required.

57. The Department admits the allegations of Paragraph 57.

58. The Department admits the allegations of Paragraph 58, except that it denies that the only justification it gave for withholding these documents is Government Code section 11183.

59. The Department admits the allegations of Paragraph 59.

60. The Department admits the allegations of Paragraph 60.

61. To the extent the allegations of Paragraph 61 contain Petitioners' arguments, no response is required. To the extent the allegations of Paragraph 61 contain reference to an order of the superior court, that authority speaks for itself and requires no response. To the extent a response is required, the Department denies the allegations of Paragraph 61.

62. The Department denies the allegations of Paragraph 62.

63. To the extent the allegations of Paragraph 63 contain Petitioners' arguments, no response is required. To the extent a response is required, the Department denies the allegations of Paragraph 63.

64. The Department admits the allegations of Paragraph 64.

2. Records related to unemployment insurance

65. The allegations in Paragraph 65 cite to a statute, which authority speaks for itself, and to which no response is required.

66. The Department admits that it contends that certain documents are withheld pursuant to the provisions of the Unemployment Code, which expressly provides for confidentiality of the document subject to criminal penalty. Except as expressly admitted, the Department denies the allegations of Paragraph 66.

67. The allegations in Paragraph 67 refer to documents in the record, which documents speak for themselves and to which no response is required.

68. The allegations in Paragraph 68 refer to documents in the record, which documents speak for themselves and to which no response is required.

69. The Department admits the allegations of Paragraph 69.

70. The Department admits that the superior court allowed the Department to withhold certain records. Except as expressly admitted, the Department denies the allegations of Paragraph 70.

3. Records of the Inspector General

71. The allegations in Paragraph 71 cite to a statute, which authority speaks for itself, and to which no response is required.

72. The allegations in Paragraph 72 cite to statutory authorities, which authorities speak for themselves, and to which no response is required.

73. The Department admits the allegations of Paragraph 73.

74. The allegations in Paragraph 74 refer to the order of the superior court, which authority speaks for itself, and to which no response is required.

75. The allegations in Paragraph 75 refer to a document in the record, an appendix to the superior court's order outlining the parties' positions with respect to a specific withheld document. That record speaks for itself and requires no response. To the extent a response is required, the Department denies the allegations of Paragraph 75.

76. The allegations in Paragraph 76 refer to the order of the superior court, which authority speaks for itself, and to which no response is required. The Department admits

that the superior court allowed the Department to withhold certain records.

I. Request for Relief

77. The Department denies that Petitioners are entitled to any relief.

AFFIRMATIVE DEFENSES

In addition to the foregoing admissions, denials, and averments, and without waiving the Department's right to assert additional defenses at a later date, the Department asserts the following affirmative defenses based on information and belief. In asserting these defenses, the Department does not assume the burden of establishing any fact or proposition where that burden is properly imposed on Petitioners.

FIRST DEFENSE

The Petition fails to allege facts sufficient to justify issuance of a writ of mandate or any other relief against the Department on any theory.

SECOND DEFENSE

Any responsive records not disclosed by the Department to Petitioners are exempt, and/or are statutorily barred, from disclosure under the Public Records Act. (Gov. Code, § 7923.600 [formerly § 6254, subd. (f)]; Gov. Code, § 7927.705 [formerly § 6254, subd. (k)], incorporating restrictions on release of records contained in Gov. Code, §§ 11180, et seq.; Pen. Code, §§ 6126, 6126.3, 6126.4, 6128; Unemp. Ins. Code, § 1094.)

THIRD DEFENSE

The allegations of the Petition fail to make it appear, as required by Government Code section 7923.100 (formerly section 6259, subdivision (a)), that any public records are being improperly withheld from a member of the public.

FOURTH DEFENSE

The Department's actions were performed fairly, in good faith, and for a lawful purpose, and were reasonable and justified under the circumstances and applicable law.

FIFTH DEFENSE

The Petition fails to allege facts sufficient to state a claim for attorneys' fees and costs of suit.

SIXTH DEFENSE

The Department reserves the right to assert additional affirmative defenses, as they may become known through the course of this litigation.

WHEREFORE, the Department prays for relief as follows:

1. The Petition and all prayers for relief therein be denied in their entirety;
2. Petitioners take nothing from the Department by this action;
3. Enter judgment in favor of the Department, affirming the order of the trial court in its entirety; and
4. Award the Department such further relief that the Court deems just and proper.

March 8, 2023

Respectfully submitted,

ROB BONTA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General
JOHN D. ECHEVERRIA
Deputy Attorney General

/S/ NATASHA SAGGAR SHETH
NATASHA SAGGAR SHETH
Deputy Attorney General

Attorneys for Real Parties in Interest Rob Bonta, in his official capacity as Attorney General of the State of California, and California Department of Justice

Real Parties in Interest 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 response to the Court's February 6, 2023 Order to Show Cause.

INTRODUCTION

This is the second time this case has come before this Court regarding the proper interpretation of Senate Bill (SB) 1421 (stats. 2018, c. 988, § 2, eff. Jan. 1, 2019), 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 (*Becerra*).) Following remand, the Department produced thousands of records, but withheld others under Government Code section 6254, subdivision (k)[1] of the CPRA, which exempts records where disclosure "is exempted or

[1] As of January 1, 2023, the CPRA was reorganized, and former Government Code section 6254, subdivision (k), is now section 7927.705. Former Government Code section 6254, subdivision (f), is now codified at sections 7923.600–7923.625. For ease of reference and consistency with the record, the Department continues to refer to the relevant statutes as section 6254, subdivisions (k) and (f), as applicable, in the body of the brief, but citations are to the current code sections.

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*. 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 (stats. 2021, c. 402,

§ 3, eff. Jan. 1, 2022), which affirmed that SB 1421 did not do away with all other privileges and confidentiality protections for officer-related records. 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 governmental interests that are not contrary to, and do not conflict with, SB 1421.

In particular, the investigative subpoena power with its attendant confidentiality provisions under Government Code section 11180, et. seq., is a critical tool that allows the Department to conduct investigations of law enforcement agencies that may be engaging in a pattern-or-practice of civil rights violations. The Department alone is entrusted with the power to identify and remedy these types of systemic violations under Civil Code section 52.3. The disclosure provisions of Penal Code section 832.7, as amended by SB 1421, focus on specific incidents of officer misconduct. They do not contemplate the types of pattern-or-practice investigations for which the Department is currently maintaining confidentiality, and the corresponding withholding and redacting provisions do not align with the way such investigations are conducted. Moreover, under the CPRA, documents that are otherwise disclosable because they are public records gain exemption from disclosure when they are

part of a legitimate investigatory file. Here, there is no indication that SB 1421 intended to do anything other than make investigations of specific incidents of officer misconduct available to the public. It does not upend the confidentiality of all *other* types of investigations. The Department's power to conduct pattern-or-practice investigations of law enforcement agencies, as facilitated by the investigative subpoena power, complements, and does not conflict with, the aims of SB 1421.

To be sure, the Department supports the aims of SB 1421 to provide greater transparency to the public about serious police misconduct in an effort to build trust among law enforcement and the communities they police. (See, e.g., Stats. 2018, ch. 988 (SB 1421), § 1.) But it is critical that the Department maintain the confidentiality of its broader investigations—unrelated to any one specific incident of officer misconduct—precisely so that it can continue its important work in ensuring law enforcement accountability.

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.

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 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).

As amended by SB 1421, 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 categories subject to disclosure under SB 1421 concern officer-involved shootings, use of force, claims of sexual assault, and claims of dishonesty. 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. PETITIONERS' 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. 910–911.) 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

[2] SB 16 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.)

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.*)

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 p. 925, internal quotations and citations omitted; italics added.)

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 concluded that the Department did not demonstrate that the

exemption should apply in this case on the facts that were 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; 2 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. (2 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]

---

[3] The Department 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

(continued…)

(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 that withholding or redactions may only occur as outlined in that section alone. (2 PA 272–277.) Additionally, Petitioners argued 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. (4 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." (4 PA 791–795.) Looking at the specific statutes invoked by the Department under Government Code section 6254, subdivision (k), the trial court found that the Department properly withheld these categories of documents. (4 PA 798–800.)

(…continued)

Department did not meet its burden of proof to show that the records could be withheld, and the Department is not challenging that ruling. (4 PA 800, 804, 808). The trial court determined that the juvenile records are properly withheld (4 PA 801–803) under the Welfare and Institutions Code, and Petitioners do not challenge that ruling in this Petition.

The instant petition followed. The Department filed an initial opposition to the petition on October 24, 2022. On February 6, 2023, this Court issued an Order to Show Cause why the relief requested in the petition should not be granted, ordering the Department to serve and file a return to the petition within 30 days. This Court further ordered that the parties specifically address whether and to what extent Government Code section 11183 provides a basis for the Department to withhold or redact records requested pursuant to SB 1421, in addition to any other issues the parties may wish to address (which argument is specifically addressed in section II(A), *infra*).

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.) Matters of statutory interpretation are reviewed de novo. (*Id.* at p. 917.)

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 for specific incidents of officer misconduct, "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 err in attempting to distinguish Government Code section 6254, subdivision (k), as a "confidentiality statute" unlike section 6255. Petitioners argue that, under *Becerra*, section 6255 survived enactment of SB 1421

because SB 1421 provided that officer-related records shall be made available under 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 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).)[4]

[4] Contrary to Petitioners' assertion, the Department is not asserting that SB 1421 categorically overrides Government Code (continued…)

Further, there is no reason to believe that 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; 3 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,

---

(…continued)

section 6254, subdivision (c), in all cases. (See Petitioners' Reply at pp. 7, 12.) Rather, as outlined above, the Department is merely noting that it would be improper, and contrary to the aims of SB 1421, to shield otherwise responsive records related to specified incidents of officer misconduct for the sole reason that the responsive records are personnel records. SB 1421 expressly contemplated and provided that certain personnel records are no longer subject to confidentiality. But there may be an instance where it would be appropriate to invoke that specific CPRA exemption, and SB 1421 does not displace the CPRA as a whole, as this Court has recognized.

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). (See, e.g., *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373.)

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. The records related to the investigation of the Bakersfield Police Department are not subject to disclosure

The first category of documents in dispute are those obtained by the Department through investigative subpoenas issued under Government Code section 11181, and protected from disclosure under Government Code section 11183. (Petn., ¶¶ 55–57.) These records were obtained from the Bakersfield Police

Department in the course of a Civil Code section 52.3 pattern-or-practice investigation initiated under Government Code sections 11180, et seq., are subject to the confidentiality restrictions contained therein, and thus exempt from disclosure under the CPRA. (2 PA 295; 3 PA 445–446 at ¶¶ 20–22.) Because these statutes serve broader and different interests that are not directly contrary to Penal Code section 832.7, they have not been supplanted by SB 1421.

Moreover, as the Department outlines below, this pattern-or-practice investigative file is also protected by Government Code section 6254, subdivision (f), because it is not the type of investigation required to be disclosed by SB 1421, and the CPRA does not require disclosure of individual public records within an otherwise exempt investigation file.

1. The records are protected under Government Code section 11183

a. Government Code section 11183 mandates confidentiality of documents obtained through an investigative subpoena

Government Code section 11180 broadly authorizes state executive departments, including the Department of Justice, to investigate and to prosecute actions concerning matters relating to the business activities and subjects under its jurisdiction. A department's power to make an administrative inquiry is akin "to the power of a grand jury," where it "does not depend on a case or controversy in order to get evidence but can investigate merely on

suspicion that the law is being violated, or even just because it wants assurance that it is not." (*Brovelli v. Superior Ct. of Los Angeles County* (1961) 56 Cal.2d 524, 529, quotation omitted.) Accordingly, "it is not necessary that a formal accusation be on file or a formal adjudicative hearing be pending." (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 8.) And courts have emphasized that "[s]uch investigatory powers have been liberally construed." (*Shively v. Stewart* (1966) 65 Cal.2d 475, 479.)

As part of such an investigation, a department head may issue subpoenas for "the production of papers, books, accounts, documents, . . . and testimony pertinent or material to any inquiry, investigation, hearing, proceeding, or action conducted in any part of the state." (Gov. Code, § 11181, subd. (e).) Government Code section 11183 expressly 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.*)

The language of section 11183 dates back to at least 1921, well before the CPRA was enacted. (See *Arnett v. Dal Cielo*, *supra*, 14 Cal.4th at p. 7 [citing Stats. 1921, ch. 602, § 1, p. 1023, adding former Pol. Code, § 353].) There is little legislative history or case law that sheds light on the meaning of the language in section 11183. However, looking at the statutory scheme as a whole, it is clear that the Legislature intended for materials obtained in the context of an investigation subject to section 11183 to remain confidential except as expressly permitted.

For example, section 11180.5 provides that a prosecuting attorney may disclose documents or information acquired through an investigation to another agency only if that other agency "agrees to maintain the confidentiality of the documents or information received to the extent required by this article." Similarly, section 11181, subdivision (g), provides that in connection with any investigation, a department head may divulge information or evidence related to the investigation of unlawful activity to any prosecuting attorney, but only if the attorney to which the information or evidence is divulged "agrees to maintain the confidentiality of the information received to the extent required by this article." Finally, as outlined above, section 11183 provides for criminal penalties in any case where an officer divulges information or evidence acquired by the officer through its investigation related to the confidential or private transactions, property, or business of any person. (See also, e.g.,

People v. Park (1978) 87 Cal.App.3d 550, 570 ["while the information obtained through the investigative efforts of the department retains its confidential character *in that it cannot be divulged without reason to the public at large* (Gov. Code, § 11183), the confidentiality of the materials does not apply within the government agencies *inter sese*"], initial italics added.)

As the trial court recognized, these confidentiality provisions facilitate witness cooperation by obviating privacy objections. (See 4 PA 798, citing *Tom v. Schoolhouse Coins, Inc.* (1987) 191 Cal.App.3d 827, 830.) Indeed, the confidentiality protections afforded to investigations are vitally important to ensuring that the Department's investigations may be conducted in as thorough and productive a manner as possible. (3 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.*) 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 in multiple ways—through

interference with the Attorney General's pursuit of an investigation by slowing the process through repeated CPRA requests; through 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 through third parties and members of the public seeking to unduly influence the integrity or outcome of an investigation (*Ibid.*)

Although the subpoenas were directed to another government entity, in this case the City of Bakersfield Police Department, the records in question qualify as "private" records and information within the meaning of section 11183. The Attorney General has opined that "'private' is broadly understood to refer to things concerning or belonging to 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., personnel and other records of peace or custodial officers and individual witness statements, and therefore qualify as private records under section 11183.

To interpret these statutes, as Petitioners do (see, e.g., Petn., ¶ 63) to assure confidentiality only to documents that are not otherwise subject to the CPRA would severely disrupt a department's ability to conduct investigations, including the Department's wide-ranging pattern-or-practice investigations, and surely was not what the Legislature intended. Taken to its logical conclusion, this interpretation would mean that any time a state department was investigating another public agency, any materials it obtained as a result of its investigation could be disclosed to the public if those materials were not otherwise

exempt under the CPRA, which could result in revealing an agency's investigative strategies, among other risks, and greatly impede a department's ability to conduct investigations. (See, generally, *Williams v. Super. Ct.* (1993) 5 Cal.4th 337, 356 [explaining in the context of Government Code section 6254, subdivision (f), that a document in an investigation file "may have extraordinary significance to the investigation even though it does not on its face . . . have an independent claim to exempt status"]; *McClatchy Newspapers v. Super. Ct.* (1988) 44 Cal.3d 1162, 1175–1176 [explaining in the context of grand jury secrecy that "the efficacy and credibility of watchdog investigations no less require that witnesses testify without fear of reproach by their peers or their superiors"].)

b. Government Code section 11183 protects important interests that are complementary—not contrary—to SB 1421, and requires the Department to withhold records obtained by investigative subpoena

Section 11183 is not "any other law" eliminated by SB 1421 because it is not directly contrary to that statute. The confidentiality protections afforded by Government Code sections 11180 et seq. 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.

The documents in question here, obtained in connection with CRES's pattern-or-practice investigation of the Bakersfield Police Department, are simply not the types of records that were contemplated for disclosure under SB 1421. The amendments to Penal Code section 832.7 plainly indicate that the Legislature intended for records relating to the report or investigation into *specific instances* of officer misconduct to be disclosed, notwithstanding subdivision (a) of that code section, Government Code section 6254, subdivision (f), or any other law. (See Pen. Code, § 832.7, subd. (b)(1)(A)-(C) [repeatedly referencing "an incident" of an officer-involved shooting, use of force, sexual assault, or dishonesty.) But nothing in SB 1421 suggests that it was intended to override protections for broad subpoenas used in pattern-or-practice investigations, like the Department's investigation of the Bakersfield Police Department, that could involve a wide array of documents, including, but not limited to, specific incidents of misconduct.

The records at issue here were obtained in connection with CRES's investigation into the Bakersfield Police Department pursuant to the Department's authority under Civil Code section 52.3 to investigate and, as appropriate, bring a civil action against, law enforcement agencies that may be engaging in a pattern-or-practice of civil rights violations.[5] When Civil Code

[5] Civil Code section 52.3 provides as follows: "(a) No governmental authority, or agent of a governmental authority, or (continued…)

section 52.3 was first enacted in 2000 under Assembly Bill Number 2484 (Stats. 2000, ch. 622, § 1), the Legislature explained that the measure was "an effort to increase accountability and oversight when police misconduct permeates a law enforcement agency." (Assem. Comm. on Judiciary, Analysis of Assem. Bill. No. 2484 (1999-2000 Reg. Sess.) April 25, 2000, p. 2.)[6] The bill was "not designed to respond to single incidents of police misconduct. Instead, it applies only when the policies, both official and unofficial, of a police department result in civil rights violations of Californians. This could include a pattern of unlawful searches, arrests, excessive force, as well as a variety of other violations." (*Ibid.*) In support of the bill, the American Civil Liberties Union explained that the measure would "allow the Attorney General to address and reform law enforcement

---

(…continued)

person acting on behalf of a governmental authority, shall engage in a pattern-or-practice of conduct by law enforcement officers that deprives any person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States or by the Constitution or laws of California. [¶] (b) The Attorney General may bring a civil action in the name of the people to obtain appropriate equitable and declaratory relief to eliminate the pattern-or-practice of conduct specified in subdivision (a), whenever the Attorney General has reasonable cause to believe that a violation of subdivision (a) has occurred."

[6] Available at http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2451-2500/ab_2484_cfa_20000424_154159_asm_comm.html (as of March 7, 2023.)

practices that permit or promote misconduct. Unlike criminal prosecutions that focus on the bad conduct of individual officers, this civil remedy focuses on management practices that condone constitutional violations, and provides the Attorney General the authority to seek injunctive relief to remedy management systems in order to better train, supervise, monitor and discipline officers." (*Id.* at p. 6.)

In these types of pattern-or-practice investigations, the Department is not focused on any one specific incident of officer misconduct, and documents returned in response to a subpoena may only contain parts of a specific incident, making it difficult, as a practical matter, to ascertain whether a given record is responsive under SB 1421.[7] Petitioners' request would require the Department to open its pattern-or-practice investigation file—that is not independently responsive to SB 1421—to search for individual records it may have obtained *within* that file that may be independently responsive and disclosable under SB 1421. But, as explained further, *infra*, in section II(A)(2), this is not required under the CPRA and was not intended under SB 1421.

[7] While the Department issues Government Code section 11181 subpoenas in a variety of contexts under its broad authority to investigate any matter under its jurisdiction, it is only in connection with CRES's pattern-or-practice investigations where records that may be responsive to SB 1421 requests are likely to be found.

Illustrating this point, the withholding and redaction provisions of SB 1421 do not align with the types of pattern-or-practice investigations conducted by CRES and, again, are focused on investigations into specific individual instances of officer misconduct. Under section 832.7, an agency may withhold a responsive record that is the subject of an active criminal or administrative investigation for a specified period of time "from the date the misconduct or use of force occurred," but in no case for longer than 180 days.[8] (Pen. Code, § 832.7, subd. (b)(8)(A), (C).) But by the very nature of a pattern-or-practice investigation, the Department does not begin with reference to a specific incident of misconduct, and thus any withholding in connection with an ongoing investigation cannot be calculated "from the date the misconduct or use of force occurred." Additionally, pattern-or-practice investigations are far-ranging, and typically take *years* to conclude. (See, e.g., 3 PA 446, ¶¶ 21–

[8] "Administrative investigation" in the context of officer misconduct generally refers to an investigation performed by the employing agency for administrative, non-criminal, purposes to determine if an officer acted within the employing agency's policies and procedures to determine if discipline is necessary—not a pattern-or-practice investigation. (See, generally, *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 574; *Van Winkle v. County of Ventura* (2007) 158 Cal.App.4th 492, 497; see also Pen. Code, § 832.7, subd. (b)(8)(C) [providing that an agency may delay disclosure of responsive records during an ongoing administrative investigation "until the investigating agency determines whether the misconduct or use of force violated a law or agency policy[.]"].)

23 [explaining that investigation of Bakersfield Police Department began in 2016 and culminated in 2021 with filing of complaint and entry of judgment]; *id*., pp. 449–450, ¶¶ 40–42 [investigation of Stockton Unified School District spanning from 2015 to 2019].) The redaction provisions, too, are inadequate for this type of investigation in that they allow for redaction only of specific information, and only for specific, limited reasons. Witness testimony or other clues about the Department's aims and strategies in its investigation cannot be withheld under the terms of Penal Code section 832.7, subdivision (b)(6).

The Legislature simply did not intend to encompass these types of pattern-or-practice investigations within SB 1421's disclosure requirement. And, fundamentally, there is no conflict between the confidentiality provisions of Government Code section 11180 et seq. and SB 1421. 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.

Moreover, only the Department has the authority to pursue civil actions in the name of the people to obtain appropriate equitable and declaratory relief to eliminate any pattern-or-practice of conduct by law enforcement officers that deprives any person of their civil rights. (Civ. Code, § 52.3, subd. (b).) The investigative subpoena power with its attendant confidentiality provisions under Government Code section 11180, et. seq. is a critical tool to enable the Department to successfully complete these investigations, which were intended to identify and remedy systemic violations by law enforcement. 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.

If the Department were required to open up its investigative files to search for documents that may be responsive to SB 1421, CRES's ability to maintain the integrity and efficacy of its pattern-or-practice investigations would be greatly impeded. Without assurances of confidentiality, local law enforcement agencies would be less likely to cooperate in sharing documents that could be publicly disclosed by the Department without the

local agency's input or control in determining what is or is not responsive under SB 1421 or what may need to be redacted or withheld. Without cooperation from targets of investigations, the Department would have to seek judicial relief to enforce subpoenas, draining resources and delaying the substantive investigation. Witnesses may be reluctant to speak candidly with investigators about ongoing systemic violations for fear of retribution. The burden, too, in having to identify and segregate files that may be responsive to future SB 1421 requests would impede the Department's ability to conduct these types of investigations with the frequency and efficiency that is warranted. Moreover, it is unclear how the Department should determine what individual records "relat[e] to" a specific incident (Pen. Code, § 832.7, subd. (b)(1)(A)-(C)), when the focus of the pattern-or-practice investigation is systemic abuse.

Finally, 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; 4 PA 798.) To the contrary, the application of section 11183 to the records at issue hinges on how the records were obtained (investigative subpoena), the use to which they were put (a pattern-or-practice investigation), and what the records concern (private information).

2. Investigations that do not pertain to the specified incidents outlined under Penal Code section 832.7 are protected under Government Code section 6254, subdivision (f)[9]

As a separate, but related, basis for withholding the records in question, because the pattern-or-practice investigation is not the type of investigation required to be disclosed by SB 1421, it is protected under the investigatory-files exemption in Government Code section 6254, subdivision (f), since the CPRA does not require disclosure of individual public records within a pattern-or-practice investigation file.

Government Code section 6254, subdivision (f), broadly exempts Department investigations from disclosure requests. Specifically, subdivision (f) provides that "records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, . . . and any state or local police agency, or any investigatory or security files compiled by

---

[9] Although this argument was not expressly raised in the trial court, this Court can affirm the trial court's order on any legal ground that is supported by the record, especially where, as here, there are important public interest and public policy issues involved. (See, e.g., *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 750–751.)

any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes" are not required to be disclosed under the CPRA. (Gov. Code, § 7923.600.) SB 1421 eliminated the confidentiality protections contained in Penal Code section 832.7, subdivision (a), and Government Code section 6254, subdivision (f), but, as relevant here, did so only for a subset of records concerning the "report, investigation, or findings" of a specific "incident" of wrongdoing. (See Pen. Code, § 832.7, subd. (b)(1)(A)(i) ["[a]n incident involving the discharge of a firearm at a person by a peace officer or custodial officer"]; *id*, subd. (b)(1)(A)(ii) "[[a]n 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"]; *id*., subd. (b)(1)(B)(i) ["[a]n 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"]; *id.*, subd. (b)(1)(C) ["an incident in which a sustained finding was made . . . involving dishonesty"].)

The Department may only have potentially responsive records because it initiated a pattern-or-practice investigation into the Bakersfield Police Department and subpoenaed certain documents under its power under Government Code section 11180, et seq.—a fact that is not in dispute. Because the Department's records in question were obtained in connection with a pattern-or-practice investigation—not targeted

investigations of individual incidents—the records remain protected under Government Code section 6254, subdivision (f). Indeed, the Department is not the type of "oversight agency" of local law enforcement contemplated by SB 1421, such as a police commission or citizen review board, that regularly exercises a direct and ongoing role in reviewing specific incidents of misconduct and making findings regarding the same.[10] (See, e.g., Sen. Rules Com., Analysis of SB 1421 (2017–2018 Reg. Sess.) as amended on Aug. 23, 2018, p. 7 [referencing oversight agencies such as the San Francisco Police Commission, Oakland Citizen Police Review Board, Los Angeles Police Commission, and Los Angeles Sheriff's Office of Independent Review].)

As Petitioners acknowledge, "materials obtained under § 11183 that are not within the scope of SB 1421 are exempt from disclosure under § 6254(f)[.]" (Petitioners' Reply at p. 33.) Yet Petitioners assert that, under SB 1421, the Department is required to open up its pattern-or-practice investigation files to

---

[10] The Department does have an independent mandate to investigate incidents of officer-involved shootings resulting in the death of an unarmed civilian under Government Code section 12525.3 (as added by Assem. Bill No. 1506, Stats. 2020, ch. 326, § 1.) These investigations do not involve the use of investigative subpoenas and are not at issue in the present litigation. Moreover, the Department does not dispute that, in cases where the Department *does* serve in an oversight capacity to review a specific incident of officer misconduct covered by SB 1421 and making findings regarding the same, it is obligated to produce certain records, and has done so in response to CPRA requests.

find records that are individually responsive to SB 1421. This is not required under the CPRA. Public documents that may, in and of themselves, be disclosable under the CPRA, gain exemption once they become part of a legitimate investigatory file. (See *Williams v. Super. Ct.*, *supra*, 5 Cal.4th at p. 354 [explaining that CPRA exemption for investigatory files "protects materials that, while not on their face exempt from disclosure, nevertheless become exempt through inclusion in an investigatory file"]; *Haynie v. Super. Ct.* (2001) 26 Cal.4th 1061, 1069–1070 [same]; *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 654 [information in public files can "gain exemption not because of [their] content but because of the use to which [they are] put, that is, when and if [the documents] became part of an investigatory file.]; *Uribe v. Howie* (1971) 19 Cal.App.3d 194, 213 [same].)

When construing a statute, a court must ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.) In determining that intent, the statute must be "read as a whole, harmonizing the various elements by considering each clause and section in the context of the overall statutory framework." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.) Courts "must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*Ibid.*;

see also, e.g., *Com. on Peace Officer Standards & Training v. Super. Ct.* (2007) 42 Cal. 4th 278, 290 ["To the extent this examination of the statutory language leaves uncertainty, it is appropriate to consider the consequences that will flow from a particular interpretation. Where more than one statutory construction is arguably possible, [courts] favor the construction that leads to the more reasonable result."]; *Copley Press, Inc. v. Super. Ct.* (2006) 39 Cal.4th 1272, 1291–92 [same].)

As outlined more fully, *supra,* section II(A)(1)(b), the language and structure of Penal Code section 832.7, as amended by SB 1421, are focused on disclosure of investigations of individual incidents of police misconduct. Had the Legislature intended that individual records obtained through the Department's pattern-or-practice investigations be opened to public disclosure, it could have easily provided for that in SB 1421 or SB 16. In the absence of clear direction from the Legislature that Penal Code section 832.7 should be broadly read to overturn the exemption for pattern-or-practice investigations, as opposed to investigations targeted at one or more specific "incidents," the protections afforded by Government Code section 6254, subdivision (f), should remain applicable. This would be the more reasonable result, consistent with the Legislature's intended purpose.

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. (4 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. Super. 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 to contend that it allows for nondisclosure where SB 1421 calls for disclosure. (4 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.

March 8, 2023

Respectfully submitted,

ROB BONTA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General
JOHN D. ECHEVERRIA
Deputy Attorney General

/S/NATASHA SAGGAR SHETH
NATASHA SAGGAR SHETH
Deputy Attorney General
Attorneys for Real Parties in Interest Rob Bonta, in his official capacity as Attorney General of the State of California, and California Department of Justice

CERTIFICATE OF COMPLIANCE

I certify that the attached **REAL PARTIES' RETURN TO ORDER TO SHOW CAUSE BY WAY OF ANSWER TO PETITION AND RESPONSE** uses a 13 point Century Schoolbook font and contains a total of 11,874 words. The response to the Order to Show Cause, alone, contains 9,458 words.

March 8, 2023

ROB BONTA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General
JOHN D. ECHEVERRIA
Deputy Attorney General

/S/ NATASHA SAGGAR SHETH
NATASHA SAGGAR SHETH
Deputy Attorney General
Attorneys for Real Parties in Interest Rob Bonta, in his official capacity as Attorney General of the State of California, and California Department of Justice

SA2022303630

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 March 8, 2023, I electronically served the attached **REAL PARTIES' RETURN TO ORDER TO SHOW CAUSE BY WAY OF ANSWER TO PETITION AND RESPONSE** 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 March 8, 2023, 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:

Thomas R. Burke **Davis Wright Tremaine LLP** **Email: thomasburke@dwt.com** ***Attorney for Plaintiff/ Petitioner*** ***KQED Inc.*** ***Via TrueFiling***	**Michael T. Risher** **Law Office of Michael T. Risher** **Email: michael@risherlaw.com** ***Attorney for Plaintiff/Petitioner*** ***First Amendment Coalition*** ***Via TrueFiling***

Sarah E. Burns Davis Wright Tremaine LLP **Email: sarahburns@dwt.com** ***Attorney for Plaintiff/Petitioner KQED Inc.*** ***Via TrueFiling***	**San Francisco Superior Court** **400 McAllister Street** **San Francisco, CA 94102** ***Via U.S. Mail*** **Supreme Court of California** ***Via TrueFiling***
David E. Snyder **David Loy** **Monica Price** **First Amendment Coalition** **Email:** **dsnyder@firstamendmentcoalition.org** **dloy@firstamendmentcoalition.org** **mprice@firstamendmentcoalition.org** ***Attorneys for Plaintiff/Petitioner First Amendment Coalition*** ***Via TrueFiling***	

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 March 8, 2023, at San Francisco, California.

M. Mendiola
Declarant


Signature

SA2022303630
43603341.docx