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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

CARLSBAD POLICE OFFICERS ASSOCIATION et al.,

Petitioners,

vs.

CITY OF CARLSBAD, a municipal corporation; NEIL GALLUCCI, Chief of Police, City of Carlsbad et al.,

Respondents,

AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES and FLORA RIVERA,

Intervenors.

Case No. 37-2019-00005450-CU-WM-CTL

INTERVENORS AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES and FLORA RIVERA'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO APPLICATION FOR WRIT OF MANDATE

HEARING DATE: March 1, 2019
TIME: 1:30 p.m.
DEPT: C-67

[Petition filed: January 28, 2019]

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I. INTRODUCTION

For decades, California had the most restrictive laws in the country on public disclosure of records concerning killings and misconduct by police. While serving the interests of police unions, those laws sowed distrust in law enforcement. Survivors of those killed by police, like Flora Rivera, were left to wonder how and why their loved ones were killed, and the public wondered how and why abusive and dishonest officers could continue to victimize the community. That distrust undermined public safety, as police became viewed as hostile and unaccountable to the public.

To restore public trust in law enforcement and promote public safety, the Legislature adopted and the Governor signed "The Right to Know Act," S.B. 1421, Chapter 988 (Cal. 2018) ("S.B. 1421"). The Act guarantees disclosure of critical information in which the public interest is paramount—use of deadly or serious force and sustained findings of sexual assault on members of the public or dishonesty in the reporting, investigation, or prosecution of crime or officer misconduct.

As the Legislature found, "[t]he public has a strong, compelling interest in law enforcement transparency because it is essential to having a just and democratic society." S.B. 1421 § 4. Peace officers are given "extraordinary authority," and "[m]isuse of that authority can lead to grave constitutional violations, harms to liberty and the inherent sanctity of human life, as well as significant public unrest." *Id.* § 1(a). The Legislature thus upheld the public's "right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force. Concealing crucial public safety matters such as officer violations of civilians' rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety." *Id*. § 1(b).

By incorrectly arguing the statute applies "retroactively" to records created or conduct occurring before January 1, 2019, Petitioners are seeking to defeat the full transparency and accountability guaranteed by S.B. 1421. As its plain language, context, and legislative history demonstrate, S.B. 1421 applies prospectively to any records maintained by a public agency, regardless of when they were created or when the underlying conduct occurred. A "statute is not made retroactive merely because it draws upon facts existing prior to its enactment." *Tapia v. Superior Court*, 53 Cal. 3d 282, 288 (1991)

(citation and quotation marks omitted). The question of retroactive application arises when the Legislature has "changed the legal consequences of past conduct by imposing new or different liabilities based on such conduct." *Id.* at 291. S.B. 1421 does not change the legal consequences of past conduct or make officers guilty of misconduct for actions that were lawful when taken. Instead, it merely guarantees the public a right to know how and why officers used deadly or serious force and whether agencies have found they committed certain egregious misconduct. The statute operates prospectively to require agencies to disclose certain records, not retroactively to punish officers. Therefore, as courts have agreed, a public disclosure statute such as S.B. 1421 applies to all covered records in an agency's possession as of its effective date.

S.B. 1421 does not deprive officers of any "vested" right to concealment of public records of their official conduct. Public employees cannot enjoy "vested" rights against disclosure of official records because such disclosure is governed purely by statute and subject to change at the Legislature's direction. There is no constitutional right for an officer to shoot or kill a person or commit sexual assault or perjury in secret. Any alleged "reliance" on confidentiality provided by the previous version of the *Pitchess* statutes is not substantiated by admissible evidence and cannot be considered. In any event, any such reliance would have been unreasonable because the previous statutes allowed disclosure of records covered by S.B. 1421 in proceedings likely to follow from the use of deadly or serious force or the commission of egregious misconduct. S.B. 1421 also applies to numerous records that were never protected by the *Pitchess* statutes and to which no "vested" right against disclosure could ever have attached because agencies were always free to disclose such records.

Even if S.B. 1421 could be deemed to apply "retroactively" to some "vested" right against public disclosure of official information, the Legislature clearly intended to override any presumption against such application. The compelling public interests found by the Legislature amply justify ending the perpetual concealment of public records concerning the use of deadly or serious force and commission of egregious misconduct by law enforcement officers.

II. ARGUMENT

"Openness in government is essential to the functioning of a democracy." *Int'l Fed'n of Prof'l & Tech. Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 319, 328 (2007). The California

Public Records Act ("CPRA") guarantees that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person." Govt. Code § 6250. The public interest in information covered by S.B. 1421 is compelling. *Long Beach Police Officers Ass'n. v. City of Long Beach*, 59 Cal. 4th 59, 74 (2014) ("*Long Beach*") (noting that in "officer-involved shootings, the public's interest in the conduct of its peace officers is particularly great because such shootings often lead to severe injury or death"); *Comm'n on Peace Officer Standards & Training v. Superior Court*, 42 Cal. 4th 278, 299 (2007) ("*POST*") ("Peace officers hold one of the most powerful positions in our society; our dependence on them is high and the potential for abuse of power is far from insignificant.") (citation and quotation marks omitted).

Under the CPRA, the public has long had the right to obtain personnel records concerning investigations of public employees that reflected serious public concern. *BRV, Inc. v. Superior Court*, 143 Cal. App. 4th 742, 758 (2006); *Bakersfield City Sch. Dist. v. Superior Court*, 118 Cal. App. 4th 1041, 1046-47 (2004); *AFSCME v. Regents*, 80 Cal. App. 3d 913, 918 (1978). Before S.B. 1421, however, the *Pitchess* statutes gave peace officers a special immunity against such disclosure, although "the public has a far greater interest in the qualifications and conduct of law enforcement officers" than those of many other public employees. *POST*, 42 Cal. 4th at 297. With S.B. 1421, the Legislature removed that immunity for critical records in which the public has a compelling interest. Nothing argued by Petitioners justifies depriving the public of the full range of records covered by S.B. 1421. As noted in the Request for Judicial Notice filed herewith, courts in Contra Costa and Los Angeles Counties have held S.B. 1421 applies to all covered records currently in an agency's possession. This Court is respectfully requested to do the same.

A. S.B. 1421 Applies Prospectively to Records Currently Maintained by Agencies.

Courts look to a statute's language in its full context to determine its purpose and effect. *Sierra Club v. Superior Court*, 57 Cal. 4th 157, 165 (2013). Taken in context with the CPRA, the plain language of S.B. 1421 applies prospectively to require disclosure of all covered records maintained by agencies regardless of when those records were created or when the underlying conduct occurred.

Subject to specified limitations, S.B. 1421 mandates that certain "records ***maintained*** by any state or local agency shall not be confidential and shall be made available for public inspection pursuant

to the California Public Records Act." Penal Code § 832.7(b)(1) (emphasis added). It mandates disclosure of "any" and "all" covered records:

> (A) A record relating to the report, investigation, or findings of ***any*** of the following:
>
> (i) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.
>
> (ii) An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury.
>
> (B)(i) ***Any*** record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public….
>
> (C) ***Any*** record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer … directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer ….

Penal Code § 832.7(b)(1)(A)-(C) (emphases added). Furthermore, the statute specifies that "[r]ecords that shall be released pursuant to this subdivision include ***all*** investigative reports" and similar records, and it defines the relevant "personnel records" as "***any*** file maintained under that individual's name." Penal Code §§ 832.7(b)(2), 832.8(a) (emphasis added).

The Legislature's express direction to disclose "any" and "all" records covered by S.B. 1421 demonstrates clear intent that the statute shall apply to all such records in an agency's possession or control. *Delaney v. Superior Court,* 50 Cal. 3d 785, 798 (1990) ("[T]he word 'any' means without limit and no matter what kind."); *In re E.A.*, 24 Cal. App. 5th 648, 661 (2018) ("[T]he ordinary meaning of the word 'any' is clear, and its use in a statute unambiguously reflects a legislative intent for that statute to have a broad application.") (citation and quotation marks omitted); *Joshua D. v. Superior Court,* 157 Cal. App. 4th 549, 558 (2007) ("[B]ecause the word 'all' means 'all' and not 'some[,]' [t]he Legislature's chosen term leaves no room for judicial construction."). The plain language of S.B. 1421 thus applies prospectively to all covered records in existence as of its effective date. *See, e.g., In re E.J.,* 47 Cal. 4th 1258, 1272 (2010) (holding "plain language" of law requiring "any person" subject to lifetime registration to comply with new parole condition "*prospectively* applied" to those "released from custody on parole" after statute's effective date even if they were convicted prior to enactment).

The context of S.B. 1421 reinforces that conclusion. "Statutes must be construed with reference to the system of laws of which they are a part." *People v. Hernandez*, 46 Cal. 3d 194, 201 (1988). S.B. 1421 mandates disclosure of covered records "***pursuant to the California Public Records Act***." Penal Code § 832.7(b)(1) (emphasis added). The CPRA requires that an "agency, ***upon a request*** for a copy of records, shall … determine whether the request … seeks copies of disclosable public records ***in the possession of the agency***" and shall disclose all requested records not expressly exempt from disclosure. Govt. Code § 6253(c) (emphasis added). Furthermore, the CPRA defines "public records"—which includes the records covered by S.B. 1421—as any records "prepared, ***owned***, used, or ***retained*** by" an agency, with no applicable limit based upon when the records were created or when the underlying conduct occurred. Govt. Code § 6252(e) (emphasis added).

Under the CPRA's plain language, the triggers for CPRA coverage are when a request is pending and whether records are in the agency's possession or control. Accordingly, the CPRA applies to all of an agency's "existing records" whenever they were created or whenever the underlying conduct occurred. *Sander v. Superior Court,* 26 Cal. App. 5th 651, 665 (2018). By mandating disclosure pursuant to the CPRA of "any" and "all" covered records, S.B. 1421 clearly requires production of all such records regardless of when they were created or when the conduct occurred.

The legislative history confirms the Legislature understood S.B. 1421 would require disclosure of all covered records currently maintained by agencies. The Senate Public Safety Committee explained that a police union objected to the bill because it would mean that "records are available for public inspection irrespective of whether or not they occurred prior to the effective date of SB 1421."[1] Sen. Comm. on Pub. Safety, Analysis of S.B. 1421 at 16 (April 17, 2018). The Legislature knew of the objection yet did not restrict the law to records created or conduct occurring after January 1, 2019. The Legislature thus intended the law to apply to all covered records. When the Legislature is warned

[1] The objection was not a mere "lobbyists' letter," Application for Writ at 7 n.4, because it was included in official committee reports, which are "appropriate sources from which legislative intent may be ascertained." *Mt. Hawley Ins. Co. v. Lopez*, 215 Cal. App. 4th 1385, 1401 (2013). In addition, the Senate recently endorsed a letter from the author of S.B. 1421 confirming that it "applies to all disclosable records whether or not they existed prior to the date the statute went into effect," consistent with "the standard practice for public records legislation." Senate Daily Journal, 2019-2020 Regular Session, at 125 (Jan. 31, 2019); *cf. In re Marriage of Bouquet*, 16 Cal. 3d 583, 588 (1976) (considering letter written by author of legislation and endorsed by Senate to determine legislative intent).

that a bill may have a particular effect but enacts the law without making changes to avoid that effect, it intends for the law to have that effect. *Brown v. Superior Court*, 63 Cal. 4th 335, 349 (2016) (where Legislature was "warned" that law might create short time period but "did not respond by expanding the time allowed," it intended that short period); *Lucent Techs., Inc. v. Bd. of Equalization*, 241 Cal. App. 4th 19, 39 (2015) (adopting broad view of law in part because "the statutes' legislative history indicates that the Board warned the Legislature of how broadly the statutes could be construed, and the Legislature enacted the statutes anyway"); *cf. Albertson v. Superior Court*, 25 Cal. 4th 796, 806-07 (2001) (relying on statement in opposition letter incorporated into Assembly Committee on Public Safety's analysis that revision to SVPA would allow disclosure of confidential medical conversations to conclude that Legislature intended to permit such disclosure).

Taken together, the language, context, and legislative history of S.B. 1421 are consistent with the settled principle that in a public records case, "the relevant event" for determining whether a statutory amendment applies to particular documents "is the disclosure of the withheld data," not the creation of the documents or occurrence of the underlying conduct. *City of Chicago v. U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms,* 423 F.3d 777, 783 (7th Cir. 2005). As multiple courts have held, when public records laws or amendments thereto require disclosure of "all" records or disclosure of "records" without reference to date, they apply prospectively to all covered records regardless of when the records were created or the underlying conduct occurred.[2]

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[2] *State ex rel. Beacon Journal Pub. Co. v. Univ. of Akron,* 64 Ohio St. 2d 392, 396 (1980) (rejecting argument that applying public records act amendment making law enforcement records public to records created before its effective date was retroactive, and holding that Ohio's public record law "speaks in terms of 'all public records' and makes no distinction for those records compiled prior to its effective date" and "[s]ince the statute merely deals with record disclosure . . . only a prospective duty is imposed upon those maintaining public records."); *Haw. Org. of Police Officers v. Soc'y of Prof.'l Journalists*, 927 P.2d 386, 398-99 (Haw. 1996) ("No distinction is made, nor is there any exemption, based upon the date that the record was created" and therefore the law "applies prospectively requiring disclosure of records maintained by State agencies regardless of when the records came into existence."); *Indus. Found. of the S. v. Tex. Indus. Accident Bd*., 540 S.W.2d 668, 677 (Tex. 1976) (holding "it is clear that the [Texas public record] Act is intended to apply to all records kept by governmental bodies, whether acquired before or after the Act's effective date. No exception is made for records which were considered confidential prior to [enactment]" and rejecting argument that previous confidentiality created vested right); *Fla. Hosp. Waterman, Inc. v. Buster,* 984 So. 2d 478, 487 (Fla. 2008) ("'The use of the word 'any' to define the scope of discoverable records … and the broad definition of 'patient' … expresses a clear intent that the records subject to disclosure include those created prior to the effective date of the amendment'"); *Cellular S., Inc. v. BellSouth Telecomm, LLC*, 214 So. 3d 208, 216 (Miss. 2017) (recognizing that even if records were confidential prior to public record act amendments, the records (cont'd)

In this case, "the last act or event necessary to trigger application" of S.B. 1421 is an agency's review of Intervenors' pending requests for covered records, which occurred "after the statute's effective date." *People v. Grant*, 20 Cal. 4th 150, 157 (1999). Therefore, S.B. 1421 does not apply "retroactively." Instead, it applies prospectively to any request pending after its effective date and requires agencies to disclose covered records regardless of when they were created or the underlying conduct occurred.

B. S.B. 1421 Does Not Apply Retroactively Because It Does Not Change the Legal Consequences of Past Conduct.

S.B. 1421 does not apply retroactively because it has not "changed the legal consequences of past conduct by imposing new or different liabilities based upon such conduct." *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223, 231 (2006). "A statute is retroactive if it substantially changes the legal effect of past events. A statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment." *Kizer v. Hanna*, 48 Cal. 3d 1, 7 (1989) (citations omitted); *see also Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, 86 Cal. App. 4th 534, 550 (2001) ("A statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment [citation], or upsets expectations based on prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events *completed* before its enactment.").

S.B. 1421 does not "increase a party's liability for past conduct." *Myers v. Philip Morris Companies, Inc.*, 28 Cal. 4th 828, 839 (2002). "Nothing [an officer] might lawfully do before [S.B. 1421] is unlawful now." *Californians for Disability Rights*, 39 Cal. 4th at 232. Instead, S.B. 1421 merely guarantees the public a right to know what police officers have done in certain circumstances where the public's interest in disclosure is at its zenith. By prospectively requiring disclosure of records after its

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"belong to the public" and must be disclosed); *Mollick v. Twp. of Worcester*, 32 A.3d 859, 870 (Pa. Commw. Ct. 2011) (rejecting argument that production of records prior to the enactment of open records law was "retroactive" application and holding that "the applicability of the [Law] is not specifically limited to public records created after its . . . effective date, but only to requests for information made after the effective date," thus it "applies to information . . . even if created prior to that date."); *Biden v. Camden-Wyom. Sewer & Water Auth.* No. 11C-08-004 (RBY), 2012 WL 5431035, at *5 (Del. Super. Ct. Nov. 7, 2012) (rejecting claim that absence of applicable time period in public records act amendment rendered application to pre-enactment records "retroactive," and holding that in the absence of time frame "the duty to produce records under [Delaware's] FOIA applies to any and all applicable records existing on the date the request was made.").

effective date, it properly governs "the conduct of proceedings following the law's enactment without changing the legal consequences of past conduct." *Id.* at 232.

S.B. 1421 does not "operate retroactively" merely because it requires disclosure of records about conduct that "came into existence prior to its enactment." *Kizer*, 48 Cal. 3d at 7. A leading case provides a clear analogy. As the California Supreme Court held, a statute designed "to prevent future discrimination in connection with the rental or sale of publicly assisted housing" presented "no problem of retroactivity" when applied "to housing which began receiving public assistance prior to the effective date of the act." *Burks v. Poppy Const. Co.*, 57 Cal. 2d 463, 474 (1962). The statute did not "penalize past conduct" but only imposed "sanctions upon conduct occurring after the effective date of the statute." *Id.* As the court confirmed, "a statute is not retroactive merely because it draws upon antecedent facts for its operation," and therefore it did not "operate retroactively merely because it may apply in some instances to housing which was receiving public assistance when the statute was enacted." *Id.* Similarly, S.B. 1421 does not penalize past conduct. Instead, it requires disclosure of all covered records in an agency's possession, and it does not operate retroactively merely because it requires disclosure of records about conduct occurring before its effective date.

Likewise, a statute authorizing the state to recoup Medi-Cal benefits from a decedent's estate had "no retroactive effect on Medi–Cal benefits received prior to the statute's effective date," because "the statute applie[d] only to estates arising after its effective date."[3] *Kizer*, 48 Cal. 3d at 9. Similarly, S.B. 1421 applies to requests made after its effective date and does not apply retroactively merely it requires disclosure of covered records about conduct occurring before that time. *See People v. McClinton*, 29 Cal. App. 5th 738, 753 (2018) (statute permitting discovery of "treatment records" was "applied prospectively, not retroactively" to require disclosure of records generated before effective date).

Under these principles, S.B. 1421 does not apply retroactively. An agency's obligation to produce covered records in its possession does not punish an officer for past conduct or impose new

[3] The statute prohibited "unfair" recoupment. *Kizer*, 48 Cal. 3d at 6. S.B. 1421 is similarly limited. It requires disclosure only for serious uses of force or egregious misconduct, not petty violations. Penal Code § 832.7(b)(1). It permits redaction of certain personal or confidential information to protect privacy or safety, allows delay of disclosure during certain investigations, and prevents disclosure of frivolous or unfounded complaints. *Id.* § 832.7(b)(5)-(8).

limitations on an officer's employment. This case is therefore materially different from *Balen v. Peralta Junior Coll. Dist.*, 11 Cal. 3d 821 (1974), in which the court held that a statute could not be used to justify firing a teacher by depriving the teacher of protected status acquired before the statute's effective date. *Id.* at 830. Here, by contrast, S.B. 1421 deprives officers of no rights against discipline or termination. Instead, it merely requires public disclosure of certain information. The agency's possession of records is merely an antecedent fact that determines whether the agency has a duty to disclose covered records. It does not convert that prospective duty into a "retroactive" law.

C. S.B. 1421 Does Not Apply Retroactively Because It Impinges No "Vested Right."

S.B. 1421 does not infringe any "vested rights" by requiring disclosure of specified records relating to the official conduct of public employees. First, public employees can have no "vested rights" against disclosure of records concerning their official conduct. While the Legislature previously allowed peace officers to object to disclosure of certain records, that remedy flowed only from statutes that the Legislature was free to amend at any time, depriving the officers of any right to demand perpetual entitlement to such a remedy. Any alleged reliance on previous statutory remedies is unsubstantiated by admissible evidence and would have been unreasonable as a matter of law for the records covered by S.B. 1421. Second, S.B. 1421 covers numerous records that were never implicated by the *Pitchess* statutes. While those records were previously exempt from disclosure under the CPRA, agencies were free to waive that exemption, a decision to which peace officers could not object because the records were not subject to the *Pitchess* statutes. Accordingly, S.B. 1421 does not implicate any "vested rights."

1. There can be no vested right in perpetual application of a superseded statute.

Petitioners cannot have any "vested right" in the perpetual application of a superseded statutory remedy to object to disclosure of official records. It has long been settled that such a "remedy dependent on a statute falls with a repeal of the statute" because these purely "statutory remedies are pursued with full realization that the Legislature may abolish the right to recover at any time."[4] *Callet v. Alioto*, 210

[4] In deciding whether a statute's application impacts a vested right, courts have invoked property and contract rights, which are not at issue here. *Strauss v. Horton*, 46 Cal. 4th 364, 473 (2009) (discussing "vested property rights"); *Kizer*, 48 Cal. 3d at 5-6 (heir's interest to testamentary distribution of an estate); *In re Marriage of Boul*, 39 Cal. 3d 751, 757 (1985) (wife's interest in home as separate property); *Bouquet*, 16 Cal. 3d at 591-92 (wife's property interest in husband's income at the time earned); *Bank of Am. v. Angel View Crippled Children's Found.*, 72 Cal. App. 4th 451, 458-59 (1999) (cont'd)

Cal. 65, 67-68 (1930); *see also Plotkin v. Sajahtera, Inc.*, 106 Cal. App. 4th 953, 962-63 (2003) (recognizing that "[c]ommon law rights were classified as 'vested'; rights created by statute were not" and there is no "vested right" to "right of action" that is purely "a creature of statute"). Indeed, in a case about disclosure of official information, the court noted "[i]t is presumed that a statutory scheme is not intended to create private contractual or vested rights" against such disclosure and held "there is no deprivation of a vested right" arising from amendment of the relevant statute to require disclosure. *Doe v. Cal. Dep't. of Justice,* 173 Cal. App. 4th 1095, 1106-07 (2009) (citation and quotation marks omitted).

While the *Pitchess* statutes previously conferred certain rights on officers to object to disclosure, *City of Hemet v. Superior Court,* 37 Cal. App. 4th 1411, 1431 (1995), the Legislature was free to modify those rights at any time. Therefore, any previous right to object to disclosure of records covered by S.B. 1421 derived solely from the previous *Pitchess* statutes and has been lost with their amendment. Although cases such as *City of Hemet* stated the law in effect at the time, that law has been changed, and Petitioners cannot claim "vested" rights against disclosure of official records governed purely by statute.

The California Supreme Court upheld that principle in holding that a statute controlling the availability of official records did not create a vested right. At one point, a statute allowed "courts, on petition, to order the destruction of all records of arrests or convictions for possession of marijuana, held by any court or state or local agency." *Younger v. Superior Court*, 21 Cal. 3d 102, 108 (1978). After an individual obtained such an order, "the Legislature changed the law," removing "authorization for destruction of marijuana arrest or conviction records by court order." *Id.* Recognizing that "the proceeding is wholly dependent on statute," because there was no "common law right" to destruction of the records and "the power to grant or withhold such a remedy rests exclusively with the Legislature," the court vacated the order based on the principle that "all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time." *Id.* at 109.

Similarly, peace officers have no common law right against disclosure of records concerning their official conduct. Their previous right to object to disclosure of certain personnel records was

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(discussing "a contract or a vested property right"); *Canfield v. Prod*, 67 Cal. App. 3d 722, 728 (1977) (property right to disability benefits owed). S.B. 1421 also implicates no right to "compensation" or "pension benefits." *White v. Davis*, 30 Cal. 4th 528, 565 (2003).

grounded solely in statutes that the Legislature was free to modify at any time, as it did in S.B. 1421. For that reason, Petitioners cannot have "vested rights" against disclosure of such records.

The California Constitution creates no "vested right" to perpetual concealment of records covered by S.B. 1421. An officer can have no constitutional right to shoot or kill a person or commit sexual assault or perjury in secret. Public employees have no right to conceal comparable records. *BRV*, 143 Cal. App. 4th at 758; *Bakersfield City Sch. Dist.*, 118 Cal. App. 4th at 1046-47; *AFSCME*, 80 Cal. App. 3d at 918. A police officer has no "constitutional right to privacy" against disclosure of personnel records in circumstances allowed by statute when "the statutory scheme makes it clear that the right to privacy in the records is limited" by allowing "disclosure of the records in a variety of investigations" and "for purposes of litigation." *Michael v. Gates*, 38 Cal. App. 4th 737, 745 (1995). Given that such records could have been disclosed under the previous statutes, especially for the serious and egregious matters covered by S.B. 1421, and that *Pitchess* statutes never applied in federal litigation, *Kelly v. City of San Jose*, 114 F.R.D. 653, 655-56 (N.D. Cal. 1987), no officer can enjoy any perpetual "vested" right to conceal those records.

Petitioners find no help in Article I, Section 3 of the California Constitution. That provision supports disclosure by declaring that "[t]he people have the right of access to information concerning the conduct of the people's business." Cal. Const. art. I, § 3(b)(1). It also directs that a statute "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access," with the reservation that such direction does not affect the construction of "statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer." Cal. Const. art. I, § 3(b)(2)-(3). That reservation applies only to statutory construction and does not create any freestanding constitutional rights, nor does it affect construction of the clear and specific language of S.B. 1421. Indeed, it confirms that procedures for disclosure of official information concerning peace officers are statutory and may be modified by the Legislature without impairing any "vested right."

Petitioners cannot manufacture a "vested right" with conclusory allegations that unnamed officers have allegedly acted in "reliance" on remedies provided under the superseded version of the *Pitchess* statutes. *See, e.g.*, Hughes Decl. ¶ 4, Exhibit C to Application for Writ. Any such allegations

are inadmissible hearsay that the court cannot consider because they necessarily incorporate assertions made by other persons.[5] Evid. Code § 1200; *Dillenbeck v. City of Los Angeles*, 69 Cal. 2d 472, 478 (1968) (hearsay rule prohibits "attempt to prove the truth of the matter implicitly asserted"); *Pacific Air Lines v. Superior Court*, 231 Cal. App. 2d 591, 592-93 (1965) (hearsay contained in declaration inadmissible to establish truth of matter asserted in mandamus action). In addition, it is implausible that officers would have foregone the right to contest or appeal the egregious disciplinary findings covered by S.B. 1421, when even before S.B. 1421 they could have resulted in termination or prosecution because they remained available in "investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office." Penal Code § 832.7(a). At the least, therefore, the existence of any alleged reliance on the *Pitches*s statutes is a disputed question of fact on which the court cannot rely without discovery, cross-examination, and factfinding.

In any event, as a matter of law, an officer may not reasonably rely on an alleged right to conceal official records where the law already permits disclosure in some circumstances. *Berkeley Police Assn. v. Berkeley*, 76 Cal. App. 3d 931, 939 (1977) (holding reliance on department policy guaranteeing confidentiality of disciplinary records was unreasonable where "police records concerning the investigation of citizen complaints are subject to discovery (and hence disclosure) where good cause is shown in both criminal proceedings and civil trials").

For similar reasons, other cases have held that statutory amendments requiring disclosure of information apply to preexisting records notwithstanding allegations of reliance on superseded confidentiality provisions. The California Supreme Court recently rejected a retroactivity argument founded on an individual's assertion that revoking the confidentiality of doctor-patient communications would be an "unfair change [to] the rules after he had already participated in treatment." *People v. Superior Court*, 6 Cal. 5th 457, 466 (2018). The court rejected defendant's claimed reliance on the "complete[] confidential[ity]" of these records, recognizing that even though prior law prohibited prosecutors from accessing treatment records not included in a shared evaluation, the possibility that

[5] Petitioners' declarations contain numerous inadmissible assertions and opinions, as noted in the evidentiary objections filed by Media Intervenors, in which undersigned Intervenors join.

some records could be disclosed within that evaluation thus provided "no assurance that any individual communication in connection with his treatment would be protected from disclosure"—essentially holding defendant's reliance unreasonable. *Id*. at 466; *see also Doe*, 173 Cal. App. 4th at 1106 (fear of disclosure of information from official records "does not constitute justifiable reliance" on previous version of statute allowing government to withhold information). Therefore, any purported reliance on the confidentiality of personnel records would have been unreasonable as a matter of law and cannot support any claim of "vested right."

2. S.B. 1421 covers records to which the *Pitchess* statutes never applied.

Even if officers could somehow have a "vested right" against disclosure of records previously covered by the *Pitchess* statutes, that right cannot preclude disclosure of records which were never subject to the *Pitchess* statutes. Those statutes only applied to "personnel records" as specifically defined. Penal Code § 832.8(a). They never applied to other records covered by S.B. 1421, such as incident reports and non-disciplinary investigations. *Long Beach*, 59 Cal. 4th at 72 ("[M]any records routinely maintained by law enforcement agencies are not personnel records. For example, the information contained in the initial incident reports of an on-duty shooting are typically not 'personnel records' as that term is defined in Penal Code section 832.8."); *Pasadena Police Officers Assn. v. Superior Court*, 240 Cal. App. 4th 268, 285, 290 (2015) (noting *Pitchess* statutes applied only to "personnel records" and holding "portions of the Report, including the CID investigation, which do not constitute or relate to employee appraisal" were not covered by *Pitchess* statutes). While non-*Pitchess* records covered by S.B. 1421 might previously have been exempt from disclosure under the CPRA, for example as investigative records, Govt. Code § 6254(f); *Haynie v. Superior Court*, 26 Cal. 4th 1061, 1071 (2001), officers could have no vested right against such disclosure, because the right to assert such exemptions belonged to the agency, not the officer, and the agency was free to waive it. *Am. Civil Liberties Union Found. v. Deukmejian*, 32 Cal. 3d 440, 458 (1982) ("Even where the Public Records Act permits nondisclosure, it does not require withholding the requested information.").

S.B 1421 requires disclosure "pursuant to the California Public Records Act" of any and all "records maintained by any state or local agency" that relate to "discharge of a firearm at a person by a peace officer or custodial officer" or "the use of force by a peace officer or custodial officer against a

person [that] resulted in death, or in great bodily injury," not merely "personnel records" on those subjects. Penal Code § 832.7(b)(1). For covered incidents, it requires disclosure of "all investigative reports; photographic, audio, and video evidence; transcripts or recordings of interviews; autopsy reports; all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident." *Id.* Many of those documents were never "personnel records," Penal Code § 832.8(a), and agencies were always free to disclose such records if they wished. Therefore, officers cannot have any "vested right" in their concealment now that S.B. 1421 requires disclosure pursuant to the CPRA.

D. Even if S.B. 1421 Applies Retroactively, the Legislature Clearly Intended Such Application, Which Is Justified by the Compelling Public Interests Found by the Legislature.

Even if S.B. 1421 could be deemed to apply "retroactively," it would still require disclosure of records about conduct occurring before January 1, 2019, for two reasons. First, the plain language of S.B. 1421 and its legislative history, taken in context of the CPRA's mandate to disclose all public records in an agency's current possession unless specifically exempt from disclosure, demonstrate that the statute's "express language or clear and unavoidable implication" override any presumption against retroactive application of a landmark law enacted to guarantee public access to official records concerning use of deadly or serious force and commission of egregious misconduct by officers. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1208 (1988).

Second, the presumption against retroactive application of civil statutes is not absolute, even if "vested rights" are implicated. The state has the "right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, and general well being of the people." *Bouquet*, 16 Cal. 3d at 592 & n.9 (internal quotation marks and citations omitted). Thus, a law "can be applied retroactively if such a retroactive application is necessary to subserve a sufficiently important state interest." *Id.* at 593. Courts consider factors including "the significance of the state interest served by the law, the importance of the retroactive application of the law to effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions." *Id.* at 592.

These factors compel application of S.B. 1421 to existing records. Both the Legislature and Supreme Court have recognized the public's compelling interest in information about the subjects covered by S.B. 1421. The only countervailing factor is the extent and legitimacy of officers' alleged reliance on the concealment of records covered by S.B. 1421. As discussed above, Petitioners submitted no admissible evidence of any harm to officers, and any alleged reliance on the confidentiality of such records would have been unreasonable as a matter of law.

"In order to support retroactive application of a law, the state's interest must be significant, but need not be compelling." *Bouley v. Long Beach Mem. Med. Center*, 127 Cal. App. 4th 601, 611 (2005). Here, the Legislature expressly found a "compelling interest in law enforcement transparency," S.B. 1421 § 4, and courts have allowed retroactive application to impair interests more significant than the alleged right of police officers to conceal information about their use of deadly or serious force or commission of egregious misconduct. *Bouquet*, 16 Cal. 3d at 594 (stripping spouses of vested property rights to provide gender equity in the dissolution of marital property); *Bouley*, 127 Cal. App. 4th at 611 (permitting individuals in domestic partnerships to retroactively bring wrongful death actions); *Plotkin*, 106 Cal. App. 4th at 964 (retroactively invalidating law regarding notice of fees in parking facilities to further interest in "ensuring fair and appropriate code enforcement"); *Ingebretsen v. McNamer*, 137 Cal. App. 3d 957, 961 (1982) (state's "strong policy toward protecting a person's dwelling place" justified retroactive application of statute limiting ability of creditors to collect outstanding debt). Accordingly, the compelling interests found by the Legislature amply justify ending the perpetual concealment of the critical records covered by S.B. 1421.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that the Court deny the Application for Writ of Mandate.

Dated: February 20, 2019

Respectfully submitted

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