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2
3 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
4 **IN AND FOR THE COUNTY OF CONTRA COSTA**

5
6 WALNUT CREEK POLICE OFFICERS')
ASSOCIATION,)

7)
8 Petitioner,)

9 v.)

10 CITY OF WALNUT CREEK, et al.,)

11 Respondents.)

12 ACLU OF NORTHERN CALIFORNIA, et)
al.,)

13 Intervenor/Real Parties)
14 In Interest.)

Case No.: N19-0109

TOGETHER WITH:

) N19-0097 (County)

) N19-0166 (Concord)

) N19-0167 (Martinez)

) N19-0169 (Richmond)

) N19-0170 (Antioch)

) **DECISION DENYING PRELIMINARY**
) **INJUNCTIONS**

15 INTRODUCTION AND SUMMARY

16 These six cases have been briefed and argued together, presenting the same controlling
17 legal issue. The Court accordingly decides them together. In all six cases, the result is the same:
18 The Court **DENIES** the motions of the petitioners for preliminary injunctions. However, the
19 Court orders a ten-day **STAY** of respondents' release of the disputed documents (in effect
20 continuing the existing TROs through February 18, 2019), in order to give petitioners time to
21 seek further immediate relief from the Court of Appeal.

22 In a nutshell, these cases are about the legal issue of whether SB 1421, enacting a major
23 amendment to Penal Code § 832.7, should or should not be applied to documents in police
24

1 personnel records¹ that were created prior to the effective date of the amendment (January 1,
2 2019).

3 Section 832.7 (both before and after the amendment) establishes a detailed procedure
4 (commonly referred to as a *Pitchess* motion) for seeking to obtain personnel records of peace
5 officers and custodial officers. The *Pitchess* procedure is quite restrictive as to what material
6 might be sought, by whom, on what grounds, and by what procedures. The previous statute also
7 provided that the *Pitchess* procedure was the exclusive means of seeking such personnel records.
8 They could not, for example, be obtained through the Public Records Act Government Code
9 §§ 6250 *et seq.* (PRA).² The result, all parties agree, was that until this year California was one
10 of the most restrictive states in the country when it came to protecting police personnel records
11 from public disclosure.

12 That landscape has changed quite considerably with the Legislature’s 2018 enactment of
13 SB 1421, effective January 1, 2019. As relevant here, SB 1421 adds a new subdivision (b) to
14 § 832.7. The new subdivision (b) does not alter the *Pitchess* procedure; it simply bypasses it. It
15 provides that several defined categories of police personnel records³ “shall be made available”
16 for public inspection under the PRA, subject to a number of restrictions stated in the subdivision.
17 Thus, a person seeking police personnel records within the categories laid out in subdivision (b)
18 need not proceed via a *Pitchess* motion, but may simply make a PRA request as with any other

20 ¹ The statute, both before and after SB 1421, speaks of personnel records of peace officers and custodial officers.
21 For convenience of exposition, however, the Court will shorten that to “police personnel records”. The scope of law
22 enforcement personnel covered by the statute is not at issue in these cases.

23 ² See *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284-86.

24 ³ It is not clear whether the PRA-related provisions of the new subdivision (b) are limited to police personnel
25 records. The relevant text speaks of “peace officer or custodial officer personnel records *and records maintained by
any state or local agency*” (§ 832.7(b)(1), italics added). Arguably, therefore, subdivision (b) requires PRA
disclosure of a broader range of records than were previously shielded from public examination under the prior
version of the section – that is, records “maintained” by a police agency that are not personnel records. The scope of
these cases, however, is limited to the effect of the amendment on police personnel records. It is therefore
unnecessary to consider whether the amendment also relates to other kinds of police records.

1 governmental records subject to the PRA. Because the PRA does not include the numerous
2 restrictions of the *Pitchess* procedure as to who may seek disclosure, and on what grounds, and
3 under what limitations, the result is to open up to general public scrutiny a broad range of
4 documents from police personnel records that were effectively unavailable to most of the public
5 prior to this year.

6 The text of the new subdivision 832.7(b) is as follows:

7 **(b)**

8 **(1)** Notwithstanding subdivision (a), subdivision (f) of Section 6254 of the
9 Government Code, or any other law, the following peace officer or custodial
10 officer personnel records and records maintained by any state or local agency
11 shall not be confidential and shall be made available for public inspection
12 pursuant to the California Public Records Act (Chapter 3.5 (commencing with
13 Section 6250) of Division 7 of Title 1 of the Government Code):

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

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

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

20 **(B)**

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

25 **(ii)** As used in this subparagraph, “sexual assault” means the commission or
attempted initiation of a sexual act with a member of the public by means of
force, threat, coercion, extortion, offer of leniency or other official favor, or
under the color of authority. For purposes of this definition, the
propositioning for or commission of any sexual act while on duty is
considered a sexual assault.

(iii) As used in this subparagraph, “member of the public” means any
person not employed by the officer’s employing agency and includes any
participant in a cadet, explorer, or other youth program affiliated with the
agency.

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

8 (2) Records that shall be released pursuant to this subdivision include all
9 investigative reports; photographic, audio, and video evidence; transcripts or
10 recordings of interviews; autopsy reports; all materials compiled and presented for
11 review to the district attorney or to any person or body charged with determining
12 whether to file criminal charges against an officer in connection with an incident,
13 or whether the officer's action was consistent with law and agency policy for
14 purposes of discipline or administrative action, or what discipline to impose or
15 corrective action to take; documents setting forth findings or recommended
16 findings; and copies of disciplinary records relating to the incident, including any
17 letters of intent to impose discipline, any documents reflecting modifications of
18 discipline due to the Skelly or grievance process, and letters indicating final
19 imposition of discipline or other documentation reflecting implementation of
20 corrective action.

21 (3) A record from a separate and prior investigation or assessment of a separate
22 incident shall not be released unless it is independently subject to disclosure
23 pursuant to this subdivision.

24 (4) If an investigation or incident involves multiple officers, information about
25 allegations of misconduct by, or the analysis or disposition of an investigation of,
an officer shall not be released pursuant to subparagraph (B) or (C) of paragraph
(1), unless it relates to a sustained finding against that officer. However, factual
information about that action of an officer during an incident, or the statements of
an officer about an incident, shall be released if they are relevant to a sustained
finding against another officer that is subject to release pursuant to subparagraph
(B) or (C) of paragraph (1).

(5) An agency shall redact a record disclosed pursuant to this section only for any
of the following purposes:

(A) To remove personal data or information, such as a home address,
telephone number, or identities of family members, other than the names and
work-related information of peace and custodial officers.

(B) To preserve the anonymity of complainants and witnesses.

(C) To protect confidential medical, financial, or other information of which
disclosure is specifically prohibited by federal law or would cause an

1 unwarranted invasion of personal privacy that clearly outweighs the strong
2 public interest in records about misconduct and serious use of force by peace
officers and custodial officers.

3 **(D)** Where there is a specific, articulable, and particularized reason to believe
4 that disclosure of the record would pose a significant danger to the physical
5 safety of the peace officer, custodial officer, or another person.

6 **(6)** Notwithstanding paragraph (5), an agency may redact a record disclosed
7 pursuant to this section, including personal identifying information, where, on the
8 facts of the particular case, the public interest served by not disclosing the
9 information clearly outweighs the public interest served by disclosure of the
10 information.

11 **(7)** An agency may withhold a record of an incident described in subparagraph
12 **(A)** of paragraph (1) that is the subject of an active criminal or administrative
13 investigation, in accordance with any of the following:

14 **(A)**

15 **(i)** During an active criminal investigation, disclosure may be delayed for
16 up to 60 days from the date the use of force occurred or until the district
17 attorney determines whether to file criminal charges related to the use of
18 force, whichever occurs sooner. If an agency delays disclosure pursuant to
19 this clause, the agency shall provide, in writing, the specific basis for the
20 agency's determination that the interest in delaying disclosure clearly
21 outweighs the public interest in disclosure. This writing shall include the
22 estimated date for disclosure of the withheld information.

23 **(ii)** After 60 days from the use of force, the agency may continue to delay
24 the disclosure of records or information if the disclosure could reasonably
25 be expected to interfere with a criminal enforcement proceeding against an
officer who used the force. If an agency delays disclosure pursuant to this
clause, the agency shall, at 180-day intervals as necessary, provide, in
writing, the specific basis for the agency's determination that disclosure
could reasonably be expected to interfere with a criminal enforcement
proceeding. The writing shall include the estimated date for the disclosure
of the withheld information. Information withheld by the agency shall be
disclosed when the specific basis for withholding is resolved, when the
investigation or proceeding is no longer active, or by no later than 18
months after the date of the incident, whichever occurs sooner.

(iii) After 60 days from the use of force, the agency may continue to delay
the disclosure of records or information if the disclosure could reasonably
be expected to interfere with a criminal enforcement proceeding against
someone other than the officer who used the force. If an agency delays
disclosure under this clause, the agency shall, at 180-day intervals, provide,
in writing, the specific basis why disclosure could reasonably be expected

1 to interfere with a criminal enforcement proceeding, and shall provide an
2 estimated date for the disclosure of the withheld information. Information
3 withheld by the agency shall be disclosed when the specific basis for
4 withholding is resolved, when the investigation or proceeding is no longer
5 active, or by no later than 18 months after the date of the incident,
6 whichever occurs sooner, unless extraordinary circumstances warrant
7 continued delay due to the ongoing criminal investigation or proceeding. In
8 that case, the agency must show by clear and convincing evidence that the
9 interest in preventing prejudice to the active and ongoing criminal
10 investigation or proceeding outweighs the public interest in prompt
11 disclosure of records about use of serious force by peace officers and
12 custodial officers. The agency shall release all information subject to
13 disclosure that does not cause substantial prejudice, including any
14 documents that have otherwise become available.

9 **(iv)** In an action to compel disclosure brought pursuant to Section 6258 of
10 the Government Code, an agency may justify delay by filing an application
11 to seal the basis for withholding, in accordance with Rule 2.550 of the
12 California Rules of Court, or any successor rule thereto, if disclosure of the
13 written basis itself would impact a privilege or compromise a pending
14 investigation.

13 **(B)** If criminal charges are filed related to the incident in which force was used,
14 the agency may delay the disclosure of records or information until a verdict
15 on those charges is returned at trial or, if a plea of guilty or no contest is
16 entered, the time to withdraw the plea pursuant to Section 1018.

16 **(C)** During an administrative investigation into an incident described in
17 subparagraph (A) of paragraph (1), the agency may delay the disclosure of
18 records or information until the investigating agency determines whether the
19 use of force violated a law or agency policy, but no longer than 180 days after
20 the date of the employing agency's discovery of the use of force, or allegation
21 of use of force, by a person authorized to initiate an investigation, or 30 days
22 after the close of any criminal investigation related to the peace officer or
23 custodial officer's use of force, whichever is later.

21 **(8)** A record of a civilian complaint, or the investigations, findings, or dispositions
22 of that complaint, shall not be released pursuant to this section if the complaint is
23 frivolous, as defined in Section 128.5 of the Code of Civil Procedure, or if the
24 complaint is unfounded.

23 The legal issue presented in these six cases is whether, and to what extent, this new
24 subdivision (b) applies to police personnel records created prior to SB 1421's enactment date –
25 that is, in 2018 or earlier. The Unions contend that the new subdivision applies only to police

1 personnel records created in 2019 or later. Thus, they contend that any 2018-or-earlier
2 documents are not subject to release or inspection under the PRA, notwithstanding SB 1421.⁴
3 Intervenor contend, to the contrary, that the new statute applies to any “peace officer or
4 custodial officer personnel records and records maintained by any state or local agency” in 2019
5 or later, regardless of when any particular record was created. That is the issue to be decided
6 now.

7 For convenience, the Court will use the phrase “pre-2019 personnel records” to refer
8 categorically to documents that would otherwise be subject to PRA disclosure under the new
9 § 832.7, but that are contended to be exempt from it because the documents were created prior to
10 2019.

11
12 THESE SIX CASES, THEIR PARTIES,
AND THEIR PRIOR PROCEEDINGS

13 These six cases were all filed by the same attorneys on January 22 or 24, 2019. The
14 alignment of parties in each case is parallel:

- 15 • The petitioner in each case is a police union, acting as the collective-bargaining
16 union for the officers of a local law enforcement agency (collectively “Unions”).
17 The agencies involved are the police departments of Walnut Creek, Concord,
18 Martinez, Richmond, and Antioch, and the Contra Costa Sheriff’s Office.⁵

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21 ⁴ The Unions’ contention is actually a little broader than stated here. They contend that SB 1421 is inapplicable not
22 only to police personnel *records* created before 2019, but also to records (whenever created) that pertain to *events*
23 occurring before 2019. Thus (as an illustrative hypothetical) if there were an officer-involved shooting in December
24 2018, but the investigation of the shooting continued into January 2019, the Unions would contend that a 2019
investigation report would not be disclosable under the new PRA provision. At the *ex parte* hearings the Court
expressed some skepticism of this extension of the Unions’ theory, noting that § 832.7 operates in terms of covered
records, not covered events. Because the Court is now ruling that the new § 832.7(b) covers police personnel
records regardless of dates, however, the Court need not separately discuss this addendum to the Unions’
contentions.

25 ⁵ There was reportedly one other parallel case filed involving El Cerrito, but the Unions’ counsel advised the Court
that that case was dismissed voluntarily.

- 1 • The named respondents are the municipalities operating the law enforcement
2 agencies in question, and their chiefs of police (or, in the County’s case, the
3 Sheriff) (collectively the “Agencies”). Two of them (Walnut Creek and
4 Richmond) have filed responses to the present OSC re preliminary injunction,
5 very briefly stating their agreement with the position of the requesters/intervenors.
6 The remaining four agencies have filed written responses taking no substantive
7 position pro or con.
- 8 • The substantive opposition to the preliminary injunctions comes from several
9 Intervenors, all entities (and one individual) who have made PRA requests to the
10 various agencies involved. The Court has granted each of them leave to
11 intervene, and they have filed formal complaints in intervention in each case. For
12 purposes of legal representation and briefing, they have grouped themselves into
13 two sets: (1) the ACLU of Northern California, along with an individual
14 requester in the Richmond case (collectively “ACLU”), and (2) a collection of
15 jointly represented media entities⁶ (collectively the “Media Intervenors”). These
16 two groups have filed separate briefs in opposition to preliminary injunctions, but
17 their arguments and positions are similar and harmonious (except that the Media
18 Intervenors also make several collateral arguments not raised by the ACLU).

19 On January 24 (in the Walnut Creek case) and January 25 (in the remaining cases), the
20 Unions appeared ex parte to seek temporary restraining orders preventing the Agencies from
21 releasing pre-2019 personnel records.⁷ The Court granted the TROs principally on the basis that
22 any release of the pre-2019 personnel records at issue, before full consideration of the merits of

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24 ⁶ The First Amendment Coalition; California Newspapers Partnership LP; KQED Inc.; Investigative Studios, Inc.;
and the Center for Investigative Reporting.

25 ⁷ The cases were all assigned to Department 12 by the Civil Supervising Judge so that they could be briefed and
decided together. They have not been formally consolidated, however.

1 these cases, would effectively be irretrievable. Once the records are released to the public in
2 general (and the media in particular), there will be no putting them back in the bottle.
3 Conversely, although Intervenors appeared in opposition at the January 25 ex parte hearing and
4 the Court expressly inquired if anyone wanted to say anything about the balance of hardships, no
5 one asserted that there would be any irreparable harm on the other side – no immediate and
6 urgent need to obtain the pre-2019 personnel records between the TRO date and today’s hearing
7 date. The Court set the present date (with as short a turn-around time as was reasonably
8 practical) for hearing on the OSCs for preliminary injunctions. The attorneys have been
9 commendably diligent in working with the shortened schedule.

10 WHAT IS NOT INVOLVED IN THESE CASES

11 Before turning to the substance of these cases, it may assist readers to note briefly what
12 these cases are *not* about.

13 First, except as to the chronological issue of 2019 documents versus pre-2019 documents,
14 these cases present no issues about whether any particular documents (or sets of documents) do
15 or don’t fall within the scope defined in the new § 832.7. Such issues may arise in the future,
16 document by document or request by request, but they are not presented in these cases.

17 Second, the Unions make no argument that the Legislature was without power to apply
18 the new PRA requirements to pre-2019 documents, if it saw fit to do so. There are no
19 arguments, for example, along the lines that police officers had any kind of “vested right” to
20 privacy under the prior § 832.7, of which they could not be deprived by superseding legislation.
21 The Unions concede that the Legislature could have done that; they argue only that the
22 Legislature did not do that.

23 Third (and related), these cases do not present any plausible argument that the records
24 covered by the new § 832.7(b) would be subject to any freestanding claim of privacy,
25 independent of the statutory force of the prior § 832.7. The Unions argue that pre-2019

1 personnel records retain their confidentiality because the Legislature conferred such
2 confidentiality on them in the prior statute, and the force of that statute continues to apply. But
3 (as the Unions’ counsel informally acknowledged at the first ex parte hearing), if we pretended
4 for a moment that there had never been a § 832.7, there would be no respectable argument that
5 the documents now at issue should have been treated as confidential or subject to officers’ rights
6 of privacy, based on the character of the documents themselves. Even a brief perusal of
7 subdivision (b)(1) suffices to demonstrate that the records now subject to PRA disclosure
8 directly involve matters of legitimate public concern and scrutiny: officer-involved shootings,
9 officers’ use of force resulting in death or serious injury, allegations of sexual assault by an
10 officer, allegations of on-duty dishonesty, and so on. The only arguable exception to this might
11 be incidents of officers committing sexual assault off the job (see § 832.7(b)(1)(B)). But even
12 there, the statute applies only to “sustained finding[s]” of such assault, not to unfounded
13 accusations. It is surely a legitimate topic of public interest to know if a police officer has been
14 determined to be a sexual assailant, even if the assault occurred in his or her private life.

15 Fourth, these cases do not require this Court to engage in any weighing or comparison of
16 the competing public policies of protection of officer privacy interests, on one hand, versus
17 disclosure to the public of potential police misconduct, on the other. Balancing those two public
18 interests against each other is the business of the Legislature, not the courts. (See, e.g., *Copley*
19 *Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1298-99.) The Legislature struck that
20 balance one way in the prior version of § 832.7. It has now struck the balance differently in SB
21 1421. As to both versions of the statute it is the job of this Court, not to second-guess or reweigh
22 the Legislature’s judgment, but to identify and enforce it. The Court must strive to ascertain
23 what the Legislature’s commands were or are, including locating the proper boundary between
24 the old command and the new one.

1 On the other side of the balance, the Court does not mean to make light of the legitimate
2 interests of Intervenors in obtaining prompt compliance with their PRA requests. It does not
3 follow, however, that they will suffer irreparable injury if they do not obtain the requested
4 documents *immediately* – meaning between now and final judgment.⁸ No such assertion or
5 showing of harm from interim delay has been made.

6 This is not the typical preliminary injunction case, however, where consideration of the
7 merits is truly only a prediction as to the ultimate outcome – and hence one must also consider
8 the balance of hardships. There are no disputed fact issues presented in any of these cases that
9 would require any trial, evidentiary hearing, or even discovery. Rather, everyone involved in the
10 cases is treating the present hearing as, in practical effect, a full-blown and plenary consideration
11 of the merits of the dispositive legal issue presented. Although it has been accelerated, the
12 briefing has also been complete and capably presented all around.

13 Accordingly, the Court views its legal rulings below not as a tentative prediction of the
14 ultimate outcome, but as its ruling on the merits of the legal question. The Court is holding – not
15 taking a tentative view, or predicting, but holding – that the Unions’ contention is legally
16 unmeritorious, and the Unions are not entitled to an injunction or any other form of relief.

17 That effectively removes the balance of interim hardships from the equation. There are
18 no interim hardships because there is no interim. The Court is not saying that the Unions’ claims
19 are insubstantial, or their arguments frivolous. The Court is holding, however, that those claims
20 are unmeritorious as a matter of law. Necessarily, then, the Court is concluding as a matter of
21 law that the Unions have no probability of success on the merits. In that circumstance, the cases
22 fall within the rule that “[a] trial court may not grant a preliminary injunction, regardless of the
23 balance of interim harm, unless there is some possibility that the plaintiff would ultimately

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25 ⁸ Or, more realistically, between now and the Court of Appeal’s decision in the appeal that will surely follow from this ruling.

1 prevail on the merits of the claim.” *Butt v. State of California* (1992) 4 Cal.4th 668, 678; accord,
2 e.g., *Jamison v. Dept. of Transportation* (2016) 4 Cal.App.5th 356, 362; *American Academy of*
3 *Pediatrics v. Van de Kamp* (1989) 214 Cal.App.3d 831, 838.⁹

4 This reality, that today’s decision represents the Court’s final legal decision, was well
5 reflected in today’s oral argument. The Unions and the Intervenors both argued, ardently and
6 well, about who should win the dispute over what § 832.7 now means. But no one mentioned
7 anything about any balance of harms, including the “interim harm” that would be suffered by the
8 Unions’ members.

9 THE UNIONS’ STANDING AS PETITIONERS

10 The Media Intervenors briefly raise an initial legal attack on the Unions’ petitions in their
11 entirety. They argue that whatever privacy rights are being asserted would belong to individual
12 police officers (the Unions’ members), not to the Unions as such. They therefore argue that the
13 Unions lack standing to assert their members’ rights. The contention is pertinent here because it
14 goes directly to the Unions’ probability of prevailing on the merits – indeed, to their right to
15 bring these actions at all. No matter how forceful or correct their legal arguments and claims
16 might be, the present petitions must fail if there are no petitioners with standing to assert those
17 arguments and claims. And if that were so, the Unions would also lack standing to seek
18 preliminary injunctions, and would have no chance of success on the merits.¹⁰

19 The Court, however, must reject the Media Intervenors’ standing argument.

20 The Media Intervenors argue that the Unions lack standing because they are asserting the
21 privacy rights of individual peace officers, and privacy rights are personal and thus can only be

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23 ⁹ The Court acknowledges that the situation may appear otherwise when these cases first come to the Court of
24 Appeal, which (at that point) will not yet have decided the dispositive legal issue. That, however, is that Court’s
call, not this Court’s.

25 ¹⁰ When this argument was raised at the ex parte hearing on January 25, the Court inquired whether the Unions
might consider adding one or more individual officers as petitioners. The Unions have declined to pursue that
possibility.

1 asserted by individual peace officers. A very similar argument was raised, and squarely rejected,
2 in *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 941. There a
3 public employer ordered employees to submit to polygraph examinations in an effort to stop
4 theft. The association opposed this order on behalf of the employees, arguing they had a
5 constitutional right of privacy not to submit to the examinations. The court apparently thought
6 the issue of standing was clear enough that it did not even merit discussion in the body of the
7 opinion. In a footnote, the court said:

8
9 Defendants contend that CEA has no standing to assert the privacy rights
10 of the employees it represents. We reject this contention. The instant lawsuit
11 comes well within the scope of representation under the Meyers-Milias-Brown
12 Act (Gov. Code, § 3500 et seq.). The fact that personal privacy rights are
13 involved is no bar to a representational suit of this kind.

14 41 Cal.3d at 941-42 n.3.

15 The two cases cited by the Media Intervenors, by contrast, did not involve any such
16 situation. *Rental Housing Owners Assn. of Southern Alameda County, Inc. v. City of Hayward*
17 (2011) 200 Cal.App.4th 81, did not involve any employee organization at all. *Association for*
18 *Los Angeles Deputy Sheriffs v. Los Angeles Times Communications LLC* (2015) 239 Cal.App.4th
19 808, 821, did involve a police union seeking to assert the privacy rights of its member officers.
20 Critically, however, the defendant being sued was a newspaper, not the officers' own employing
21 agency. That necessarily takes the *Los Angeles Deputy Sheriffs* case out of the ambit of the
22 Meyers-Milias-Brown Act, and the *Long Beach* court's application of it.

23 FIRST AMENDMENT ARGUMENTS

24 The Media Intervenors argue that a preliminary injunction forbidding the Agencies from
25 releasing any pre-2019 personnel records would constitute an unconstitutional prior restraint in
violation of the First Amendment. The argument is unconvincing.

The Media Intervenors cite two cases as establishing that news media have standing to
litigate the validity of restraints on speech, even though they are the audience rather than the

1 speaker.¹¹ In both of those cases, however, there were willing speakers involved – people who,
2 but for the attacked restraints, were apparently eager to speak the speech that the media desired
3 to hear. The cases do not stand for the proposition that the media have standing to assert the
4 First Amendment rights of people or entities who don't desire to speak.

5 The latter describes the situation here. Two of the Agencies have indicated that they
6 agree that the current version of § 832.7(b) authorizes and requires them to release the requested
7 material, and the other Agencies have indicated expressly or by implication that they intend to
8 comply with Intervenors' PRA requests unless this Court grants the Unions' preliminary
9 injunction requests. None of them, however, has indicated or even hinted that it intends to
10 release any pre-2019 personnel records on any basis other than compliance with the PRA, as
11 authorized by § 832.7(b). (The Court asked them that at argument, and no one spoke up to the
12 contrary.) In other words, no Agency has indicated any interest in releasing these documents as
13 a matter of the Agency's own volitional speech. The Agencies are willing to comply with the
14 law, as the courts determine the law to be; and two of them have their own view as to what the
15 law is. But no Agency is asserting or suggesting that it wants or intends to release these
16 documents to anyone as an exercise of its own free speech. If (as the Unions urge) the Court
17 were to conclude that the PRA does not require or authorize any such release, all of these
18 Agencies would surely be equally willing to comply with that legal dictate.

19 The Media Intervenors' argument, carried to its full logic, seems to suggest that anytime
20 someone contends that a state statute compels a government agency to say or publicize
21 something, a court would be violating the First Amendment if it rejects the contention and holds
22 that the statute doesn't require any such statement or publicity – on the rationale that if the court
23 ruled the other way, the agency would perforce be speaking. That can't be the law.

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¹¹ *CBS, Inc. v. Young* (6th Cir. 1975) 522 F.2d 234; *Connecticut Magazine v. Moraghan* (D.Conn. 1987) 676 F.Supp. 38.

1 The Media Intervenors' argument also overlooks the principle that whatever right of
2 confidentiality is created by § 832.7 has been held to belong *both* to the employing agency *and*
3 the individual officer. *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1430-31.
4 Thus, contrary to Media Intervenors' unspoken premise, it is not the case that the Agencies here
5 would be free to release these pre-2019 personnel records as a matter of their own volitional
6 speech, even if such release is not authorized by § 832.7. If the Unions are right in arguing as a
7 statutory matter that § 832.7 forbids release of pre-2019 personnel records, the Court would not
8 violate the First Amendment by so ruling, and enjoining such release.

9 RIPENESS

10 Having posited without support that the Agencies are eager to release these pre-2019
11 personnel records in the exercise of their own First Amendment rights, the Media Intervenors
12 turn around and argue next that three of the six present cases are not ripe because there is no
13 indication that the Agencies intend to release any pre-2019 personnel records if not enjoined.
14 Indeed, the Media Intervenors go so far as to question whether those Agencies even possess any
15 responsive pre-2019 personnel records.

16 The assertion on the latter point is difficult to take seriously as a factual matter.
17 Everyone involved here, starting with the Intervenors' own PRA requests and continuing with
18 their complaints in intervention, takes for granted that these Agencies possess and maintain pre-
19 2019 personnel records that would be responsive to these PRA requests. No Agency has
20 responded to either the PRA requests or these lawsuits by asserting, "Nope, we don't have any of
21 those."

22 The argument on the former point is a little more substantial, but only a little. The
23 several Agencies involved in these cases have stated their initial positions on the PRA requests
24 with various levels of certainty and precision. All of them, however, have indicated or at least
25 implied that they are considering whether to release pre-2019 personnel records, depending on

1 what this Court ends up ruling. None has stated, or even hinted at, any intention of *withholding*
2 pre-2019 personnel records on the ground that SB 1421 does not apply to pre-2019 personnel
3 records. If not enjoined, then, it is reasonable to expect that they will proceed with full
4 production in response to the pending PRA requests. Again, the Court asked this question at oral
5 argument, and all the Agencies present confirmed what the Court had assumed: They will
6 comply with the Court’s ruling in whichever direction it goes. But if not enjoined, they do
7 intend to produce pre-2019 personnel records, because it appears that such production is required
8 by the new statute.

9 The Court adds the observation that if perchance the Media Intervenors were right that
10 any of these Agencies will be withholding pre-2019 personnel records with or without this
11 Court’s preliminary injunction, then by hypothesis there would be no real harm in the Court
12 enjoining them from doing what (hypothetically) they don’t want or plan to do anyway. The risk
13 that the Media Intervenors’ ripeness argument invites, however, is that the Court might guess
14 wrong about the Agencies’ intentions. If the Court were to deny a preliminary injunction on the
15 sole ground that there is no showing that an Agency intends to release pre-2019 personnel
16 records, the Agency might then immediately release the records because there is no injunction
17 against it – and might do so without further warning to the Unions, or without leaving them
18 enough time to return to court for a new TRO.

19
20 THE STATUTORY MERITS, PART 1:
 DOES SB 1421 APPLY RETROACTIVELY?

21 Analysis in the case law of whether a newly enacted statute should be applied
22 “retroactively” (or “retrospectively”) tends to proceed in two steps, with the first step often being
23 rather easier than the second. The first question is whether there is any indication in the text of
24 the statute (or, sometimes, from external sources such as legislative history) that the Legislature
25 intended the statute to apply retroactively. If the answer to that question is “no” (which is

1 usually the case), however, the courts must then go on to look at whether a particular proposed
2 application of the new statute does or does not constitute “retroactive” application. *Tapia v.*
3 *Superior Court* (1991) 53 Cal.3d 282, for example, illustrates the analytical method. At issue
4 there was whether various provisions of Proposition 115 should or should not be applied in cases
5 alleging crimes committed before the Proposition’s effective date. It took the California
6 Supreme Court took less than half a page, and little effort, to conclude that the Proposition was
7 not intended to operate retroactively. 53 Cal.3d at 287. The remaining thirteen pages of the
8 court’s opinion then turned to the knottier problems of whether applying various particular
9 provisions to cases of pre-enactment offenses would or would not constitute “retroactive”
10 application, reaching mixed results. *Id.* at 288-302.

11 Taking up the first question first: There are many precedents discussing whether a new
12 enactment should be construed as applying retroactively, all saying more or less the same thing.
13 A recent example from the California Supreme Court lays out the legal framework:

14 Our decisions have recognized that statutes ordinarily are interpreted as
15 operating prospectively in the absence of a clear indication of a contrary
16 legislative intent. In construing statutes, there is a presumption against retroactive
17 application unless the Legislature plainly has directed otherwise by means of
18 express language of retroactivity *or* ... other sources [that] provide a clear and
19 unavoidable implication that the Legislature intended retroactive application.
20 Ambiguous statutory language will not suffice to dispel the presumption against
21 retroactivity; rather a statute that is ambiguous with respect to retroactive
22 application is construed ... to be unambiguously prospective.

23 *Quarry v. Doe I* (2012) 53 Cal.4th 945, 955 (internal quotations and citations omitted).

24 Through this unforgiving lens, it is readily seen that the Unions are right in saying there
25 is no basis for construing SB 1421 as commanding retroactive application. The statute itself says
not a word about whether it should be applied retroactively. Intervenor’s argue that various
particular words or phrases in § 832.7 (such as “maintained”, “any”, and “shall”) are proof that
retroactivity is intended. In the following section of this decision the Court agrees with
Intervenor’s arguments that those words (among other indications) show that Intervenor’s

1 proposed reading of SB 1421 does not constitute a “retroactive” application of it. But at this first
2 stage of the analysis, another way of phrasing that same point is that those words do not compel
3 the inference that the statute is to be applied retroactively. Neither is there anything in the
4 legislative history that even suggests retroactive application, let alone compelling it with the
5 clarity that *Quarry* and like cases would require.¹²

6
7 THE STATUTORY MERITS, PART 2:
8 WHAT WOULD CONSTITUTE “RETROACTIVE APPLICATION” HERE?

9 That’s the easy part. As *Quarry* went on to discuss, however, the more difficult issue is
10 sorting out whether a particular invocation of a new statute does or doesn’t constitute retroactive
11 application.

12 The terms “retroactive” and “prospective,” however, are not always easy
13 to apply to a given statute. We must consider the nature and extent of the change
14 in the law and the degree of connection between the operation of the new rule and
15 a relevant past event. In exercising this judgment, familiar considerations of fair
16 notice, reasonable reliance, and settled expectations offer sound guidance.

17 In general, a law has a retroactive effect when it functions to change[] the
18 legal consequences of past conduct by imposing new or different liabilities based
19 upon such conduct ... that is, when it substantially affect[s] existing rights and
20 obligations. In general, application of a law is retroactive only if it attaches new
21 legal consequences to, or increases a party's liability for, an event, transaction, or
22 conduct that was *completed* before the law's effective date. Ordinarily,
23 considerations of basic fairness militate against such retroactive changes.

24 Changes to the law, however, are not necessarily considered retroactive
25 even if their application involve[s] the evaluation of civil or criminal conduct
occurring before enactment. In a principle of significance to the present case,
changes to rules governing *pending litigation*, for example, frequently have been
designated as prospective, because they affect the future; that is, the future

12 The only morsel of legislative history proffered on this topic is a criticism from an opponent of the bill,
complaining that it would appear to require PRA production of police personnel records dating back to before
enactment. But in the first place, a single comment from an opponent is hardly a reliable indicator of what the bill’s
proponents thought it would do. It is all too common for opponents to predict, in various forms and with varying
degrees of credibility, how the sky will fall if this bill passes. And in any event, the result the commenter was
deploring – application of the new law to pre-2019 personnel records – is exactly the result the Court is reaching, not
because the new law applies retroactively, but because this isn’t a retroactive application.

1 proceedings in a trial. The prospective label applies even though the trial
2 concerns conduct that occurred prior to the enactment of the new law.

3 53 Cal.4th at 955-56 (internal quotations and citations omitted); and see, *e.g.*, *In re E.J.* (2010)
4 47 Cal.4th 1258, 1273-74; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 936-37; *People v. Grant*
5 (1999) 20 Cal.4th 150, 157.

6 The recent case law has focused on three key considerations in deciding whether a new
7 law is being applied retroactively or prospectively: (1) whether the facts triggering application
8 of the new law are events occurring before or after its effective date; (2) whether the new law
9 alters the substantive consequences of prior actions, such as by imposing or increasing
10 someone's liability for acts occurring before enactment; and (3) whether there have been acts
11 done in reasonable reliance on the previous state of the law, such that it would be unfair to
12 subject the actors to new law. These three factors are closely related to each other, and they
13 overlap analytically to a large extent. The Court will discuss them in order. All three of them
14 favor the conclusion that applying the new § 832.7(b) to pre-2019 personnel records constitutes a
15 prospective application of the new statute, not a retroactive application.

16 1. When the Operative Events Occurred.

17 The consideration most closely tied to the actual statutory language is whether the new
18 statute is triggered by events occurring after the effective date. In *In re E.J.*, 47 Cal.4th 1258, for
19 example, the issue was whether a newly enacted provision, restricting the permissible residence
20 locations of registered-sex-offender parolees, applied to parolees whose offenses were
21 committed before the new restrictions were enacted. The court held that the restrictions did so
22 apply, because the key operative fact – the conduct to which the restrictions were being applied –
23 was not the original offenses, but the parolees' post-enactment choices of residence. “[T]he
24 critical question for determining retroactivity usually is whether the last act or event necessary to
25 trigger application of the statute occurred before or after the statute's effective date. A law is not
retroactive merely because some of the facts or conditions upon which its application depends

1 came into existence prior to its enactment.” 47 Cal.4th at 1273-74 (citations and internal
2 quotations omitted).

3 Similarly, in *People v. McClinton* (2018) 29 Cal.App.5th 738, 753, the court held that a
4 new statute governing access to mental health records should be applied to the discovery and
5 trial in a sexually-violent-predator case, even though the records at issue dated to back before the
6 effective date of the new statute. “The statute plainly applies to SVP proceedings that were to
7 occur after January 1, 2016. In this case, the People’s [subpoenas], the disclosure of
8 McClinton’s ... mental health records ..., and the SVP retrial all occurred after January 1, 2016.
9 Thus, section 6603(j) was applied prospectively, not retroactively.” *Id.*¹³

10 More broadly, new statutes that change the rules of evidence and procedure for cases are
11 routinely held applicable to the future conduct of cases and trials that relate to past events,
12 because the events on which the new law operates are the conduct of the trials, not the past
13 events giving rise to the trials.

14 [The rule against retrospective application] does not preclude the application of
15 new procedural or evidentiary statutes to trials occurring after enactment, even
16 though such trials may involve the evaluation of civil or criminal conduct
17 occurring before enactment. [Citation.] This is so because these uses typically
18 affect only future conduct – the conduct of the trial. “Such a statute is not made
19 retroactive merely because it draws upon facts existing prior to its enactment....
[Instead,] [t]he effect of such statutes is actually prospective in nature since they
relate to the procedure to be followed in the future. [Citations.] For this reason,
we have said that it is a misnomer to designate [such statutes] as having
retrospective effect.”

20 *Elsner*, 34 Cal.4th at 936, quoting *Tapia*, 53 Cal.3d at 288.

21 In *Kizer v. Hanna* (1989) 48 Cal.3d 1, the new enactment at issue required a decedent’s
22 estate to reimburse Medi-Cal payments. The court held that the law could be applied
23 prospectively to require reimbursement of payments received before the law’s effective date,

24
25 ¹³ For a similar result, although in a different procedural posture and additional legal reasoning, see *People v. Superior Court (Smith)* (2018) 6 Cal.5th 457, decided two weeks after *McClinton*.

1 because the operative fact giving rise to the obligation of reimbursement was the decedent's
2 post-enactment death, not the decedent's pre-enactment receipt of benefits. But by contrast, a
3 new statute altering calculation of disability benefits could not be applied to disabilities arising
4 from pre-existing injuries, because the operative fact giving rise to the right to benefits was the
5 pre-amendment injury, not the post-amendment disability. *Aetna Casualty & Surety Co. v.*
6 *Industrial Accident Comm'n* (1947) 30 Cal.2d 388.

7 Here, the challenged application of the new statute is the requirement in § 832.7(b)(1)
8 that specified police personnel records “shall not be confidential and shall be made available for
9 public inspection pursuant to” the PRA. The operative facts triggering this obligation of
10 disclosure are neither the underlying police conduct, nor the creation of personnel records about
11 that conduct. The requirement that the police agency must make the records available under the
12 PRA arises from two facts: first, the fact that the agency “maintain[s]” the records – meaning,
13 that it maintains them at the time of the PRA request. And second, that the PRA request is made
14 after the new statute has taken effect. Section 832.7 does not require an agency to produce
15 records in 2019 that it does not “maintain” in 2019. And it does not require an agency to
16 produce any records at all, until a PRA request for them is made – again, in 2019.

17 The Unions err in arguing that the operative facts to be considered are the underlying
18 police conduct, and the agency's investigation and records of that conduct. In the language of
19 the *In re E.J.* decision, that constitutes “some of the facts or conditions upon which its
20 application depends [coming] into existence prior to [the new law's] enactment.” 47 Cal.4th at
21 1274. But neither the pre-2019 conduct nor the pre-2019 records, by themselves, would have
22 given rise to any obligation whatsoever that the records be made available under the PRA. That
23 result follows only from the making of a PRA request in 2019.

24 The Unions' argument puts words into the statute that the Legislature did not put there.
25 The Legislature said that certain police personnel records “maintained” by police agencies “shall

1 not be confidential and shall be made available for public inspection pursuant to” the PRA.
2 “Maintained” means “maintained at the time the request is made”. The Legislature did not say,
3 “maintained now and created only after 2018”. Neither did the Legislature state any date-based
4 exemption from the unqualified statement that those documents “shall not be confidential and
5 shall be made available”. The text of the new § 832.7(b) does not support inserting such major
6 restrictions into what the Legislature has otherwise provided.

7 What, then, would constitute a retroactive application of SB 1421? It would be
8 improperly retroactive to apply the new law to an old PRA request. Suppose a PRA request for
9 pre-2019 personnel records was made in (say) November 2018, and denied by the agency in
10 December 2018 because the then-existing version of § 832.7 did not authorize or require PRA
11 production of those records. That denial was perfectly lawful – indeed, legally mandatory – at
12 the time it was made. If a lawsuit seeking to compel production came up for court decision in
13 January 2019, it would be impermissibly retroactive for the court to order production based on
14 the new version of the statute.

15 2. Altering the Substantive Consequences of Pre-Enactment Actions.

16 A second (and related) major consideration is whether application of a new enactment to
17 prior facts would have the result of changing the substantive consequences of prior actions, such
18 as by imposing new legal liability on acts that were subject to no such liability at the time they
19 occurred.

20 Having articulated the presumption [against retroactive application],
21 [t]here remains the question of what the terms “prospective” and “retroactive”
22 mean. In deciding whether the application of a law is prospective or retroactive,
23 we look to function, not form. We consider the effect of a law on a party's rights
24 and liabilities, not whether a procedural or substantive label best applies. Does
25 the law change[] the legal consequences of past conduct by imposing new or
different liabilities based upon such conduct[?] Does it substantially affect[]
existing rights and obligations[?] If so, then application to a trial of reenactment
conduct is forbidden, absent an express legislative intent to permit such
retroactive application. If not, then application to a trial of preenactment conduct
is permitted, because the application is prospective.

1
2 *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 230-31 (internal
3 quotations and citations omitted).

4 *Elsner* illustrates the distinction. The court held that there was it was not retroactive to
5 apply certain newly enacted statutes concerning workplace safety, because even before they were
6 enacted, the common law already imposed substantially the same duties on the employer. 34
7 Cal.4th at 937-38. But it reached the opposite result as to application of different new rules that
8 might impose stricter responsibilities than the pre-existing common law. *Id.* at 938.

9 The *Disability Rights* opinion drew heavily on *Elsner*, and added several explanatory
10 examples from other case law. 39 Cal.4th at 231-32. It has been held retroactive to subject
11 tobacco sellers to tort liability for conduct that, at the time it occurred, was immunized by a
12 (subsequently repealed) statute.¹⁴ It was likewise retroactive to subject persons to increased
13 punishment for past criminal conduct, or to punishment for past conduct not formerly defined as
14 criminal.¹⁵ But by contrast, it was prospective to require plaintiffs using a new environmental
15 law to provide a certificate of merit;¹⁶ to eliminate the right to dismiss certain public-interest
16 lawsuits;¹⁷ and to eliminate a right of appeal from certain decisions.¹⁸ “In each of these cases,
17 application of the new law to pending cases properly governed the conduct of proceedings
18 following the law’s enactment without changing the legal consequences of past conduct.” 39
19 Cal.4th at 231-32.

20
21
22 ¹⁴ 39 Cal.4th at 230, citing *Myers v. Philip Morris Cos.* (2002) 28 Cal.4th 828.

23 ¹⁵ 39 Cal.4th at 230, citing *Tapia*, 53 Cal.3d at 297-99.

24 ¹⁶ 39 Cal.4th at 230, citing *In re Vaccine Cases* (2005) 134 Cal.App.4th 438.

25 ¹⁷ 39 Cal.4th at 230, citing *Brenton v. Metabolife Internat., Inc.* (2004) 116 Cal.App.4th 679.

¹⁸ 39 Cal.4th at 230, citing *Landau v. Superior Court* (1998) 81 Cal.App.4th 191.

1 In *Disability Rights* itself, the court held that it was prospective to apply, to a pending
2 appeal, a new statute limiting standing under the Unfair Competition Law to those injured by the
3 asserted unlawful conduct. It was key, the court said, that the new law had no effect at all on
4 what was lawful or unlawful conduct.

5 To apply Proposition 64's standing provisions to the case before us is not
6 to apply them "retroactively," as we have defined that term, because the measure
7 does not change the legal consequences of past conduct by imposing new or
8 different liabilities based on such conduct. The measure left entirely unchanged
9 the substantive rules governing business and competitive conduct. Nothing a
10 business might lawfully do before Proposition 64 is unlawful now, and nothing
11 earlier forbidden is now permitted. Nor does the measure eliminate any right to
12 recover. Now, as before, no one may recover damages under the UCL, and now,
13 as before, a private person may recover restitution only of those profits that the
14 defendant has unfairly obtained from such person or in which such person has an
15 ownership interest.

16 39 Cal.4th at 232 (citations omitted).

17 Similarly in *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 356-57, the court held
18 that the then-new anti-SLAPP statute applied to causes of action accruing before its effective
19 date. "Section 425.16 does not change the legal effect of past conduct. It merely is a procedural
20 screening mechanism for determining whether a plaintiff can demonstrate sufficient facts to
21 establish a prima facie case to permit the matter to go to a trier of fact." *Id.* at 356.

22 Here, there is nothing whatsoever in SB 1421 that changes the legal consequences for
23 police officers (or police agencies) of their pre-2019 conduct. SB 1421 criminalizes no conduct
24 that was not criminal in 2018. It creates no legal claim or cause of action that did not exist in
25 2018. It establishes no new principles of employment or administrative rules that did not exist in
2018. It does not even change the procedures by which alleged police misconduct is to be
investigated, administratively adjudicated, sued on in court, or criminally prosecuted. In every
respect, the law applicable to all those things is exactly the same as it was before SB 1421 was
enacted – or, at least, if it has coincidentally changed, it was not SB 1421 that changed it. To

1 paraphrase *Disability Rights*, “Nothing a [police officer] might lawfully do before [SB 1421] is
2 unlawful now, and nothing earlier forbidden is now permitted.”

3 So what has changed? Only who can find out the facts and obtain the evidence of
4 incidents of police conduct (whether it is misconduct, as in sexual assaults, or conduct that may
5 be lawful or unlawful, as in officer-involved shootings). Providing information to people who
6 could not previously get it is not changing the substantive legal effect of prior acts.

7 Revealing police personnel records that were previously kept confidential may, of course,
8 result in officers being held accountable (officially or unofficially) in ways that might not have
9 occurred before SB 1421. For example, it may enable tort or civil-rights plaintiffs to proceed
10 with lawsuits that would have been impractical without this access to evidence. It may result in
11 criminal prosecution or administrative discipline of officers, if it gives citizens or the media the
12 ammunition to pressure prosecutors or chiefs of police. And even if nothing occurs differently in
13 an official setting, it may result in officers being held responsible in the proverbial court of
14 public opinion. Conversely, we should not assume that all new revelation of pre-2019 personnel
15 records will necessarily redound to the officers’ disadvantage. In some cases, the result may be
16 to allow the media and the public to see exculpatory facts and findings that would have been
17 withheld from them under the previous version of § 832.7.

18 None of that, though, constitutes the kind of legislative change of liabilities for past
19 conduct contemplated by *Elsner*, *Myers*, *Disability Rights*, and similar precedents. Assume a
20 hypothetical police officer commits an act of unjustified and unlawful police brutality. Assume
21 further that before 2019, he would have escaped external scrutiny for that act because § 832.7
22 prevented his employing agency from disclosing its investigation, and effectively allowed the
23 agency to hush the matter up. Now, by hypothesis, the agency’s investigation into the incident
24 can be requested under the PRA. That, however, is not a change in the substantive legal
25 consequences of the officer’s act. Police brutality was just as illegal in 2018 as it is in 2019. All

1 that has changed is an increased chance that illegal or improper conduct will come to public
2 light, and that legal and proper conduct will be better shown to the public as being legal and
3 proper.

4 The Unions argue forcefully that SB 1421 does change pre-existing rights and liabilities
5 in one respect: It effectively takes away the rights of confidentiality that officers had under the
6 previous version of § 832.7. But that tends to assume its own conclusion, in terms of the verb
7 tenses used and when those rights were in force. It is true (as dicta in several court decisions
8 remarked) that officers *had* rights to privacy in the personnel records covered by the prior
9 version of § 832.7, because the Legislature said so. But they do not now *have* those rights,
10 because again the Legislature says so.

11 As noted above, the Unions do not contend that their members have any kind of
12 constitutionally vested right (independent of current statutes) in the confidentiality of any
13 personnel records. Further, as noted above, there is no plausible argument that any of the police
14 personnel records now made available under SB 1421 were anything as to which police officers
15 would have had any personal rights of privacy, *except* to the extent that the prior statute made
16 those records confidential. But what the Legislature gives, it can take away. Those records were
17 confidential in 2018 because the Legislature said they were. But now the Legislature says they
18 *are not* confidential. It has mandated that “the following peace officer or custodial officer
19 personnel records and records maintained by any state or local agency *shall not be confidential*
20 and *shall be made available for public inspection*” (§ 832.7(b)(1), emphasis added).

21 The Unions invoke a formulation of the definition of retroactivity dating back to
22 *American States W.S. Co. v. Johnson* (1939) 31 Cal.App.2d 606, 613, to the effect that a
23 retroactive law is one that “affects rights, obligations, acts, transactions and conditions which are
24 performed or exist prior to the adoption of the statute.” The Unions of course stress the word
25 “rights” in this formulation, noting that before SB 1421 their members were often said to have

1 rights to the confidentiality of their personnel records. But any focus on statutorily created
2 “rights” as a separate and determinative factor in the analysis was soundly rejected by the
3 California Supreme Court in *Tapia*, 33 Cal.3d at 291-92. The phrase has been occasionally
4 repeated in passing in subsequent case law, but it has ceased to provide a meaningful and distinct
5 rule of decision. Nowadays, when the courts speak of pre-existing “rights” as a consideration in
6 whether a statute is being applied retrospectively or prospectively, they mean changes in the
7 substantive *legal consequences* of past actions. Casting public light on police actions does not fit
8 that criterion.

9 3. Reliance on Prior Law.

10 Finally, in deciding whether an application of a newly enacted statute should be classed
11 as retroactive or prospective, the courts have looked at whether there was any substantial and
12 legitimate reliance on the prior state of the law, such that applying the changed law would be
13 unfair. Obviously this consideration may apply to changes in substantive legal consequences, as
14 discussed in the preceding section. But even where the new statute does not announce a new and
15 different standard of lawful conduct, there may still have been a justifiable reliance on the prior
16 law.

17 In *Quarry*, 53 Cal.4th 945, for example, the question was whether new revisions to the
18 statutes of limitations applicable to child-molestation cases could be applied to causes of action
19 accruing before the new statute’s effective date. The court drew a distinction between an
20 amendment extending the limitations period on a cause of action not yet lapsed at the time of
21 enactment, versus revival of causes of action that were already past limitations at the time of the
22 new enactment. The latter, the court held, represented a retroactive application of the new
23 limitations statute. Among its reasons for that holding was the observation that accused
24 tortfeasors might well have relied on the lapsing of the statute of limitations, for example in
25 deciding what records to keep, what evidence or facts to preserve, and so on. *Id.* at 957-58.

1 Again, in *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1205-06, the new statute
2 at issue was Proposition 51, which substantially altered the tort-law landscape with respect to the
3 proportional liability of co-tortfeasors. The court held that it was impermissibly retroactive to
4 apply the Proposition to causes of action arising before its effective date. It reasoned that while
5 of course no one suffers an injury accident “in reliance on” the pre-existing law of tort
6 contribution, parties in pre-existing cases could well have made their decisions about whom to
7 sue, and with whom to settle and for how much, in reliance on that law. To change the rules on
8 them, after those decisions were made, was potentially to pull the rug out from under them.

9 So what would be the equivalent reliance interest at stake here? There are three plausible
10 candidates: (1) including sensitive information (such as names of informants or crime victims)
11 in investigative reports or the like, in reliance on those records being confidential; (2) officers or
12 agencies doing things they wouldn’t want to have publicly known, confident that their misdeeds
13 (or whitewashes, etc.) would never come to light because of the prior statute’s protection; and
14 (3) officers declining to oppose or appeal disciplinary actions because the results would remain
15 confidential.

16 The first two can be brushed aside quickly. The first one is addressed in the new statute
17 itself, which includes detailed provisions for redacting or withholding information or documents
18 in a variety of circumstances (§ 832.7(b)(5),(6),(7)). The Unions have not suggested that those
19 provisions are insufficient in any way that would bear on the present question.

20 The second one was hypothesized by the Court, but understandably not posited by the
21 Unions. No one asserts that this form of “reliance” – officers or agencies performing their duties
22 in ways they would want to keep covered up – could be a legitimate form of justifiable reliance
23 under the principles of *Quarry*, *Evangelatos*, or similar cases.¹⁹

24
25 ¹⁹ The Court hastens to add that in hypothesizing such “reliance”, it does not mean to suggest that it thinks such
misconduct is the norm among police officers. But it must surely be supposed that at least some of it occurs at least
some of the time.

1 The third possible form of reliance was raised for the first time at oral argument, and it is
2 an argument that must be considered. Intervenors' counsel made the point that it is speculative
3 to assume that an officer might have given up on resisting a form of internal discipline solely
4 because he or she figured the black mark would remain confidential. That is speculative – but it
5 is not really all that much more speculative than the California Supreme Court's speculation in
6 *Evangelatos* that tort plaintiffs may have shaded their decisions on whom to sue and whom to
7 settle with, in reliance on pre-Proposition 51 law; or its speculation in *Quarry* that accused child
8 abusers or their employers might have purged records or stopped doing investigations in reliance
9 on the running of the statute of limitations.

10 There is an important difference, though, between this hypothesized form of reliance by
11 police officers, and the forms of reliance hypothesized in *Quarry* and *Evangelatos*. In those
12 cases, the persons acting in reliance on prior law – tort plaintiffs in *Evangelatos*, tort defendants
13 in *Quarry* – stood to suffer real, financial consequences as a result of their reliance on prior law.
14 A tort plaintiff may have settled with a potential co-tortfeasor for less than he would have taken,
15 had he known that Proposition 51 would come along – and having settled, the plaintiff cannot get
16 that claim back. A potential child abuse defendant might find itself losing a suit because it no
17 longer has the records that could have exonerated it.

18 Here, by contrast, the hypothetical officer who threw in the towel on a disciplinary
19 proceeding does not stand to face any further discipline when the records of the proceeding
20 become public. He or she stands to have to face adverse publicity. That's not nothing – but it's
21 not as solid or real as the potential harms that swayed the court in *Quarry* and *Evangelatos*. This
22 assertion of reliance is just not solid or credible enough to overcome the strong indications to the
23 contrary – the statutory language, the fact that the new statute is triggered only by a post-
24 enactment PRA request, and the absence of any effect on substantive consequences of past acts.

1 Finally, Intervenor's point out that this result is in accord with the results and reasoning of
2 cases in other states where similar issues have arisen. These courts have ruled that new laws,
3 increasing the public's access to law enforcement or other records, must be applied to records
4 dating back to before the new laws' enactment.²⁰

5 CONCLUSION

6 The California Supreme Court has commented:

7 The public's legitimate interest in the identity and activities of peace
8 officers is even greater than its interest in those of the average public servant.
9 Law enforcement officers carry upon their shoulders the cloak of authority to
10 enforce the laws of the state. In order to maintain trust in its police department,
11 the public must be kept fully informed of the activities of its peace officers. It is
12 indisputable that law enforcement is a primary function of local government and
13 that the public has a far greater interest in the qualifications and conduct of law
14 enforcement officers, even at, and perhaps especially at, an "on the street" level
15 than in the qualifications and conduct of other comparably low-ranking
16 government employees performing more proprietary functions. The abuse of a
17 patrolman's office can have great potentiality for social harm.

18 *Comm'n on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 297-
19 98 (internal quotations and citations omitted).

20 The Legislature, in enacting SB 1421, echoed those concerns.

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

23 ²⁰ *State ex rel. Beacon Journal Publishing Co. v. University of Akron* (Ohio 1980) 415 N.E.2d 310; *State Org. of*
24 *Police Officers v. Society of Professional Journalists* (Haw. 1996) 927 P.2d 386; *Mollick v. Township of Worcester*
25 (Pa.Com.Ct. 2011) 32 A.3d 859 (county supervisors' e-mails); *Florida Hospital Waterman, Inc. v. Buster* (Fla.
2008) 984 So.2d 478 (records of adverse medical incidents); *Industrial Foundation of the South v. Texas Industrial*
Accident Bd. (Tex. 1976) 540 S.W.2d 668 (worker's comp benefit records). The Unions have a point, however, that
none of those cases involved arguments based on an affirmative statutory protection for confidentiality, such as is
found in the prior version of § 832.7.

1 (b) The public has a right to know all about serious police misconduct, as
2 well as about officer-involved shootings and other serious uses of force.
3 Concealing crucial public safety matters such as officer violations of civilians'
4 civil rights, or inquiries into deadly use of force incidents, undercuts the public's
5 faith in the legitimacy of law enforcement, makes it harder for tens of thousands
6 of hardworking peace officers to do their jobs, and endangers public safety.

7 SB 1421, § 1.

8 It makes little sense to suppose that the Legislature saw these serious problems and
9 concerns as applying strongly to police personnel records dating to 2019 – but that it viewed the
10 same problems and concerns as categorically inapplicable to police personnel records dating to
11 2018 or earlier. Such a chronological distinction would make sense if, but only if, the
12 Legislature thought that the police were entitled to conceal the records of their actions before this
13 year. The text of the new statute says nothing to suggest that that is what the Legislature
14 thought, and it makes very little sense to assume that that is what the Legislature meant.

15 Dated: February 8, 2019

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Hon. Charles S. Treat
Superior Court Judge