

October ____, 2018

VIA ELECTRONIC MAIL

Sanford A. Toyen, Esq.
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San Diego County Sheriff's Department
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Re: Request by KPBS for Disclosure of Public Records

Dear Mr. Toyen:

As you know, I represent KPBS Public Broadcasting. I am writing in response to your letter dated July 16, 2018, and to reiterate the request for records previously made by KPBS.

The request for records to which I refer was made on June 22, 2018, by Claire Trageser of KPBS, and is described in my prior letter of July 5, 2018. In your letter, you assert that the Sheriff's Department "does not have a record that meets Ms. Trageser's description." However, you apparently concede that the requested information can be provided in the form of "redacted documents . . . that reveal the date the complaint was received as well as the date the investigation was completed." As you know, and as you apparently recognize, the Department has a statutory obligation to provide all "reasonably segregable portion[s]" of its records. (Gov. Code § 6253, subd. (a) ["Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law."]; *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 652 ["The fact that parts of a requested document fall within the terms of an exemption does not justify withholding the entire document."].) Thus, the assertion that the Sheriff's Department does not have a single record containing all and only the requested information is, as I explained, beside the point.

You persist in asserting that the requested records are exempt from disclosure under Government Code sections 6254(f) and 6254(k) (hereafter "Section 6254(f) and Section 6254(k)," respectively). You are incorrect.

First, I remind you that the CPRA must be construed in light of its plain language and its fundamental purpose of maximizing public access to information in the hands of the government. (*ACLU v. Superior Court* (2017) 3 Cal.5th 1032, 1038; *Wilder v. Superior Court* (1998) 66 Cal.App.4th 77.) The rights of access it confers must be broadly construed. (Cal.

Const., art. VI, § 3, subd. (b)(2); *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 456 [“The Act is ‘intended to be construed liberally in order to further the goal of maximum disclosure in the conduct of governmental operations.’”]; *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651-652 [“Maximum disclosure of the conduct of governmental operations was to be promoted by the Act.”]; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1335 (*Times Mirror*) [broadly interpreting CPRA is necessary “to be more fully in accord with the Act’s express purpose of broadening the public’s access to public records”].) The limitations on access it provides must be construed narrowly. (Cal. Const., art. VI, § 3, subd. (b)(2); *Times Mirror, supra*, 53 Cal.3d at p. 1359 [CPRA “accommodate[s] . . . competing concerns by mandating a general policy of full disclosure, with specific and narrowly drawn exemptions”]; *California State University, Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 831 [“Statutory exemptions from compelled disclosure are narrowly construed.”].) Your interpretation of the asserted exemptions contravenes these requirements and misconstrues the authority on which it is premised.

You assert that the information requested by KPBS is “a record of [a] complaint to . . . a local police agency.” That is not true. As both the original request and my letter of July 5, 2018 made clear, KPBS is *not* requesting the complaints themselves, but only the date the complaints were received. The date a complaint was received is not part of the complaint itself. Instead, it is a record created by the Department of the date it received a complaint.

Furthermore, the California Court of Appeal has expressly held that there is no specific exemption in the Public Records Act covering law enforcement personnel investigations:

It is also to be noted that the Legislature *did* provide categorical exemptions in section 6254 for two classes of documents related to those in issue here: subdivision (c) protects “[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy,” while subdivision (f) protects most of a law enforcement agency’s general investigative files. We cannot accept the proposition that the Legislature, being obviously aware of the sensitivity of both personnel files and law enforcement investigations, would not have created a specific exemption for law enforcement personnel investigations had it wished to do so *and* saw a need to do so.

City of Hemet v. Superior Court (1995) 37 Cal. App. 4th 1411, 1421-1422. Your assertion that the *City of Hemet* case concluded that the records sought in that case were exempt under Section 6254(k) and the *Pitichess* statutes is beside the point. That such records may (or may not) be exempt under Section 6254(k) does not mean that they are exempt under 6254(f). Moreover, while you dispute—inaccurately—the authority holding that the requested records are *not* subject to Section 6254(f), you provide no authority holding that they *are*.

You take issue with the holding in *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1276 that Section 6254(f) “protects witnesses, victims, and investigators, secures evidence and investigative techniques, encourages candor, recognizes the rawness and sensitivity of information *in criminal investigations*, and in effect makes such investigations possible” (emphasis added). You assert that confining the scope of Section 6254(f) to criminal investigations is inconsistent with the language of that exception providing that it applies to “any

investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes.” (Gov. Code § 6254, subd. (f).) In fact, this language underscores the limited scope of the statute as applied to records of a “local police agency,” such as the Department. The two previous clauses of Section 6254(f) apply to such agencies, but the clause you quote does not.

Furthermore, your interpretation of the preamble of Section 6254(f) as applying to citizen complaints to law enforcement agencies regarding law enforcement officials cannot be reconciled with your assertion that such complaints are *not* subject to Section 6254(f)(2). Nothing in Section 6254(f) indicates that the word “complaints” means one thing in one part of the statute and another in a different part of the same statute. Section 6254(f)(2) does not say that it applies only to “complaints to which law enforcement personnel respond” or that it excludes citizen complaints regarding law enforcement officers. On the contrary, it requires disclosure of “the time, substance, and location of *all complaints or requests for assistance* received by the agency *and* the time and nature of the response thereto . . .” (Gov. Code § 6254, subd. (f)(2) [emphasis added].) Your construction would effectively limit the application of this provision to “requests for assistance,” reading out the requirement for disclosure of “complaints.” Thus, your interpretation violates fundamental canons of statutory construction. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798-799 [“Significance should be given, if possible, to every word of an act. Conversely, a construction that renders a word surplusage should be avoided.”]; *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715-716 [the rules of statutory interpretation “preclude judicial construction that renders part of the statute ‘meaningless or inoperative.’].) Furthermore, your interpretation would relieve law enforcement agencies of the obligation to provide any information if the agency did not respond to a complaint. This is an absurd construction of the statute, obviously contrary to its purpose, and therefore untenable. (*Commission on Peace Officer Standards & Training v. Superior Court*, 42 Cal. 4th 278, 290 (“*POST*”) [“It is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.”].) The word “complaint” as used in the various parts of Section 6254(f) must be given a consistent construction. (*People v. Dillon* (1983) 34 Cal. 3d 441, 468 [“[I]t is generally presumed that when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in another part of the same statute.”]; *Estate of Thomas* (2004) 124 Cal. App. 4th 711, 720, quoting *Miranda v. National Emergency Services, Inc.* (1995) 35 Cal.App.4th 894, 905 [“A word or phrase, or its derivatives, accorded a particular meaning in one part or portion of a law, should be accorded the same meaning in other parts or portions of the law, especially if the word is used more than once in the same section of the law.”].) Thus, if, as you assert, Section 6254(f)(2) does not apply to the records sought by KPBS, then Section 6254(f) as a whole does not apply either. On the other hand, if—contrary to the conclusion of the Court of Appeal—Section 6254(f) creates an exemption for records of citizen complaints regarding law enforcement officers, then the Department is required by Section 6254(f)(2) to provide KPBS with the “time” of each such complaint and “the time of . . . the response thereto.”¹

¹ As explained below, Section 6254(k) and Penal Code section 832.7 do not preclude disclosure. Therefore, if applicable, Section 6254(f) would require disclosure of the information requested by KPBS.

You continue to assert that the records requested by KPBS are exempt under Section 6254(k) and Penal Code section 832.7, despite the fact that, as is clear from both the original KPBS request and my July 5, 2018 letter, KPBS is not seeking the content of any peace officer personnel records. You either do not understand or are deliberately mischaracterizing the *Pitchess* statutes and the decisions construing them. You claim, in essence, that any information “obtained from” a record that contains information falling within the categories defined in Penal Code section 832.8 is exempt from disclosure. That is not the law.

First, as you admit, the only potentially pertinent provision of the *Pitchess* statutes is Penal Code section 832.8(e): ““Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.” You again misperceive or misconstrue the request by KPBS. As I have endeavored to explain, KPBS is not seeking the complaints themselves, but only the dates of the complaints and the initial responses thereto. Thus, KPBS is not seeking information that falls within the categories protected by the *Pitchess* statutes, and hence the information it seeks is not exempt from disclosure. (*POST*, 42 Cal.4th at p. 293 [*Pitchess* statutes prohibit disclosure only of “the types of information enumerated in section 832.8.”].)

But you have fallen into an even more fundamental error. As KPBS and I have both made clear, KPBS is not seeking any information that can be linked to the identity of any peace officer employee of the Department. As the California Supreme Court explained in *POST*:

We find no indication that the Legislature, in adopting sections 832.7 and 832.8, was concerned with making confidential the identities of peace officers or the basic fact of their employment. Rather, the legislative concern appears to have been with *linking a named officer to the private or sensitive information listed in section 832.8*. The latter statute applies to files “maintained under that individual's name by his or her employing agency and containing records relating to” the enumerated types of information. (§ 832.8.) Thus, the statute prevents the unauthorized disclosure of the specified types of information concerning *a named officer*.

(*POST*, 42 Cal. 4th at p. 295 [emphasis added].) As the information requested by KPBS would not “link[] a named officer to the private or sensitive information listed in section 832.8,” it is not information intended to be kept confidential by the *Pitchess* statutes. It was in light of this holding by the California Supreme Court that the Court of Appeal recognized in *Pasadena Police Officers Assn. v. Superior Court* (2015) 240 Cal.App.4th 268, that, under *POST*, “information does not become confidential simply because it is derived from a personnel file that also contains confidential information.” (*Id.*, at p. 287. See also *Sander v. State Bar of California* (2013) 58 Cal.4th 300, 325-326 [recognizing that assurances of confidentiality have “not prevented public access to otherwise confidential, private information in the possession of a public entity that is not linked to the individual to which it pertains”].)

Furthermore, your dismissal of my explanation as “disingenuous” notwithstanding, Penal Code section 832.7 supports the disclosure of the information requested by KPBS. It requires the disclosure of “data regarding the number, type, or disposition of complaints (sustained, not

sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved.” (Pen. Code § 832.7, subd. (c).) This manifests a clear intent to provide access to information regarding how law enforcement agencies address complaints about their officers. The time that elapses between an agency’s receipt of a complaint and its initial response to a complaint is precisely such information, and therefore can and must be disclosed. If there is any doubt as to whether disclosure of such dates is required, it must be resolved in favor of access. (Cal. Const., art. VI, § 3, subd. (b)(2); *Black Panther Party v. Kehoe* (1974) 42 Cal. App. 3d 645, 651 [“Statutory ambiguities should be resolved to promote the legislative objective exhibited by the entire enactment.”].)

In light of the foregoing explanation, I trust you will agree that the records KPBS has requested are subject to disclosure under the California Constitution and the California Public Records Act. If you have concerns about the burden of complying with the request, we would be happy to work with you to address such concerns. We recently did so in addressing the concerns of the San Diego Police Department, to which KPBS sent a nearly identical request. We promptly arrived at an agreement on a process that resulted in the disclosure of records requested by KPBS.

Of course, it is possible that the Department has concerns about its handling of citizen complaints about its officers, and therefore wishes to avoid disclosure of such records for reasons that have nothing to do with the law. The Department’s obdurate refusal to disclose the requested records, despite the fact that they can be provided without implicating—much less invading—the privacy interests of its officers, and despite the disclosure of the same information by the San Diego Police Department, certainly suggests that it does. Far from warranting nondisclosure, however, this would only reinforce the need for public access. The fact that the Department apparently has no single record that includes the requested information indicates that the Department has never concerned itself with whether it is providing timely responses to citizen complaints. Perhaps it is time that the Department itself looked into that. In any event, compliance with the KPBS request will serve to provide the Department with useful insight, at the same time that it serves the profound public interest in ensuring that the public can understand how the Department is addressing its obligations.

Please inform us by no later than October ____, 2018, whether the Department will provide records responsive to the KPBS request. If we do not hear from you by then, we will have to assume that it does not, and KPBS will proceed accordingly.

Sincerely,

James M. Chadwick
for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

cc: Ms. Claire Trageser, KPBS
Mr. Matthew Halgren, Sheppard Mullin