Filed 4/7/05

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

CALIFORNIA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING, Petitioner, v. THE SUPERIOR COURT OF SACRAMENTO COUNTY, Respondent; LOS ANGELES TIMES COMMUNICATIONS LLC, Real Party in Interest.	C045494 (Super. Ct. No. 03CS01077)

ORIGINAL PROCEEDINGS in mandate. Lloyd G. Connelly, Jr., Judge. Petition granted.

Bill Lockyer, Attorney General, Jacob A. Appelsmith, Senior Assistant Attorney General, Elizabeth Hong and Michael E. Whitaker, Deputy Attorneys General, for Petitioner.

No appearance for Respondent.

Davis Wright Tremaine, Kelli L. Sager, Alonzo Wickers IV, Rochelle L. Wilcox; and Karlene Goller for Real Party in Interest.

After the California Commission On Peace Officer Standards And Training (known by the acronym POST) refused to disclose the names and certain identifying employment information pertaining to peace officers throughout the state, the Los Angeles Times Communications LLC (The Times) filed a petition for writ of mandate, seeking to compel POST to release the data. According to The Times, it is entitled to the requested information under the California Public Records Act (CPRA or the Act). (Gov. Code, § 6250 et seq.; further section references are to the Government Code unless otherwise specified.) The trial court granted the petition in part.

On review by a petition for extraordinary relief (§ 6259, subd. (c)), POST claims the requested information is privileged and exempt from disclosure. We agree. As we will explain, all of the information sought by The Times was obtained by POST from peace officer personnel records within the meaning of Penal Code sections 832.7 and 832.8. Thus, the data is exempt from disclosure under section 6254, subdivision (k). Accordingly, we shall issue a peremptory writ directing the trial court to vacate its order and to deny The Times's petition for writ of mandate.

FACTUAL AND PROCEDURAL BACKGROUND

POST is a state agency created in 1959 "[f]or the purpose of raising the level of competence of local law enforcement officers." (Pen. Code §§ 13500, 13510, subd. (a).) It is dedicated to the development of peace officer education and training, including college-level education programs for peace officers. (Pen. Code,

§ 13503.) POST has 626 "participating departments" throughout the state that receive its services. A "participating department" is any law enforcement entity that has applied to, and been accepted by, POST to participate in its programs and receive services. (Cal. Code Regs., tit. 11, § 1001, subd. (*l*).)

Under California Code of Regulations, title 11, section 1003 (Regulation 1003), whenever a peace officer of a participating department is newly appointed, promoted, demoted, terminated, or changes his or her name or appointment status within the same department, the participating department must notify POST on a form entitled "Notice of Appointment/Termination" (Form 2-114). In performing its functions, POST collects employment data from participating law enforcement agencies pertaining to the peace officers who work for them. Although hard copies of Form 2-114 are eventually discarded, the forms are microfilmed and kept as part of a computerized database.

The Times asked POST to release certain data derived from Form 2-114. Specifically, The Times sought peace officer names and birth dates, department names, appointment dates, appointment status, termination dates, and reason for termination.

When POST denied the request, The Times filed a petition for writ of mandate, seeking release of the information pursuant to CPRA.[1] Granting the petition in part, the trial court ordered POST

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[1] The original petition for writ of mandate was filed in the Los Angeles County Superior Court, which granted partial relief. POST sought review in the Court of Appeal, Second Appellate District, which ruled that the Los Angeles County Superior Court had no jurisdiction to hear the matter because the records are

to release the following data: peace officer names, department names, "appointment type new," appointment dates, and termination dates.[2] POST sought relief in this court, and we issued an alternative writ to review the propriety of the order.

DISCUSSION

I

CPRA, adopted in 1968 (Stats. 1968, ch. 1473, § 39, pp. 2945-2948), "acknowledges the tension between" individual privacy and transparency in government. (*City of Richmond v. Superior Court* (1995) 32 Cal.App.4th 1430, 1433.) In section 6250, "the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." The Act states that "[p]ublic records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. . . ." (§ 6253, subd. (a).) But the Act enumerates a host of exemptions (§ 6254, subds. (a)-(z), (aa)-(cc)), all of which manifest a concern to protect individual privacy in records that happen to appear in government files. (See *City of Richmond v. Superior Court, supra,* 32 Cal.App.4th at pp. 1433-1434.)

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kept in Sacramento. The Second Appellate District ordered the case transferred to the Sacramento County Superior Court.

[2] The trial court refused to order release of the officers' birth dates or reasons for termination. The Times does not challenge this portion of the order.

There is no dispute that the records sought in this case constitute "public records" within the meaning of CPRA. (§ 6252, subd. (e) ["'Public records' includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics"].) Thus, grounds to deny disclosure "'"must be found, if at all, among the specific exceptions to the general policy that are enumerated in the Act."'" (*Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, 1419-1420.)

CPRA's statutory exemptions are to be construed narrowly, and the burden is on the public agency to show why disclosure should be withheld under the express provisions of the Act. (§ 6255, subd. (a); *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1425.)

A trial court's order directing disclosure of records by a public official, or supporting the official's refusal to disclose records under CPRA, is immediately reviewable by petition to the appellate court for issuance of an extraordinary writ. (§ 6259, subd. (c); *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1336.) Factual findings made by the trial court will be upheld if based on substantial evidence. But the interpretation of CPRA, and its application to undisputed facts, present questions of law that are subject to de novo appellate review. (*CBS Broadcasting Inc. v. Superior Court* (2001) 91 Cal.App.4th 892, 905-906.)

II

POST claims the records sought by The Times are confidential "peace officer personnel records/information" within the meaning of

Penal Code sections 832.7 and 832.8, and, thus, disclosure can be compelled only through the discovery provisions of Evidence Code sections 1043 and 1046. The Times replies that those discovery procedures are triggered only when peace officer personnel records are sought in an underlying action, and are not applicable to CPRA requests by nonlitigants seeking public records. We agree with The Times on this point.

In *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (hereafter *Pitchess*), the Supreme Court held that criminal defendants have the right to discover relevant information in a peace officer's personnel records relating to citizen complaints. "In 1978, the California Legislature codified the privileges and procedures surrounding what had come to be known as '*Pitchess* motions' . . . through the enactment of Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81, citation & fns. omitted; *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 425.)

Penal Code section 832.8 defines "personnel records." Penal Code section 832.7 states that such records are "confidential" and subject to discovery in any criminal or civil proceeding only through the procedures set forth in the Evidence Code. Evidence Code sections 1043 through 1045 set out detailed procedures for obtaining discovery of peace officer personnel files, including a written motion supported by affidavits showing good cause for the disclosure sought, including its materiality to the subject matter involved in the pending litigation, as well as notice to the governmental agency which has custody of the records. (Evid.

Code, § 1043, subds. (a), (b)(3).) If good cause for discovery is established, the statutes provide for an "in-chambers" examination of the material; they also establish general criteria to guide the trial court's decision-making process and ensure that the privacy interests of the officers subject to the motion are protected. (Evid. Code, § 1045, subd. (b); *City of Santa Cruz v. Municipal Court, supra,* 49 Cal.3d at p. 84; *Rosales v. City of Los Angeles, supra,* 82 Cal.App.4th at p. 425.)

Thus, the statutory scheme carefully balances two directly conflicting interests: a peace officer's right to confidentiality, and the interest of a criminal defendant or civil litigant in information pertinent to pending lawsuits. (*City of Santa Cruz v. Municipal Court, supra,* 49 Cal.3d at p. 84; *Rosales v. City of Los Angeles, supra,* 82 Cal.App.4th at p. 425.)

Notably, in every case cited by POST holding that compliance with the *Pitchess* discovery statutes is mandatory, there was an underlying civil or criminal action. (See, e.g., *Garden Grove Police Department v. Superior Court* (2001) 89 Cal.App.4th 430, 432; *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019-1020; *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 400.) Here, however, The Times has requested public records under CPRA and invoked the mandamus procedure authorized therein for obtaining judicial review.

As explained in *City of Richmond v. Superior Court, supra,* 32 Cal.App.4th 1430 (hereafter *City of Richmond*), the *Pitchess* procedure is not mandatory when a nonlitigant requests public records that might be classified as peace officer personnel files.

In that case, a local newspaper filed a CPRA request for records of complaints against the city's police department of excessive force and racially abusive treatment. The city claimed that compliance with the *Pitchess* procedure was the sole and exclusive method for obtaining access to police personnel files. (*Id.* at pp. 1432, 1438.) The Court of Appeal, in an opinion authored by Justice Chin, disagreed: "We reject . . . Richmond's assertion that CPRA procedures are not appropriate to this case because it involves police agency records governed by Penal Code section 832.7. By its *terms, section 832.7 describes procedures for litigants in criminal and civil proceedings, not procedures for nonlitigants seeking public records*. . . . [T]he Guardian is not conducting an end run around the procedures set forth in Evidence Code sections 1043 and 1046. The Guardian, through its investigative reporter, made a legitimate public record request, to which CPRA procedures apply." (*Id*. at p. 1440, italics added.) *City of Hemet v. Superior Court, supra,* 37 Cal.App.4th 1411, also concluded that procedures set out in CPRA provide an appropriate method for requesting police personnel records where there is no underlying lawsuit. (*Id*. at pp. 1426-1427.)

We agree. But as we will explain in Part III, *post*, the fact that CPRA provides an independent mechanism to obtain law enforcement records outside the litigation framework does not strip peace officer personnel files of the statutory protections accorded to them by the Penal Code.

III

Essential to the holding in *City of Richmond, supra,* 32 Cal.App.4th 1430, is the dual aspect of Penal Code section 832.7, which provides that peace officer personnel records are "confidential *and* shall not be disclosed in any criminal or civil proceeding except by [compliance with specified Evidence Code procedures]." (Pen. Code, § 832.7, subd. (a); italics added.) By using the conjunctive, the Legislature intended *both* to confer confidential status on peace officer personnel records and to establish a procedure for their discovery on a showing of good cause in pending litigation. Accordingly, the proper interpretation of Penal Code section 832.7 is that the term "confidential" has independent significance and imposes a general privilege of confidentiality in peace officer personnel records. (*Rosales v. City of Los Angeles*, *supra*, 82 Cal.App.4th at p. 426; *City of Richmond, supra,* 32 Cal.App.4th at pp. 1440-1441.)

Section 6254, subdivision (k), exempts from inspection under the CPRA any "[r]ecords, the disclosure of which is *exempted or prohibited pursuant to federal or state law*, including, but not limited to, provisions of the Evidence Code relating to privilege." (Italics added.) "Penal Code section 832.7 is such a provision of state law." (*City of Richmond, supra,* 32 Cal.App.4th at p. 1440.)

Penal Code section 832.7 carves out a privilege for "[p]eace officer . . . personnel records . . . , or information obtained from these records . . . ." By cross-reference to section 6254, subdivision (k), such information qualifies as "[r]ecords, the disclosure of which is exempted or prohibited

pursuant to . . . state law," and properly may be withheld in response to a CPRA request.

Therefore, it is not surprising that much of the debate in this case centers on whether the records sought by The Times constitute "peace officer personnel records." The Times contends that the term has a precise definition set forth in Penal Code section 832.8, and that the records here simply do not fit the statutory description. POST urges us to read the statute "broadly" in order to effectuate the strong legislative intent in favor of protecting peace officer personnel files from disclosure.

Penal Code section 832.8 states: "As used in Section 832.7, 'personnel records' means any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following: [¶] (a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information. [¶] (b) Medical history. [¶] (c) Election of employee benefits. [¶] (d) Employee advancement, appraisal, or discipline. [¶] (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. [¶] (f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy."

POST's files are not records maintained under an individual officer's name, and it is undisputed that POST is not an "employing agency" of the subject peace officers. Rather, its data is derived from forms submitted by participating departments, which are the

employing agencies. However, section 832.7 covers not only peace officer personnel records themselves but also "information obtained from these records." (Pen. Code, § 832.7, subd. (a); see *Hackett v. Superior Court* (1993) 13 Cal.App.4th 96, 100 [personnel information does not lose privileged status merely because it may be obtainable elsewhere].)

We agree with POST that in the trial court, it established that the information sought by The Times is information POST has obtained from peace officers' personnel records.

As we noted previously, POST collects employment data from participating law enforcement agencies concerning the peace officers who work for them. Whenever a peace officer of a participating department is newly appointed, promoted, demoted, terminated, or changes his or her name or appointment status within the same department, the participating department must notify POST on Form 2-114. (Regulation 1003.)

POST submitted the declaration of Paul Harman, the chief of POST's information services bureau, whose declaration was based on his personal knowledge, except for matters stated on information and belief. Harman declared that POST inputs the employment information from Form 2-114 into a database and uses the information "to ensure compliance with certain codified selection and training requirements," which "are measured from the date of [the peace officer's] appointment or promotion." Harman averred that he was employed previously by the Los Angeles County Sheriff's Department and that while there, he became thoroughly familiar with peace officer personnel records and files, and with POST's

Form 2-114 and the regulations pertaining thereto. Based on his personal experience with the Los Angeles County Sheriff's Department and on information and belief, Harman declared that the information required by the regulations to be submitted on Form 2-114 is derived from the personnel files and records of peace officers maintained by the employing law enforcement departments.

Although Harman's declaration is based in part on information and belief, this does not render it a nullity. Affidavits generally lack evidentiary value when based on information and belief; "[i]t is decidedly *not* true, however, that an affidavit upon information and belief is an anomaly in the law, bereft of legal significance." (*City of Santa Cruz v. Municipal Court, supra,* 49 Cal.3d at p. 87.) For example, an affidavit based on information and belief is sufficient whenever a statute, expressly or implicitly, requires a person to make a statement which, from the very nature of things, can be made only on information and belief. And "affidavits on information and belief may be sufficient in a variety of contexts where the facts would otherwise be difficult or impossible to establish." (*Ibid*.)

There are 626 law enforcement agencies that submit personnel information to POST on Form 2-114. Surely, requiring POST to submit declarations from all 626 departments would be far too difficult and cumbersome. Accordingly, POST submitted one declaration from Harman effectively averring, based on his personal knowledge, that the information submitted to POST by the Los Angeles County Sheriff's Department on Form 2-114 is taken from that department's personnel

files and records, and further averring, based on information and belief, that the other employing agencies follow similar procedures.

The Times did not attempt to refute POST's showing by submitting evidence demonstrating that the personnel information forwarded to POST on Form 2-114 came from anywhere other than the employing law enforcement agencies' personnel records. Nor did it attempt to present any other logical explanation for the origin of the information. Indeed, as a matter of common sense, the information contained in Form 2-114 (i.e., identities, employment histories, and status of peace officers) necessarily is culled from peace officer personnel records.

Absent any other logical explanation for the origin of the information contained in Form 2-114, Harman's declaration, and the reasonable inferences to be drawn therefrom, establish that the data sought by The Times is "information obtained from [peace officer personnel] records" within the meaning of Penal Code sections 832.7 and 832.8. In other words, the requested data is categorically exempt from disclosure under the privilege established in section 6254, subdivision (k) of CPRA.

IV

The Times argues that because the names of peace officers, their departments, and their dates of employment are not expressly listed in Penal Code section 832.8 as components of a peace officer's personnel file, they do not constitute personnel records within the meaning of Penal Code section 832.7 and, therefore, are not privileged under the CPRA. We disagree.

In construing a statute, we begin by examining the statutory language, giving the words their ordinary meaning. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) Courts cannot insert or omit words to cause the meaning of a statute to conform to a presumed intent that is not expressed. (Code Civ. Proc., § 1858; *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633.) "As a judicial body, it is our role to interpret the laws as they are written." (*San Diego Police Officers Assn. v. City of San Diego Civil Service Com*. (2002) 104 Cal.App.4th 275, 287.)[3]

Penal Code section 832.7 provides that peace officer "personnel records . . . , or information obtained from these records, are confidential . . . ." Penal Code section 832.8 defines "personnel records" as "any file maintained under that individual's name by his or her employing agency and containing

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[3] The Times asks us to take judicial notice of a bill to amend section 832.8. (Assem. Bill No. 1198 (2003-2004 Session)). According to The Times, the underlying legislative history demonstrates that the Legislature does not intend for peace officers' names to be privileged and, thus, it rejected the bill that would have amended the statute favorable to POST's position on appeal. However, it appears the bill was withdrawn rather than submitted to a vote of the Legislature. Thus, we draw no inference of legislative intent from it. (*Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1342.) We are concerned with the application of the existing statute, not the legislative intent underlying a potential amendment. Such inchoate actions are of no relevance to our inquiry. Hence, the request for judicial notice is denied.

records relating to any of the following: [¶] (a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information. [¶] (b) Medical history. [¶] (c) Election of employee benefits. [¶] (d) Employee advancement, appraisal, or discipline. [¶] (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. [¶] (f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy."

Under the plain language of these statutes, the protection afforded by Penal Code section 832.7 is not limited to information enumerated in subdivisions (a) through (f) of Penal Code section 832.8. Rather, a confidential personnel record is defined as "any file . . . containing records relating to" the enumerated items. (Pen. Code, § 832.8.) This means that if a file otherwise meeting the definition in Penal Code section 832.8 contains records relating to items specified in subdivisions (a) through (f) of that section, then the entire file is a personnel record and all of the items in the file are confidential.

To the extent that *City of Los Angeles v. Superior Court* (2003) 111 Cal.App.4th 883 (hereafter *City of Los Angeles*) suggests otherwise, we disagree.

City of Los Angeles held that in a dissolution of marriage proceeding, the wife of a peace officer could obtain discovery of his payroll records for purposes of a spousal support order and an award of attorney fees. (*City of Los Angeles, supra,*

111 Cal.App.4th at pp. 885-886, 895-896.) Harmonizing (1) "the legislative mandate of," and "public policy concerns advanced by," the Family Code (*id*. at pp. 893, 895), with (2) the statutory provisions regarding peace officer personnel records, the court held that "the time has come for the policy protecting a peace officer's privacy interest in his or her personnel records to give way to the Family Code's requirements of full financial disclosure during marital dissolution proceedings." (*Id*. at pp. 894, 895-896.)

We have no quarrel with this conclusion, but find fault with the court's analysis along the way. In reaching its conclusion, *City of Los Angeles* found that peace officer payroll records are not subsumed within the definition of personal data in Penal Code section 832.8, subdivision (a) because the term "payroll records" does not appear in the subdivision and payroll records "do not constitute 'similar information' to the other data listed in [the subdivision]." (*City of Los Angeles, supra,* 111 Cal.App.4th at p. 891.) Nevertheless, the court held that payroll records are personnel records because they are "other information the disclosure of which would constitute an unwarranted invasion of personal privacy." (*Id*. at p. 892; Pen. Code, § 832.8, subd. (f).)

Thus, *City of Los Angeles* can be read, as The Times views it, to stand for the proposition that the privilege applies only to items that are enumerated in Penal Code section 832.8. However, under the plain meaning of the statute's language, a personnel record is "any file maintained under [a peace officer's] name by his or her employing agency and containing records relating

to any of the [items set forth in subdivisions (a) through (f)]." In other words, it is not the enumerated items that are protected, but *any information* in a file maintained by the employing agency that contains records relating to any of the items specified in subdivisions (a) through (f).

Our interpretation of the statutory scheme comports with the Legislature's intent of protecting the privacy rights of peace officers in their personnel files, absent a compelling need for the personnel information in pending civil or criminal litigation. As pointed out in *Hackett v. Superior Court, supra,* 13 Cal.App.4th 96, "it is . . . clear from its plain language that the bill [adding Penal Code sections 832.7 and 832.8], from the outset, was intended to create a privilege for *all* information in peace officers' personnel files." (*Id*. at p. 100, orig. italics; accord, *Teamsters Local 856 v. Priceless, LLC* (2003) 112 Cal.App.4th 1500, 1524; *San Diego Police Officers Assn. v. City of San Diego Civil Service Com*., *supra,* 104 Cal.App.4th at p. 287.)

In any event, even if the privilege applies only to the type of information specified in Penal Code section 832.8, subdivision (a), we conclude all of the information sought by The Times constitutes "employment history" within the meaning of this section. Dates of hire, promotion, demotion, departmental assignments, and other such events occurring during a person's employment as a peace officer, including his or her current status as a peace officer, are all literally part of a peace officer's employment history.

We recognize that *City of Los Angeles* states "[the list in Penal Code section 832.8, subdivision (a)] does not include any

information that would be specific to the current job, such as would be found in payroll information. Information that is specific to the employee's *current status* as a peace officer would not be 'similar information' to the other information covered by the statute." (C*ity of Los Angeles, supra,* 111 Cal.App.4th at p. 892; italics added.) Again, we disagree.

A person's "employment history" ordinarily is understood to mean all of the events connected with the person's career, both past and present. (See 5 Oxford English Dict. (1st ed. 1978) page 306 ["history": The "whole train of events connected with a particular . . . person . . . ; course of existence or life, career"]; *Day v. City of Fontana, supra,* 25 Cal.4th at p. 272 [courts give words of a statute their usual and ordinary meaning].) Certainly, when filling out the employment history portion of a job application, any reasonable person would understand the need to list his or her current work position or positions, if any.

The Times also relies on *New York Times Co. v. Superior Court* (1997) 52 Cal.App.4th 97 (hereafter *New York Times*) to support its position that peace officers' names, departments, and employment dates are not protected.

In *New York Times*, sheriff's deputies killed a person during a gunfight. An internal investigation identified five deputies who had fired their weapons. A copy of the investigative report was placed into the personnel file of each deputy. A newspaper filed a CPRA request for their names, but the sheriff's department refused to release the information, claiming it was part of the officers' personnel files. *New York Times* held that the public

was entitled to the information: "Here what is sought are simply the names of officers who fired their weapons while engaged in the performance of their duties. Notably, uniformed peace officers are statutorily mandated to wear identification. (Pen. Code, § 830.10.) [¶] The California Supreme Court has recognized that a public agency may not shield a record from public disclosure by placing it into a file labeled 'investigatory.' [Citation.] . . . A public servant may not avoid such scrutiny by placing into a personnel file what would otherwise be unrestricted information." (*New York Times*, *supra*, 52 Cal.App.4th at pp. 99-100, 102-103.)

New York Times does not sanction the release of employment information from the personnel records of thousands of peace officers throughout the state. It simply holds that information to which the public is otherwise entitled may not be shielded by placing it inside a personnel file.

That is not what happened here. The data sought by The Times from POST's personnel database is derived from employing agencies' existing personnel records and is comprised of information ordinarily found in personnel files. Accordingly, as we have explained, the requested information is confidential and not subject to disclosure under CPRA.

Consequently, the trial court erred in rejecting Harman's declaration and in concluding the information the court ordered POST to disclose to The Times is not privileged because it was not obtained from peace officer personnel records. We shall direct the trial court to vacate its order and to deny The Times's petition for writ of mandate.

V

The Times requests an award of attorney fees and costs pursuant to section 6259, subdivision (d), which provides in pertinent part: "The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to [the CPRA]." Because The Times has not prevailed in this litigation, it is not entitled to recover its attorney fees and costs.

DISPOSITION

Let a peremptory writ of mandate issue directing the trial court to vacate its order and to enter a new order denying the petition for writ of mandate in its entirety. The Times shall reimburse POST for its cost in the proceedings in this court. (Cal. Rules of Court, rule 56(*l*)(1).) Having served its purpose, the alternative writ is discharged.

SCOTLAND, P.J.

I concur:

HULL, J.

CONCURRING AND DISSENTING OPINION of BUTZ, J.:

I concur in parts I and II of the majority opinion.

However, I respectfully dissent from the majority's conclusion, in parts III and IV, that all of the information sought is information petitioner California Commission on Peace Officer Standards and Training (POST) has "obtained from [peace officers' personnel] records" within the meaning of Penal Code section 832.7, subdivision (a), and is therefore exempt from disclosure under Government Code section 6254, subdivision (k).[1] (Maj. opn., *ante*, at pp. 11, 13-14.) My reason is simple: Despite ample opportunity to do so, POST could not produce even one declaration from any of the 626 participating law enforcement agencies in this state stating that the information it places on the form entitled "Notice of Appointment/Termination" (Form 2-114) was obtained from peace officer personnel files.

The only evidence POST submitted was a declaration from its own employee, one who has not worked for a local law enforcement agency in a decade and whose critical statement was made "on information and belief." Absent a declaration from someone with personal knowledge of how local agencies currently fill out Form 2-114, the trial court, which ordered disclosure, was well within its discretion in rejecting POST's evidence as weak and

[1] Undesignated statutory references are to the Government Code.

insubstantial. And, as an appellate court, we are duty-bound to uphold this ruling.

Because it did not carry its burden of demonstrating that the Form 2-114 information is derived entirely from categorically exempt peace officer personnel records, POST cannot justify withholding the requested data under section 6254, subdivision (k). On the other hand, balancing the officers' right to personal privacy against the public's right to the information sought by real party in interest Los Angeles Times Communications, LLC (The Times), I would conclude that the names of peace officers in POST's database are privileged and exempt from disclosure under section 6254, subdivision (c) (section 6254(c)); the remaining information requested by The Times is not so exempt and should be released by POST. I would uphold the disclosure of the information requested by The Times except for each individual officer's name, which should be excised and an anonymous tracking marker substituted in its place.

I. BACKGROUND

The Times filed a California Public Records Act (CPRA) (§ 6250 et seq.) request that POST release certain data derived from Form 2-114: peace officer names and birth dates, department names, appointment dates, appointment status, termination dates and reason for termination. When POST denied the request, The Times filed a petition for writ of mandate in the trial court, seeking release of the information. The trial court granted the

writ in part, ordering POST to disclose the first, middle and last name of each peace officer employed in the State of California between the years 1991 and 2001; the peace officer's employing department; the position in which the officer was originally employed ("appointment type new"); the date of the officer's appointment; and date, if any, of the officer's termination. The trial court refused to order release of the officers' birth dates or reasons for termination, and The Times does not challenge this portion of the order.

II. DISCUSSION

A. The Evidence Fails to Establish the Requested Information Was Obtained from Peace Officers' Personnel Records

To begin with, I agree with my colleagues that if the information local law enforcement agencies use to complete Form 2-114 was "obtained from" local agency peace officer personnel files, it would be categorically exempt from disclosure. (§ 6254, subd. (k); *Hackett v. Superior Court* (1993) 13 Cal.App.4th 96, 100.) My disagreement stems from the manner in which they overturn the trial court's implied finding that this was not the case.

The *only* evidence POST submitted on where local agencies obtain the information to complete Form 2-114 came from the declaration of its Information Services Bureau Chief Paul Harman. Harman began his employment with POST in 1993. At some unspecified time before that, he was employed as a peace officer by the Los Angeles County Sheriff's Department, where he became

familiar with peace officer personnel files. In the key sentence on which the majority relies to reverse this case, Harman cryptically states "on information and belief" that "the personnel information required [to be submitted under California Code of Regulations, title 11, section 1003 (Regulation 1003)] is derived from the personnel files and records of peace officers maintained by participating departments."

By ordering disclosure, the trial court made an implied finding, contrary to Harman's averment, that Form 2-114 information is *not* derived from confidential peace officer files. That finding may not be disturbed unless it was arbitrary or unreasonable. (See *Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169, 173-174 [in CPRA proceedings, the appellate court must defer to the trial court's express or implied factual determinations].) Thus, the appropriate issue for review is whether it was reasonable for the trial court to reject a statement made on information and belief by someone who possesses no personal knowledge about how local agencies currently fill out Form 2-114. The majority opinion fails to acknowledge this as the standard of review, yet it cannot reach the result it does without concluding that the trial court was *compelled* to believe Harman's declaration.

In my view, the trial court's refusal to credit Harman's ineffectual declaration was reasonable and well founded. While Harman may have been familiar at one time with the Los Angeles County Sheriff's Department's personnel records, he professed no

personal knowledge of how that department currently operates with regard to compliance with Regulation 1003. Nor is there any indication that the foundation for Harman's opinion is based on inspecting or observing how local law enforcement agencies compile the data that they submit to POST.

"[T]he applicable standards of appellate review of a judgment based on affidavits or declarations are the same as for a judgment following oral testimony: . . . we must presume the court found every fact and drew every permissible inference necessary to support its judgment, and *defer to its determination of credibility of the witnesses and the weight of the evidence*." (*Betz v. Pankow* (1993) 16 Cal.App.4th 919, 923, italics added.) Evidence Code section 412 states: "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." This bedrock principle, on which juries are instructed on a daily basis (see CACI 203 [former BAJI No. 2.02]), is fully applicable here. We have no right to disturb the trial court's refusal to credit a statement made "on information and belief" by a declarant who tiptoes around, if not wholly avoids, the key issue in the case.

Overlooking the above principles, the majority concludes that Harman's declaration must be believed in the absence of contrary proof introduced by The Times or another "logical explanation" for the source of the information. (Maj. opn.,

ante, p. 13.) Such reasoning reflects a topsy-turvy view of the allocation of the burden of proof in CPRA proceedings.

As the majority concedes (maj. opn., *ante*, p. 5), CPRA's statutory exemptions are to be construed narrowly and the burden is *on the public agency* to show why disclosure should be withheld under its express provisions. (§ 6255, subd. (a); *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1425.) Just recently, the voters of this state overwhelmingly approved Proposition 59,[2] enshrining the principle that the disclosure provisions of CPRA be construed broadly into our state Constitution and declaring access to government records and meetings to be a civil right.

Accordingly, The Times had no burden to come forward with evidence supporting its right to a public record. Indeed, given its lack of access to the internal workings of state and local agencies, it is completely unrealistic to expect it to have done so. The burden was squarely on POST, as the withholding agency, to show by competent evidence that the requested data was exempt.

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[2] Article I, section 3 of the California Constitution was amended by Proposition 59 and now provides, in relevant part: "(b)(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision [(November 3, 2004)], *shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. . . .*" (Cal. Const., art. I, § 3, subd. (b)(2), added by initiative, Gen. Elec. (Nov. 2, 2004), commonly known as Prop. 59, italics added.)

The majority suggests that The Times would require POST to produce declarations from 626 law enforcement departments on this issue. (Maj. opn., *ante*, p. 12.) Had POST submitted two or three declarations from participating local law enforcement agencies regarding the source of information used to complete Form 2-114, a reasonable inference could be drawn that other agencies perform their functions in a similar manner. Yet POST did not submit even one.

I also disagree that it is "a matter of common sense" that the information contained in Form 2-114 is extracted from peace officer personnel records. (Maj. opn., *ante*, at p. 13.) First of all, since when does "common sense" serve as a substitute for competent evidence? Second, even the majority's appeal to "common sense" is flawed, because the record does not reveal how the computerized operations of the participating departments work.[3] It is not inconceivable that all of the required information can be inputted into Form 2-114 without ever delving into the contents of a peace officer's personnel file.

Finally, the majority's assertion that affidavits on information and belief may be sufficient to carry the day "'where the facts would otherwise be difficult or impossible to

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[3] Harman states that since April 2000, POST receives the required information under Regulation 1003 from an unspecified number of participating departments through an "Electronic Interchange System (EDI)," which adds the transmitted information directly to POST's computerized database system. Departments that do not use the EDI must submit a hard copy of the Form 2-114.

establish'" (maj. opn., *ante*, at p. 12, quoting *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 87), is a makeweight. There is no hint in this record that it would be "difficult or impossible" to prove the facts set forth in Harman's declaration. On the contrary, if "common sense" tells us anything, it indicates that proof of these facts would be rather easy. I would therefore uphold the trial court's implied finding that POST did not carry its burden of proving that the data sought was categorically exempt.

B. Section 6254 (c)

In section 6254(c), the Legislature has protected as exempt "[*p*]*ersonnel*, medical, *or similar files*, the disclosure of which would constitute an unwarranted invasion of personal privacy." (Italics added.) Clearly, POST's compilation of officer names, statuses, appointment and termination dates and the like, is a "personnel . . . or similar" file under any sensible meaning of the term.[4]

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[4] The Times asserts that POST waived the privacy exemption in section 6254(c) because it did not specifically cite the subsection when it initially refused to release the records. In fact, POST's refusal letter asserted that The Times sought "confidential information which is obtained from peace officer personnel files" and referenced, albeit generally, the exemptions listed in section 6254. Furthermore, POST cited section 6254(c) as an affirmative defense in its answer to The Times' petition for writ of mandate. The applicability of this exemption has been briefed since the inception of this litigation. Thus, I conclude POST did not waive its right to rely on section 6254(c) as a ground for nondisclosure.

"'The purpose of the exemption for private records embodied in subdivision (c) of section 6254 is to " . . . 'protect information of a highly personal nature which is on file with a public agency . . . [to] typically apply to public employee's personnel folders or sensitive personal information which individuals *must* submit to government.'" (*San Gabriel Tribune v. Superior Court* [(1983)] 143 Cal.App.3d [762,] 777 . . . .)'" (*City of Los Angeles v. Superior Court* (1996) 41 Cal.App.4th 1083, 1091, quoting *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 902, italics added by *Register*.) By parity of reasoning, the exemption should also protect peace officers, whose participating departments are compelled by law to submit personal information about them to POST in furtherance of POST's laudable purposes.

The language "unwarranted invasion of personal privacy" in section 6254(c) necessarily requires a balancing of two competing interests: the privacy interest of this state's peace officers in personnel information appearing in POST's files and the public interest in compelling disclosure. (See § 6250; *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 345.)

While a POST personnel file may not fit the strict definition of an employer-maintained "peace officer personnel record" as set forth in Penal Code section 832.8, it certainly is a close cousin. I recognize that the identities, employment histories, and statuses of peace officers are all facts that commonly appear in an employer's personnel records. The only

difference is that the information here resides in a statewide database kept by POST, rather than appearing in individual departmental files. The Legislature has made no secret of its preference for keeping sensitive police personnel information out of public view unless strong reasons exist for disclosure. (See *Garden Grove Police Department v. Superior Court* (2001) 89 Cal.App.4th 430, 434 [officers' birth dates are confidential]; *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 426 [*Pitchess*[5] discovery statutes reflect Legislature's intent to confer confidential status on police personnel records to protect officers from "'unnecessary annoyance, embarrassment or oppression' (Evid. Code, § 1045, subd. (d))"]; *Hackett v. Superior Court*, *supra*, 13 Cal.App.4th at pp. 100-101 [police officer personnel files, including home addresses and "similar data" are privileged].) Thus, the Legislature's recognition of peace officer personnel files as confidential in other contexts must be accorded considerable weight.

I agree with the majority (*ante*, pp. 18-19) that *New York Times Co. v. Superior Court* (1997) 52 Cal.App.4th 97 does not sanction the massive release of the names and employment histories of thousands of peace officers throughout the state. *New York Times* only dealt with a situation where a police department attempted to shield what otherwise would be clearly

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[5] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

public information by placing it into officers' personnel files. (*Id*. at pp. 99, 103.) The case thus does not assist us in balancing the public's right to know against the officers' right to privacy.

In *Teamsters Local 856 v. Priceless, LLC* (2003) 112 Cal.App.4th 1500 (*Teamsters Local 856*), the Court of Appeal, First Appellate District, Division One, recognized that public employees enjoy a legally protected right of privacy in their personnel files. (*Id.* at p. 1512.) Accordingly, a newspaper could not, by filing a CPRA request, secure the wholesale disclosure of names, titles and compensation paid to identified employees of various Bay Area cities. (*Id*. at pp. 1512-1513.)

The right of peace officers to keep information in their personnel records private is entitled to no less dignity. Indeed, given the dangerous and demanding work they perform, the potential for mischief caused by indiscriminate release of personnel information to the public at large, and the Legislature's articulated concern for protecting peace officers' personnel information as exemplified by the *Pitchess* statutes,[6] the need to protect the privacy of law enforcement officers is even more compelling.

On the disclosure side of the scale is the people's right to obtain access to the workings of their government. "Implicit

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[6] See Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045.

in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651.) The CPRA was passed "to ensure public access to vital information about the government's conduct of its business." (*Id*. at p. 656.)

The Times articulates the public interest in the subject information thusly: "The Times seeks to evaluate employment trends in the state's law enforcement agencies. The Los Angeles Police Department [(LAPD)], for example, is chronically understaffed and has an unusually high rate of attrition. The information that the Superior Court ordered POST to disclose may reveal important trends. Do LAPD officers stay with the Department for less time on average than officers in other large cities? Where do those LAPD officers go when they leave the Department? . . . The information from POST also may reveal whether certain agencies have more experienced officers."

These are valid concerns. I agree with The Times that there is a clear public interest in making visible the employment trends of law enforcement agencies, which are funded by and are ultimately accountable to the people. (Cf. *New York Times Co. v. Superior Court*, *supra*, 52 Cal.App.4th at p. 104.) Knowledge of the retention and hiring practices of police

departments throughout the state is a legitimate objective and consonant with the policy behind the CPRA.

However, I do not feel that disclosure of *peace officer names*, such that the remaining employment data may be connected to individual employees and exposed to the glare of public view, is indispensable to the accomplishment of this goal. The trial court may allow The Times to analyze the information it desires without compromising peace officer privacy by redacting the names of individuals and replacing them with another, nonidentifying tracking designation.

There is precedent for a redaction of individual names and personal information while allowing disclosure of raw data that is likely to shed light on the workings of public agencies. In *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008 (*San Jose*), a newspaper sought records kept by the city regarding complaints of airport noise, including the names, addresses and telephone numbers of individual complainants. The city offered to provide a list indicating the date and time of each call and the nature of the complaint, but declined to provide personal identifying information regarding the complainants. (*Id*. at pp. 1012-1013.) The newspaper claimed that only disclosure of the complainants' identities would assist the public in determining whether the city was "meeting its obligations under state law to handle airport noise complaints." (*Id*. at p. 1022.) The Court of Appeal rejected that argument, holding that "the public interest in protecting

the privacy of noise complainants and in preventing a chilling effect on complaints, clearly outweighs the public interest in disclosure of complainants' names, addresses, and telephone numbers." (*Id*. at p. 1012.) In support of its conclusion, the court noted "in this particular case, City discloses a substantial amount of detailed information about public complaints of airport noise. This information provides the public with data to analyze City's performance of its duty to record, investigate and report airport noise complaints." (*Id*. at p. 1023.)

More recently, in *Teamsters Local 856*, a trial court issued a preliminary injunction that permitted release of title and salary information of city employees but forbade the cities from releasing the information in a form that would identify the salaries of individual, named employees. (*Teamsters Local 856, supra,* 112 Cal.App.4th at pp. 1507-1508.) Consequently, "the defendant Cities released detailed listings of salaries, itemized as to each city employee, but identifying the particular employee only by job title." (*Id*. at p. 1508.)

The appellate court affirmed. After citing the legislative policy in favor of protecting the privacy of personnel information, as well as federal Freedom of Information Act cases barring release of information that would compromise the privacy of government workers (*Teamsters Local 856, supra,* 112 Cal.App.4th at pp. 1514-1515), the appellate court found that the trial court had struck the correct balance between the

competing interests of employee privacy and the public's right to know about the workings of government. (*Id.* at pp. 1519-1523.)

Thus, I would conclude that while The Times is entitled to employment tracking information, the peace officers in POST's database are equally entitled to keep private their identities. As observed in *San Jose*, "[i]n determining whether the public interest in nondisclosure of individuals' names and addresses outweighs the public interest in disclosure of that information, courts have evaluated whether disclosure would serve the legislative purpose of '"shed[ding] light on an agency's performance of its statutory duties."' [Citation.] Where disclosure of names and addresses would not serve this purpose, denial of the request for disclosure has been upheld." (*San Jose*, *supra*, 74 Cal.App.4th at pp. 1019-1020.) Likewise, the purpose of public disclosure statutes "'is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.'" (*Teamsters Local 856*, *supra*, 112 Cal.App.4th at p. 1520, quoting *Department of Defense v. FLRA* (1994) 510 U.S. 487, 496 [127 L.Ed.2d 325, 335].) Here, the release of the identities (i.e., names) of individual peace officers throughout the state does little to serve the public interest in obtaining insight into the operation of governmental agencies.

III. CONCLUSION

In my view, the names of the peace officers should be exempted from disclosure under section 6254(c), but the remaining information requested by The Times is not so exempt and should be released. Disclosure of the data ordered by the trial court with redaction of peace officers' names to shield their identities fairly balances the competing legislative concerns of preserving individual privacy while promoting openness in government.

Thus, I would uphold the trial court's order that POST disclose the employing department names, appointment type (new), date of appointment, and date of termination, if any. I would issue a peremptory writ directing the trial court to modify its disclosure order to excise the names of individual officers and to require that a random identifier be assigned to each individual officer's record to assist in tracking employment trends or the movement of officers in, out of, or between different departments.

I would also remand The Times' request for an award of attorney fees and costs pursuant to section 6259, subdivision (d), to the trial court for a full evidentiary hearing upon appropriate motion. (See *Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 631, fn. 11.)

BUTZ, J.