Filed 2/7/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LONG BEACH POLICE OFFICERS ASSOCIATION, Plaintiff and Appellant, v. CITY OF LONG BEACH et al., Defendants and Appellants; LOS ANGELES TIMES COMMUNICATIONS LLC, Real Party in Interest and Respondent.	B231245 (Los Angeles County Super. Ct. No. NC055491)

APPEAL from an order of the Superior Court of Los Angeles County. Patrick T. Madden, Judge. Affirmed.

Law Offices of James E. Trott, James E. Trott and Larry J. Roberts for Plaintiff and Appellant.

Robert E. Shannon, City Attorney, Christina L. Checel, Deputy City Attorney, for Defendants and Appellants.

Los Angeles Times Communications LLC, Karlene W. Goller; Davis Wright Tremaine, Kelli L. Sager, Rochelle L. Wilcox and Jeff Glasser for Real Party in Interest and Respondent.

Stone Busailah and Michael P. Stone for Los Angeles Police Protective League as Amicus Curiae on behalf of Plaintiffs and Appellants Long Beach Police Officers Association.

ACLU Foundation of Southern California, Peter Bibring; ACLU Foundation of Northern California, Michael T. Risher; ACLU Foundation of San Diego & Imperial Counties and David Blair-Loy as Amici Curiae on behalf of Real Party in Interest and Respondent Los Angeles Times Communications LLC.

Sheppard, Mullin, Richter & Hampton and Guylyn R. Cummins as Amicus Curiae on behalf of Real Party in Interest and Respondent Los Angeles Times Communications LLC.

* * * * * *

Real party in interest and respondent Los Angeles Times Communications LLC (Times) made a request under the California Public Records Act (Gov. Code, § 6250 et seq.; Cal. Const., art. I, § 3(b))[1] (CPRA) seeking the names of police officers involved in a December 2010 officer-involved shooting in Long Beach and those involved in officer-involved shootings in Long Beach for the preceding five years. Plaintiff and appellant the Long Beach Police Officers Association (LBPOA) brought an action against defendants and appellants the City of Long Beach, the Long Beach Police Department and Chief of Police James McDonnell (collectively City) seeking to enjoin disclosure of the names. After initially issuing a temporary restraining order, the trial court granted the Times's request to dissolve the order and denied, without prejudice, the LBPOA's request for an injunction.

We affirm. The trial court properly ruled that officer names are not rendered confidential by any of the statutory exemptions contained in the CPRA.

---

[1] Unless otherwise indicated, all further statutory citations are to the Government Code.

FACTUAL AND PROCEDURAL BACKGROUND

On December 12, 2010, Long Beach police officers shot and killed Douglas Zerby, an intoxicated, unarmed 35-year-old man who was carrying a garden hose nozzle that officers mistook for a gun. Following the shooting, Times reporter Richard Winton made a CPRA request to the City seeking "[t]he names of Long Beach police officers involved in the December 12 office[r] involved shooting in the 5300 block of East Ocean Boulevard" and "[t]he names of Long Beach police officers involved in officer involved shootings from Jan. 1[,] 2005 to Dec. 11, 2010." The City initially responded that it intended to comply with the request by January 10, 2011.

After the City informed the LBPOA of the request and its intent to comply, the LBPOA filed a verified complaint against the City, seeking a temporary restraining order and preliminary and permanent injunctions to prevent the release of the names. In support of the LBPOA's request, LBPOA president Steve James averred he was aware that the shooting review which takes place following an officer-involved shooting can lead to findings resulting in an internal affairs investigation. He expressed safety concerns about releasing the names of shooting officers, referring to an incident in which an anonymous blog posting contained a threat to a shooting officer's family and to another incident in which an officer involved in a shooting was reassigned to another area following death threats. He also described the ease with which the Internet allows an individual to discover personal information about another and opined that "[t]he best way to keep officers safe from these unknown people who may try to bring harm is to not let them know which officer was involved."

Following a December 30, 2010 hearing, the trial court issued a temporary restraining order preventing the release of the officers' names. Finding that the Times should have been given notice of the proceedings, the trial court directed the LBPOA to give notice and set the matter for a preliminary injunction hearing.

Thereafter, the Times moved to intervene and filed opposition. The City filed a memorandum in which it aligned itself with the LBPOA. In support of the City's position, Long Beach Police Department Lieutenant Lloyd Cox averred that department

policy was not to release the names of officers involved in an officer-involved shooting because those officers become the subject of an administrative and/or criminal investigation, and the investigative materials become part of the officers' personnel records. He further declared that upon completion of the investigative process, the officer names were kept confidential unless a motion was filed pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) or they were sought through discovery in a civil or criminal case. He indicated that, since late 2007, the police department had issued eight officer safety bulletins about potential threats or retaliation against officers, two of which related to officer-involved shootings. Noting that knowing someone's name can be the gateway to a world of information about him or her through the Internet, Lieutenant Cox declared that "the Long Beach Police Department insists on protecting the identity of its officers, when those officers are involved in critical incidents, including shootings, in order to ensure their safety and the safety of their families."

Following a January 18, 2011 hearing, the trial court issued an order granting the Times's request to intervene and to dissolve the temporary restraining order, and denying without prejudice the LBPOA's preliminary injunction request. As part of the order, the trial court sustained the Times's evidentiary objections to James's declaration. Specifically, it sustained objections to James's generalized statements about safety concerns, his description of the two incidents of anonymous threats and his opinions about Internet access and officer safety. The Times did not file objections to Lieutenant Cox's declaration.

Addressing the first requisite element of preliminary injunctive relief, the trial court ruled that the LBPOA had not demonstrated a likelihood of success on the merits. It concluded that the CPRA required disclosure of officer names unless the LBPOA or the City established the names were exempt from disclosure under a statutory exception. The trial court ruled that the release of the names was not an unwarranted invasion of personal privacy (§ 6254, subd. (c)), the names could not be shielded as an investigative report (§ 6254, subd. (f)), and the names were not protected as a part of a police officer's personnel record (§ 6254, subd. (k); Pen. Code, §§ 832.7 & 837.8). Nor did the trial

court find that the public interest in nondisclosure outweighed the public interest served by disclosure of the names. (§ 6255, subd. (a).)

With respect to the element of irreparable harm, the trial court ruled that neither the LBPOA nor the City had demonstrated that any officer was likely to suffer harmful consequences as a result of disclosure. But it recognized that, potentially, a showing could be made that disclosing the identity of a particular officer would compromise his or her safety. Accordingly, the trial court ruled that its denial was without prejudice to renewed requests by the LBPOA or the City to seek, upon a proper evidentiary showing, an order protecting the names of particular officers from disclosure. Finding that the balance of hardships element had been addressed in connection with the other elements, the trial court reasoned that the present balance weighed in favor of disclosure but, depending on a future evidentiary showing, could shift with respect to the name of a particular officer.

Thereafter, the trial court granted the LBPOA's application for a 30-day stay to file for writ relief in this Court. In February 2011, the LBPOA and the City filed petitions for writ of mandate and the LBPOA simultaneously filed a notice of appeal from the trial court's order. We issued an order providing that the trial court's order was directly appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(6) and had been appealed by the LBPOA. We construed the LBPOA's petition as a petition for writ of supersedeas, which we granted to stay the trial court's order, and denied the petition for writ of mandate in all other respects. The City filed a separate notice of appeal in March 2011.

DISCUSSION

Appellants contend that the trial court misconstrued both the applicable statutory scheme and California Supreme Court authority in ordering the disclosure of officer names. They also contend that the trial court engaged in an improper balancing, failing

to accord due weight to the interests served by nondisclosure. We disagree with their contentions.[2]

I. The Statutory Scheme and Standard of Review.

"In 1968, the Legislature enacted the CPRA 'for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies. [Citation.]' [Citation.]" (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1281 (*Copley Press*).) Consistent with this purpose, the Legislature declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (§ 6250.) Since 2004, the California Constitution has confirmed the principle: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, . . . the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I, § 3, subd. (b)(1); see *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 329 (*International Federation*); *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 288 (*POST*).)

But the right of access to public records under the CPRA has never been absolute. (*Copley Press, supra*, 39 Cal.4th at p. 1282.) In section 6250, the Legislature declared it was "'mindful of the right of individuals to privacy,'" and the dual concern for privacy and disclosure appears in numerous provisions throughout the CPRA. (*Copley Press, supra*, at p. 1282.) Likewise, the Constitution recognizes the right to privacy, providing that nothing in article 1, section 3, subdivision (b) is intended to supersede or modify the constitutional right of privacy or the statutes or rules guaranteeing that right, or to repeal

---

[2] We likewise disagree with the Times's contention that the LBPOA lacks standing to bring this action. Currently nothing in the statutory scheme prohibits a third party or other public agency whose interests will be affected by disclosure from bringing an action under general equitable principles. (See *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 431; *County of Santa Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 130.)

or nullify any constitutional or statutory exception to the right of access to public records. (Cal. Const., art. 1, § 3, subds. (b)(3) & (b)(5).)

The CPRA defines "'[p]ublic records'" to include "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."[3] (§ 6252, subd. (e).) According to the Legislature, the definition of public records "'is intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed. Only purely personal information unrelated to "the conduct of the public's business" could be considered exempt from this definition . . . .' (Assem. Statewide Information Policy Com., Final Rep. (Mar. 1970) 1 Assem. J. (1970 Reg. Sess.) appen. p. 9.)" (*POST, supra*, 42 Cal.4th at p. 288, fn. 3.)

Section 6253, subdivisions (a) and (b) provide that public records are open to inspection and must be made available to the public upon request, unless they are exempt from disclosure by an express provision of law. Section 6254 exempts from disclosure numerous, specifically defined categories of records.[4] Pertinent here, section 6254, subdivision (c) exempts from disclosure "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy"; and subdivision (k) exempts "[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

---

[3] The definition of "[w]riting" is correspondingly broad and "means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." (§ 6252, subd. (g).)

[4] The Legislature has recently amended section 6254 to add minor modifications that do not affect our analysis of the statute. (See Stats. 2010, c. 178 (Sen. Bill No. 1115), § 33, operative Jan. 1, 2012.)

Code relating to privilege."[5] Further, "[s]ection 6255, subdivision (a), often referred to as the 'catchall exemption,' provides that an otherwise nonexempt record may be withheld if 'on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.'" (*Sonoma County Employees' Retirement Assn. v. Superior Court* (2011) 198 Cal.App.4th 986, 991.)

The exemption provided by section 6254, subdivision (k), is not an independent exemption, but rather, "'merely incorporates other prohibitions established by law. [Citations.]' [Citation.]" (*Copley Press, supra,* 39 Cal.4th at p. 1283.) In 1998, the Legislature added section 6275 to the CPRA, which provides a nonexclusive list of statutes that operate to exempt records, or portions thereof, from disclosure. (*Copley Press, supra*, at p. 1283.) Among the statutes identified (see § 6276.34), Penal Code section 832.7, subdivision (a), exempts from disclosure "[p]eace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records," except by discovery pursuant to Evidence Code sections 1043 and 1046.[6] Penal Code section 832.8 defines "personnel records" as used in Penal Code section 832.7 to mean "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. [¶]

---

[5] Appellants do not claim that the requested information should be withheld under a separate statutory exemption, section 6254, subdivision (f), which exempts a limited category of records of complaints or investigations conducted by a local law enforcement agency, but excludes from the exemption the names of persons involved unless the disclosure would endanger the person's safety or the completion of the investigation.

[6] Again, appellants do not contend that the requested information falls within the second category of records identified in Penal Code section 832.7, subdivision (a), records maintained pursuant to Penal Code section 832.5, a statute which mandates that "[e]ach department or agency in this state that employs peace officers shall establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies . . . ." (Pen. Code, § 832.5, subd. (a)(1).)

(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."

"Statutory exemptions from compelled disclosure under the CPRA are narrowly construed. [Citations.] The burden of proving a specific statutory exemption applies (or that the public interest in nondisclosure clearly outweighs the interest in disclosure) is on the proponent of nondisclosure. [Citations.]" (*Sonoma County Employees' Retirement Assn. v. Superior Court*, *supra*, 198 Cal.App.4th at p. 992.) In reviewing an order prohibiting disclosure under the CPRA, "[f]actual findings made by the trial court will be upheld if based on substantial evidence. But the interpretation of the [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.)" (*BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 750; accord, *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1336; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1416.)

II. The LBPOA Did Not Meet Its Burden to Show That Officer Names Are Exempt from Disclosure Under the CPRA.

The trial court concluded that the LBPOA and the City failed to show that the information requested by the Times—names of Long Beach police officers involved in officer-involved shootings between January 2005 and December 2010—fell within any CPRA exemption. To reach its conclusion, the trial court relied on a series of cases interpreting the CPRA and applying it to information about officers, including their names.

In *New York Times Co. v. Superior Court* (1997) 52 Cal.App.4th 97, 99 (*New York Times*), disapproved on another point in *Copley Press*, *supra*, 39 Cal.4th at page 1298,

Division Six of this district held that the CPRA required disclosure of the names of officers who fired shots at a specific victim. There, copies of an internal investigative report of the shooting were placed in the officers' personal files, and the appellate court rejected the argument that the officers' names were exempt from disclosure as part of those files, reasoning that what was sought "are simply the names of officers who fired their weapons while engaged in the performance of their duties" and concluding that a public agency may not avoid disclosure "by placing into a personnel file what would otherwise be unrestricted information." (*New York Times, supra*, at pp. 102, 103.) It likewise rejected the sheriff's arguments that disclosure impaired the officers' privacy interests (§ 6254, subd. (c)) or that any balancing weighed in favor of nondisclosure under section 6255, reasoning that "[t]he perceived harm to deputies from revelation of their names as having fired their weapons in the line of duty resulting in a death does not outweigh the public interest served in disclosure of their names." (*New York Times, supra*, at p. 104.)

The Supreme Court in *Copley Press, supra,* 39 Cal.4th 1272, reached a contrary conclusion regarding the disclosure of civil service commission records relating to a deputy sheriff's administrative appeal of a disciplinary matter, where the information sought included "the deputy's name and all documents, evidence, and audiotapes from the appeal." (*Id.* at pp. 1279, 1280.) The Court concluded that the disciplinary appeal records qualified under Penal Code section 832.7, subdivision (a), as personnel records maintained by the agency pursuant to Penal Code section 832.5. (*Copley Press, supra*, at pp. 1288–1293.) Specifically addressing why the deputy's identity was exempt from disclosure, the *Copley Press* Court concluded that, read together, Penal Code section 832.7, subdivisions (a) and (c), were "designed to protect, among other things, 'the identity of officers' subject to complaints. [Citations.]" (*Copley Press, supra*, at p. 1297.) In the context of this conclusion, the Court criticized the broad and unqualified declaration in *New York Times, supra,* 52 Cal.App.4th at page 101 "that '[u]nder [Penal Code] sections 832.7 and 832.8, an individual's name is not exempt from disclosure.' [Citation.] As the preceding discussion of the statutory language and legislative history

demonstrates, the court's unsupported assertion is simply incorrect, at least insofar as it applies to disciplinary matters like the one at issue here. Thus, we disapprove *New York Times Co. v. Superior Court, supra,* 52 Cal.App.4th 97, to the extent it is inconsistent with the preceding discussion, and we reject Copley's reliance on that decision." (*Copley Press, supra,* 39 Cal.4th at p. 1298.)

One year later, the Supreme Court in *POST, supra*, 42 Cal.4th 278, held the CPRA required the disclosure of officer names, employing departments and hiring and termination dates included in the database of the Commission on Peace Officer Standards and Training, an agency that established standards and provided educational and training programs for peace officers. (*Id.* at pp. 284–285.) Examining both the language and legislative history of Penal Code section 832.8, the Court found no basis to conclude that type of information constituted components of a peace officer's personnel record. (*POST, supra,* at pp. 289–293.) The Court explained: "The categories of information listed in section 832.8 certainly are sufficiently broad to serve the purposes of the legislation and to protect the legitimate privacy interests of peace officers. To extend the statute's protection to information not included within any of the enumerated categories merely because that information is contained in a file that also includes the type of confidential information specified in the statute would serve no legitimate purpose and would lead to arbitrary results. Therefore, we conclude that peace officer personnel records include only the types of information enumerated in section 832.8." (*POST, supra*, at p. 293.)

Further, the Court declined to construe any of the categories of information identified in Penal Code section 832.8 to encompass officer identities, finding it "unlikely that the Legislature contemplated that the identification of an individual as a peace officer, unconnected to any of the information it defined as part of a personnel record, would be rendered confidential by section 832.8." (*POST, supra,* 42 Cal.4th at pp. 295–296.) *POST* distinguished *Copley Press, supra,* 39 Cal.4th 1272, on the ground the information sought did "not involve the identification of an individual as the officer involved in an incident that was the subject of a complaint or disciplinary investigation.

The officers' names, employing departments, and dates of employment were not sought in conjunction with any of the personal or sensitive information that the statute seeks to protect." (*POST, supra,* at p. 299.) Finally, the Court concluded that "'[a] mere assertion of possible endangerment'" to officers and their families was insufficient to justify nondisclosure under section 6254, subdivision (c) or section 6255, but allowed the commission to make a further showing in the trial court that information concerning particular officers should be exempt from disclosure. (*POST, supra*, at pp. 301, 302, 303.)

The trial court here also relied on an Attorney General opinion which synthesized the foregoing cases to "conclude that, in response to a request made under the [CPRA] for the names of peace officers involved in a critical incident, such as one in which lethal force was used, a law enforcement agency must disclose those names unless, on the facts of the particular case, the public interest served by not disclosing the names clearly outweighs the public interest served by disclosing the names." (91 Ops.Cal.Atty.Gen. 11 at *6 (May 19, 2008); see *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal. 3d 1, 17 ["'Opinions of the Attorney General, while not binding, are entitled to great weight'" and "'are persuasive "since the Legislature is presumed to be cognizant of that construction of the statute"'"]; see also *International Federation, supra,* 42 Cal.4th at p. 331 [relying on three Attorney General opinions for the proposition that "'the name of every public officer and employee . . . is a matter of public record'"].)

Relying heavily on *POST, supra*, 42 Cal.4th 278, the trial court here concluded that appellants failed to show the information sought by the Times fell within any of the statutory exemptions. We share the view that relevant case law leads to the inexorable conclusion that the names of officers involved in officer-involved shootings over a five-year period must be disclosed under the CPRA, absent any particularized showing of the interests served by nondisclosure. Notwithstanding *POST,* appellants maintain that the statutory scheme allows for nondisclosure when officers are linked to a critical incident and internally investigated, and that the privacy interests of officers involved in a

shooting must be deemed paramount due to the potential threat to their safety stemming from disclosure. Accordingly, we examine each of the claimed exemptions in turn.

A. Officer Names Are Not Exempt Under Section 6254, Subdivision (k) Via Penal Code Sections 832.7 and 832.8.

Addressing the application of section 6254, subdivision (k), the trial court ruled: "Because the information sought does not fall into any of the 'personnel records' categories listed in Penal Code § 832.8, it is not within the privilege created by Penal Code § 832.7." In evaluating whether the names of officers involved in officer-involved shootings are protected from disclosure by Penal Code sections 832.7 and 832.8 as part of a peace officer personnel record, we are guided by well-settled principles of statutory interpretation. "Our role in construing a statute is to ascertain and give effect to the Legislature's intent. 'To determine that intent, a court first looks to the statutory words themselves, giving to the language its usual and ordinary import. The court construes statutory words in context, keeping in mind the statutory purpose. Statutory sections relating to the same subject matter must be harmonized, both internally and with each other, to the extent possible.' [Citations.] 'Furthermore, we consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.' [Citation.] At all times, '[o]ur foremost task remains ascertainment of the legislative intent, including consideration of "the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness." [Citation.]' [Citation.]" (*Albillo v. Intermodal Container Services, Inc.* (2003) 114 Cal.App.4th 190, 200.)

Penal Code section 832.7 provides for the confidentiality of "[p]eace officer or custodial officer personnel records" and "information obtained from these records . . . ." In turn, Penal Code section 832.8 defines peace officer personnel records as "any file maintained under that individual's name by his or her employing agency and containing records relating to any of" a list of enumerated categories of information. The Legislature enacted these statutes to codify the procedures for discovery of peace officer

personnel files; those discovery motions had come to be known as "*Pitchess* motions" following the Supreme Court's decision in *Pitchess, supra,* 11 Cal.3d 531. (See generally *Zanone v. City of Whittier* (2008) 162 Cal.App.4th 174, 186 & fn. 13, 187.) The legislative purpose of the statutes was to "provide retention of relevant records while imposing limitations upon their discovery and dissemination," and to protect peace officer personnel records from "random discovery by defendants asserting self-defense to charges of criminal assault upon a police officer."[7] (*San Francisco Police Officers' Assn. v. Superior Court* (1988) 202 Cal.App.3d 183, 190.)

Nowhere in either the language of Penal Code sections 832.7 and 832.8 or the statutes' legislative history is there any indication that these provisions were designed to protect the confidentiality of officer names when those names are untethered to one of the specified components of the officer's personnel file. As *POST, supra,* 42 Cal.4th at page 295, concluded: "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." Consequently, "the information sought by the Times is not protected from disclosure by section 832.7 unless the request encompasses one of the types of information enumerated in section 832.8." (*POST, supra,* at p. 294.)

1. Personal data.

Penal Code section 832.8, subdivision (a) describes records relating to "[p]ersonal data, including marital status, family members, educational and employment history, home addresses, or similar information." Explaining that while a name might be characterized as "'personal data'" in a broad sense, *POST* determined that the statutory

---

[7] We grant the Times's request to take judicial notice of exhibits A and B, the legislative history of Senate Bill No. 1436 (1977-1978 Reg. Sess.), the legislation which resulted in the enactment of Penal Code sections 832.7 and 832.8, as well as related Evidence Code provisions. (See Evid. Code, §§ 452, subd. (c) & 459; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 306, fn. 2.)

term "'personal'" connoted something private, not generally known to the public. (*POST, supra,* 42 Cal.4th at p. 296 ["The information specifically listed in section 832.8, subdivision (a), is the type of information that is not generally known to persons with whom officers interact in the course of performing their official duties"].) In contrast, an officer's name is typically not private and is available to the public when an officer wears a badge depicting his or her name (Pen. Code, § 830.10) or signs a police report. (*POST, supra,* at p. 296.) *POST* found intentional the Legislature's omission of officer names from the list of personal data: "Had the Legislature intended to prevent the disclosure of officers' identities as such, an obvious solution would have been to list 'name' as an item of '[p]ersonal data' under subdivision (a) of section 832.8." (*POST, supra,* at p. 298 [citing statutes specifying an individual's name as personal or confidential information]; accord, *Sacramento County Employees' Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440, 466.) *POST* concluded that absent "a more specific indication in the statute, we hesitate to conclude that the Legislature intended to classify the identity of a public official whose activities are a matter of serious public concern as 'personal data.'" (*POST, supra,* at p. 296.)

Relying on *POST, supra*, 42 Cal.4th 278, the trial court reasoned that an officer's name is not personal data within the meaning of Penal Code section 832.8, subdivision (a), explaining: "The fact that an officer's name is linked to a critical event, such as a shooting, is not 'personal' to the officer in the same way that things like marital status, education, employment history, and the like are 'personal.'" Arguing to the contrary that an officer's involvement in a critical incident necessarily renders the officer's identity confidential, LBPOA relies on *Copley Press, supra*, 39 Cal.4th 1272, where the Court stated that "section 832.7, subdivision (a), is designed to protect, among other things, 'the identity of officers' subject to complaints. [Citations.]" (*Id.* at p. 1297.) But the Supreme Court later explained that *Copley Press* should not be construed to protect the identity of officers who are not subject to a complaint or disciplinary action. "Our decision in *Copley Press, Inc. v. Superior Court, supra*, 39 Cal.4th 1272, does not support the proposition that lists of names of peace officers,

identified in conjunction with their employing departments and dates of employment, constitute confidential personnel records." (*POST, supra,* 42 Cal.4th at p. 298.) The *POST* Court continued: "Unlike *Copley Press, Inc. v. Superior Court, supra*, 39 Cal.4th 1272, . . . the case before us does not involve the identification of an individual as the officer involved in an incident that was the subject of a complaint or disciplinary investigation. The officers' names, employing departments, and dates of employment were not sought in conjunction with any of the personal or sensitive information that the statute seeks to protect. We conclude that the information ordered to be disclosed by the Commission is not '[p]ersonal data' within the meaning of section 832.8, subdivision (a)."[8] (*POST, supra,* at p. 299.)

Importantly, the *POST* Court expressly retreated from any disapproval of *New York Times, supra*, 52 Cal.App.4th 97, explaining: "We disagreed with the statement in [*New York Times*] that '"[u]nder Penal Code sections 832.7 and 832.8, an individual's name is not exempt from disclosure,"' but our disagreement was qualified: we concluded that this broad assertion was incorrect 'at least insofar as it applies to disciplinary matters like the one at issue here.' [Citation.]" (*POST, supra*, 42 Cal.4th at p. 298.) Moreover, the *POST* Court cited with approval a separate statement from *New York Times* concerning the public's interest in the "identity and activities" of its peace officers. (*POST, supra*, at p. 297 ["'In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers'"].) We agree with the Attorney General that the Supreme Court's deliberate reliance on *New York Times*, and the limiting of its previous disapproval to an isolated sentence of that case, demonstrate

---

[8] In this manner, *POST* effectively disposed of the example posited by the City that a request for a specific category of officer names—i.e., those officers who have had cancer within the past five years—could effectively amount to the disclosure of protected personal data. (See Pen. Code, § 832.8, subd. (b) [exempting medical history from disclosure].) The City's example ignores the distinction between information, such as medical history, specified in Penal Code section 832.8 and therefore protected from disclosure, and information such as involvement in a shooting or other critical incident that is not. (See *POST, supra,* 42 Cal.4th at p. 294.)

the continued viability of *New York Times*. (See 91 Ops.Cal.Atty.Gen. at *4.) According to *New York Times,* the names of officers involved in a shooting may be provided without disclosing any aspect of an officer's personnel file, including personal data. (*New York Times, supra,* 52 Cal.App.4th at pp. 103–104.)

2. Employee advancement, appraisal or discipline.

As an alternative basis for nondisclosure, the LBPOA relies on the exemption provided by Penal Code section 832.8, subdivision (d) for "[e]mployee advancement, appraisal, or discipline." It points to the City's internal policies, which require an internal investigation of an officer involved in a shooting that can result in disciplinary action being taken against the officer, and argues that officer names are therefore protected from disclosure. The City makes a related argument, characterizing the internal investigation as an "appraisal" similarly protected from disclosure under the statute.[9]

As the trial court observed, the Times's request sought only the identity of officers involved in shootings; it did not seek protected "information about whether these officers were disciplined, promoted, or about how the shootings affected the officers' performance evaluations." This observation is consistent with the Supreme Court's conclusion in *POST, supra,* 42 Cal.4th at page 295, that Penal Code section 832.8 "prevents the unauthorized disclosure of the specified types of information concerning a named officer," but does not make confidential the officer's identity. Indeed, the Court

---

9 Neither the LBPOA nor the City provided a copy of the City's internal policies to the trial court. Accordingly, we deny the City's request on appeal for judicial notice of a portion of the Manual of the Long Beach Police Department regarding firearm discharge investigations. (E.g., *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 [absent exceptional circumstances, "[r]eviewing courts generally do not take judicial notice of evidence not presented to the trial court"]; *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 332, fn. 9 [declining to take judicial notice of materials not before the trial court].) Nonetheless, Lieutenant Cox identified the relevant policy in his declaration, averring that officers involved in a shooting are subject to an administrative and/or criminal investigation for their conduct. In view of this evidence, we consider whether an officer's involvement in an internal investigation serves to exempt the officer's name from disclosure without reference to the materials in the judicial notice request.

in *International Federation, supra*, 42 Cal.4th at page 336 soundly rejected the notion that a public entity's internal policies—there, the practice of refusing to disclose salary information—can dictate the entity's disclosure obligations: "Whether or not a particular type of record is exempt should not depend upon the peculiar practice of the government entity at issue—otherwise, an agency could transform public records into private ones simply by refusing to disclose them over a period of time."

Likewise, appellants cannot transform an officer's identity into confidential information by asserting that the officer's involvement in a shooting has resulted in an appraisal or discipline. The Supreme Court has repeatedly stated that the protection afforded by Penal Code section 832.8 does not extend to information that may be contained in the same file as information expressly protected by the statute. (*POST, supra,* 42 Cal.4th at p. 291 ["we do not believe that the Legislature intended that a public agency be able to shield information from public disclosure simply by placing it in a file that contains the type of information specified in section 832.8"]; *Williams v. Superior Court* (1993) 5 Cal.4th 337, 355 ["the law does not provide, that a public agency may shield a record from public disclosure, regardless of its nature, simply by placing it in a file labelled 'investigatory'"].) Because the disclosure of the name of an officer who was involved in a shooting does not reveal any information about the officer's advancement, appraisal or discipline, the officer's name is not protected by Penal Code section 832.8, subdivision (d).

Copley Press, supra, 39 Cal.4th 1272 is consistent with this conclusion. There, because disclosure of the deputy's name was obtained from and would necessarily reveal the type of information expressly protected by Penal Code sections 832.7 and 832.8, the Court concluded that the disclosure of his name was similarly prohibited. (*Copley Press, supra,* at p. 1297; see also 91 Ops.Cal.Atty.Gen. at *3 [describing the narrow holding in *Copley Press* "that a peace officer's name may be kept confidential when it is sought *in connection with* information pertaining to a confidential matter such as an internal investigation or a disciplinary proceeding"].) Where an officer's name is neither derived from nor results in the disclosure of information about "[e]mployee advancement,

appraisal, or discipline," it is not protected from disclosure. (Pen. Code, § 832.8, subd. (d).)

3. Complaints or investigation of complaints.

Finally, appellants seek to rely on the protection afforded by Penal Code section 832.8, subdivision (e) for "[c]omplaints, or investigations of complaints, concerning an event or transaction in which [an officer] participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties." The trial court ruled the subdivision was inapplicable because "[t]he Times is not seeking information regarding complaints made about the conduct of officers who were involved in shootings, or who witnessed officer-involved shootings."

In asserting that the Times sought protected information, appellants reiterate that officers involved in a shooting are typically administratively and sometimes criminally investigated. But they employ the terms "complaint" and "investigation" virtually interchangeably, ignoring that the reference to investigations in Penal Code section 832.8, subdivision (e) pertains only to investigations of complaints. The Legislature used precise language and expressly limited the scope of Penal Code section 832.8, subdivision (e) to investigations of complaints. (See *Berkeley Police Assn. v. City of Berkeley* (2008) 167 Cal.App.4th 385, 401 ["The text of the statutes demonstrates that records pertaining to citizen complaints are protected"].) "Where the Legislature makes express statutory distinctions, we must presume it did so deliberately, giving effect to the distinctions, unless the whole scheme reveals the distinction is unintended. . . . [W]e presume the Legislature intended everything in a statutory scheme, and we should not read statutes to omit expressed language or include omitted language." (*Jurcoane v. Superior Court* (2001) 93 Cal.App.4th 886, 894.) The Legislature's express protection of investigations of complaints does not encompass the name of an officer subject to an internal investigation that is unrelated to a complaint.

The legislative history of Penal Code section 832.8 confirms that the Legislature meant what it said when it limited protection to investigations of complaints. As explained in *POST, supra,* 42 Cal.4th at page 293: "It is apparent that the Legislature's

major focus in adopting the statutory scheme here at issue was the type of record at issue in *Pitchess*—records of citizen complaints against police officers." (See also Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1436 (1977-1978 Reg. Sess.), pp. 1-4 [purpose of bill was to protect information derived from investigation of citizen complaints]; Assem. Com. on Criminal Justice, Final Analysis of Sen. Bill No. 1436 (1977-1978 Reg. Sess.), pp. 1-2 [bill designed to address the situation where a defendant charged with assault against a police officer seeks to assert self-defense, and "defense attorneys have requested discovery of the victim-officer's personnel files to determine if the officer has had complaints for use of excessive force, in order to demonstrate that the officer has a propensity for violent behavior"].) Given the express legislative purpose to assure the confidentiality of citizen complaint records by providing specific procedures for their discovery, we decline to extend the protection in Penal Code section 832.8, subdivision (e) to exempt from disclosure the name of an officer involved in a shooting where no citizen complaint is involved.

B. Officer Names Are Not Exempt Under Section 6254, Subdivision (c) or Section 6255.

The trial court further ruled that the disclosure of officer names did not constitute "an unwarranted invasion of personal privacy" under section 6254, subdivision (c).[10] It relied on *POST, supra,* 42 Cal.4th at pages 300 to 303, to conclude that an officer's privacy interest in his or her name was not significant enough to preclude disclosure, particularly when balanced against the public interest in police conduct.[11] Though

---

[10] Though the trial court did not address the characterization of officer names, "[w]e assume for purposes of analysis that the records at issue may be characterized as '[p]ersonnel . . . or similar files'" within the meaning of section 6254, subdivision (c). (*POST, supra,* 42 Cal.4th at p. 299.)

[11] Although section 6254, subdivision (c) does not expressly employ a balancing test, courts have construed the statute's requirement of an "unwarranted" invasion of privacy to require that any privacy interests be weighed against the public interest in disclosure. (E.g., *International Federation, supra,* 42 Cal.4th at pp. 329–330 ["This exemption [§ 6254, subd. (c)] requires us to balance two competing interests, . . . the public's

acknowledging that an officer could demonstrate that privacy interests predominate—for example, by showing a particularized threat to his or her safety—the trial court further concluded that appellants' evidence of speculative and generalized threats was inadequate to outweigh the public interest in disclosure.

The public interest in the conduct of peace officers is substantial: "Peace officers 'hold one of the most powerful positions in our society; our dependence on them is high and the potential for abuse of power is far from insignificant.' [Citation.] A police officer 'possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss.' [Citation.]" (*POST, supra*, 42 Cal.4th at pp. 299–300.) For these reasons, the *POST* Court concluded that the public has a legitimate interest not only in the conduct of individual officers, but also in the balance of the information sought concerning employing departments and hiring and termination dates; such information would enable the Times to trace officer movement among agencies and identify potentially inappropriate employment practices. (*Id.* at p. 300.)

As part of its public interest discussion, the Court quoted *New York Times, supra*, 52 Cal.App.4th at pages 104 to 105: "The public's legitimate interest in the identity and activities of peace officers is even greater than its interest in those of the average public servant. 'Law enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the state. In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers.'" (*POST, supra*, 42 Cal.4th at p. 297.) Significantly, the *New York Times* court reasoned that there is a heightened public interest in disclosure when an officer is involved in a shooting, stating:

---

interest in disclosure and the individual's interest in personal privacy"]; *POST, supra*, 42 Cal.4th at p. 299 ["This exemption [§ 6254, subd. (c)] requires us to balance the privacy interests of peace officers in the information at issue against the public interest in disclosure, in order to determine whether any invasion of personal privacy is 'unwarranted'"]; *New York Times, supra*, 52 Cal.App.4th at p. 104 ["Section 6254, subdivision (c), allows for a weighing of interests by the trial court"].)

"Disclosure is all the more a matter of public interest when those officers use deadly force and kill a suspect." (*New York Times, supra,* at p. 105.)

An officer's privacy interest in maintaining the confidentiality of his or her name does not outweigh the public's interest in disclosure. Recognizing that individuals have a privacy interest in controlling the disclosure of personal information, the *POST* Court declined to characterize "the fact of an individual's *public* employment, however, as a *personal* matter." (*POST, supra*, 42 Cal.4th at p. 300.) *POST* continued: "We find no well-established social norm that recognizes a need to protect the identity of all peace officers. Peace officers operate in the public realm on a daily basis, and identify themselves to the members of the public with whom they deal. Indeed, uniformed peace officers are required to wear a badge or nameplate with the officer's name or identification number. [Citation.]" (*Id*. at p. 301; accord, *New York Times, supra,* 52 Cal.App.4th at p. 104 ["the public interest here outweighs the right of the deputies to have their names withheld"]; 91 Ops.Cal.Atty.Gen. at *4 [the public has a "legitimate interest in the identity and conduct of peace officers" that "is substantial and 'both diminishes and counterbalances' any expectation that a peace officer may have that his or her identity will ordinarily be kept confidential," fn. omitted].)

Nonetheless, in certain circumstances protecting the anonymity of a peace officer may outweigh the public interest in disclosure. (*International Federation, supra,* 42 Cal.4th at p. 337.) For example, an undercover officer might be able to show that the release of his or her identity would threaten the officer's safety and effectiveness. (*POST, supra,* 42 Cal.4th at p. 303; see also *International Federation, supra,* at p. 337 ["If an officer's anonymity is essential to his or her safety, the need to protect the officer would outweigh the public interest in disclosure and would justify withholding the officer's name"].) In accordance with this authority, the trial court denied appellants' preliminary injunction request without prejudice and permitted either the LBPOA or the City to make an evidentiary showing that the disclosure of a particular officer's identity would jeopardize that officer's safety or efficacy.

Appellants contend that the trial court's resolution is inadequate and argue that they offered sufficient evidence to show that the disclosure of the name of any officer involved in a shooting would threaten officer safety. They rely on Lieutenant Cox's declaration, in which he described generally that many officer-involved shootings involve gang members or violent criminals who commonly reoffend and retaliate. Describing specific instances of threats against officers, Lieutenant Cox averred: "Since late 2007, the Long Beach Police Department has issued eight Officer Safety Bulletins to the department about potential retaliation/threats against officers, two of which were directly related to shootings involving police officers. As recently as January 10, 2011, the department was notified of graffiti at 5100 Appian Way that was approximately 4 feet high and 6 inches long which read 'Strike Kill a Cop.' The department immediately issued an officer safety memorandum informing officers of the death threat graffiti. The graffiti threat is currently under investigation and detectives will try and determine if there is any connection to recent enforcement activities, including officer involved shootings." Lieutenant Cox concluded by outlining the number of ways that the Internet enables one to locate the home address of another whose name is known.

The trial court appropriately characterized this evidence as establishing nothing "beyond the generalized and speculative invocation of fear that someone, somewhere—for example, a family member of a shooting victim—may ultimately use names that are disclosed as stepping stones to find the officers and hurt them or their families." Appellants' evidence was no different than that offered in *POST, supra,* 42 Cal.4th at page 301, where the commission asserted that because of the "'dangerous and demanding work' performed by peace officers, releasing such information to the public creates a 'potential for mischief.'" Rejecting evidence remarkably similar to the generalized statements by Lieutenant Cox about the potential threat arising from disclosure, the *POST* Court stated: "[T]he Commission argued that persons who were hostile toward law enforcement officers generally (though not toward a particular individual officer) might use the list of names to locate peace officers' addresses through other means (such as Internet resources) and harass them. It offered no evidence that such a scenario is more

than speculative, or even that it is feasible. Furthermore, by virtue of the visibility of their activities in the community, the identity of many officers is well known or readily obtainable. The Commission has not provided any convincing rationale for its assertion that disclosing a comprehensive list of officers' names and employing departments (with the exceptions noted above) would increase the threat to officer safety presented by those with a generalized hostility toward law enforcement officers." (*Id*. at pp. 302–303; fns. omitted.) The Court concluded that "'[a] mere assertion of possible endangerment' is insufficient to justify nondisclosure." (*Id.* at p. 302; see also *San Diego County Employees Retirement Assn. v. Superior Court* (2011) 196 Cal.App.4th 1228, 1246 [rejecting argument that disclosing names of retirees and their pension benefits threatened their security, in part because "'[i]t is a fact of modern life in this age of technology that names can be used to obtain other personal information from various sources, but we conclude that is not sufficient [under a state public records act] to prevent the disclosure of [public employee] names'"]; 91 Ops.Cal.Atty.Gen. at *4 [because perceived harm from disclosing peace officer's identity does not outweigh public interest in disclosure, "the names of peace officers involved in a critical incident in the performance of their official duties are not generally exempt from disclosure under Government Code section 6254(c)"].)

In the context of discussing section 6254, subdivision (c), the *POST* Court in a footnote distinguished *Stone v. FBI* (D.D.C. 1990) 727 F.Supp. 662, where the district court ruled the FBI met its burden to show a Freedom of Information Act request for the identity of officers who participated in the investigation of Robert F. Kennedy's assassination "'could reasonably be expected to constitute an unwarranted invasion of personal privacy'" under the exemption provided by Title 5 United States Code section 552(b)(7)(C). (*POST*, *supra*, 42 Cal.4th at p. 302, fn. 12.) In addition to concluding that the officers had a reasonable expectation of privacy concerning events that had happened over 20 years earlier, the *Stone* court further commented that "[w]hat could reasonably be expected to constitute an unwarranted invasion of an agent's privacy is not that he or she is revealed as an FBI agent but that he or she is named as an FBI

agent *who participated in the RFK investigation.*" (*Stone v. FBI, supra*, at p. 665.) *POST* commented: "By contrast, in the present case, the information sought merely would reveal that the named individuals had worked as peace officers; it would not reveal their involvement in any particular case." (*POST, supra*, at p. 302, fn. 12.) Though this comment could be construed to suggest that disclosing an officer's name in connection with a particular incident can constitute a basis for nondisclosure, we do not believe that the *POST* Court intended to eliminate or minimize the burden on the party seeking nondisclosure to make a particularized showing as to why disclosure would be an unwarranted invasion of personal privacy under section 6254, subdivision (c). We agree with the trial court that appellants' assertion of possible threats was inadequate under the exemption, absent any evidence indicating that the safety or effectiveness of any particular officer was threatened by the disclosure of his or her name.

Appellants' evidence likewise did not support application of the "catch-all" exemption provided by section 6255, which "'"allows a government agency to withhold records if it can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure"' [Citation.] This catchall exemption 'contemplates a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality.' [Citation.] 'Where the public interest in disclosure of the records is not outweighed by the public interest in nondisclosure, courts will direct the government to disclose the requested information.' [Citation.]" (*County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1321.) The trial court reasoned that the deficiencies in appellants' evidentiary showing were likewise relevant to the balancing required under section 6255. Beyond reiterating their generalized safety concerns, appellants have failed to identify any public interest that would be served by nondisclosure. (See *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 652 ["A mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to those records"]; *Sacramento County Employees' Retirement System v. Superior Court, supra,*

195 Cal.App.4th at p. 471 ["Although unrealized threats must be considered in weighing the public interest in nondisclosure, speculative threats must not"].)

Given the legitimate public interest in the conduct of individual officers (*POST, supra*, 42 Cal.4th at p. 300), appellants' failure to offer any countervailing public interest in the nondisclosure of the names of officers involved in shootings precludes the application of section 6255.

DISPOSITION

The order denying the request for a preliminary injunction without prejudice is affirmed. The Times is entitled to its costs on appeal.

CERTIFIED FOR PUBLICATION.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ