Hearing Date: 07/06/2021
Department: 85

Alex Villanueva, Sheriff of Los Angeles County v. County of Los Angeles, 21STCP00900

Tentative decision on demurrer: conditionally sustained without leave

Respondent County of Los Angeles ("County") demurs to the first cause of action of the Petition for writ of mandate filed by Petitioner Alex Villanueva, Sheriff of Los Angeles County ("Sheriff").

The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

1. Petition

Petitioner Sheriff commenced this proceeding on March 22, 2021, alleging a cause of action for traditional mandamus. The Petition alleges in pertinent part as follows.

On January 22, 2021, the Inspector General, Max Huntsman, emailed the Sheriff asking him to meet on a date that was inconvenient for the busy Sheriff. Pet. ¶6. The Sheriff responded that he was not available on the unilaterally set date and proposed that the Inspector General provide written questions for him and his staff. Pet. ¶6.

On March 2, 2021, the Inspector General caused the Sheriff to be served with a subpoena for a 90-minute interview under oath at the Office of the Inspector General ("OIG"). The topic of the interview is "deputy secret societies." Pet. ¶6.

The Sheriff previously appeared before the County's Civilian Oversight Commission ("COC") on December 18, 2020, for slightly more than one hour and answered the COC's questions about "deputy secret societies" and the policies and procedures he had implemented during his administration. Pet. ¶7. The Sheriff appeared again before the COC on January 21, 2021, where the COC posed no questions re "deputy secret societies" but the Sheriff asked for feedback about a video he had provided about this topic. Pet. ¶7.

The Inspector General's power is not unlimited, and the subpoena is overbroad, harassing, and not within the scope of his authority granted by state law and County ordinance. *See* Pet. ¶12. The Sheriff is a constitutionally created office (Pet. ¶15) and constitutional officers and government agency heads are not subject to depositions absent compelling reasons. Pet. ¶¶ 25-28. There should be limitations on the Inspector General's ability to question the Sheriff pursuant to Govt. Code section 25303.7, and case law governing the questioning of apex executives is clearly applicable. Pet. ¶28. It is well recognized that when the testimony of a high-ranking government official is sought, there is a tremendous potential for abuse or harassment. Pet. ¶32 (citation

omitted). The courts consider whether there are extraordinary circumstances that justify deposing the high-ranking official based on his or her firsthand, unique knowledge of facts and whether less intrusive means have been exhausted. Pet. ¶33. Govt. Code section 25303.7 incorporates procedures set forth in the Code of Civil Procedure ("CCP") and should logically include protective orders under CCP section 1987.1. Pet. ¶¶ 20, 30.

The Inspector General's purported justification for the meeting is that he did not have an opportunity to speak with the Sheriff directly at the COC meeting to "obtain necessary information to provide the feedback you requested" about the video. Pet. ¶7. Rather than use a less intrusive means such as a series of questions or interviewing Sheriff personnel involved in the day-to-day implementation of the policies and practices of the Sheriff's Department, the Inspector General is seeking this information directly from the Sheriff and threatening him that any statement he makes during the meeting may be used in a future criminal proceeding against him. Pet. ¶¶ 22, 34. The Inspector General has not described efforts to determine whether the information is available from another source and the extent to which his efforts failed to uncover such information. Pet. ¶35.

The Sheriff seeks an order quashing the subpoena and a protective order to prevent the interview from going forward. Pet. Prayer.

2. Course of Proceedings

On April 19, 2021, the court found that the instant case and Case No. 20STCP02073 are not related within the meaning of CRC 3.300(a).

B. Applicable Law

Demurrers are permitted in administrative mandate proceedings. CCP §§1108, 1109. A demurrer tests the legal sufficiency of the pleading alone and will be sustained where the pleading is defective on its face.

Where pleadings are defective, a party may raise the defect by way of a demurrer or motion to strike or by motion for judgment on the pleadings. CCP §430.30(a); Coyne v. Krempels, (1950) 36 Cal.2d 257. The party against whom a complaint or cross-complaint has been filed may object by demurrer or answer to the pleading. CCP §430.10. A demurrer is timely filed within the 30-day period after service of the complaint. CCP § 430.40; Skrbina v. Fleming Companies, (1996) 45 Cal.App.4th 1353, 1364.

A demurrer may be asserted on any one or more of the following grounds: (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading; (b) The person who filed the pleading does not have legal capacity to sue; (c) There is another action pending between the same parties on the same cause of action; (d) There is a defect or misjoinder of parties; (e) The pleading does not state facts sufficient to constitute a cause of action; (f) The pleading is uncertain ("uncertain" includes ambiguous and unintelligible); (g) In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct; (h) No certificate was filed as required by CCP §411.35 or (i) by §411.36. CCP §430.10. Accordingly, a demurrer tests the sufficiency of a pleading, and the grounds for a demurrer must appear on the face of the pleading or from judicially noticeable matters. CCP §430.30(a); Blank v. Kirwan, (1985) 39 Cal.3d 311, 318. The face of the pleading includes attachments and incorporations by reference (Frantz v. Blackwell, (1987) 189 Cal.App.3d 91, 94); it does not include inadmissible hearsay. Day v. Sharp, (1975) 50 Cal.App.3d 904, 914.

The sole issue on demurrer for failure to state a cause of action is whether the facts pleaded, if true, would entitle the plaintiff to relief. Garcetti v. Superior Court, (1996) 49 Cal.App.4th 1533,

1547; Limandri v. Judkins, (1997) 52 Cal.App.4th 326, 339. The question of plaintiff's ability to prove the allegations of the complaint or the possible difficulty in making such proof does not concern the reviewing court. Quelimane Co. v. Stewart Title Guaranty Co., (1998) 19 Cal.4th 26, 47. The ultimate facts alleged in the complaint must be deemed true, as well as all facts that may be implied or inferred from those expressly alleged. Marshall v. Gibson, Dunn & Crutcher, (1995) 37 Cal.App.4th 1397, 1403. Nevertheless, this rule does not apply to allegations expressing mere conclusions of law, or allegations contradicted by the exhibits to the complaint or by matters of which judicial notice may be taken. Vance v. Villa Park Mobilehome Estates, (1995) 36 Cal.App.4th 698, 709.

For all demurrers filed after January 1, 2016, the demurring party must meet and confer in person or by telephone with the party who filed the pleading for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. CCP §430.41(a). As part of the meet and confer process, the demurring party must identify all of the specific causes of action that it believes are subject to demurrer and provide legal support for the claimed deficiencies. CCP §430.41(a)(1). The party who filed the pleading must in turn provide legal support for its position that the pleading is legally sufficient or, in the alternative, how the complaint, cross-complaint, or answer could be amended to cure any legal insufficiency. Id. The demurring party is responsible for filing and serving a declaration that the meet and confer requirement has been met. CCP §430.41(a)(3).

C. Governing Law

a. The Sheriff and the Board

The Legislature is required to provide for county powers and an elected sheriff, district attorney, assessor, and governing body in each county. Cal. Const. art. XI, §1(b). Similarly, county charters shall provide for an elected sheriff, district attorney, assessor, and other officers. Cal. Const. art. XI, §4(c). The sheriff has the sole and exclusive authority to keep the county jail and its prisoners. Govt. Code[1] §26605; 26600-778. The Attorney General has direct supervision over sheriffs and district attorneys. Cal. Const., art. V, §13.

A county board of supervisors has no inherent powers. Counties are legal subdivisions of the state, and a board of supervisors may "exercise only those powers granted by [the] Constitution or statutes, and those necessarily implied therefrom. Cal. Const., art. XI, §1." Hicks v. Board of Supervisors, (1977) 69 Cal.App.3d 228, 242.

A county board of supervisors is required to supervise all county officers to ensure they faithfully perform their duties, particularly with respect to the collection, management, and supervision of public funds. §25303. Section 25303 is not limited to fiscal conduct of county officers; it permits the board of supervisors to "supervise county officers in order to insure [*sic.*] that they faithfully perform their duties. Dibb v. County of San Diego, ("Dibb") (1994) 8 Cal.4th 1200, 1210 (citation omitted) (citizens review board created by county board of supervisors may lawfully issue subpoenas). "[T]he operations of the sheriff's . . . department[] and the conduct of employees of [that] department[] [are] a legitimate concern of the board of supervisors." Id. at 1209.

The exception is that the board of supervisors may not "obstruct the investigative function of the sheriff...." §25303. Although a board of supervisors has authority to supervise county officers to ensure that they faithfully perform their duties (§25303), the board has no power to perform county officers' statutory duties for them or direct the manner in which those duties are performed. Id. at 242 (board may not prevent district attorney from incurring necessary expenses for crime detection by failing to appropriate funds).

b. Section 25303.7

Effective January 1, 2021, the Legislature passed section 25303.7, which confirms the authority of the Board to create oversight bodies like the OIG and the COC to assist the Board with its duty to supervise the Sheriff under section 25303. §25303.7; County RJN, Ex. 3 (Legislative Counsel's Digest).[2] This reform was intended to improve the functioning of government by providing meaningful oversight and monitoring of sheriffs' departments (id.), adding "additional checks and balances to counties in California." County RJN, Ex. 1 (Senate Report, p. 6).[3] Dem. at 5.

Pursuant to section 25303.7, a county may create a sheriff oversight board, either by action of the board of supervisors or through a vote of county residents, comprised of civilians who may assist the board of supervisors in its supervision of the sheriff under section 25303. §25303.7(a). A county may also establish an office of inspector general, appointed by the board of supervisors, to assist the board of supervisors in its supervision of the sheriff under section 25303. §25303.7(c)(1).

The inspector general shall have the independent authority to issue a subpoena or subpoena duces tecum in accordance with CCP section s 1985-1985.4, inclusive. §25303.7(c)(2)(citing §25303.7(b)). The inspector general may issue a subpoena to any officer of the county whenever the inspector general deems it necessary or important to examine the officer in relation to the discharge of their official duties on behalf of the sheriff's department. §§ 25303.7(b)(1)(B), (c)(2). *See also* County RJN, Ex. 3 (Legislative Counsel's Digest: section 25303.7 "authorize[s] . . . the inspector general to issue a subpoena or subpoena duces tecum when deemed necessary to investigate a matter with [its] jurisdiction").

Under this process, the subpoena shall be served in accordance with sections 1987 and 1988. §25303.7(b)(2). If the witness fails to attend, or in the case of a subpoena duces tecum, the chair or the chair authorized deputy issuing the subpoena may certify the facts to the superior court, which shall issue an order to show cause ("OSC") why the subpoenaed person should not be ordered to comply with the subpoena. §25303.7(b)(3)(A), (B). The order shall be served on the person and the court shall then have jurisdiction. §25303.7(3)(B). The same proceedings shall be had as in a case of a person who has committed a contempt in the trial of a civil action, and the person charged may purge himself or herself of the contempt in the same way as a person charged with contempt. §25303.7(3)(C).

The exercise of powers under this section or other investigative functions performed by a board of supervisors, sheriff oversight board, or inspector general vested with oversight responsibility for the sheriff shall not be considered to obstruct the investigative functions of the sheriff. §25303.7(d).

c. The OIG

Effective January 1, 2021, the Board adopted a motion affirming section 25303.7 to vest the OIG with subpoena power. County RJN, Ex. 4 (November 10, 2020 Board Statement of Proceedings, p. 13). The Board created the OIG "[a]s part of" and to assist the Board's "duty to supervise the official conduct of County officers under Government Code section 25303." *See* Los Angeles County Code ("LACC") §6.144.190.A; *see also* League of Women Voters v. Countywide Crim. Justice Coordination Com., 203 Cal.App.3d 529, 551 (1988) ("the board of supervisors may, under appropriate direction and control, create commissions or committees to which it delegates authority"). The OIG is "an agent of the Board of Supervisors . . . and shall make regular reports to the Board of Supervisors." LACC §6.44.190.H.

The OIG's mission is "to promote constitutional policing and the fair and impartial administration of justice, and to facilitate the Board of Supervisors' responsibility without obstructing the Sheriff's criminal investigative function." LACC §6.144.190.A. The OIG's "scope [of authority] includes matters relevant to the policies, procedures, practices, and operations of the" Sheriff's Department. Id. The OIG is permitted to conduct an inquiry or investigation. Id. LACC

§6.44.190.C. An "inquiry" consists of gathering of information as in monitoring, but with the goal of obtaining additional information regarding a potential problem area. Id. An "investigation" is a formal gathering of information targeted at producing actionable information regarding an employee or employees. Id. "In accordance with...section 25303, the OIG shall have access to [the Sheriff's Department's] information; documents; materials; facilities; and meetings, reviews, and other proceedings necessary to carry out the OIG's duties under this section." LACC §6.144.190.A. The [Sheriff's Department] and their employees and all other County departments shall cooperate with the OIG and promptly provide any information or records requested. LACC §6.44.190.I.

D. Analysis[4]

The County demurs to the Petition on the ground that it fails to allege a ministerial duty or show that the Sheriff has a beneficial right to mandamus. The County has complied with the meet and confer requirements of CCP section 430.41(a). Anand Decl., ¶5, Ex. 2.

1. Statement of Facts

The Petition's allegations and its exhibits reflect as follows. In a January 21, 2021 email, the OIG asked the Sheriff to meet to answer questions about "the Sheriff's Department['s] policy on membership in deputy secret societies."[5] The OIG noted that the OIG has not responded to the Sheriff's video discussing his Department's policy on deputy secret societies. The Inspector General stated that he has some questions about the policy and was writing to schedule a meeting during the next week. Pet. Ex. 2.

The Sheriff responded in a January 25, 2021 letter that he attended two COC meetings on December 18, 2020 and January 21, 2021 and responded to questions for 75 minutes. He stated that his schedule does not permit a meeting the following week, but the Inspector General could ask additional questions of his staff. The Sheriff noted that the Inspector General stated at the January 21 meeting that he intended to ask questions about inconsistencies between what the Sheriff told COC and a video briefing on deputy sub-groups. The Sheriff stated that he is happy to provide clarity, but if the Inspector General intended to investigate him, he (the Sheriff) has POBRA rights. The Sheriff opined that further questions could be satisfactorily handled in writing with a researched response from the Department, which would be a less intrusive means of providing the information and would enable the Sheriff to devote his time to law enforcement. Pet., Ex. 3.

On February 25, 2021, the Inspector General explained that he sought to meet with the Sheriff because "although [the Sheriff had] provided information to the COC, the [OIG] has had little to no opportunity to speak with [him] regarding any of the Department's policies or procedures since [he] took office more than two years ago." The Inspector General explained that a written question approach was unacceptable:

"[The OIG is] unable to accept [the Sheriff's] proposal because [his] participation is required for [the OIG] to understand the Department's policies and procedures. Members of [the Sheriff's] staff have consistently told the Civilian Oversight Commission that only [the Sheriff] can address ultimate questions of policy for the Department.

Moreover, as [Sheriff Villanueva] know[s], written questions are no substitute for in-person questioning. Among other things, [the OIG] would not be able to ask follow-up questions to written answers or be able to clarify the responses. Indeed, answers to the first set of written questions undoubtedly would result in [the OIG] sending additional questions, the answers to which may

require yet further clarification. Proceeding in this fashion would be inefficient for [everyone] and would interfere in the [OIG's] efforts to obtain necessary information regarding this important topic." Pet., Ex. 1.

Because the Sheriff did not accept the OIG's invitation to appear voluntarily, the OIG issued a subpoena requiring the Sheriff to appear online before the OIG on March 25, 2021. Pet., Ex. 1. The Sheriff filed the Petition in lieu of appearing on March 25, 2021.

2. The Petition Does Not State a Mandamus Claim

A writ of mandate under CCP section 1085 will lie when the respondent has a ministerial, non-discretionary duty to perform and the petitioner has a clear and beneficial right to performance. Pomona Police Officers' Assn. v City of Pomona, (1997) 58 Cal.App.4th 578, 583-84; Shamsian v. Dep't of Conservation, ("Shamsian") (2006) 136 Cal.App.4th 621, 640.

The County correctly argues that the Inspector General has no clear, present ministerial duty to withdraw or quash a lawful subpoena in discharge of his duty to assist the Board in supervising the Sheriff. He further has no duty to prevent any and all future interviews of the Sheriff. On the contrary, the Inspector General is within his authority to interview the Sheriff on the issue of deputy secret societies, including his Department's policies on that issue. *See* Dem. at 2, 10.

The Board has directed the OIG to "provide, within its scope of authority, independent and comprehensive oversight, monitoring of, and reporting about the" Sheriff's Department. LACC §6.144.190.B. The Legislature added section 25303.7 "to assist the board of supervisors with [its] duties [under section 25303] as they relate to the sheriff." County RJN, Ex. 3. Section 25303.7 gives the Inspector General power to subpoena "[a]ny officer of the county" "whenever [the Inspector General] deems it necessary or important to examine" the officer "in relation to the discharge of their official duties on behalf of the sheriff's department." §25303.7.

To fulfill his duties, the Inspector General is entitled to engage with the Sheriff on issues such as deputy secret societies. Pursuant to section 25303.7 and the County's implementation of it, both the COC and Inspector General have the authority and discretion to subpoena the Sheriff, and do not have a duty to refrain from doing so. The Inspector General's lawful exercise of his discretionary authority precludes mandamus. Shamsian, *supra,* 136 Cal.App.4th at 640 ("absent a clear duty imposed by law..., mandamus is not a proper vehicle for resolution of the asserted grievance"). *See* Dem. at 10-11.

a. The Discovery Act and CCP Section 1987.1

The Petition relies on CCP sections 1987.1 and 2025.420 for the Sheriff's right to mandamus relief. CCP section 2025.420 is part of the Civil Discovery Act, which applies to depositions in civil actions and special proceedings, not investigative subpoenas. Section 25303.7 makes no reference to a motion to quash or a protective order.

Code of Civil Procedure section 2025.420, part of the Civil Discovery Act, permits a court to grant a protective order "[b]efore, during, or after a deposition." CCP §2025.420. The Inspector General does not seek to depose the Sheriff in a civil action; he seeks an investigative interview pursuant to section 25303.7. Moreover, the Civil Discovery Act applies to civil actions and special proceedings of a civil nature. Bouton v. USAA Cas. Ins. Co., (2008) 167 Cal.App.4th 412, 427. A civil "action" is defined as "an ordinary proceeding in a court of justice by which one party prosecutes another for

the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Id*.* (quoting CCP §22). The Inspector General has not filed an action and does not seek any of these remedies. Part 3 of the CCP (CCP §§ 1063-1822.60) sets forth procedures for "special proceedings of a civil nature." Id. at 427 (quoting CCP §23). CCP sections 1063-1822.60 do not include an investigative subpoena issued by an oversight agency. Accordingly, the Inspector General's subpoena is not issued in an "action" or in a "special proceeding of a civil nature." *See* Dem. at 13-14.

The California Supreme Court explained the difference between an investigative subpoena and civil discovery in Arnett v. Dal Cielo, ("Arnett") (1996) 14 Cal.4th 4. There, the court upheld the Medical Board's investigative subpoena for hospital peer review records for a doctor despite the fact that such records are statutorily exempt from civil discovery under Evidence Code section 1157. The court explained the difference between "discovery" in an action and an investigative agency's use of subpoena power. "[T]he Legislature repeatedly and consistently uses the term 'discovery' only in the . . . legal sense of the procedures by which *parties* to *a pending action* exchange *evidence* admissible in that action." Id*.* at 21 (emphases in original). In contrast, "...an investigation is not the equivalent of discovery; rather, [u]nlike a discovery procedure, an administrative investigation is a proceeding distinct from any litigation that may eventually flow from it." Id*.* at 23 (citation omitted). The court held that the term "discovery" "does not include a subpoena issued . . . by an administrative agency for purely investigative purposes." Id*.* at 24. Dem. at 14.[6]

The County persuasively argues that the Sheriff has no right to a protective order under CCP section 2025.420 because the Civil Discovery Act does not apply. Dep't of Fair Emp. & Hous. v. Superior Ct., (1990) 225 Cal.App.3d 728, 732 ("the *sine qua non* of invoking relief available under the Civil Discovery Act" is a pending action). Even if CCP section 2025.420 did apply, the court would have discretion whether to issue a protective order, meaning that mandamus relief would be inappropriate. Hilmer v. Superior Ct. of City & Cty. of San Francisco, ("Hilmer") (1934) 220 Cal. 71, 73 ("It is well settled that mandamus will not lie to control the discretion of a court or judicial officer or to compel its exercise in a particular manner, except in those rare instances when under the facts it can be legally exercised in but one way."). Dem. at 14.[7]

The County concludes that the Sheriff has no right to a protective order under CCP section 1987.1 for similar reasons. CCP section 1987.1(a) provides, in relevant part, that a court "may" quash or modify a subpoena or issue a protective order, but only for "a subpoena [that] requires the attendance of a witness . . . before a court, or at the trial of an issue therein, or at taking of a deposition." There is no subpoena requiring a court appearance and the Inspector General does not seek to depose the Sheriff. Further, section 25303.7 requires an oversight agency to "issue [subpoenas] in accordance with [CCP] Sections 1985 to 1985.4" and to serve subpoenas "in accordance with [CCP] Sections 1987 and 1988" (§§ 25303.7(b)(1), (b)(2)), but it omits any reference to section 1987.1 and does not provide for any procedure to quash a subpoena or for a protective order. Reply at 2.

The Sheriff's ability to rely on CCP section 1987.1 for a protective order is addressed *post.* The court agrees with the County, however, that under section 1987.1(a) the court has discretion whether to quash or modify a subpoena or issue a protective order, which makes mandamus relief inappropriate. Hilmer, *supra,* 220 Cal. at 73. Dem. at 14-15.

The County further correctly argues that the Sheriff has no right to a blanket order preventing any future Inspector General investigative interview because mandamus cannot issue to compel the performance of future acts. "Mandamus will not lie to compel the performance of future acts." Communist Party v. Peek, (1942) 20 Cal.2d 536, 540; *see also* Diller v. Flynn, (1964) 26 Cal.App.2d 449, 453 ("The general rule is that mandamus will not issue to compel the performance of future acts."). Dem. at 15. As the County notes, the Sheriff does not respond to this argument. *See* Reply at 2.

b. **The Apex Deposition Rule**

The Sheriff asserts that mandamus is appropriate because the Inspector General has a ministerial duty to comply with the law. *See* Morgan v. City of Los Angeles Board of Pension Commrs., (2000) 85 Cal.App.4th 836, 843 ("A ministerial act is one which a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority, without regard to his own judgment or opinion.").

The Sheriff contends that the law requires the Inspector General's subpoena to comply with case law that apex executives, agency heads, and highly placed public officials are not subject to deposition absent compelling reasons. Westly v. Superior Court, (2004) 125 Cal.App.4th 907, 910. The apex deposition rule is established to relieve agency decision makers from the burdensomeness of discovery, to allow them to spend their valuable time on the performance of official functions. Cornejo v. Landon, (N.D. Ill. 1981) 524 F.Supp. 118, 122;[8] Nagle v. Superior Court, 28 Cal.App.4th 1465, 1468. As a result, the head of a government agency is not normally subject to deposition. Kyle Engineering Co. v. Kleppe, (9th Cir. 1979) 600 F.2d 226, 231; U.S. v. Morgan, (1941) 313 U.S. 409, 422 (finding that Secretary of Agriculture's examination should not have proceeded and threatened the integrity of the administrative process). Because "[h]igh ranking government officials have greater duties and time constraints than other witnesses," they "should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." In re United States, (11thCir. 1993) 985 F.2d 510, 512 (quoting Simplex Time Recorder Co. v. Secretary of Labor, (D.C.Cir. 1985) 766 F.2d 575, 586. If other persons can provide the information sought, subpoenaing such an official will not be permitted. In re. United States, *supra,* 985 F.2d at 513; In re FDIC, (5th Cir. 1995) 58 F.3d 1055, 1062 ("We think it will be the rarest of cases…in which exceptional circumstances can be shown where the testimony is available from an alternate witness.")

The court agrees with the County that the apex doctrine has no application to the Inspector General's subpoena. The apex doctrine is a "judicially-created vehicle" to limit depositions of senior executives or officials in a civil action. Apple Inc. v. Samsung Elecs. Co., Ltd., (N.D. Cal. 2012) 282 F.R.D. 259, 263. The courts generally do not permit depositions of high government officials in civil actions for two reasons. Coleman v. Schwarzenegger, ("Coleman") (E.D. Cal. Sept. 15, 2008) 2008 WL 4300437 at *2. "The first is to protect the officials from discovery that will burden the performance of their duties, particularly given the frequency with which such officials are likely to be named in lawsuits. The second is to protect the officials from unwarranted inquiries into their decision-making process." Id. Many courts also rely on a practical reason that apex deponents usually do not have personal knowledge of the facts. *See* State Bd. of Pharmacy v. Superior Ct., (1978) 78 Cal.App.3d 641, 644 (Attorney General had no personal knowledge of any matter germane to the litigation). Reply at 8-9.

The Inspector General is not seeking to depose the Sheriff in a civil action; he has issued an investigative subpoena to which different principles apply. The Legislature enacted section 25303.7 to enable the Inspector General to subpoena the Sheriff and assist the Board with its duty to supervise the Sheriff under section 25303. §25303.7; County RJN, Ex. 3. This reform was intended to improve the functioning of government by providing meaningful oversight and monitoring of sheriffs' departments (id.), adding "additional checks and balances to counties in California." County RJN, Ex. 1. The statute makes no exception for subpoenas to the Sheriff. Indeed, the Legislature clearly wanted sheriffs to appear before oversight agencies like the COC and the Inspector General to explain their decisions and decision-making process. The court must follow such legislative policy choices when they are discernable from the statute. Los Angeles County Metropolitan Transit Authority v. Alameda Produce Mkt., LLC, ("MTA") (2011) 52 Cal.4th 1100, 1114. *See* Reply at 9.

Pursuant to section 25303.7, the Inspector General issued an investigative subpoena stating that he needs to interview the Sheriff to fulfill his oversight duties because members of the Sheriff's staff have consistently said "that only [the Sheriff] can address ultimate questions of policy for the Department." Dem., Ex. 3, p. 1. This is within the discretion that section 25303.7 accords to the Inspector General and the apex doctrine does not apply. *See* Reply at 9-10.

c. <u>Less Intrusive Means</u>

The Sheriff further contends that he has been transparent on the issue of deputy cliques and the Inspector General's need to interview him directly is unclear. By his Petition, the Sheriff asks that the Inspector General be required to use a lesser intrusive means to acquire the information.

The Sheriff argues (without supporting allegations in the Petition) that he has volunteered to meet with the COC once every trimester and did so on January 21, 2021 and May 20, 2021 to discuss the very topic at issue in the subpoena. The Inspector General attended those two meetings. Yet the Inspector General feels a personal need to interview the Sheriff under oath to try to identify discrepancies in the Sheriff's statements.

The Inspector General sought to schedule a meeting with the Sheriff on only one week's notice in disregard of the Sheriff's busy schedule. The Sheriff responded by asking the Inspector General to send a list of his concerns so that he (the Sheriff) could research the answers, as well as by expressing concern about his Peace Officer Bill of Rights Act ("POBRA") rights in light of the Inspector General's statement that any statement the Sheriff makes "may be used in a future criminal proceedings against you." Pet., Ex. 1.

The procedure proposed by the Sheriff has been recognized as reasonable and preferable by the courts. *See* <u>Coleman</u>, 2008 U.S.Dist. Lexis 70224, at *27 ("When the Governor acts within the parameters of his official duties, by, for example, issuing orders, it is likely that other lower-ranking members of his office or administration would have relevant information about his actions."); <u>Thomas v. Cate</u>, (E.D. Cal. 2010) 715 F.Supp.2d 1012, 1048-50. Yet, the Inspector General rejected the Sheriff's request. Pet., Ex. 3. The Inspector General then issued a subpoena for one month later, showing that time was not of the essence. In that one-month period, the Inspector General could have submitted written questions and already received answers. The Sheriff concludes that the Inspector General is hoping for a "gotcha" moment, knowing that he will likely not have the minuscule details immediately at hand. Opp. at 3.

The Sheriff notes that Article XI of the California Constitution requires the Legislature to provide for county powers, an elected county sheriff, an elected district attorney, an elected assessor and an elected governing body in each county. A county board of supervisors has no inherent powers. Counties are legal subdivisions of the state, and a board of supervisors may "exercise only those powers granted by [the] Constitution or statutes, and those necessarily implied therefrom. Cal. Const., art. XI, §1." <u>Hicks v. Board of Supervisors</u>, *supra,* 69 Cal.App.3d at 242. Given that the Sheriff is co-equal to the Board of Supervisors, there is a legitimate question whether the Board can properly subpoena the elected Sheriff. As the County notes, the Board created the OIG "[a]s part of" and "to assist the BOS' duty to supervise the official conduct of County officers under Government Code § 25303." Thus, the Inspector General's subpoena power is no broader than the Board's. Opp. at 4-5.

The County disagrees that the Sheriff has cooperated, contending that the Inspector General "has had little to no opportunity to speak with [the Sheriff] directly regarding any of the Department's policies or procedures since [he] took office more than two years ago." Dem., Ex. 3., pp. 1-2. The Sheriff refused to meet with the Inspector General voluntarily and his desire for an order protecting him from all future subpoenas reflects his disdain for OIG oversight. Reply at 9, n. 8.

As for the Sheriff's "gotcha" argument, the County contends that it is unsupported. Section 25303.7 demands robust oversight over the Sheriff's Department and the Sheriff must be prepared to respond even to difficult questions. The Inspector General informed the Sheriff that he was "welcome to be accompanied by a representative of [his] choice during [the] meeting" and that he "would be free during [the] meeting to assert any lawful right or privilege [the Sheriff] may have." Dem., Ex. 3., p. 2. The Inspector General provided the criminal advisement out of an abundance of caution only after the Sheriff purported to invoke his POBRA rights. Id. Reply at 10, n. 8.

The court agrees with the County that the plain text of section 25303.7 grants the Inspector General broad discretion to issue subpoenas whenever he "deems" it "necessary or important" without requiring any showing of good cause or a compelling reason. §§ 25303.7(b)(1)(B), (c)(2). These words define the scope of the Inspector General's subpoena power. "'The statute's words generally provide the most reliable indicator of legislative intent; if they are clear and unambiguous, '[t]here is no need for judicial construction and a court may not indulge in it. [Citation.]'" MCI Communications Services, Inc. v. California Dept. of Tax & Fee Administration, (2018) 28 Cal. App. 5th 635, 643. *See* Reply at 4-5.

To limit section 25303.7's grant of discretion and authority by grafting on a "compelling reasons" requirement for subpoenas to the Sheriff or by requiring the Inspector General to "use . . . lesser intrusive means" would negate the text of section 25303.7 and undermine its purpose. The Sheriff is not permitted to thwart the Inspector General's mandate by directing the manner in which the OIG conducts oversight. A contrary rule would permit the Sheriff to evade interview and obstruct oversight by demanding written questions or by requiring an interview of a lower-level official he designates. Reply at 5-6.

The facts that both the Sheriff and the Board are elected, and that the OIG is the Board's creation, do not affect the Inspector General's subpoena authority. The Legislature determines the powers and duties of the Sheriff and the Board. *See* Beck v. County of Santa Clara, (1988) 204 Cal.App.3d 789, 800. It determined in section 25303 that the Board is required to supervise the Sheriff to ensure he "faithfully performs" his duties. Section 25303.7 assists the Board with its oversight duties under section 25303 and gives a COC or OIG authority to achieve the aims of section 25303. Contrary to the Sheriff's claim that an appearance before the Inspector General would "tak[e] the Sheriff away from his duties" (Opp. at 2), one of the Sheriff's responsibilities is to submit to the OIG's oversight. Reply at 6-7.

d. Conclusion

In sum, neither of CCP sections 2025.420 and 1987.1 is referred to in section 25303.7 and neither provision imposes a ministerial duty or mandamus right to quash the Inspector General's investigative subpoena or issue a protective order barring the current and all future OIG interviews. The apex doctrine does not apply to the Inspector General's subpoena and the Inspector General is not required to use a lesser intrusive means to obtain information. Mandamus relief is not available for the Inspector General's discretionary decision to subpoena the Sheriff. *See* Shamsian, *supra,* 136 Cal.App.4th at 640.[9] Dem. at 13, 15.

4. The Sheriff Has a Right to Challenge the Subpoena

This conclusion does not leave the Sheriff without a right to challenge the subpoena on appropriate grounds.

a. The Parties' Positions

The Sheriff notes that a legislative investigative subpoena must be related to, and it must further, a legitimate purpose of the legislative body. Watkins v. United States, (1957) 354 U.S. 178, 187. An investigation conducted solely for the personal aggrandizement of the investigators or to punish those investigated is indefensible. Id. at 187. The Sheriff contends that the Inspector General's subpoena does not evidence any compelling reasons for its issuance, is overbroad, and is contrary to the public interest. Deukmejian v Superior Court (1983) 143 Cal.App.3d 632, 635. He notes that the Inspector General's draft letter states that he just "has some questions regarding the policy." Pet., Ex. 2. Yet, the Inspector General's understanding of Department policies and procedures is not an examination about the discharge of the Sheriff's official duties. Opp. at 4.

The Sheriff argues that the County's position -- that the only remedy for an overbroad subpoena is to defend against a contempt citation -- does not allow him or any witness to seek to quash a subpoena. He asks: How can a bureaucrat be given greater subpoena power than an officer of the court in litigation? How can defending against a criminal contempt proceeding be an adequate remedy? Why then does CCP section 1987.1 allow subpoenas to be quashed? The Sheriff argues that the law assumes "that some form of judicial relief is available to correct misconduct of an administrative agency." Board of Dental Examiners, *supra*, 55 Cal.App.3d at 811.

The Sheriff notes that the California Supreme Court in Dibb recognized the legitimate concern about a COC's possible misuse of its subpoena power, stating that this concern should be addressed through "close scrutiny" by the court. 8 Cal.4th at 1218. The Sheriff believes he similarly is entitled to close scrutiny of the Inspector General's subpoena. The Sheriff concludes that, inasmuch as section 25303.7 "incorporates CCP sections 1985 through 1988", he has the right to seek to quash the subpoena pursuant to CCP section 1987.1. He also argues that the court can quash the subpoena on its own. Opp. at 3-4, 5.

The County responds that the process set forth in section 25303.7 contemplates that the Sheriff is free to challenge the subpoena once the OIG initiates a contempt proceeding, and "purge [himself] of the contempt in the same way as in a case of a person who has committed a contempt in the trial of a civil action before a superior court." §25303.7(b)(3)(C). Because this process is sufficient to vindicate any due process objections the Sheriff has to the subpoena, mandamus relief is unavailable. County of San Diego v. State of California, (2008) 164 Cal.App.4th 580, 596 ("[A] writ of mandate will not issue where the petitioner's rights are otherwise protected.").[10] Dem. at 2-3, 11-13.

The County argues that section 25303.7 omits any reference to CCP section 1987.1 and does not provide for any procedure to quash a subpoena or for a protective order. The Sheriff's contention that the court "can quash the subpoena on its own" is unsupported. The court does not have authority to insert a non-existent provision in CCP section 1987.1 or section 25303.7. Cornette v. Dep't of Transp., (2001) 26 Cal.4th 63, 73-74 (2001) ("A court may not rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed."). Nor should the court ignore the Legislature's clear choice to incorporate some CCP provisions and not CCP section 1987.1. Courts are "required to follow the public policy choices actually discernible from the Legislature's statutory enactments." MTA, *supra,* 52 Cal.4th at 1114. Nor can the court "disregard the statute and decide the case according to other criteria, such as the court's own 'sense of the demands of public policy". *See* Steven S. v. Deborah D., (2005) 127 Cal.App.4th 319, 327. Reply at 3.

The County argues that, while the Sheriff cites Board of Dental Examiners, *supra,* 55 Cal.App.3d at 814, for the proposition that "there is an assumption that some form of judicial relief is available to correct misconduct of an administrative agency", the case supports the County's position. Board of Dental Examiners held that the trial court went too far in issuing orders permitting discovery into the deliberative process of an administrative agency. 55 Cal.App.3d at 814. The agency's "proceedings

were supported by a presumption of regularity" and "[i]t was not the function of the superior court . . . to inquire into the reasoning processes underlying the [agency's] decision." Id. The court explained that the petitioner was incorrect in his assumption that "some form of relief" must be available because he "failed completely to make any foundational showing" to rebut the presumption the agency had acted properly. Id. Reply at 3.

Resolution of the Sheriff's right to challenge the subpoena requires closer examination of Dibb and the law concerning enforcement of investigative subpoenas.

b. Dibb

In Dibb, *supra*, 8 Cal.4th at 1200, the California Supreme Court addressed the subpoena power of a citizen review board similar to the COC: a Citizens Law Enforcement Review Board ("CLERB") enacted by voters through amendment to the city charter. Id. at 1204. The charter amendment granted CLERB the power to subpoena and require attendance of witness and documents pertinent to its investigation of use of excessive force, discrimination, sexual harassment, and false arrest by the sheriff's department or probation department. Id. at 1204. The court concluded that section 25303 gave the board of supervisors a statutory duty to supervise the conduct of all county officers and section 31000.1 gave the board the right to establish a commission of citizens to study and report on matters within the board's jurisdiction. Id. at 1210. Therefore, the creation of CLERB was a proper exercise of charter county authority. Id. CLERB's authority to issue subpoenas, although prescribed by charter amendment and not by statute, was consistent with the county's home rule status as a charter county and could not be preempted by the Legislature. Id. at 1210-11. The court noted that the power to issue subpoenas is often conferred throughout the nation on boards such as CLERB. Id. at 1216.

Plaintiff taxpayer objected that the power to issue subpoenas differs from those that may be granted to a non-judicial body such as CLERB because it is a potent tool that may be employed in an abusive and oppressive manner. Id. at 1217. The court acknowledged the potential for abuse, but it noted that CLERB has no authority to enforce or adjudicate punishment for violation of its subpoenas and must proceed in court to enforce a subpoena under the court's contempt power. Id. at 1218. The plaintiff's legitimate concern about CLERB abusing its subpoena power "may be addressed through close scrutiny by the court in motions to quash, or in contempt actions to enforce, subpoenas. (See Code Civ. Proc. §§ 1985, 1987.1, 1991; cf. Gov. Code §§ 25173-25175." Id. at 1218.

c. Legislative Investigative Subpoena

Is the Inspector General's subpoena an administrative or legislative investigative subpoena?

An administrative agency's investigative subpoena power is construed broadly. "The Supreme Court [has] explained that '[t]he only power that is involved [in an administrative inquiry] is the power to get information from those who best can give it and who are most interested in not doing so.'" City & Cty. of San Francisco v. Uber Techs., Inc., (2019) 36 Cal.App.5th 66, 74 (quoting United States v. Morton Salt Co., (1950) 338 U.S. 632, 642–43). "[J]udicial deference to administrative discretion and expertise is considerable." Id. "An administrative subpoena will be enforced if it "(1) relates to an inquiry which the administrative agency is authorized to make; (2) seeks information reasonably relevant to that inquiry; and (3) is not too indefinite." Id.

The legislative investigation subpoena power is similarly broad. Connecticut Indemnity Co. v. Superior Court, (2000) 23 Cal.4th 807, 813. There are limits to the use of legislative subpoenas, which are proper only if (a) authorized by ordinance or similar enactment, (b) serves a valid purpose,

(c) the witness or documents subpoenaed are pertinent to the subject matter of the investigation. Id. (citation omitted).

The parties do not discuss whether the Inspector General's subpoena power is administrative or legislative in nature.[11] Nor did the California Supreme Court in Dibb discuss whether the CLERB's subpoena power was legislative or administrative. *See* 8 Cal.4th at 1200. Because the OIG was created to assist the Board with its duty to supervise the Sheriff under section 25303 and not to impose its own remedies, the court will assume the OIG's subpoena power is legislative in nature. But it probably makes no difference for present purposes of ascertaining the Sheriff's right to challenge the investigative subpoena.

d. State Agency Investigative Subpoenas

Under the Administrative Procedures Act ("APA"), state agencies have general authority to investigate matters under their jurisdiction. §§ 11180-191. This includes the power to issue subpoenas for the attendance of witnesses and the production of documents pertinent to any inquiry, investigation, or proceeding. §11181(e); Franchise Tax Board v. Barnhart, (1980) 105 Cal.App.3d 274, 278-80.

If a witness refuses to attend or comply with the subpoena, the agency's head may file a petition with the superior court for an order compelling compliance. §§ 11187(a). The petition must state that due notice was given (§11181(b)(1), the subpoena was served in the manner required for service of process under CCP section 413.10 *et seq.* (§§11184, 11187(b)(2)), and the person failed and refused to answer or appear (§11187(b)(3)).

The court shall issue an OSC directing the person to appear in court and show cause why he or she has not attended or produced the subpoenaed documents. §11188. The OSC must be served on the person in the manner required for service of process in CCP section 413.10 *et seq*. §11188. If the witness objects, the court at the OSC hearing will decide whether the subpoena meets legal and constitutional standards and will hear any cognizable defenses, including the scope of agency authority and whether the subpoena violates the fourth or fifth amendments, right of privacy, and other privileges. *See* §11187(d). If the subpoena was "regularly issued", the court shall enter an order that the person appear before the officer named in the subpoena at the time and placed fixed in the order and testify or produce and permit the inspection as required. §11188. Failure to obey the court order compelling compliance shall be dealt with as a contempt under CCP sections §1209-22. §11188.

Thus, the enforcement of a state investigative subpoena in superior court is a two-step process in which the court first hears any cognizable defenses in deciding if the subpoena was "regularly issued" and a contempt proceeding is initiated only when the witness still refuses to comply.

e. State Agency Adjudicative Subpoenas

The subpoena power of a state agency in support of its investigation is separate from the subpoena power granted in the APA to all parties to a pending administrative adjudication. Article 12 of the APA (§11455.10 *et seq*.) authorizes a state agency conducting an adjudicative proceeding to deal with party, witness, and attorney misconduct by initiating the contempt process. Unless the California Constitution provides otherwise, the agency itself cannot themselves adjudicate a contempt and must rely on the courts. Dibb, *supra*, 8 Cal.4th at 1217. If a witness fails to attend, or in the case of a subpoena duces tecum fails to produce documents, the presiding officer or agency head may certify the facts to the superior court, which shall issue an OSC why the subpoenaed person should not be punished for contempt. §11455.20(a); *see* Parris v. Zolin, (1996) 12 Cal.4th 844 (agency's transmission of certification of facts to superior court initiates contempt

proceeding and invokes CCP section 1211 contempt procedure). The order shall be served on the person and the court shall then have jurisdiction. §11455.20(a). The same proceedings shall be had as in a case of a person who has committed a contempt in the trial of a civil action, and the person charged may purge himself or herself of the contempt in the same way as a person charged with contempt. §11455.20(b).

Thus, the state adjudicative subpoena process in superior court is a one-step contempt procedure in which the presiding officer or agency head certifies facts to the superior court and a contempt proceeding occurs.

f. The Sheriff's Right to Challenge

The language of section 25303.7 seems to parallel the language of section 11455.20(a) for enforcement of state agency adjudicative subpoenas insofar as it provides that, if the witness fails to attend, or in the case of a subpoena duces tecum, the Inspector General may "certify the facts" to the superior court (§25303.7(b)(3)(A)), and that the same proceedings shall be had as in a case of a person who has committed a contempt in the trial of a civil action, and the person charged may purge himself or herself of the contempt in the same way as a person charged with contempt. §25303.7(3)(C).

There is a difference, however. While the agency's transmission of certified facts to the superior court under section 11455.20(a) initiates a contempt proceeding, for which the court shall issue an OSC why the subpoenaed person should not be punished for contempt (*see* Parris v. Zolin, *supra*, 12 Cal.4th at 844), section 25303.7(b)(3)(B) provides only that the superior court shall issue an OSC why the subpoenaed person should not be ordered to comply with the subpoena. In other words, the plain language of section 25303.7 creates a two-step process in which the superior court first decides whether the Sheriff or witness should be ordered to comply with the subpoena and a second step of a contempt proceeding is initiated only if the Sheriff or witness fails to comply.

This construction of section 25303.7(b)(3)(B) makes logical sense because section 25303.7 authorizes the Inspector General or COC to issue a legislative investigative subpoena and there are due process reasons to distinguish between the enforcement of investigative and adjudicative subpoenas. Although the court has not fully researched this issue, it would appear that due process requires that the validity of an investigative subpoena must be decided by a superior court before the agency may invoke the contempt process. A witness to an administrative investigation should not have to face quasi-criminal contempt before contesting the lawfulness of the investigative subpoena. In contrast, a witness subpoenaed to testify or produce documents for a quasi-judicial hearing has the nature and trappings of the quasi-judicial process -- including an independent presiding officer -- to ensure that the subpoena is lawful; due process does not require assurance that the subpoena was lawfully issued before enforcement through the contempt process.

Thus, section 25303.7(b)(3)(B) permits the Sheriff to contest the Inspector General's subpoena at a superior court hearing for issuance of an OSC why he should not be ordered to comply with the subpoena under section 25303.7(b)(3)(B).[12] The courts presume that the Inspector General properly exercised his discretion in issuing the subpoena and that he is conducting his investigation in accordance with law. Board of Dental Examiners v. Superior Court, ("Board of Dental Examiners") (1976) 55 Cal.App.3d 811, 814; White v. Church, (1986) 185 Cal.App.3d 627, 631. *See* Reply at 7. The Sheriff can rebut this presumption by raising defenses that the Inspector General's subpoena is not related to or does not further a legitimate purpose of the OIG under section 25303.7 or was issued solely for the personal aggrandizement of the Inspector General or to punish him. *See* Watkins v. United States, *supra,* 354 U.S. at 187. While section 25303.7 does not require the Inspector General to have a compelling reason for issuing the subpoena, not subpoena an agency head, or use a less intrusive means of obtaining information, the Sheriff also may argue that the subpoena is uncertain, overbroad, presented solely for harassment, constitutes an undue burden

or an abuse of the subpoena power, or is contrary to the public interest. The Sheriff does not have to face a contempt hearing to raise these defenses.

Nor would it be possible for the Sheriff to present all these defenses in a contempt proceeding. The elements of contempt are: (l) a lawful order was issued, (2) the contemnor knew of its issuance, (3) the contemnor was capable of obeying it, and (4) the contemnor willfully disobeyed. Koehler v. Superior Court, (2010) 181 Cal.App.4th 1153, 1169. While the lawfulness of the subpoena would include defenses concerning the scope of agency authority, other defenses such as harassment, undue burden, and abuse of subpoena power arguably would not be relevant to a contempt proceeding.

This interpretation of section 25303.7(b)(3)(B) is supported not only by due process requirements, but also by the California Supreme Court in Dibb, which noted that the plaintiff's legitimate concern about CLERB abusing its subpoena power "may be addressed through close scrutiny by the court in motions to quash, or in contempt actions to enforce, subpoenas. (See Code Civ. Proc. §§ 1985, 1987.1, 1991; cf. Gov. Code §§ 25173-25175." 8 Cal.4th at 1218. Dibb's reference to CCP section 1987.1 suggests that a court may impose a protective order or quash the Inspector General's subpoena as part of deciding whether to issue an OSC why the Sheriff or witness should not be ordered to comply with the subpoena.

Thus, the County does not accurately set forth the process in stating that section 25303.7 contemplates that the Sheriff is free to challenge the subpoena once the OIG initiates a contempt proceeding. Section 25303.7(b)(3)(B) and due process contemplate that the superior court first decides whether the Sheriff or witness should be ordered to comply with the subpoena. During this hearing, the Sheriff may raise his defenses. If the defenses are overruled and the Sheriff still refuses to comply, the contempt process is initiated by an OSC re: contempt.[13]

D. Conclusion

Mandamus is not available to compel the Inspector General to set aside his subpoena. Because the Sheriff has the ability to raise proper defenses in response to the Inspector General's request for an OSC re: contempt, the demurrer is sustained without leave to amend.

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[1] All further statutory references are to the Government Code unless otherwise stated.

[2] The Legislative Counsel's digest constitutes the official summary of the legal effect of the bill and is relied upon by the Legislature throughout the legislative process, and thus is recognized as a primary indication of legislative intent." Mt. Hawley Ins. Co. v. Lopez, (2013) 215 Cal.App.4th 1385, 1401, *as modified* (May 29, 2013) (internal quotations and citations omitted).

[3] Analyses by the Office of Senate Floor Analyses and the Office of Assembly Floor are relevant to the issue of legislative intent. Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc., (2005) 133 Cal.App.4th 26, 31, 37 (2005) (listing Senate Floor Analyses and Assembly Floor Analyses as "cognizable legislative history").

[4] The County requests judicial notice of: (1) Analysis of Senate Bill No. 1185 by Senate Public Safety Committee, Office of Senate Floor Analyses (2019–2020 Regular Session) (Ex. 1); (2) Analysis of Sen Bill No. 1185 by Assembly Public Safety Committee, Office of Assembly Floor Analyses (2019–2020 Regular Session) (Ex. 2); (3) Legislative Counsel's Digest, Assembly Bill 1185 ("AB 1185"), approved by Governor Gavin Newsom on September 30, 2020 (Ex. 3); (4) Excerpts of the Statement of Proceedings for the Regular Meeting of the Board of Supervisors of County of Los Angeles dated November 10, 2020, adopting Section 25303.7 and vesting the OIG with subpoena power (Ex. 4); and (5) Minute Order, dated Nov. 20, 2020, County of Los Angeles v. Sheriff, LASC Case No. 20STCP02073 (Ex. 5).

The request is granted for Exhibits 1-4. Evid. Code §452(c). The existence of the Exhibit 5, but not the truth of its contents, is judicially noticed. Evid. Code §452(d); Sosinsky v. Grant, (1992) 6 Cal.App.4th 1548, 1551 (judicial notice of findings in court documents may not be judicially noticed). The County also requests judicial notice of the Sheriff's December 17, 2020 testimony before COC under Evid. Code §452(h). The court cannot judicially notice a transcript of proceedings and the request is denied.

[5] The Petition acknowledges that this is a subject of intense public scrutiny inside and outside the County. Pet. ¶¶ 7, 8.

[6] The Sheriff distinguishes Arnett as a case in which the Medical Board subpoenaed records, not testimony and the Arnett court noted that the Medical Board had tried other alternative means to obtain the information besides a subpoena. 14 Cal.4th at 17. Opp. at 2. While true, these facts do not distinguish Arnett's holding, which is that an administrative investigation subpoena is not the equivalent of discovery in a lawsuit, and as a result, hospital peer review records are not immune from production under Evidence Code section 1157. 14 Cal.4th at 4, 23.

[7] This issue is moot because, as the County's reply acknowledges (Reply at 2), the Sheriff's opposition does not rely on the Civil Discovery Act and CCP section 2025.420.

[8] California courts have relied upon and cited to federal decisions in adopting this rule. Liberty Mutual Ins. Co. v. Superior Court, (1992) 10 Cal.App.4th 1282, 1288 (holding that federal discovery decisions are persuasive authority absent contrary California law).

[9] The Sheriff argues that, if the court concludes that mandamus is not the proper vehicle, it should construe his Petition as seeking a writ of prohibition to prevent a threatened act in excess of jurisdiction. CCP §1102. Generally, the petitioner's characterization of the requested writ is unimportant and relief will rarely be denied because the wrong writ is sought. *See, e.g.,* Anderson v. Superior Court, (1989) 213 Cal.3d 1321, 1324. Opp. at 7.

A writ of prohibition is a writ to restrain judicial actions in excess of jurisdiction. CCP §1102; International Film Investors v. Arbitration Tribunal of Directors Guild of America, Inc., (1984) 152 Cal.App.3d 699, 704 (prohibition will not lie to restrain acts of arbitrator). The Petition cites no judicial act at issue, and a writ of prohibition will not lie.

[10] The Sheriff correctly points out that County of San Diego is inapposite because it held that a mandamus petition to compel the Legislature to appropriate money violated the separation of powers. 164 Cal.App.4th at 596. Opp. at 6-7.

[11] The County relies on Judge Fujie's decision on the COC's motion for an OSC re: contempt for its subpoena to the Sheriff in County of Los Angeles v. Villanueva, LASC Case No. 20STCP02073. County RJN, Ex. 5. Dem. at 8-9. The Sheriff responds that Judge Fujie never ruled on the OSC because the County withdrew its request due to its failure to comply with the court's

order re service of the OSC, and the County also misled Judge Fujie that the COC is a legislative body. Opp. at 9. The County replies that it withdrew its petition for an OSC re: contempt in exchange for the Sheriff's agreement to appear before the COC and that it did not mislead Judge Fujie because a "legislative body" is defined to include "[a] commission . . . whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body." §54952. Reply at 8, n. 6.

Except to note that Judge Fujie assumed that the COC's subpoena was legislative in nature, the court will decide the Inspector General's authority without the reliance on another trial court's analysis. *See* County RJN Ex. 5, pp. 3, 5-6.

[12] The COC used a similar procedure in County of Los Angeles v. Villanueva, LASC Case No. 20STCP02073, by moving for an OSC re: contempt which permitted the Sheriff raised defenses to the subpoena. *See* County RJN, Ex. 5.

[13] If the parties doubt that this is the correct procedure, the court will permit the Sheriff to amend the Petition to seek declaratory relief concerning the proper section 25303.7 procedure.