Hearing Date: 1/18/2022
Department: 82

American Civil Liberties Union of Southern California,

v.

Inglewood Police Department,

Judge Mary Strobel

Hearing: January 18, 2022

21STCP04167

Tentative Decision on OSC re: Preliminary Injunction

Petitioner American Civil Liberties Union of Southern California ("Petitioner" or "ACLU") moves for a preliminary injunction enjoining Respondent Inglewood Police Department ("Respondent" or "Department") from destroying public records that are potentially responsive to Petitioner's outstanding records requests of January 1, 2019, under the California Public Records Act ("CPRA").

Respondent's Evidentiary Objection to Declaration of Tiffany Bailey

(1) Overruled.

Requests for Judicial Notice

Petitioner's RJN Exhibit F – Granted. (Evid. Code § 452(c).)

Respondent's RJN Exhibit A – Denied. "The truth of the content of [newspaper] articles is not a proper matter for judicial notice." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1141, fn. 6; see also Oppo. 3,9 [citing Exh. A for truth].)

Respondent's RJN Exhibit B – Granted. (Evid. Code § 452(c), (h).)

Petitioner's Reply RJN Exhibit A – Granted. (Evid. Code § 452(c).)

Petitioner's Reply RJN Exhibits B-F, Y-Z, BB, CC – Granted. (Evid. Code § 452((c), (d), (h).) The court judicially notices the existence of these court and official records, but not the truth of any statements therein.

Petitioner's Reply RJN Exhibits G-X, AA, DD – Denied. Contrary to Petitioner's assertion, Petitioner appears to rely on these new articles for their truth, making judicial notice improper. (See Ochoa Decl. ¶ 8; see *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1141, fn. 6.) Subject to any evidentiary objections, Petitioner is not precluded from submitting these exhibits into evidence by declaration, as it has done.

Respondent's objection to reply evidence: Overruled.

Background

For many years, the CPRA's public disclosure mandate did not extend to records of police discipline, which remained by and large exempted from disclosure under California's Penal Code, Sections 832.7 and 832.8 (Pitchess Statutes).

In 2018, the California Legislature enacted S.B. 1421, which amended the CPRA to require disclosure of records related to police uses of force and misconduct. Specifically, S.B. 1421 makes disclosable peace officer records relating to (1) use of force resulting in death or great bodily injury; (2) discharge of a firearm; (3) a sustained finding of sexual assault by a peace officer; and (4) a sustained finding of dishonesty directly related to the reporting, investigation, or prosecution of a crime, or reporting or investigation of misconduct of another police officer, including perjury, false statements, filing false reports, destruction, falsifying, or concealing evidence. (See Pen. Code, § 832.7(b)(1)(A)-(C); see also 2018 Cal. Legis. Serv. Ch. 988 (S.B. 1421).)

In passing S.B. 1421, the Legislature declared: "The public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force. Concealing crucial public safety matters such as officer violations of civilians' rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety." (S.B. 1421, § 1(b).)

On January 1, 2019, Petitioner submitted a CPRA request to Respondent, seeking certain documents, including documents relating to: (1) Any use of force resulting in death from January 1, 1999 to the present; (2) Any use of force resulting in great bodily injury from January 1, 2009 to the present; (3) Any sustained act of dishonesty directly relating to the reporting, investigation, or prosecution of a crime, or the reporting or investigation of misconduct by another police officer, from January 1, 1999 to the present; and (4) Any sustained act of sexual assault involving a member

of the public from January 1, 2009 to the present (hereafter "CPRA Request"). (Bailey Decl. Exh. A.)

On or about March 5, 2019, Lieutenant Scott Collins sent Petitioner a brief email stating that Respondent had received the CPRA Request and was in the process of reviewing its files to fulfill the request, and that additional time was needed to respond. (Bailey Decl. Exh. B.) Respondent asked for additional extensions to comply with the CPRA Request, including in an email dated January 29, 2020. (Id. Exh. E.) As confirmed in opposition, Respondent has not produced any records in response to the CPRA Request to date. (Id. ¶ 7 and Exh. G; see Brenneman Decl. filed 12/27/21 ("Brenneman Decl.") ¶¶ 3-6; Brenneman Decl. filed 1/10/22 ("Suppl. Brenneman Decl.") ¶¶ 4-14.)

On or about December 14, 2021, Respondent issued a memorandum to the City of Inglewood Mayor and City Council titled "Resolution Authorizing the Destruction of Specific Internal Affairs Records." (Bailey Decl. Exh. F.) In the memorandum, Respondent recommended that the City Council adopt a resolution authorizing the destruction of the following categories of Police Department records:

· Administrative Investigations and any associated case files dated through December 31, 2016.

· Use of Force Reports, Traffic Collision Reviews, Foot Pursuit Reviews, and Vehicle Pursuit Reviews dated through December 31, 2019.

Respondent explained that Government Code section 34090 and Penal Code section 832.5(b) "authorize government agencies to destroy certain records, provided that the records are beyond their retention period and/or no longer required for any pending matters." Respondent stated that a review found that the specified records "are no longer required to be maintained" pursuant to applicable statutes and retention policies. (Ibid.)

On or about December 14, 2021, Petitioner learned that, consistent with Respondent's recommendation, the Inglewood City Council adopted a resolution granting Respondent authority to destroy certain public records. (See Bailey Decl. ¶ 5, Exh. F.)

On December 23, 2021, after attempts to meet and confer informally with Respondent, Petitioner filed its verified petition for writ of mandate seeking to compel Respondent to produce all non-exempt public records that are responsive to the CPRA Request. (See Bailey Decl. Exh. G.)

On December 28, 2021, the court (Judge David Cowan) granted Petitioner's ex parte application for a temporary restraining order and OSC re: preliminary injunction. The court issued a TRO staying the destruction of the disputed records pending further court order. Respondent filed its initial opposition on December 27, 2021, and a supplemental opposition on January 10, 2022. Petitioner filed its reply on January 12, 2022.

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Summary of Applicable Law

Preliminary Injunction Standard

The purpose of a preliminary injunction is to preserve the status quo pending a decision on the merits. (*Major v. Miraverde Homeowners Ass'n.* (1992) 7 Cal. App. 4th 618, 623.) In deciding whether or not to grant a preliminary injunction, the court looks to two factors, including "(1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*White v. Davis* (2003) 30 Cal.4th 528, 553-54.) The factors are interrelated, with a greater showing on one permitting a lesser showing on the other. (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley*(2003) 105 Cal.App.4th 1414, 1420.) However, the party seeking an injunction must demonstrate at least a reasonable probability of success on the merits. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 73-74.) The party seeking the injunction bears the burden of demonstrating both a likelihood of success on the merits and the occurrence of irreparable harm. (*Savage v. Trammell Crow Co.* (1990) 223 Cal.App.3d 1562, 1571.) Irreparable harm may exist if the plaintiff can show an inadequate remedy at law. (CCP § 526(a).)

California Public Records Act

Pursuant to the CPRA (Gov. Code § 6250, et seq.), individual citizens have a right to access government records. In enacting the CPRA, the California 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." (Gov. Code, § 6250; see also *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 63.) To facilitate the public's access to this information, the CPRA mandates, in part, that: "[E]ach state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available…." (Gov. Code § 6253(b).)

The CPRA defines "public records" as follows:

(e) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. "Public records" in the custody of, or maintained by, the Governor's office means any writing prepared on or after January 6, 1975. (Gov. Code § 6252(e).)

Article I, Section 3(b) of the Constitution affirms that "[t]he people have the right of access to information concerning the conduct of the people's business." As amended, the Constitution mandates that the CPRA be "broadly construed," while any statute "that limits the right of access" must be "narrowly construed." (See *Nat'l Lawyers Guild v. City of Hayward* (2020) 9 Cal.5th 488, 507.)

Exemptions from disclosure under the CPRA must be narrowly construed, and the agency bears the burden of showing that a specific exemption applies. (*Sacramento County Employees' Retirement System v. Superior Court* (2013) 195 Cal.App.4th 440, 453.)

Government Code sections 6258 and 6259 set forth the scope of the trial court's review of a writ petition under the CPRA. "Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter." (Gov. Code § 6258.) "Whenever it is made to appear by verified petition to the superior court of the county where the records or some part thereof are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why the officer or person should not do so." (§ 6259(a).) "If the court finds that the public official's decision to refuse disclosure is not justified under Section 6254 or 6255, the court shall order the public official to make the record public. If the court determines that the public official was justified in refusing to make the record public, the court shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure." (Id. § 6259(b).)

Analysis

Petitioner's Likelihood of Success

Petitioner alleges that Respondent's "failure to produce any records in response to the ACLU's January 1, 2019 request for almost three years to date … violated the PRA." (Pet. ¶ 31.) Petitioner alleges that Respondent has not "explain[ed] what steps were taken to gather documents and ready them for production … , nor did it invoke any statutory basis for withholding any of the documents that the ACLU requested." (Id. ¶ 28.) Petitioner seeks a writ of mandate compelling Respondent to perform its duties under the CPRA and produce all non-exempt, responsive records. (Id. ¶¶ 43-52 and Prayer.)

Petitioner shows a reasonable probability of success. The CPRA Request seeks documents that fall within the scope of S.B. 1421 and Penal Code section 832.7(b). (Bailey Decl. Exh. A.) Respondent has not produced any records in response to the CPRA Request to date. (Id. ¶ 7 and Exh. G; see Brenneman Decl. ¶¶ 3-6; Suppl. Brenneman Decl. ¶¶ 4-14.) Prior to this litigation, Respondent apparently did not provide Petitioner any explanation for failing to produce records responsive to the CPRA Request. Nor has Respondent asserted that no responsive documents exist. (See Bailey Decl. ¶ 7 and Exh. A-G and Brenneman Decls. generally.) In opposition, Respondent concedes that it has withheld some documents responsive to the CPRA Request based on purported exemptions. (See Suppl. Brenneman Decl. ¶¶ 3-5.)

In rebuttal to the Brenneman declarations, Petitioner also submits additional evidence suggesting that Respondent has responsive records within its possession. (Reply Ochoa Decl. ¶¶ 2-8.) Petitioner's Director of Police Practices declares: "I conducted a search of publicly-available records to see if there was published information relating to incidents involving [Respondent] that

appear to involve incidents covered under SB 1421 within the time frame requested by ACLU. In the course of my search, I located reports of several incidents involving use of force in the time period sought in the ACLU request (January 1, 1999-January 1, 2019) and reviewed records reflecting the following reports: …." (Id. ¶ 8.)

Respondent contends that Petitioner has not demonstrated a likelihood of success because "the CPRA catchall exemption may apply to requests for section 832.7 officer-related records" and "[p]ursuant to Penal Code section 832.7, subd. (b)(7)(A), (B), (C), Respondent may temporarily withhold records of incidents involving an officer's discharge of a firearm or use of force resulting in death or great bodily injury by delaying disclosure when the incidents are the subject of an active criminal or administrative investigation." (Oppo. filed 1/10/22 ("Oppo.") 6-8.) Respondent contends that "Assistant City Attorney Derald Brenneman reviewed Petitioner's January 1, 2019 CPRA … [and] confirmed that some records potentially responsive to Petitioner's CPRA request should be temporarily withheld, because they concerned incidents that are subject to a pending criminal, civil, or administrative investigations and on that basis, that Respondent is withholding certain records until either a statute of limitations has run or when the matters are no longer pending such as when the District Attorney has decided whether or not to pursue criminal charges." (Oppo. 8, citing Suppl. Brenneman Decl. ¶¶ 10-14.)

The CPRA catchall exemption, found in Government Code section 6255, "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." (*City of San Jose v. Sup. Ct.* (1999) 74 Cal.App.4th 1008, 1017.) "The burden of proof is on the proponent of nondisclosure, who must demonstrate a 'clear overbalance' on the side of confidentiality." (Id. at 1018.) This balancing depends on the specific circumstances and "facts of a particular case." (Ibid.; see also *ACLU of Northern Cal. v. Sup.Ct.* (2011) 202 Cal.App.4th 55, 83 ["[T]he agency must describe '*each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information' "].)

The exemptions in Penal Code section 832.7(b)(7) and (8), cited by Respondent, also impose requirements on the agency to justify non-disclosure. For instance, section 832.7(b)(8)(A)(i) states: "During an active criminal investigation, disclosure may be delayed for up to 60 days from the date the misconduct or use of force occurred or until the district attorney determines whether to file criminal charges related to the misconduct or use of force, whichever occurs sooner. If an agency delays disclosure pursuant to this clause, the agency shall provide, in writing, the specific basis for the agency's determination that the interest in delaying disclosure clearly outweighs the public interest in disclosure. This writing shall include the estimated date for disclosure of the withheld information." Section 832.7(8)(B) also states: "If criminal charges are filed related to the incident in which misconduct occurred or force was used, the agency may delay the disclosure of records or information until a verdict on those charges is returned at trial or, if a plea of guilty or no contest is entered, the time to withdraw the plea pursuant to Section 1018."

A public agency also has the burden to demonstrate that it properly determined that records are non-responsive to a CPRA request. (*ACLU of Northern Cal. v. Sup.Ct.* (2011) 202 Cal.App.4th 55, 84-86.)

Here, to justify withholding *all* records responsive to the CPRA Request, Respondent submits two declarations of Assistant City Attorney Brenneman, who declares: "I received and reviewed Petitioner's January 1, 2019 CPRA request seeking disclosure of certain records pursuant to the amended Penal Code section 832.7, which makes certain records from a peace officer's personnel file nonconfidential. I confirmed that some records potentially responsive to Petitioner's CPRA request should be temporarily withheld because they concerned incidents that are subject to a pending criminal, civil, or administrative investigations, and on that basis that Respondent is withholding certain records until either a statute of limitations has run, or when the matters are no longer pending, such as when the District Attorney has decided whether or not pursue criminal charges. With regard to the incident related to the February 21, 2016 officer involved shooting of Kisha Michael, I have not received any communications from the District's Attorney George Gascon's Office concerning whether a decision has been reached whether to prosecute any of the officers involved in that incident, and my understanding is that the statute of limitations has not run in that matter. Additionally, the District Attorney's Office's usual practice is to publicly post all decisions concerning prosecutions of police shooting incidents, and to my knowledge that has not been done with regard to this particular incident." (Suppl. Brenneman Decl. ¶¶ 2-4.) In a conclusory statement, Brenneman also asserts that, based on his review, documents within Respondent's possession are not responsive to the CPRA Request. (Id. ¶ 5.)

In reply, Petitioner argues that Brenneman's declarations are insufficient to satisfy Respondent's burden under section 6255 or section 832.7 to withhold public records. (Reply 5-6 and fn. 4.) Petitioner states that these statutes require a "case-specific showing," which is not made in Brenneman's declarations. Petitioner also states that certain time limits for withholding the subject records in section 832.7 are not met. With respect to responsiveness, Petitioner also contends that Respondent's "conclusory statements provide no details regarding substance of the records in question nor the criteria applied by [Respondent] to determine that they were nonresponsive, and do not come close to satisfying its heavy burden to justify withholding." (Reply 7.) While Petitioner makes colorable arguments, the court need not decide them definitively for purposes of this application.

As discussed, Petitioner has shown a reasonable probability of success on its claim that Respondent has responsive records within its possession and has not produced such records. Respondent, not Petitioner, has the burden of proof on CPRA exemptions and to justify withholding documents as non-responsive. Respondent relies entirely on the terse declarations of Brenneman to satisfy that burden and has not described the withheld documents in any detail. On this record and briefing, the court has insufficient basis to conclude that Respondent will be able to show that all of the disputed records are exempt or non-responsive. Whether Respondent can establish that any records may be withheld as exempt or non-responsive are disputed questions of fact and law for trial. At this juncture, Petitioner has shown a reasonable probability of prevailing on its CPRA petition.

The question of whether Petitioner has shown that Respondent is likely to destroy responsive records relates predominately to the balance of harms and is discussed *infra*. (See Oppo. 9-10; Reply 6-9.)

<u>Balance of Harms</u>

For the second factor, the court must consider "the interim harm that the plaintiff would be likely to sustain if the injunction were denied as compared to the harm the defendant would be likely to suffer if the preliminary injunction were issued." (*Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 749.) "Irreparable harm" generally means that the defendant's act constitutes an actual or threatened injury to the personal or property rights of the plaintiff that cannot be compensated by a damages award. (See *Brownfield v. Daniel Freeman Marina Hospital* (1989) 208 Cal.App.3d 405, 410.)

Petitioner shows that it would suffer severe, irreparable harm if the preliminary injunction is denied. Petitioner has a constitutional and statutory right to public records with Respondent's possession. (Gov. Code § 6250, et seq.; Cal. Const. Art. I, § 3(b); Penal Code § 832.7(b); and *Nat'l Lawyers Guild v. City of Hayward*(2020) 9 Cal.5th 488, 507.) In passing S.B. 1421, the Legislature declared: "The public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force. Concealing crucial public safety matters such as officer violations of civilians' rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety." (S.B. 1421, § 1(b).) Destruction of records responsive to Petitioner's CPRA Request would defeat Petitioner's and the public's weighty constitutional and statutory right of access to these records and impair Petitioner's ability to further its mission of police transparency and accountability by making these records accessible to the public. (See Ochoa Decl. ¶ 3; Bailey Decl. ¶ 8.)

Petitioner submits evidence that City's December 14, 2021, Resolution ("Resolution") authorizes destruction of records responsive to the CPRA Request. The Resolution authorizes destruction of "***All*** Internal Affairs Investigations and Administrative Investigations dated through December 31, 2016" and "***All*** Use of Force Reports . . . through December 31, 2019." Records related to sustained sexual assault and official dishonesty allegations and serious uses of force for the time period requested by Petitioner are encompassed by this description.

Nonetheless, attorney Brenneman declares that, based on his review, "[n]one of the records slated for destruction are responsive or relevant to the ACLU's January 1, 2019 PRA request." (Suppl. Brenneman Decl. ¶¶ 8-9, 12-13.) Lieutenant Geoffrey Meeks also declares that, based on his review, "none of the records scheduled to be destroyed are responsive to the ACLU's PRA request." (Meeks Decl. ¶ 7.) As discussed, a public agency has the burden to demonstrate that it properly determined that records are non-responsive to a CPRA request. (*ACLU of Northern Cal. v. Sup.Ct.* (2011) 202 Cal.App.4th 55, 84-86.) Conclusory declarations may not satisfy that burden. (Id. at 83.) More importantly here, Petitioner has had no opportunity to challenge the validity of Respondent's determination that responsive records would not be destroyed. If the documents are destroyed, it will be impossible for Petitioner to challenge Respondent's responsiveness determinations.

Respondent fails to show any irreparable harm to its own interests or operations if the preliminary injunction is granted. A memorandum from the Chief of Police dated December 2, 2021, suggests that as few as 58 records may be subject to destruction. (See Reply 2, fn. 2; Compl. Exh. F; and Bailey Decl. Exh. F.) In opposition, Respondent does not state how many records were authorized

for destruction by the Resolution and it identifies no harm at all from being required to maintain the subject documents in its possession through trial. The court's ruling on the TRO states that, at the ex parte hearing, "Inglewood's counsel was unable to identify any potential prejudice from staying destruction of the documents." (TRO Ruling at 3.) That observation remains true based on the supplemental opposition filed January 10, 2022.

Respondent asserts that "[i]f the Court grants Petitioner's requested injunction to stay the normal course of City business without showing the requisite elements for a preliminary injunction, it would chill the City's ability to conduct its business and embolden petitioners to run into Court to the detriment of cities throughout the state." (Oppo. 10.) This argument is not persuasive. Respondent fails to identify any impact on its ability to conduct its business from the proposed preliminary injunction and there is no reason to believe the injunction would "embolden" petitioners to make improper requests for injunctive relief against public agencies. Petitioner only seeks to prevent Respondent from destroying records that may be responsive to its CPRA Request before the court has had the opportunity to adjudicate the parties' dispute, and Respondent can minimize any claimed harm by expeditiously responding to Petitioner's Request to obviate the need for the injunction.

Finally, as noted in reply, a recent change in the law appears to prohibit Respondent from destroying records that are potentially responsive to Petitioner's request before this court determines whether they must be produced. (Reply 9-10.) Effective January 1, 2022, Penal Code section 832.5(b) mandates that "[a] record shall not be destroyed while a request related to that record is being processed or any process or litigation to determine whether the record is subject to release is ongoing." These new provisions of section 832.5(b), enacted by S.B. 16, were discussed in the ex parte papers. (Ex parte 8.) In opposition, Respondent developed no argument that section 832.5(b) would not apply here. Section 832.5(a)(2) specifically refers to section 832.7, which includes the CPRA disclosure provisions at issue in this litigation. S.B. 16 also states that "existing law requires a state or local agency to make these excepted records available for inspection pursuant to the California Public Records Act, subject to redaction as specified." The amended section 832.5 provides an additional reason to preclude Respondent from destroying the records and underscores the conclusion that there is no prejudice to Respondent to retain these records.

The balance of harm weighs heavily in favor of granting the preliminary injunction. Having considered Petitioner's probability of success and the balance of harms, the court will grant the preliminary injunction.

Undertaking

A preliminary injunction ordinarily cannot take effect unless and until the plaintiff provides an undertaking for damages which the enjoined defendant may sustain by reason of the injunction if the court finally decides that the plaintiff was not entitled to the injunction. (See Code Civ. Pro. § 529(a); *City of South San Francisco v. Cypress Lawn Cemetery Ass'n.* (1992) 11 Cal. App. 4th 916, 920; see *Abba Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 15-16 ["the prevailing defendant

may recover that portion of his attorney's fees attributable to defending against those causes of action on which the issuance of the preliminary injunction had been based"].)

The undertaking requirement of CCP section 529 applies in a CPRA action, including when the requestor seeks a preliminary injunction against destruction of potentially responsive records. (See *Stevenson v. City of Sacramento* (2020) 55 Cal.App.5th 545 generally; see also Id. at 550 [trial court imposed undertaking of $2,349.50].)

The parties do not address the undertaking requirement in their legal briefs and should so at the hearing. Subject to argument, the court concludes that an undertaking of $1,000 is sufficient.

Conclusion

The application for preliminary injunction is GRANTED. Subject to argument, Petitioner to post an undertaking of $1,000.