15. TIME: 9:00 CASE#: MSN19-0169
CASE NAME: RICHMOND POLICE VS. CITY OF RICHMOND
HEARING ON MOTION FOR ISSUANCE OF WRIT AND JUDGMENT
FILED BY FIRST AMENDMENT COALITION, et al.
**** TENTATIVE RULING: ****

Intervenors/Cross-Petitioners First Amendment Coalition; California Newspapers Partnership; KQED, Inc., Investigative Studios, Inc.; and Center for Investigative Reporting (collectively petitioners) move for a writ of mandate against the City of Richmond.

The Court agrees with petitioners on many issues, but agrees with the City on certain others. This ruling lays out the Court's views on the points of dispute. Whether an actual writ will be necessary, however, remains to be seen. The Court accordingly sets this motion over to September 4, 2020, at 10:00 a.m., for further review as to the state of compliance,

noncompliance, or continued disagreement as to particular documents. The parties are to meet and confer in the meantime, with the expectation that they should be able to agree on all (or at least most) details of compliance in light of the Court's rulings. Each party may, if it thinks necessary, file and serve a short update statement with the Court on the status of the issues by August 28. (Courtesy copies to the Court would be a good idea.)

Both sides' unopposed requests for judicial notice are granted.

Background

At issue here are various particular aspects of the scope and interpretation of Penal Code § 832.7(b), enacted in 2018 and also known as SB 1421. The new statute specified certain categories of police records that are newly made subject to request and disclosure under the Public Records Act (PRA, Government Code §§ 6250 et seq.), and no longer included within the confidentiality protections against disclosure found in Penal Code § 837.7(a) and Government Code § 6254(f).

This action began as a writ of mandate proceeding filed by the Richmond Police Officers Association (RPOA), focused solely on SB 1421's chronological coverage – specifically whether the new statute's disclosure requirements applied to documents created (or incidents occurring) before the January 1, 2019 effective date of the new statute. That issue was fully argued and decided by this Court, and subsequently affirmed by the court of appeal. The RPOA part of the action has now dropped out of the case.

What is left is a complaint in intervention filed by petitioners, seeking to enforce compliance with their own PRA requests under SB 1421. (A parallel complaint in intervention was filed by a second set of intervenors, but they are not parties to the present proceedings.) After considerable negotiation and discussion, petitioners and the City have come to impasse on several particular points of dispute as to the City's compliance with Petitioners' requests. The aim of the present motion is to bring those points of dispute to the Court for decision. In short, the Court concludes that petitioners are right on some points; the City is right on others; and the parties should now continue their discussions as to particular documents in light of these rulings.

The text of the new subdivision 832.7(b) is as follows:

> **(b) (1)** Notwithstanding subdivision (a), subdivision (f) of Section 6254 of the Government Code, or any other law, the following peace officer or custodial officer personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code):
>
> > **(A)** A record relating to the report, investigation, or findings of any of the following:
> >
> > > **(i)** An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.

(ii) An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury.

(B)

(i) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.

(ii) As used in this subparagraph, "sexual assault" means the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or other official favor, or under the color of authority. For purposes of this definition, the propositioning for or commission of any sexual act while on duty is considered a sexual assault.

(iii) As used in this subparagraph, "member of the public" means any person not employed by the officer's employing agency and includes any participant in a cadet, explorer, or other youth program affiliated with the agency.

(C) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

(2) Records that shall be released pursuant to this subdivision include all investigative reports; photographic, audio, and video evidence; transcripts or recordings of interviews; autopsy reports; all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take; documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action.

(3) A record from a separate and prior investigation or assessment of a separate incident shall not be released unless it is independently subject to disclosure pursuant to this subdivision.

(4) If an investigation or incident involves multiple officers, information about allegations of misconduct by, or the analysis or disposition of an investigation of,

an officer shall not be released pursuant to subparagraph (B) or (C) of paragraph (1), unless it relates to a sustained finding against that officer. However, factual information about that action of an officer during an incident, or the statements of an officer about an incident, shall be released if they are relevant to a sustained finding against another officer that is subject to release pursuant to subparagraph (B) or (C) of paragraph (1).

(5) An agency shall redact a record disclosed pursuant to this section only for any of the following purposes:

(A) To remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace and custodial officers.

(B) To preserve the anonymity of complainants and witnesses.

(C) To protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct and serious use of force by peace officers and custodial officers.

(D) Where there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer, custodial officer, or another person.

(6) Notwithstanding paragraph (5), an agency may redact a record disclosed pursuant to this section, including personal identifying information, where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information.

(7) An agency may withhold a record of an incident described in subparagraph (A) of paragraph (1) that is the subject of an active criminal or administrative investigation, in accordance with any of the following:

(A)

(i) During an active criminal investigation, disclosure may be delayed for up to 60 days from the date the use of force occurred or until the district attorney determines whether to file criminal charges related to the 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.

(ii) After 60 days from the use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against an

officer who used the force. If an agency delays disclosure pursuant to this clause, the agency shall, at 180-day intervals as necessary, provide, in writing, the specific basis for the agency's determination that disclosure could reasonably be expected to interfere with a criminal enforcement proceeding. The writing shall include the estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner.

(iii) After 60 days from the use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against someone other than the officer who used the force. If an agency delays disclosure under this clause, the agency shall, at 180-day intervals, provide, in writing, the specific basis why disclosure could reasonably be expected to interfere with a criminal enforcement proceeding, and shall provide an estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner, unless extraordinary circumstances warrant continued delay due to the ongoing criminal investigation or proceeding. In that case, the agency must show by clear and convincing evidence that the interest in preventing prejudice to the active and ongoing criminal investigation or proceeding outweighs the public interest in prompt disclosure of records about use of serious force by peace officers and custodial officers. The agency shall release all information subject to disclosure that does not cause substantial prejudice, including any documents that have otherwise become available.

(iv) In an action to compel disclosure brought pursuant to Section 6258 of the Government Code, an agency may justify delay by filing an application to seal the basis for withholding, in accordance with Rule 2.550 of the California Rules of Court, or any successor rule thereto, if disclosure of the written basis itself would impact a privilege or compromise a pending investigation.

(B) If criminal charges are filed related to the incident in which 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.

(C) During an administrative investigation into an incident described in subparagraph (A) of paragraph (1), the agency may delay the disclosure of records or information until the investigating agency determines whether the use of force violated a law or agency policy, but no longer than 180 days after the date of the employing agency's discovery of the use of force, or allegation

> of use of force, by a person authorized to initiate an investigation, or 30 days after the close of any criminal investigation related to the peace officer or custodial officer's use of force, whichever is later.
>
> **(8)** A record of a civilian complaint, or the investigations, findings, or dispositions of that complaint, shall not be released pursuant to this section if the complaint is frivolous, as defined in Section 128.5 of the Code of Civil Procedure, or if the complaint is unfounded.

"Great Bodily Injury"

The parties' first disagreement concerns the construction of the term "great bodily injury" in SB 1421. The statute includes, in the categories of disclosable documents,

> A record relating to the report, investigation, or findings of any of the following: …**(ii)** An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury.

Penal Code § 832.7(b)(1)(A)(ii). In sum, petitioners argue that the City is using an incorrect and improperly narrow definition of "great bodily injury" by relying instead on the term "serious bodily injury", a term not used in SB 1421. Petitioners contend that the City should interpret their requests for documents reflecting instances of "great bodily injury", which language is identical to their requests and to SB 1421.

The City argues instead that the term "great bodily injury" in SB 1421 should be read to mean the same as the definition of "serious bodily injury" as found in Penal Code § 423(f) and Government Code § 12525.2(a). The latter statute requires local law enforcement agencies to furnish reports to the Department of Justice of all instances where have occurred a shooting of a civilian by a peace officer, a shooting of a peace officer by a civilian, an incident where a use of force by a peace officer against a civilian results in "serious bodily injury" or death, and vice versa. This statute defines "serious bodily injury" as "a bodily injury that involved a substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ" (§ 12525.2(d)).

In contrast, "great bodily injury" is defined in Penal Code § 12022.7(a), which permits enhancement of a criminal defendant's sentence if the defendant has inflicted "great bodily injury" on any person other than an accomplice in committing a felony. That statute defines "great bodily injury" as "a significant or substantial physical injury" (§ 12022.7(d)). (See, e.g., *People v. Washington* (2012) 210 Cal.App.4th 1042, 1047-48.) Thus, the phrase "great bodily injury" appears to cover a significantly broader range of injuries than the phrase "serious bodily injury".

SB 1421, of course, uses the specific language "great bodily injury" rather than the term "serious bodily injury". Indeed, as the parties both point out, the Legislature consciously chose the term "great bodily injury" in lieu of "serious bodily injury". On the face of the statutory language, that is all but conclusive as to which of the two terms should be applied under SB 1421.

In construing a statute, the court's fundamental task is to ascertain the intent of the Legislature. (*Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 164.) To determine intent, courts must first

examine the statute's words, "because they are generally the most reliable indicator of intent". (*Wirth v. California* (2006) 142 Cal.App.4th 131, 139.) "[T]he meaning of a statute is to be sought in the language used by the Legislature." (*City of Emeryville v. Cohen* (2015) 233 Cal.App.4th 293, 303-04.) If the statute's language is clear and unambiguous, no construction is necessary and the court need not resort to other indicia of intent. (*Wirth*, 142 Cal.App.4th at 139.)

These principles apply with particular force when the Legislature uses well-established legal terms of art in its enactments. "[I]t is a cardinal rule of statutory construction that, when [a legislature] employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken." (*Air Wisconsin Airlines Corp. v. Hoeper* (2014) 571 U.S. 237, 248.) The Legislature's choice of the phrase "great bodily injury" signals its intent that this term of art be applied, and not the narrower (and equally well-established) term of art "serious bodily injury". (See, e.g., *Brown v. Superior Court* (2016) 63 Cal.4th 335, 350 (noting that Legislature could have, but did not, use other terms, but instead adopted a term of art "with which it is quite familiar").)

It is a stretch, perhaps, to say that the term "great bodily injury" is clear and unambiguous as applied to any particular set of facts in arising as to a particular incident or requested document. But the present motion does not call on the Court to apply the definition to any particular document or incident. The Court is called on only to select between the term of art "great bodily injury" and the term of art "serious bodily injury" as to the correct meaning of SB 1421. And on that point of debate, there simply is no ambiguity at all. Not only did the Legislature actually use one of those phrases rather than the other, but indeed it consciously chose one over the other. A prior draft of SB 1421 expressly used the language "serious bodily injury, as defined in subdivision (f) of Section 243". An amendment in the Assembly then substituted the term "great bodily injury" for that language. (Rodewald Decl. Exh. N.) Here, the inference that the Legislature consciously chose the term of art "great bodily injury" instead of the term of art "serious bodily injury" is not just a presumption – it is a demonstrated historical fact.

Both sides ask the Court to look at the only available legislative history bearing on that amendment, namely the Senate Floor Analysis of August 31, 2018 (Rodewald Decl. Exh. O). In summarizing the Assembly's amendments, the Analysis stated that the amendments "clarify the level of injury that requires release of records is 'great bodily injury' due to the larger body of law interpreting that term, and existing incident tracking already done by law enforcement in lieu of 'serious bodily injury'".

The first part of this comment apparently reflects the Legislature's conscious intent that in construing the term "great bodily injury" in § 832.7(b)(1)(a)(ii), law enforcement agencies and the courts are to look for guidance to the extensive case law construing that exact term, most notably as it arises in Penal Code § 12022.7(d).

The Analysis's second comment, about "existing incident tracking already done by law enforcement", is less transparent. This evidently refers to the mandatory reporting of "serious bodily injury" incidents required by Government Code § 12525.2(a). The City would have the

Court infer that the Legislature must have meant for the scope of the disclosure requirements of § 832.7(b)(1)(a)(ii) to mirror the scope of the reporting requirements in § 12525.2(a), thus saving agencies from having to produce or report incidents under two different standards. But if that were the case, there would have been zero reason for the Assembly's amendment; that intent would have been captured, unambiguously and directly, in the prior draft reference to serious bodily injury and § 423(f). As best the Court can make out, the purport of this comment is that law enforcement agencies are already required to make disclosure (albeit to the DOJ rather than the public) of serious bodily injury incidents, and the intent of the amendment is to require public disclosure of a broader category instead. But be that as it may, there is just no getting around the dispositive observations that (1) the Legislature used the term "great bodily injury"; (2) the Legislature consciously chose that term as preferable to "serious bodily injury"; and (3) the Legislature intended that agencies and the courts use the case law construing "great bodily injury" in applying 832.7(b)(1)(a)(ii).

Finally, the City points to the comment in *People v. Wade* (2012) 204 Cal.App.4th 1142, 1149, that the term "serious bodily injury" as used in § 243(f) is "essentially equivalent to 'great bodily injury'" as used in § 12022.7. If the City is seriously arguing that there is no real difference between the two terms, one is forced to wonder why the City finds it necessary to argue at such length for one term over the other.

Assuming arguendo that the two terms mean about the same thing, however, that tells us little about *what* the two terms mean. It is significant that *Wade* was construing the term "serious bodily injury" by reference to the term "great bodily injury", rather than vice versa. The tenor of *Wade*'s comment is that the term "serious bodily injury" must be read expansively to match the existing case-law meaning of "great bodily injury" – and not, as the City would have it, to instead contract the meaning of "great bodily injury" down to a narrower (and less-well-established) meaning of "serious bodily injury". Whether or not this comment in *Wade* means anything relevant to the present debate, then, it definitely does not mean what the City wants to take it to mean – namely, that great bodily injury is narrower than the extensive case law says it is.

"Sexual Assault"

SB 1421 includes, as a category of disclosable records, those related to sustained findings of sexual assault:

> **(i)** Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.
>
> **(ii)** As used in this subparagraph, "sexual assault" means the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or other official favor, or under the color of authority. For purposes of this definition, the propositioning for or commission of any sexual act while on duty is considered a sexual assault.

> **(iii)** As used in this subparagraph, "member of the public" means any person not employed by the officer's employing agency and includes any participant in a cadet, explorer, or other youth program affiliated with the agency.

(Penal Code § 832.7(b)(1)(B).) The parties' debate on this motion centers on the relationship between the first and second sentences in subdivision (ii). The first sentence, in defining "sexual assault", clearly has reference to nonconsensual sexual encounters: "by means of force, threat, coercion, extortion, offer of leniency or other official favor, or under the color of authority". The second sentence, however, is not so limited: "the propositioning for or commission of *any* sexual act while on duty" (emphasis added).

In a nutshell, the debate here is whether the limitation to nonconsensual acts applies to the second sentence. The Court concludes that it does not. In practical effect, the Legislature has chosen to draw a prophylactic line: If a police officer propositions or has sex with a non-officer while on the job, that is sexual assault, period – at least for purposes of disclosability under SB 1421. In other words, the Legislature does not intend to carve out a situation along the lines of "okay, it's true that I propositioned that streetwalker I was questioning, but it was all consensual." The Legislature may have had in mind that it can be too easy for an officer to claim consent in this situation where it isn't really consensual – or it may simply have concluded that on-the-job sex with a civilian is either inherently coercive, or at least highly likely to be so. Indeed, there is an obvious risk that such an encounter might be thought to be "under the color of authority", in that a proposition from a uniformed or badge-flashing officer may be inherently coercive, at least as against a member of the general public.

Neither side points the Court to any useful legislative history on point here. The Court looks to the plain language used. Each of the two sentences of subdivision (ii) constitutes a freestanding, if partial, definition of the term "sexual assault". It is true that the two definitions are not entirely harmonious with each other, and the Legislature has provided no clear guidance as to how they are to be read together. But there is no reason not to read each sentence as it was written.

Under the City's interpretation, to fall within the second sentence, a sexual encounter must meet all of three criteria: (1) it must involve "the propositioning for or commission of a sexual act"; (2) the propositioning or sexual act must occur "while on duty"; and (3) the propositioning or sexual act must have been nonconsensual. The first two criteria are found textually in the sentence. The third is not.

The problem with the City's reading of the second sentence is that it makes that sentence entirely redundant with the first, effectively reading the second sentence out of the statute. The first sentence already includes all propositioning ("attempted initiation") or commission of sexual acts with civilians, if they are nonconsensual – including those occurring while on duty. It is broader than the second sentence in that it applies to nonconsensual encounters off the job as well as on the job. But, if the criterion of nonconsensuality is incorporated into the second sentence, the result is that the second sentence covers no cases at all that are not already covered in the first sentence.

It is a well-settled principle of statutory construction that the Court must, if possible, avoid any interpretation that would make surplusage of any part of the statutory language. (E.g., *People v. Loeun* (1997) 1 Cal.4th 1, 9; *Dyna-Med, Inc. v. FEHC* (1987) 43 Cal.3d 1379, 1387; *Regents of Univ. of California v. Superior Court* (2013) 220 Cal.App.4th 549, 566-67.)

Thus, to paraphrase slightly, the Legislature has identified two categories of incidents, substantially overlapping but not identical, that would give rise to disclosability under § 832.7(b)(1)(B):

- Nonconsensual sexual acts or propositions, whether committed on or off the job; and
- Sexual acts or propositions committed on the job, whether or not consensual (or claimed to be consensual).

It is important to note here that the Legislature is not banning, punishing, or sanctioning on-the-job consensual encounters. All it is doing is making such encounters the subject of possible disclosure under SB 1421 – and then only if the matter is serious enough that the police agency pursues the accusation to the point of a sustained finding. If an on-the-job sexual encounter really was consensual, disclosure of the facts will enable the requesting public to ascertain and confirm that the encounter was consensual. But the logic of the Legislature's prophylactic line-drawing is that when an on-duty officer has or solicits sex from a member of the public, there is an inherent danger that the encounter may be coercive – and that it therefore may call for the scrutiny that public disclosure enables. If there is any room for doubt as to consent (even if the officer claims it was or the agency found it was), then the intent of the statute is to let the requesting public see the facts and make up their own minds.

The City has half a point when it describes this reading of the second sentence as potentially overreaching in at least minor respects. It appears to be true, for example, that the second sentence would at least nominally reach (say) an on-duty officer sneaking off for a consensual nooner or quickie with his or her own spouse or significant other, during the officer's duty shift. One might question whether the Legislature, if it had thought about that particular nuance, would have chosen to include it. But include it the Legislature evidently did.

That concern, however, arises *only* if the matter rises to the level of a formal disciplinary proceeding and a sustained finding. In the nooner hypothetical, that might well occur not because sex is involved – but simply because it's a serious matter for an on-duty officer to divert from his or her duties for any private business, sexual or otherwise. But the City's more alarmist hypothetical, that the statute might require disclosure of an officer sexting or the like with his or her own spouse, strikes the Court as highly improbable. It is true that such conduct could literally constitute "propositioning" while on duty. But it still is not a disclosable incident unless it results in discipline and a sustained finding. The Court cannot see any police agency making a serious discipline case out of a cop making a flirty phone call to his or her spouse during a coffee break.

The counterargument, as noted above, is the concern that it would be too easy for officers, soliciting sex from members of the general public, to claim consent where none really exists. By allowing disclosure under SB 1421, the Legislature allows the inquiring public to get the facts

and make its own inquiry about whether an on-the-job encounter really was or wasn't consensual. That is a line the Legislature was entitled to draw.

"Dishonesty"

SB 1421 requires disclosure of

> **(C)** Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

(Penal Code § 832.7(b)(1)(C).) The dispute here is whether this subdivision includes incidents of dishonesty outside the stated subject matter of the subdivision – for example, falsifying time cards or padding expense reimbursements. The Court agrees with the City that it does not.

The debate on this subdivision is superficially similar to that over sexual assault, as discussed in the preceding part of this ruling. In both subdivisions, there is initial language expressly limiting the subject-matter coverage of the subdivision. In subdivision (b)(1)(B), the limitation is to nonconsensual encounters. Here, it is a limitation on the subject-matter scope of dishonesty involved – "directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer". That excludes other subjects of dishonesty, such as time cards or expenses.

But in both subdivisions, there is then follow-on language that can be read as not including the same subject-matter limitation. In subdivision (b)(1)(B) that was the second sentence covering on-duty sexual encounters. Here, it is the language "including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence".

In a nutshell, the City seeks to read this as still limited by the subject-matter restrictions of the first part of the sentence. Petitioners instead read this as covering *any* perjury, false statements, and so on, whether they relate to the stated subject matter or not – and thus, for example, including the Court's hypothetical expense-padding or time-card cheating.

Again, neither side can cite any useful legislative history or other outside sources on point; so again the Court must simply look to the statutory language. Despite the superficial similarity between this issue and the sexual-assault issue, the Court must agree with the City on this point.

In the sexual-assault subdivision, the second sentence (concerning on-duty encounters) was effectively a second, parallel definition of "sexual assault". Here, by contrast, the "including but not limited to" proviso is more limited: It appears to be expanding on the definition of what kinds of statements constitute "dishonesty" as such – not of the topics on which an officer is being dishonest. Petitioners make the general point that "including" is usually taken as an expansion,

not a contraction. (E.g., *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 717.) But expansion *of what* exactly? To say that the use of "including" expands the physical forms that dishonesty may take, is not the same thing as saying that it expands the topics on which one may be dishonest. The Court reads this proviso as expanding the first of these, not the second.

The decisive consideration here is the same principle that was decisive in the sexual-assault analysis, namely the prohibition on reading a statute in a way that renders some of its language surplusage. In the sexual-assault discussion above, the Court concludes that putatively "consensual" on-duty encounters must be included because, if they were excluded, the entire second sentence of the subdivision would become redundant and meaningless. Here, exactly the opposite is true. If (as petitioners argue) the subdivision covers *any* "perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence" – whether or not the subject matter of the dishonesty is "the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer" – the effect is to read the latter language entirely out of the statute. The result would be to make the subdivision cover any sustained findings of dishonesty at all, regardless of what the officer was being dishonest about. That cannot be squared with the care the Legislature took to lay out express limits on what topics of dishonesty are and are not covered.

"Sustained Findings"

In both of the preceding subdivisions of SB 1421, concerning sexual assault and dishonesty, the scope of disclosable documents is limited to cases in which there have been "sustained findings" of the covered misconduct. Thus, mere accusations of sexual misconduct or dishonesty by officers – whether wholly baseless, or factually ambiguous, or simply not serious enough to call for the full machinery of formal adjudication and discipline – fall outside the required area of required disclosure.

Penal Code § 832.8(b) defines what it means for a finding to be "sustained":

> "Sustained" means a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to Sections 3304 and 3304.5 of the Government Code, that the actions of the peace officer or custodial officer were found to violate law or department policy.

It often occurs that accusations against officers are resolved by less formal procedures falling short of the stage of making or not making "sustained findings". They may, for example, be determined at the outset to be unfounded. They may be deemed too minor to call for full formal disciplinary proceedings. And even if the accusations are serious, it may be that the supporting evidence is too shaky to bear the weight of formal discipline. Both parties agree that any accusations fitting this description are not "sustained findings" and hence not disclosable under SB 1421.

The present debate on this motion, by contrast, arises when proceedings against the officer go a step *beyond* the formal adjudication stage. That is, it sometimes occurs that there is a formal hearing resulting expressly in a sustained finding of dishonesty or sexual assault. But the agency and the officer then negotiate further, and reach an agreed disposition of the matter that includes the element of revoking or eliminating the sustained finding. Of course, if this results from an actual reversal on an administrative appeal, then by definition it ceases to be a sustained finding under § 823.8(b). But the debatable issue arises when the elimination of the sustained finding occurs, not by appellate reversal, but by negotiated settlement. (This is, so to speak, the equivalent of settling a case after Superior Court adjudication but while pending on appeal.)

Again neither side offers any pertinent guidance from legislative history. On the statutory language alone, the Court agrees with petitioners.

The pertinent statutory language is: "Any record relating to an incident in which *a sustained finding was made* by any law enforcement agency or oversight agency" (§ 832.7(b)(1)(B)(i) and (B)(1)C), emphasis added). In the class of cases we are discussing, it is a matter of plain historical fact that "a sustained finding was made". Period. What happened to the finding later is irrelevant, unless the later event is sufficient to take the finding outside the statutory definition of "sustained finding" in § 832.8(b) (as would be true of, for example, an appellate reversal).

The City characterizes this as the elimination of a "sustained finding", followed by "retroactively reinstating" the sustained finding via SB 1421 request. But no one is reinstating anything. If the finding has been deprived of effect by agreement, then it is no longer in effect. But the finding was still "made". It is the City's reading that would be improperly retroactive – seeking to retroactively erase the historical fact that a sustained finding was actually made. If a sustained finding is made, the agency and the officer cannot undo that historical fact by private agreement.

It is of course for the Legislature, not this Court, to lay down the rules of what should or should not be disclosed in this situation. The Court nevertheless has in mind, as a strong possible indication of what may have been on the Legislature's mind, the ongoing (and recently heightened) controversy about the problem of "bad apple" officers migrating from one agency to another, with no due warning to the new employers or the public of issues that may have arisen about sexual assault or dishonesty in prior police employment.

The Court also realizes that this may be marginally overinclusive in some cases. It may be that negotiated eliminations of sustained findings, short of formal reversals, may occur not just as compromised retirements or the like, but because there really is something factually or substantively wrong with the sustained finding. But again, SB 1421 does not result in any concrete punishment of anyone for anything; its only consequence is that records may be requested under the PRA. If there is honest doubt as to the validity of a sustained finding that was made and then negotiated away (but not formally reversed), the Legislature's answer is that the public may look at the records and decide for themselves whether the finding was right or wrong. And of course, if the flaw in the finding is serious or obvious enough, the officer and the

agency can stipulate to a formal administrative-appeal reversal of it. That would suffice to take the defective finding outside the definition in § 832.8(b).

Redactions

Petitioners raise several issues concerning redactions by the City. First, they complain that the City has been trying to charge requesting parties for the personnel cost of redacting what the City regards as unresponsive material. This was apparently authorized at the time under the authority of *National Lawyers Guild v. City of Hayward* (2018) 27 Cal.App.5th 937. As petitioners point out and the City expressly concedes, however, that decision has been reversed by the California Supreme Court. (*National Lawyers Guild v. City of Hayward* (2020) 9 Cal.App.5th 488.) Both sides agree that that settles the point in petitioners' favor.

Beyond cost, however, petitioners complain that the City has been improperly redacting some material from the records it has produced, and has given insufficient explanation for its redactions. One particularly salient example has been the investigation of accusations of sexual misconduct made against several officers by Jasmin Abuslin (aka Celeste Guap); petitioners say that the City redacted all but the first 20 seconds of the recording of the interview with Abuslin.

The Court is not at all sure it understands all the factual details concerning these redactions, as to the Abuslin matter or more generally. It does have the distinct sense, however, that to a large extent these redactions are artifacts of the more substantive disputes discussed in the preceding parts of this ruling. For example, it appears that the asserted justification for the Abuslin redactions may have been the City's view that any sexual contacts between her and the officers involved were consensual, and thus not within the scope of § 832.7(b)(1)(B). If so, the Court's ruling above construing that subdivision will no doubt guide the parties' disclosure conduct going forward. The same appears to be at least potentially true as to other asserted redaction issues.

The parties do address one particular redaction issue on which they seek the Court's ruling. Their discussion of it, however, is at a rather abstact level, frankly making it hard for the Court to be sure it understands what is at issue. One or two "for instances", whether real or hypothetical, would have been helpful in framing the issue for the Court.

The issue concerns the scope of the facts to be disclosed, given that there is a disclosable incident. The City has framed its position thus:

> [W]hen a disclosable record includes material regarding a sustained finding of misconduct other than sexual assault or dishonesty, [the City can] redact that material unless there is a case-specific indication that the misconduct contributed to the disclosable incident – that, but for the otherwise non-reportable misconduct, there would not have been an officer-involved shooting, use of force resulting in death or great bodily injury, sexual assault, or dishonesty.

Petitioners counter that the statute frames the scope of disclosable documents less restrictively. Section 832.7(b)(2) provides:

> Records that shall be released pursuant to this subdivision include all investigative reports; photographic, audio, and video evidence; transcripts or recordings of interviews; autopsy reports; all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take; documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action.

In light of the sweeping scope of this subdivision, the Court agrees with petitioners that the City cannot pick and choose among those facts relevant to a disclosable incident. The public's interest in evaluating police misconduct, evaluating an agency's propriety and diligence in addressing that misconduct, and evaluating the district attorney's decisions about prosecuting or not prosecuting the misconduct, is best served by getting the full details on the table. Thus (to make up the Court's own hypothetical), suppose there has been a sustained finding that an officer coerced sex from a prostitute. In the course of that action the officer also committed other misconduct that would not itself be reportable as such, such as misusing a police vehicle, falsely reporting his own whereabouts and activities, and so on. In the Court's view the requesting public is entitled to the full details of what happened in the incident as a whole.

On the other hand, a distinct and separate act of misconduct does not become disclosable simply because, for administrative convenience, it happens to be included in the same disciplinary proceeding. So assume that our hypothetical wayward officer was also up on charges that, the following week, he drove unsafely. That is not disclosable, and does not become disclosable simply by being in the same documents. That can be redacted.

Timing of Compliance

Petitioners complain at some length about how long the City is taking to disclose responsive documents. They must realize, however, that this Court cannot issue a writ of mandate that goes back in time and causes a document to be disclosed in 2019 because petitioners think it should have been disclosed in 2019.

It is a little dispiriting, all the same, to see that disclosure is apparently still incomplete a year and a half after it was due under the statutory deadlines. Some of this is due to good-faith disagreements about the scope of what disclosure was due – disagreements that (one hopes) are now resolved by today's rulings.

Beyond that, it is no doubt true that the delay is due in substantial part to the bolus of high-volume requests made immediately upon SB 1421's effective date. The Legislature must have foreseen that there would be such initial bolus demands, and it made no special timing accommodations for them. All the same, realistically, no one expected police agencies to drop everything else they were doing in January 2019 and turn all their resources to immediate compliance with large disclosure demands going back years in their scopes.

The timing and pace of the completion of compliance will be one of the topics for discussion at the next hearing. Whether the City has or has not been sufficiently diligent up until now, the Court will expect prompt compliance going forward.

Issuance of a Writ

It is for this reason that the Court now defers ruling on whether formal issuance of a writ will be necessary. It takes for granted that the City will comply in good faith with the Court's rulings, and it is to be hoped that these parties can discuss between themselves what is to be disclosed or withheld in light of these rulings. That meet-and-confer and compliance process should begin immediately.

The Court is therefore continuing this motion to September 4 for further review of compliance. At that time, the Court will discuss and schedule an in camera review of any disputed sets of documents on which the parties remain in disagreement. (Or, if the volume is excessive, the Court may consider appointing a Special Master for that purpose.) The Court hopes, however, that by that time there will be little and perhaps no remaining areas of dispute that have not been resolved in accordance with these rulings. Similarly, the Court will consider at that time whether it will be appropriate to issue a formal writ, or if it appears that the City can be trusted to comply without formal compulsion.

Also to be taken up in the future is the subject of seeking attorney's fees as the prevailing party. Petitioners request this in their reply brief, but the topic was not discussed in their opening brief. Absent agreement between the parties, the issue is best raised by follow-on motion.

Finally, the Court also notes that the City's papers (its RJN and Moore Declaration) do not comply with CRC 3.1110(f) and Local Rule 3.42 concerning tabbing of exhibits. Counsel is directed to review these rules and comply with them as to any future filings. Failure to do so may result in rejection or disregard of nonconforming papers.

16. TIME: 9:00 CASE#: MSN19-1992
CASE NAME: SOLOFF VS. CA DEPT. OF PUBLIC HEALTH
SPECIALLY SET HEARING ON: PETITION FOR WRIT OF MANDATE
SET AT REQUEST OF BOTH PARTIES
**** TENTATIVE RULING: ****

This is **continued** at the request of both parties to August 21.