IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NATIONAL LAWYERS GUILD, SAN FRANCISCO BAY AREA CHAPTER,

Plaintiff and Appellant,

v.

CITY OF HAYWARD, ET AL.,

Defendants and Respondents.

Case No. S252445

Court of Appeal No. A149328

Alameda County Superior Court
Case No. RG15785743
(Hon. Evelio Grillo)

AFTER A DECISION OF THE COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION THREE

CITY'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS FILED ON BEHALF OF APPELLANT

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INTRODUCTION

In this digital age information flows quickly and freely. New technology comes online daily, creating new ways to make large amounts of information available in an instant for all the world to share. New video technologies are particularly widespread, allowing us to see people near and far, and view situations that could never have been captured a decade ago. Advancement in video has brought us police body-cameras, which have compelled a societal reflection on law enforcement practices, moving each of us to evolve with the truths and realities that police videos uncover. But while enjoying the unquestionable technological benefits of this age, it is important that we also be reticent of privacy. Individual privacy should not be taken lightly. This balancing of privacy and transparency is at the crux of the issue before this court, and for the most part, all the Amicus Curiae have helped enrich and clarify this aspect of the discussion.

Amicus Curiae supporting the City have not only assisted with the policy issues described above, but also provided meaningful evidence supporting the City's statutory interpretation. One particularly noteworthy document was uncovered by the League of California Cities (the "League"). It found a document in the Legislative History of Assembly Bill 2799 ("AB 2799") regarding the Legislature's definition of "extraction." In this document, we see an author of the

legislation using "extraction" synonymously with "redaction." (League Brief, p. 21-22.) In its brief, the League references a document in the author's bill file with handwritten notes mentioning the California Association of Clerk's "'redaction' issues" and then describing these "redaction" issues as difficulties associated with "extracting data from [an] electronic database." (LH:570) The importance of this document cannot be overstated. The handwritten notes show that "redaction" is to be interpreted as "extracting data." This greatly assists the discussion at hand, and removes any doubt whether "redaction" is encompassed in the term "extraction."

However, the Amicus Curiae supporting the National Lawyers Guild's position (hereinafter referred to as the "Amici") have not provided new evidence to clarify the proper interpretation of § 6253.9(b). Other than various conclusory statements, the Amici have provided no support showing how their position is bolstered by the legislative record. Because of this dearth in legislative support, the Amici try to confuse the issue that is before this Court. At various points in the Amici briefs, the Amici reference body-camera videos that have garnered national attention or highlight public records requests that have led to changes in the law. When boiled down, the Amici's argument is that if the Court aligns with the City, the costs imposed onto a requester would effectively put such information out of reach. The Amici's arguments illustrate a fundamental misunderstanding. The question is not whether all

videos should cost the same as the subject videos provided to the NLG. The question is not whether electronic records should be charged beyond the direct costs of duplication when the records are simply copied to a disk. The proper question to ask is whether a requester may be invoiced the costs of compiling data and extracting exempt sensitive material from a video under § 6253.9(b). Bringing us back to the actual question before this Court, the City responds to the Amici and the general arguments they present in opposition to the City's position.

ARGUMENT

I. The Legislature Understood That Electronic Record Production Would Decrease the Amount of Paper Records Produced Under the PRA.

The Legislature understood that paper records were in their twilight.1 Making more records available in electronic form was part of the intent of AB 2799 and decreasing the amount of paper records produced was an anticipated result of the bill when enacted. ("[T]he bill minimizes the flow of paper needed to accommodate certain requests by requiring public agencies to provide computerized data in any electronic form in

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1 *Compare with*, Reporters Committee for Freedom of the Press ("RCFP") Brief, p. 10-11; San Diegans for Open Govt. ("SDOG") Brief, p. 20.

which that data is already kept." (LH:320)

Additionally, when AB 2799 was drafted, it was understood as having wide application. Numerous electronic records were anticipated to fall under the bill's ambit. (LH:240) Noted specifically, AB 2799 "would target . . . City budget, Environmental Impact Reports, Minutes" and other "voluminous documents." (*Ibid.*) These referenced text-based electronic records are the types of records that the Amici fear will fall under § 6253.9(b), but as shown in the legislative history, these text-based documents are precisely the records that were anticipated to be captured by § 6253.9's provisions.

As shown above, the legislative history suggests that AB 2799's drafters sought to increase electronic record requests and limit paper requests, and contemplated that § 6253.9 would apply to numerous types of electronic records beyond just the body-camera videos at issue here.

II. The PRA Encourages Agencies and Requesters to Narrow Overly Burdensome Requests, Reduce Costs, and Enable Production of Important Records.

The Amici point out that since the commencement this year of two bills aimed at the disclosure of police records, Senate Bill ("SB") 1421 and Assembly Bill ("SB") 748, several police agencies have presented requesters with hefty bills for records. For example, it has been reported that San Diego has

issued a bill of $354,524 to KPBS for records. (Pacific Media Workers Guild ["PMWG"], p. 27). The City does not have any information on San Diego's fee calculation or the Public Records Act ("PRA") request that prompted this invoice, nor any information on the breadth of the request or number of redactions required, still, a $354,524 fee is a barrier to access.2 But the PRA anticipates these types of situations and has mechanisms that deal with voluminous requests for records. The PRA tells us how to allow transparency where the cost of production appears prohibitive.

Government Code § 6253.1(a)(3) says that an agency must "[p]rovide suggestions for overcoming any practical basis for denying access to the records or information sought." (*Ibid.*) If the requestor cannot afford the $350,000 bill, and access is effectively denied, that is when § 6253.1 kicks in. A negotiation of sorts begins, which along with some creativity, should allow

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2 This bill is a barrier to most people, but some news organizations could afford this cost. It is true that newspaper revenue is down, but overall, news media revenue is up. Digital advertising grew to $90 billion from $72 billion in 2016. Mobile advertising grew to $61 billion from $47 billion in 2016. Cable news media, specifically Fox News, MSNBC and CNN, saw revenue grow from approximately $2.4 trillion to $2.7 trillion. (PEW research, https://www.journalism.org/fact-sheet/digital-news/ [last viewed July 10, 2019].) Even though traditional newspapers are losing market share, the changed media landscape does not mean that financial resources do not exist for the news industry generally, the money has merely changed hands. *Compare with*, PMWG Brief, p.21-22; RCFP Brief, p. 18-19

the respective parties to find a path towards allowing access to at least a portion of the records sought.

In doing this, first the agency should provide all identified records that do not have exempt material and that are readily available. These records will be provided for the direct cost of duplication since they already exist and can be simply downloaded to a flash drive and handed over to the requester. The agency and requestor then work to narrow the remainder of the request to the most critical records desired. These are some steps that San Diego and KPBS and other similarly situated agencies and requesters should take to allow access and the greatest possible transparency.

But the request should have reasonable limits. The PRA does not desire burdensome requests. It does not promote unfettered access. Government Code § 6255 exists for this reason.3 Requesters cannot simply request every document from forever- the Act's balancing test prohibits these types of overly burdensome requests. Instead, the PRA seeks thoughtful and focused requests. Section 6253.1 along with § 6255 exist to promote communication and consideration. These provisions uphold the interests of both transparency and reasonableness.

The PRA's language, when read properly, allows the invoicing of necessary edits and data compilation, but also

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3 Records may be withheld if "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." (Govt. Code § 6255.)

ensures that practical barriers to access will be overcome. When the NLG requested all 90 hours of video from the City, through the City's prompt disclosure of text-based records, the NLG was able to focus its video request on the most essential videos it desired. The § 6253.1 discussion and negotiation by the parties here allowed for transparency, but also limited both agency and requester production costs. The facts here in this matter, the communications between these parties, and the City's application of the terms of the PRA, properly follow the law as it was structured and intended. News reports regarding PRA fees requested by other agencies does not change the law or its application to the facts here before this Court. Here, the City and NLG properly narrowed the request decreasing the agency burden to extract information, and still, the City was able to give the NLG all the records it needed. "Access" was maintained to the records sought.

III. The City Narrowly Construed the Fees it Could Invoice to the NLG, and Provided Narrow, Specific Edits to Give NLG the Greatest Possible Amount of Access to the Requested Records.

When considering the concept of "access," and how to broadly or narrowly define "access," the constitutional imperative applies "unless the Legislature has *expressly* provided to the contrary." (*Sierra Club v. Superior Court*

(2013) 57 Cal.4th 157, 175.) The legislative intent behind § 6253.9(b) is undeniable, the Legislature wanted fees to apply to electronic records if data compilation, extraction, or programming are required. As recognized by the Court of Appeal, the Legislature has expressly provided an exception to the general rule that only direct costs may be invoiced.

Constant references by the Amici suggest that a barrier to access will be created if the Court upholds the Court of Appeal ruling. But the Amici misunderstand that "access" requires a multifaceted analysis that is subject to many nuances, and that when considering "access," courts consider much more than just expense. Case law provides that access may have a cost component, a time component, and an ease of access component. (*California Public Records Research, Inc. v. County of Stanislaus* (2016) 246 Cal.App.4th 1432, 1451-1452.) Each of these components are discussed below.

Regarding the cost of the records and looking at the facts here in the present matter, the City narrowly construed what costs it may recoup under § 6253.9(b). (JA:53-57, 255 [Roush]; JA:101-102, 104, 106, 247, 582-583 [Perez].) Numerous costs were *not* invoiced to the NLG because of the City's narrow construction of this provision. For instance, the following were not invoiced to the NLG:

Perez Time Not Invoiced

- Perez did not invoice 135 of the 170 hours spent servicing the NLG's PRA request; (JA:111, JA:249.)

Roush Time Not Invoiced

- Time spent to download body-camera from Evidence.com;
- Time to copy and move the downloaded files from their location on the PC to the DVD burning folder;
- Time to insert the blank DVD media into DVD burner;
- Time for the software to burn data onto DVD;
- Time to eject the media;
- Time to label the DVD;
- Time to fill out the evidence envelope to transfer to the police department;
- Time to transfer sealed evidence envelope to property unit; and
- Discussions with Perez. (JA:255)

Though the City invoiced a total bill of around $3,000, this fee was only a fragment of the total cost required to service the NLG's request. Many things were done to minimize the costs and burden on the requester so as to maintain "access."

Concerning the time component of "access," the City provided the records to the NLG quickly, providing the text-based electronic records in only 45 days (JA:245), and the video records after only about two months. (*See*, JA:363-372.) To give some context as to how quickly the City was able to produce

these video records, an identical PRA request was submitted by the NLG to the City of Oakland. (JA:297-301.) That request took over a year for the City of Oakland to service. (JA: 310.) "Access" here in this matter before the Court, based on the amount of time it took the City to provide the records, was not interrupted. The City was able to improve access to the requester because of its expedience.

Concerning the ease of reviewing the videos, the records here were easy to play and watch. All that was required for the NLG to view the videos was to simply click on the MP4 file and watch each officers' respective body-camera video. The videos were not segmented or broken, or produced in countless little small clips. (*Compare with*, JA:246, para. 28-29 [City's attempt to use VLC player].) The extractions were seamlessly integrated, which allowed the requester to easily watch and understand the data produced.

Even if this Court considers the constitutional imperative in Article I, Section 3(b)(2), the City's practices of narrowly construing costs, and broadly construing which documents it provides access, do not provide a point of challenge. The City takes an approach favoring access, providing records for reasonable costs, quickly delivering documents, and providing records in an easily viewable format. But moreover, the City does this in a way that preserves the privacy interests of the people captured within the records. Privacy is enshrined in Article I, Section 1 of the California Constitution, right in the

first section, representing one of the cornerstone "inalienable" rights. (*Ibid.*) Nothing shall supersede or modify the right to privacy. (Article I, Section 3(b)(3)) Even with all the access provided to the NLG, the City has still maintained privacy for individuals, which, as the Amici have known since the adoption of AB 2799, aligns with the intent of the statute.

IV. When AB 2799 was Adopted by the Legislature, The Amici's Interpretation of § 6253.9(b) Aligned with the City's Interpretation.

Privacy and its importance are generally ignored by the Amici. But this has not always been the case. During the drafting of AB 2799, media agencies supported the amendment adding § 6253.9(b). After the June amendment, the California News Publishers Association ("CNPA") encouraged the Legislature to sign the bill because agencies can "recover costs associated with compiling data, extracting data, or performing programming." (LH:383-384) The CNPA went as far to say that § 6253.9(b) "guarantees the costs associated with any extra effort that might be required to make an electronic public record available shall be borne by the requester, not the state or local agency." (LH:358; *Compare with*, RCFP Brief, p. 6, fn. 2)

This CNPA interpretation of § 6253.9(b), and its understanding that the requester bears the costs of "any extra effort," was because the CNPA closely tracked the legislation as

it was formulated. Throughout the drafting of AB 2799, the CNPA participated in sculpting the legislation. Recognizing the pressures that led to the June amendment integrating § 6253.9(b), the CNPA stated:

> "After lengthy negotiations with several local government agencies and representatives, including the League of California Cities, the California State Association of Counties, the County Clerks Association, law enforcement groups and others, AB 2799 was amended on June 22, to ensure the bill would not place new burdens on state or local agencies. Specifically, the bill was amended to require the requester to bear the cost of producing a copy of an electronically held record. . ." (LH:358)

After recognizing the exact entities the City uses to support its legislative analysis, the CNPA then continued by citing the language in § 6253.9(b).

Back in 2000 when AB 2799 was adopted, the difficulty of passing new PRA legislation was not lost on the Amici. They were aware during the drafting of AB 2799 that Governor Pete Wilson had previously vetoed similar legislation twice, and that Governor Gray Davis also vetoed similar legislation the year before AB 2799 was first proposed. (LH:414) Amici had supported AB 179 and had watched that fail (LH:1217) and had seen SB 1065 fail soon thereafter. (LH:1181) The First Amendment Coalition acknowledged the pressures that led to

the integration of § 6253.9(b), stating that "[t]he proposed amendments, negotiated with a variety of governmental interest organizations, encourage agencies to comply by accommodating the occasional extraordinary cost concerns involved in a request that requires expedited attention or special programming to permit special data extraction." (LH:382)4 Though it is not stated in the Amici briefs, the Amici know that the reason that AB 2799 was passed was because of § 6253.9(b) and the amendment allowing agencies to recoup the costs of compiling and editing electronic records.

The June amendment to AB 2799 was part of a long negotiation process, and supporters of the legislation, including the Amici, knew that § 6253.9(b) was a necessary concession. Amici knew that the cost burdens of data compilation, extraction, and programming were great, and that some of these cost burdens needed to be shifted to the requester. Though the Amici's interpretation of § 6253.9(b) has swayed over time, at the time of AB 2799's adoption, the Amici advocated for legislation to allow agencies to charge requesters the exact costs at issue here in this matter.

Like the Amici's present interpretation of the statute, there are other misrepresentations by the Amici, some of which are presented in the section below.

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4 Both CNPA and the First Amendment Coalition are Amici to this case. (RCFP Brief, p. 6, fn. 2.)

V. Responses to Specific Examples by Amici Where It Is Claimed That Requester Access Would Be Interrupted by Fees.

Several examples presented by the Amici provide specific examples where requester access to government records was or could be interrupted in some way if agencies utilize the cost bearing provision in § 6253.9(b). The City took the opportunity to research a couple of these examples.

Homeless encampments, and records concerning the removal of homeless from these encampments, were the primary focus of the Western Center of Law and Poverty ("WCLP"). Focusing on a voluminous request for records, the WCLP described how public records led to changes within the City of San Francisco's polices regarding homeless property and safety. (WCLP Brief, p. 14-15.) Of the numerous records disclosed in the referenced PRA request, many were photograph or video records.5 None of these photograph or video records

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5 *See*, San Francisco PRA request #18-2803, https://sanfrancisco.nextrequest.com/requests/18-2803 (last viewed July 9, 2019); #18-2922, https://sanfrancisco.nextrequest.com/requests/18-2922 (last viewed July 9, 2019); #19-1088, https://sanfrancisco.nextrequest.com/requests/19-1088 (last viewed July 9, 2019); #19-928, http://sanfrancisco.nextrequest.com/requests/19-928 (last viewed July 9, 2019)

were edited. If identified by the requester, these documents would have only cost the direct costs of production since they were simply downloaded onto a disk. Of the thousands of text-based electronic records produced by San Francisco, the City was only able to find twelve redacted text-based electronic records where personal information of the homeless camp inhabitants was removed. These minor redactions would have only taken a few minutes. Fees under § 6253.9 for these thousands and thousands of records produced by San Francisco would have been minimal, only costing the requester time for data compilation and a few minutes of extractions. Records, when directly duplicated onto a disk like many of the records encompassed in this San Francisco PRA request, do not require extraordinary costs to produce. The Amici seem to miss this point.

A couple of the articles referenced by Amici did point out situations where numerous redactions were required for records to be produced. The most compelling of the articles referenced by Amici is a story of a mother who could not get information on her son who was killed by police. (Pacific Media Workers Guild ("PMWG") Brief, p. 27) The article and the Amici describe a situation where the mother, who was just trying to get information about her deceased son, could only receive access to records concerning her son if she paid a $3,000 deposit for the records. (*Ibid.*) Such a demand, particularly if the mother is unable to afford the $3,000 initial

deposit, effectively puts such records out of reach in a situation where access is absolutely imperative. It is a compelling example, and it would certainly represent a failure in government transparency— if it were true.

There is no question that the mother referenced in the article lost her son. Such a loss is unimaginable and horrible and utterly heartbreaking. There is not a shade of doubt regarding the tragedy of her loss. But the issue before this court is about the PRA, and the facts surrounding this PRA request involving this mother, contrary to the article and representations of PMWG, show us that agencies are properly protecting privacy and yet maintaining transparency.

As presented in the Declaration of Kristin Pelletier, Senior Assistant City Attorney of the City of Anaheim, the PRA request referenced in this article was not actually submitted by the mother but by a third-party requester.6 And this PRA request was presented to Anaheim *after* it had already produced the unredacted records in a civil lawsuit filed by the mother. Later, following the lawsuit, another PRA request was made by the ACLU and Anaheim offered to provide the unedited records to the mother for free yet again, at no cost whatsoever, though the mother elected not to retrieve the records. The referenced request for a $3,000 deposit was presented thereafter by the City of Anaheim to a third-party requester unrelated to the

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6 The Declaration of Kristin Pelletier is appended at the end of this Brief.

mother. To protect the privacy interests of the mother's deceased son, the City elected to provide edited records to the unrelated third-party requester rather than simply produce the unedited records as offered to the mother and ACLU. Contrary to the article presented by Amici, the mother's access to the records was never interrupted by fees. Only the unrelated third-party requester was asked to pay a reasonable deposit for the editing required.

The requested deposit by the City of Anaheim is in keeping with the privacy protections incorporated throughout the PRA. If there is private information regarding the decedent or any witnesses vulnerable to harm, that information should be removed prior to production to a third-party who does not represent the interests of the family. However, as done here by Anaheim, if the request is submitted by a member of the family, or the estate of the decedent, cities can elect to provide the unedited records free of charge without the need for costly extractions. Such is the practice of the City of Anaheim and the City of Hayward (JA:250-251) and shows that the interest in privacy and the interest in transparency are preserved by § 6253.9(b), not hindered.

Another example provided by PMWG was a situation showing how PRA transparency can compel the government to change a misguided law. In its brief, PMWG describe a person who was able to use Kansas' public records statute, specifically the Kansas Open Records Act (KORA), to find documents to

uncover issues on restrictions on access to criminal records. (PMWG Brief, p. 20) However, what is not stated by PMWG and critical to note is that Kansas charged this requester for the staff time to process the request. The records were not free. In Kansas, agencies are not limited to the direct cost of duplication. Kansas is a state where requesters are required to pay actual costs including "staff time for processing your request." 7 Even though the requester was likely charged for the staff time to process the request and receive these records, access was not interrupted by the fees.

Another article by PMWG claims there is a lack of transparency concerning sexual assault reports at public universities. (PMWG Brief, p. 20-21) But these are records that should *not* be freely disclosed. "Sexual violence experts agree that confidentiality and privacy concerns are the most significant reasons why sexual assault crimes go unreported."8 One of the most common ways in which sexual violence victim's privacy is breached is "Public Records." (*Id.*, p. 23; *See also*, p. 33 ["Privacy may easily be compromised" through public records laws.].)

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7 Kansas Statutes Annotated, K.S.A. § 45-219 (c)(2),_ http://kslegislature.org/li_2014/b2013_14/statute/045_000_0000_chapter/045_002_0000_article/045_002_0019_section/045_002_0019_k/s (last viewed July 2, 2019).

8 Center for Law & Public Policy on Sexual Violence, *Confidentiality and Sexual Violence Survivors: A toolkit for State Coalitions*, p. 9. https://law.lclark.edu/live/files/6471-confidentiality-and-sexual-violence-survivors-a (last viewed July 2, 2019).

Records concerning sexual assault victims and minors show that "privacy" is not a word used by the PRA to protect shadowy figures or undesirable truths, it is used as a shield to protect those who are most vulnerable. Trivializing our interest in privacy not only contradicts stated provisions in the PRA and the California Constitution, it infringes on an ethic, and a code we hold for those who need our protection most. Nothing should supersede or modify this right, including a ruling from this Court.

CONCLUSION

We all understand that the extraction of medical information is a necessary task prior to production. People should be able to elect whether their private medical information is disclosed to the public. But the disclosure of information that could jeopardize safety is less understood.

Security procedures are exempt under the PRA. (Govt. Code §6254(f)) Public disclosure of the security tactics that officers use when controlling crowds could be used to later subvert those procedures so that officers cannot as effectively protect themselves and the public. Privacy in situations where disclosure could lead to harm or retaliation deserve our attention, and mindfulness, and should not be taken lightly. There are examples, too many to note, where disclosure of confidential information has led to the worst imaginable

outcomes.

For instance, there was Gregory Sawyers who, at 34 years of age, was killed after an alleged leak of information by an administrative assistant in Kentucky's Department of Public Advocacy.9 He was gunned down prior to the trial of a notorious drug dealer.

Then there was Guy Coffey who, at 28 years of age, was killed after a defense attorney accidentally disclosed Mr. Coffey's name in a letter.10 Mr. Coffey was set to testify as a key witness in a murder trial.

Then there was David Henderson.11 Mr. Henderson "did what he felt was right— he told authorities what he knew about an August 2016 robbery" which led to the arrest of Terance Black. "A clerical error" by the Court "supplied Terance Black

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9 *Man Charged with Killing Ricky Kelly Witness*, by Matthew Glowicki, The Courier-Journal, https://www.courier-journal.com/story/news/crime/2014/09/24/man-charged-killing-ricky-kelly-witness/16178781/ (last viewed July 9, 2019) (The administrative assistant in the Oldham County Office of the Kentucky Department of Public Advocacy, Shanion Thurman, was accused, charged and later acquitted of leaking sensitive information to Kelly that included Sawyers' plea agreement to testify.)

10 *Killing of federal witness revealed as trial begins for alleged Baltimore hitmen*, by Tim Prudente, The Baltimore Sun, https://www.baltimoresun.com/news/crime/bs-md-ci-barronette-trial-20180914-story.html (last viewed July 9, 2019)

11 See, KSBTV, *Mother, son sentenced to life for murder of witness inadvertently identified in court docs* by Crystal Bonvillian, https://www.wsbtv.com/news/trending-now/mother-son-sentenced-to-life-for-murder-of-witness-inadvertently-identified-in-court-docs/925133434 (last visited 7/6/2019).

with Henderson's name and personal information." Mr. Henderson, a man who was always ready to provide a helpful hand, and was there when you needed him, who made everyone around him laugh and smile, a loved person, is buried at Entombment Eastlawn Memorial Gardens in Aurora, Colorado.12 He was shot 10 times by Terance Black following disclosure of his identifying information.

These are not necessarily disclosures from public records laws, but they are examples showing why the City takes these extractions seriously, and why PRA exemptions should not be dismissed or set-aside. The extractions here were not to shadow some unfavorable truth, but to shield those who are vulnerable, those who need and deserve our protection, people like Gregory Sawyers, Guy Coffey, and David Henderson. The California Constitution names privacy as an inalienable right for good reason— because it can save us.

The examples above epitomize why privacy is stated at the forefront of both the California Constitution and the Public Records Act. Privacy has been a focus of the City throughout these proceedings, but in these closing sentences, the City would like to end not by discussing privacy, but instead, advocating for more transparency.

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12 *See*, Humphrey Funeral Ministry, Obituary of David Henderson, https://www.humphreyfm.com/obituaries/David-Henderson-10/#!/Obituary (last visited 6/20/2019).

If there were to be a single goal, one outcome from this case that would be desired above all else, it would be the increased adoption of body-cameras by police agencies. With more agency adoption of body-cameras, and thus more videos, access into the inner workings of law enforcement is broadened. To better understand this, we need to go back to the beginning, before this case was filed, and remember the catalysts of the protests giving rise to the PRA request at issue— Eric Garner and Michael Brown.

The final moments of Eric Garner's life are not a mystery. We saw him die. We saw exactly how it happened. There is a difference between how his death will be remembered versus the death of Michael Brown. With Michael Brown, many may intuitively understand that he died in vain, but for some, there will always be doubt as to what happened in his final moments. No one, other than the officer who took his life, saw how he died. This is important. And as the Amici point out, this is one of the values, if not the greatest value, in body-cameras. But the key to enjoying a body-camera's benefits is that a body-camera must exist in the first place.

Unfortunately, contrary to the impression given by the Amici, far too few agencies utilize body-cameras. While the numbers of agencies using body-cameras is growing, body-cameras are still the exception rather than the rule, only garnering the support of roughly 20 percent of California

agencies.13 The precise reasons vary from agency to agency as to why body-cameras have not been implemented, but largely, the reasons are financial.14

Lessening the financial strain associated with compiling records and editing out private exempt material is not only plainly authorized by § 6253.9(b), it also promotes transparency. In addition to allowing the release of otherwise exempt electronic records, § 6253.9(b) helps encourage the adoption of body-cameras where they are absent. It removes a significant financial obstacle. It puts some agencies one step closer towards implementation.

Again, there is a difference between Eric Garner and Michael Brown. Every police interaction should be recorded. Truth deserves preservation. Moving the needle closer to this reality requires making body-cameras economically feasible, which is what § 6253.9(b) helps accomplish. The Amici's financial interests should not overcome this significant public

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13 KPBS, *Number of California Police Department With Body Cameras Growing* (April 2, 2015), http://www.kpbs.org/news/2015/apr/02/number-california-police-departments-body-cameras-/ (last viewed July 9, 2019); *See also*, National Institute of Justice, Research on Body-Worn Cameras and Law Enforcement (modified on June 12, 2017) https://www.nij.gov/topics/law-enforcement/technology/pages/body-worn-cameras.aspx (last viewed July 9, 2019)

14 Detroit Free Press, *Costs of Police Body Cameras Raise Concern* (June 6, 2016), http://www.freep.com/story/news/local/michigan/2016/06/06/police-body-cameras-high-costs/85356518/ (last viewed July 10, 2019)

interest.

There is often a tension between privacy and transparency, but this is a rare situation where these interests are intertwined. Increased costs often equate to increased access. Records that would be otherwise exempt can be made available through the recoupment of fees. More transparency can occur when privacy is properly defended and exempt information is extracted. The principles go hand in hand. The Legislature, through § 6253.9(b), has enacted a provision that allows privacy and transparency to maintain an indispensable balance, and the actions here by the City, in narrowly invoicing the costs at issue, are a reflection of § 6253.9 working well for both agencies and requesters, creating broad disclosures, and narrowly tailored deletions of exempt information.

The City respectfully requests that this Court, who is tasked with maintaining the legislative intent of § 6253.9(b) and defending the inalienable rights provided by the California Constitution, uphold the decision by the Court of Appeal in its entirety.

Dated: July 12, 2019

/s/Justin Nishioka
Justin Nishioka
Assistant City Attorney
Attorneys for Defendants and Respondents

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c))

The text of this brief consists of 5326 words as counted by the Microsoft Word 2016 version word-processing program used to generate the brief.

Dated: July 12, 2019

/s/ Justin Nishioka
Justin Nishioka
Assistant City Attorney
City of Hayward

DECLARATION OF KRISTIN PELLETIER

I, Kristin Pelletier, declare as follows:

1. I am an attorney duly licensed to practice law in the State of California, and the Senior Assistant City Attorney in the Civil Division of the Anaheim City Attorney's Office. Unless otherwise stated, I have personal knowledge of the facts set forth herein and, if called as a witness, I could and would competently testify thereto.

2. On January 28, 2019, I responded to a Public Records Act request made by Annie Banks of the Justice Teams Network for all records relating to the "report, investigation, findings and administrative discipline related to the December 11, 2009 shooting of Caesar Cruz" (hereinafter, the "Cruz Investigation"). The request specifically stated that it was made pursuant to Senate Bill 1421.

3. In February 2019, I was contacted by Peter Bibring of the ACLU of Southern California ("ACLU"). Mr. Bibring advised, both verbally and in writing, that the ACLU was attempting to assist Theresa Smith, the mother of Caesar Cruz, in obtaining access to the Cruz Investigation pursuant Senate Bill 1421. I advised Mr. Bibring that Theresa Smith had not made a Public Records Act request for the Cruz Investigation under Senate Bill 1421, and that the request had been made by a third party,

Ms. Banks. I further advised Mr. Bibring that the Cruz Investigation had previously been produced to Ms. Smith's attorney, pursuant to a protective order issued by the United States District Court, in the civil lawsuit that she had filed against the City of Anaheim. Because the investigation had previously been made available to Ms. Smith through her attorney, I advised Mr. Bibring that the Anaheim Police Department ("APD") would make it available to Ms. Smith again for her review at no cost.

4. Following my conversation with Mr. Bibring, I contacted APD Deputy Chief Julian Harvey, who agreed to contact Theresa Smith and offer her the opportunity to review the Cruz Investigation. Chief Harvey subsequently advised me that he had contacted Ms. Smith on two occasions and left her voicemail messages indicating that APD would make the Cruz Investigation available for her review, but that Ms. Smith had not returned his phone calls.

5. With respect to Ms. Banks' Public Records Act request, the City of Anaheim assessed the volume of responsive materials and requested a deposit from Ms. Banks to offset the cost of extracting exempt information from audio/video files in order to produce these records to Ms. Banks. Senate Bill 1421 (incorporated into California Penal Code section 832.7) mandates that agencies redact records produced pursuant to that statute to

remove any reference to various categories of information, *e.g.*, identity of witnesses, personal information, confidential medical or financial information, or other information protected by law or privacy interests (See Penal Code section 832.7(b)(5)). The $3,000 estimate was the anticipated cost that the City would need to pay a consultant to extract information from audio/video records so that these records could be produced to Ms. Banks in compliance with (and without violating) Penal Code section 832.7(b)(5). Without the ability to offset these costs, the City would have to absorb them, potentially making Senate Bill 1421 an unfunded state mandate given its requirement that records be redacted before being produced.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 3rd day of July, 2019 at Anaheim, California.

Kristin Pelletier

PROOF OF SERVICE

I am employed in the County of Alameda, State of California. I am over the age of 18 years and not a party to the within action. My business address is 777 B Street, 4th Floor, Hayward, California 94541-5007.

On July 12, 2019, I served the document(s) described as:

- **CITY'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS FILED ON BEHALF OF APPELLANT**

on the interested parties in this action as follows:

Amitai Schwartz
Law Offices of Amitai Schwartz
2000 Powell Street, Suite 1286
Emeryville, CA 94608
Email: Amitai@schwartzlaw.com

Alan Schlosser
American Civil Liberties Union
Foundation of Northern California, Inc.
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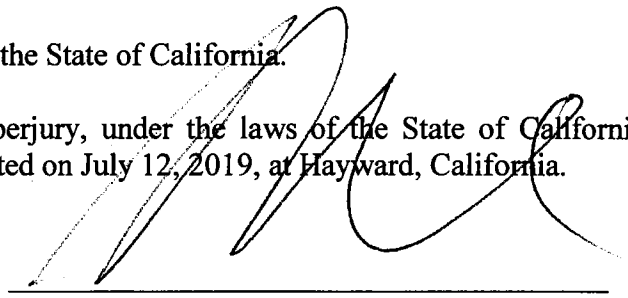
Email: Aschlosser@aclunc.org

[X] (BY ELECTRONIC MAIL) Pursuant to the parties stipulation for email service, I served the above documents to the email listed in the service caption above.

[X] (STATE) Under the laws of the State of California.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on July 12, 2019, at Hayward, California.



Morgan Cahee