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10   **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11   **IN AND FOR THE COUNTY OF CONTRA COSTA**

12
                                          | Case No.: N19-0169
13 RICHMOND POLICE OFFICERS' |
    ASSOCIATION, |
14 | **EX PARTE APPLICATION BY
                                          | PETITIONER/PLAINTIFF FOR
15   Petitioner/Plaintiff, | TEMPORARY RESTRAINING ORDER AND
                                          | ORDER TO SHOW CAUSE RE:
16   vs. | PRELIMINARY INJUNCTION;
                                          | MEMORANDUM OF POINTS AND
17 CITY OF RICHMOND; ALLWYN BROWN, | AUTHORITIES**
    Chief of Police; and DOES 1 through 20,|
18 inclusive, | [Filed Concurrently With Declaration of Zachery
                                          | A. Lopes and Exhibits thereto; Declaration of
19   Respondents/Defendants. | Zachery A. Lopes, Re: Notice of Ex Parte Hearing
                                          | of Application; Request for Judicial Notice;
20 | (Proposed) Temporary Restraining Order and
                                          | Order to Show Cause re: Permanent Injunction]
21 |
22 | DATE: JANUARY 25, 2019
                                          | TIME: 10:00 A.M.
23 | DEPT.: 12
24

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EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

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I. INTRODUCTION

Petitioner/Plaintiff Richmond Police Officers' Association ("RPOA") hereby makes its Ex Parte Application for a Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction against Respondents/Defendants City of Richmond ("City") and Allwyn Brown, Chief of Police ("Chief"), and their employees and representatives (collectively "Respondents") to refrain from retroactively enforcing or taking any steps to retroactively enforce California Senate Bill 1421, enacted as Chapter 988 of the 2017-2018 Regular Session ("SB 1421") effective January 1, 2019, which amends Penal Code sections 832.7 and 832.8 respecting the confidentiality of peace officer personnel records.

SB 1421 amends Penal Code section 832.7 by eliminating the long-established statutory confidentiality of specified peace officer and custodial officer personnel records and the information contained in such records. SB 1421 mandates that certain of these records and the information maintained by public agencies shall be subject to disclosure and otherwise available for public inspection pursuant to the California Public Records Act ("CPRA"), Government Code section 6250 et seq.

Respondents incorrectly contend that, notwithstanding the absence of any express retroactivity provision, SB 1421 must be applied and enforced as to personnel records and information reflecting specified peace officer conduct occurring prior to January 1, 2019. Indeed, Respondents have informed the RPOA that it intends to apply SB 1421 retroactively and release personnel records reflecting conduct occurring prior to January 1, 2019. That information, however, was and is confidential as a matter of law and is not otherwise subject to disclosure, except pursuant to Evidence Code sections 1043 and 1046. The law in existence prior to the effective date of SB 1421 afforded peace officers a confidentiality privilege to all the information contained in their personnel files as defined in Penal Code section 832.8. This privacy right was established by statute, affirmed by the California Supreme Court, and acknowledged by the California Constitution. SB 1421's changes, therefore, must operate prospectively only. Peace officers retain their privacy right to personnel file information respecting incidents or conduct which occurred prior to January 1, 2019.

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1   Pursuant to California Constitution, article I, section 3, subdivision (b), paragraph (3), any

2   broad construction of statutes pertaining to the right of access to information of public agencies

3   (such as the CPRA) *does not supersede the construction of statutes that protect the constitutional*

4   *right of privacy, including any statutory procedures governing discovery or disclosure of*

5   *information concerning the official performance or professional qualifications of a peace officer.*

6   Furthermore, it is well-settled that a statutory enactment cannot operate retroactively unless it

7   contains an express retroactivity provision or it is "very clear" from other sources that the

8   Legislature "must have intended a retroactive application." (*Evangelatos v. Superior Court* (1988) 44

9   Cal.3d 1188, 1209.) SB 1421 does not contain an express retroactivity provision, and the relevant

10   extrinsic evidence contains no indication that the Legislature intended a retroactive application of the

11   new law.

12   As a consequence of the exceedingly short ten (10) day time frame for Respondents to

13   respond to public records requests under Government Code section 6253(c), and Respondents' stated

14   intent to unlawfully release personnel records, a regularly noticed hearing on a preliminary

15   injunction would not provide timely relief to RPOA's represented peace officers whose statutory and

16   constitutional privacy rights are imminently jeopardized by requests under the CPRA seeking peace

17   officer personnel records and information respecting incidents or conduct which occurred prior to

18   January 1, 2019. Therefore, a Temporary Restraining Order is appropriate and necessary to maintain

19   the *status quo ante* to the January 1, 2019 effective date of SB 1421 pending the hearing on the

20   Order to Show Cause re: Preliminary Injunction against Defendants.

21   RPOA is likely to succeed on the merits of this action. SB 1421's amendments do not operate

22   retroactively to divest RPOA's members of their prior-acquired privacy right to maintain the

23   confidentiality of their personnel file information reflecting conduct that occurred prior to January 1,

24   2019. Respondents' stated intent to apply the new law retroactively is unlawful.

25   Moreover, absent an immediate injunction, Respondents' unlawful retroactive application of

26   SB 1421's amendments, RPOA's represented peace officers will suffer irreparable harm to their

27   statutory and constitutional privacy rights that far outweighs any detriment alleged by Respondents

28   because, once made public, the disclosed information can never be considered confidential again.

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This Ex Parte Application is based on the accompanying Memorandum of Points and
Authorities, Declaration of Zachery A. Lopes and Exhibits Thereto, Declaration of Zachery A. Lopes
Re: Notice of Ex Parte Hearing on Application, Request for Judicial Notice and Proposed Temporary
Restraining Order and Order to Show Cause re: Preliminary Injunction.

Respondents/Defendants are represented by the following attorney:

Name: Bruce Goodmiller

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Phone No.:   (510) 620-6509

E-Mail: city_attorney@ci.richmond.ca.us

On December 18, 2018, the San Bernardino County Sheriff's Employees' Benefit
Association ("SEBA") sought original jurisdiction in the California Supreme Court pursuant to
California Constitution, article VI, section 10 by filing with the California Supreme Court a Petition
for Writ of Mandate, Alternative Writ of Mandate and Request for Stay Order in *San Bernardino
County Sheriff's Employees Benefit Association v. County of San Bernardino et al.,* Case No.
S253115, seeking to prevent the retroactive application of Senate Bill 1421 as to peace officer
personnel records regarding incidents or reflecting conduct occurring prior to January 1, 2019.

On January 2, 2019, the California Supreme Court declined to exercise original jurisdiction
and denied SEBA's Petition for Writ of Mandate and Application for Stay without explanation,
reason or written opinion. Such action by the California Supreme Court does not constitute the law
of the case, nor otherwise establish any legal precedent or adjudication of the merits of this matter.
(*Funeral Directors Ass'n of Los Angeles and Southern California v. Board of Funeral Directors and
Embalmers of California* (1943) 22 Cal.2d 104, 110; See also *Frisk v. Superior Court* (2011) 200
Cal.App.4th 402, 415 [Summary denials do not constitute law of the case, and do not establish any
legal precedents.]; *Kowis v. Howard* (1992) 3 Cal.4th 888, 894-95.)

On December 31, 2018, the Los Angeles Superior Court issued an Order Directing
Alternative Writ of Mandate and Stay Order prohibiting Respondents City of Los Angeles and Police
Chief Michel R. Moore and their agents, employees and representatives from retroactively enforcing
or applying Senate Bill 1421's amendments to California Penal Code sections 832.7 and 832.8 in any

manner which would result in the disclosure or production of peace officer personnel records and

information regarding incidents or reflecting conduct occurring prior to January 1, 2019. (A copy of

the Order Directing Alternative Writ of Mandate and Stay Order in *Los Angeles Police Protective*

League v. City of Los Angeles et al., Los Angeles Superior Court Case No. 18STCP03495 is attached

as Exhibit A to the Request for Judicial Notice filed herewith.)

On January 9, 2019, the San Bernardino Superior Court issued an Order Directing

Alternative Writ of Mandate and Stay Order prohibiting the County of San Bernardino and John

McMahon, Sheriff of San Bernardino Sheriff's Department and their agents, employees and

representatives from retroactively enforcing or applying Senate Bill 1421's amendments to

California Penal Code sections 832.7 and 832.8 in any manner which would result in the disclosure

or production of peace officer personnel records and information regarding incidents or reflecting

conduct occurring prior to January 1, 2019. (A copy of the Order Directing Alternative Writ of

Mandate and Stay Order in *San Bernardino County Sheriff's Employees' Benefit Association v.*

County of San Bernardino et al., San Bernardino Superior Court Case No. CIVDS 1900429 is

attached as Exhibit B to the Request for Judicial Notice filed herewith).

On January 17, 2019, the Orange County Superior Court issued a Temporary Restraining

Order and Order to Show Cause Re: Preliminary Injunction prohibiting the County of Orange and

Don Barnes, Sheriff-Coroner of the Orange County Sheriffs' Department and their agents,

employees and representatives from retroactively enforcing or applying Senate Bill 1421's

amendments to California Penal Code sections 832.7 and 832.8 in any manner which would result in

the disclosure or production of peace officer personnel records and information regarding incidents

or reflecting conduct occurring prior to January 1, 2019. (A copy of the Temporary Restraining

Order and Order to Show Cause Re: Preliminary Injunction in *Association of Orange County Deputy*

Sheriffs, Orange County Superior Court Case No. 30-2019-01043706-CU-JR-CJC is attached as

Exhibit C to the Request for Judicial Notice filed herewith).

On January 23, the Ventura County Superior Court issued a Temporary Restraining Order

and Order to Show Cause Re: Preliminary Injunction prohibiting the County of Ventura and Bill

Ayub, Sheriff of Ventura County, and their agents, employees and representatives from retroactively

enforcing or applying Senate Bill 1421's amendments to California Penal Code sections 832.7 and 832.8 in any manner which would result in the disclosure or production of peace officer personnel records and information regarding incidents or reflecting conduct occurring prior to January 1, 2019. (A copy of the Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction in *Ventura County Deputy Sheriffs' Association v. County of Ventura, et al.* Ventura County Superior Court Case No. 56-2019-00523492-CU-WM-VTA is attached as Exhibit D to the Request for Judicial Notice filed herewith).

II. SENATE BILL 1421 CHANGES EXISTING PRIVACY RIGHTS OF PEACE OFFICERS

Prior to SB 1421's operative date, the law identified all peace officer personnel records and information obtained from those records as confidential and exempt from disclosure absent compliance with the statutory *Pitchess* process.[1] (Pen. Code § 832.7(a).) Confidential peace officer "personnel records" include "any file maintained under that individual's name by his or her employing agency and containing records relating to" among other things "[e]mployee advancement, appraisal, or discipline," and "[c]omplaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties." (Pen. Code § 832.8(a) (4)-(5).)

This is a confidentiality privilege, or right, possessed by the peace officer (and his or her employer) which forbids public agencies from disclosing such information in response to a CPRA request. (*City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1430 ["the confidentiality privilege is possessed both by the agency and the subject officer…";] ["[T]he protection of Penal Code section 832.7 is illusory unless that statute is incorporated into CPRA…"].)

The California Supreme Court has recognized that the statutory privilege affords peace officers "a strong privacy interest in [their] personnel records." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1227; *Id*. at p. 1220 [A peace officer has a "legitimate expectation of privacy in his or her

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[1] The "*Pitchess* process" refers to the statutory in-camera disclosure procedure for relevant personnel records during civil and criminal proceedings enacted in response to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. (Evid. Code §§ 1043, 1046, 1047.)

EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

personal records"]; *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1300 ["One of

Penal Code section 832.7's purposes is 'to protect the right of privacy of peace officers.'"]; *City of*

Santa Cruz v. Superior Court (1989) 49 Cal.3d 74, 83-84.) Maintaining the confidentiality of such

information encourages public agencies to retain these records and encourages the cooperation and

candor of peace officers during internal investigations. (*Davis v. City of Sacramento* (1994) 24

Cal.App.4th 393, 401, fn. 1; *City of Hemet*, *supra*, 37 Cal.App.4th at p. 1430.)

This privacy interest is expressly enumerated in the California Constitution. Article I,

Section 3 provides generally that legal authority which furthers the people's right of access to public

records should be "broadly construed," while authority that "limits" the right of access should be

"narrowly construed." (Cal. Const., art. I, § 3, subd. (b), pars. (1), (2).) This mandate, however,

specifically excludes provisions which protect peace officers' privacy interest in the confidentiality

of their personnel file information. (Cal. Const., art. I, § 3, subd. (b), par. (3); *Commission on Peace*

Officer Standards & Training v. Superior Court (2007) 42 Cal.4th 278, 288 ["The Constitution []

recognizes the right to privacy and specifically acknowledges the statutory procedures that protect

the privacy of peace officers"].)

SB 1421's amendments to Penal Code sections 832.7 and 832.8 prospectively modified this

pre-existing privacy right by identifying four particular categories of peace officer personnel file

"records"[2] as non-confidential and therefore subject to disclosure: (1) records relating to incidents

involving the discharge of a firearm at a person; (2) records relating to incidents involving use of

force resulting in death or great bodily injury; (3) records relating to sustained findings by a law

enforcement agency or "oversight agency" of "sexual assault involving a member of the public",

and; (4) records relating to sustained findings by a law enforcement agency or "oversight agency" of

specified instances of dishonesty. (Pet. ¶ 9, Exh. A, Sec. 2, Pen. Code § 832.7(b) (1)-(2).)

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[2] Records" is defined very expansively to include essentially the entirety of an investigation file, including all documents
from a subsequent administrative appeal process and anything presented by an employer to a district attorney for criminal
investigation. (Pen. Code § 832.7(b)(1)(C)(2).)

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III.   SENATE BILL 1421'S AMENDMENTS OPERATE PROSPECTIVELY ONLY AND CANNOT BE APPLIED OR ENFORCED AS TO PEACE OFFICER PERSONNEL RECORDS ARISING OUT OF INCIDENTS OR CONDUCT PRIOR TO 1/1/19

"A retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute." (*Aetna Cas. & Sur. Co. v. Industrial Acc. Commission* (1947) 30 Cal.2d 388, 391.) "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 839.) Statutes are not to be given a retrospective operation unless it is clear that the Legislature intended that result. (*Aetna Cas. & Sur. Co.*, *supra*, 30 Cal 2d at p. 393.)

Applying SB 1421's amendments in a manner which rescinds the confidentiality of peace officer records related to conduct occurring prior to SB 1421's effective date would constitute a retroactive application of its provisions. Prior to the effective operation of SB 1421's amendments, peace officers were afforded the right to confidentiality in all of their personnel file information – a privacy right established by statute, affirmed by this Court, and acknowledged by the Constitution. (See Pen. Code § 832.7(a); *Mooc*, *supra*, 26 Cal.4th at p. 1227; Cal. Const., art. I, § 3, subd. (b), par. (3).) *This is an informational privilege* held by the individual peace officer – not merely a privilege allowing a public agency to withhold the production of physical documents. The privacy right extends beyond the actual "files" or "records" maintained by public agencies to encompass the *information* contained in or obtained from those documents. (Pen. Code § 832.7(a) ["Peace officer… personnel records ... *or information obtained from these records*, are confidential…", emphasis added]); Cal. Const. art. I, § 3, subd. (b), par. (3) [Right to privacy acknowledged by the Constitution includes the "statutory procedures governing discovery or disclosure *of information* concerning the official performance or professional qualifications of a peace officer", emphasis added]; *Hackett v. Superior Court* (1993) 13 Cal.App.4th 96, 98-99 ["[T]here is *nothing* in the statutory scheme or its history suggesting a legislative intent to exclude from the privilege[] information which happens to be obtainable elsewhere." Emphasis in original]; *City of San Diego v. Superior Court* (1981) 136

Cal.App.3d 236, 239 ["There would be no purpose to protecting such information in the personnel records if it could be obtained by the simple expedient of asking the officers for their disciplinary history orally"].)

Indeed, the Legislature itself acknowledged the informational nature of the existing privilege when it enacted SB 1421. (Pet. ¶ 9, Exh. A, Legislative Counsel's Digest ["Existing law requires any peace officer or custodial officer personnel records … *or any information obtained from these records*, to be confidential…"] Emphasis added.)

Accordingly, disclosing records reflecting incidents or conduct occurring prior to January 1, 2019 would constitute a retroactive application of SB 1421's amendments because it would violate the right to privacy of that information *already acquired* under existing law. (*Aetna Cas. & Sur. Co.*, *supra*, 30 Cal.2d at p. 391 ["A retrospective law is one which affects rights… [which] exist prior to the adoption of the statute"].)

SB 1421's amendments cannot be applied retroactively, however, because the Legislature did not intend such an operation. "Application of a statute to destroy interests which matured prior to its enactment is generally disfavored." (*Balen v. Peralta Junior Col. Dist.* (1974) 11 Cal.3d 821, 830.) Statutes are presumed to "operate prospectively only," because "the first rule of [statutory] construction [states] that legislation must be considered as addressed to the future, not to the past…." (*Myers*, *supra*, 28 Cal.4th at p. 840.) "[A] retrospective operation will not be given to a statute which interferes with antecedent rights ... unless such be '*the unequivocal and inflexible import of the terms, and the manifest intention of the legislature*.'" (*Id*., emphasis added; also see *Evangelatos*, *supra*, 44 Cal.3d at p. 1209 ["[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature [] must have intended a retroactive application"].) "Something more than a desirable social objective served by the legislation is [] required if we are to infer a legislative intent of retroactivity." (*Indus. Indem. Co. v. Workers' Comp. Appeals Bd.* (1978) 85 Cal.App.3d 1028, 1032.)

"First, a court should examine the actual language of the statute" to determine if a retroactive intent exists because "it is the language of the statute itself that has successfully braved the legislative gauntlet." (*Halbert's Lumber, Inc. v. Lucky Stores, Inc*. (1992) 6 Cal.App.4th 1233,

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1238.) SB 1421's terms contain no express statement of retroactive application. (Pet. ¶¶ 9, 11, Exh. A, Sec. 2.) The enactment contains no legislative findings directing a retroactive application of the new law or asserting that SB 1421 is intended to "clarify" the existing operation of Penal Code section 832.7.[3] (Pet. ¶ 9, Exh. A, Sec. 1.) The language of SB 1421 is not ambiguous on this point. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 ["If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature…"].) Had the Legislature intended SB 1421's amendments to apply retroactively to rescind already acquired privacy rights it would have expressly stated as such. (See *Aetna Cas. & Sur. Co.*, *supra*, 30 Cal.2d at p. 396 ["[I]t must be assumed that the Legislature was acquainted with the settled rules of statutory interpretation, and that it would have expressly provided for retrospective operation of the amendment if it had so intended"].)

Likewise, the relevant legislative history of SB 1421 contains no expression of retroactive intent. (Declaration of Zachery A. Lopes and Exhibits thereto ("Lopes Decl."), ¶ 3, Exhs. A-I.)[4] While the legislative history contains ambiguous references to SB 1421's "effect" as being to "open [] police officer personnel records in very limited circumstances," such language does not manifestly state an intent to unwind previously-acquired privacy rights for incidents or conduct that has already occurred. (Lopes Decl., ¶ 3, Exh. A, p. 8; *Myers*, *supra*, 28 Cal.4th at p. 840.) Rather, this simply states an intent to prospectively open personnel records for specified peace officer misconduct that occurred after SB 1421's operative date. Interpreting this stated "effect" any other way would ignore the fact that peace officers had an informational privilege, not a document production privilege, for the specified categories of incidents prior to January 1, 2019. (*Arthur Andersen v. Superior Court* (1998) 67 Cal.App.4th 1481, 1500 ["The Legislature is presumed to know existing law when it

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[3] To the contrary, the legislative history repeatedly affirms that "existing law" deems all peace officer personnel file material as confidential.

[4] The only mention of a potential retroactive application comes from a lobbying organization's opposition to the bill. (Lopes Decl., Exh. A, p. 16 ["[Our] reading of Senate Bill 1421 is that making the records of an officer's lawful and in policy conduct is retroactive in its impact"].) This is irrelevant, however, because it does not provide any insight into the Legislature's collective intent in enacting SB 1421 – lobbyists' letters "do not aid in [the] interpretation of the statute" because they "merely state the individual opinions of their authors." (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1066, fn. 5.) The same is true for statements by individual legislators, including those made by a bill's principal author. (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 569 ["In construing a statute 'we do not consider the motives or understandings of an individual legislator even if he or she authored the statute'"].)

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enacts a new statute…"].) Either way, "the wisest course is to rely on legislative history only when that history itself is unambiguous." (*J.A. Jones Construction Co. v. Superior Court* (1994) 27 Cal.App.4th 1568, 1578.) And, "*a statute that is ambiguous with respect to retroactive application is construed ... to be unambiguously prospective*." (*Myers*, *supra*, 28 Cal.4th at p. 841, emphasis added.)

The rule is clear: "a statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application. [Citation.]" (*Bullard v. California State Automobile Assn.* (2005) 129 Cal.App.4th 211, 217.) SB 1421 contains no "express language of retroactivity" and nothing in the relevant legislative history indicates even an implied retroactive intent. SB 1421's amendments cannot lawfully be applied to rescind previously-acquired privacy rights to the confidentiality of information concerning incidents or conduct occurring prior to the statute's effective date. Accordingly, Defendants' stated intent to apply SB 1421's amendments retroactively is unlawful.

IV. THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION IS NECESSARY

Preliminary injunctive relief is appropriate to maintain the status quo pending a final determination of the merits of an action by restraining the commission of a threatened act in violation of the plaintiff's rights or to prevent great or irreparable injury. (Code Civ. Proc. § 526(a)(1)-(3); *Continental Baking Co. v. Katz* (1986) 68 Cal.2d 512, 528.) This court has the authority to immediately stay Respondents' threatened release of confidential information pursuant to an unlawful application of SB 1421's amendments. (*Startrack, Inc. v. County of Los Angeles* (1976) 65 Cal.App.3d 451, 457 ["Injunctive relief may be granted against illegal enforcement of valid ordinances"]; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1292 [threatened enforcement of state statute by school district sufficient for enjoining implementation, citing *Cohen v. Bd. of Supervisors* (1985) 40 Cal.3d 277; *Costa Mesa City Employees' Assn. v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 305 [Petitioner "may seek injunctive relief against the *threatened infringement* of their rights", original emphasis].)

Here, Respondents have unequivocally stated their intent to apply SB 1421's amendments

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retroactively by releasing personnel files reflecting conduct or incidents which occurred prior to January 1, 2019. (Pet. ¶ 12, Exh. B.) Issuance of a preliminary injunction depends on two interrelated factors: (1) the likelihood that the plaintiff will succeed on the merits of his claim at trial, and (2) the harm that plaintiff is likely to suffer if preliminary injunctive relief does not issue, balanced against the harm that the defendant is likely to suffer if it does issue. (*Cohen*, *supra*, 40 Cal.3d at p. 286.) Both factors warrant issuing an immediate stay order in this case.

A. RPOA IS LIKELY TO PREVAIL ON THE MERITS

The Petition seeks a writ of mandate directing Respondents to refrain from applying SB 1421's amendments in a retroactive manner, and declaratory relief finding that those amendments may be lawfully applied prospectively only. Both are appropriate remedies.

Mandamus is proper to compel a public agency's performance of acts specifically prescribed by law. (Code Civ. Proc. § 1085.) Issuance of a writ of mandate is dependent upon two basic requirements: 1) a clear, present and ministerial duty on the part of the respondent; and 2) a clear, present and beneficial right in the petitioner to the performance of that duty. (Code Civ. Proc. § 1085; *People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491.) Respondents have a ministerial duty to refrain from unlawfully releasing confidential information. (Code Civ. Proc. § 1085; *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1266-1267 [Mandamus is appropriate to "prevent a public agency from acting in an unlawful manner by releasing information the disclosure of which is prohibited by law."]) RPOA, the employee organization recognized by Respondents to represent its bargaining unit peace officers in all matters regarding working conditions under Government Code section 3500 et seq., is beneficially interested in the enforcement of Respondents' duty to refrain from releasing RPOA's peace officer members' confidential personnel information and any other information in contravention of Penal Code sections 832.7 and 832.8. (See *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 941, fn. 3 [employee organization has standing to assert the privacy rights of its members].)

Declaratory relief is appropriate where there exists "(1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to" the parties' rights and

obligations. (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1582.)

The interpretation of statutes is a proper subject for declaratory relief. (*Walker v. Los Angeles County* (1961) 55 Cal.2d 626, 637; *Alameda County. Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1723 ["An action for declaratory relief lies when the parties are in fundamental disagreement over the construction of particular legislation, or they dispute whether a public entity has engaged in conduct or established policies in violation of applicable law"].) An actual controversy exists between the parties as to the lawfulness of Respondents' stated intent to apply SB 1421's amendments in a retroactive manner by releasing personnel files reflecting conduct or incidents which occurred prior to January 1, 2019. (Pet. ¶ 12, Exh. B.)

As discussed in sections II and III above, RPOA is likely to succeed on the merits of this action. SB 1421's amendments do not operate retroactively to divest RPOA's represented peace officers of their prior-acquired privacy right to maintain the confidentiality of their personnel file information reflecting conduct that occurred prior to January 1, 2019. Respondents' stated intent to apply the new law retroactively is unlawful.

B. THE HARM SUFFERED BY RPOA AND ITS MEMBERS WILL FAR OUTWEIGH ANY HARM SUFFERED BY RESPONDENTS

Absent an immediate injunction to enjoin Respondents' intended retroactive application of SB 1421's amendments, RPOA's represented peace officers will suffer irreparable harm. (*Novar Corp. v. Bureau of Collection & Investigative Services* (1984) 160 Cal.App.3d 1, 5 ["[I]t is well settled that where the enforcement of a statute may cause irreparable injury, the injured party may seek to enjoin its enforcement"].) There is no adequate legal remedy to compensate peace officers for the unlawful disclosure of their confidential personnel file information. The damage caused by unlawful disclosure of confidential information is immediate – the *mere disclosure* of that information to unauthorized individuals constitutes the harm suffered. Once such information is in the public domain, there is no practical way to unwind that harm, and certainly not by way of an action for monetary damages. (See *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 427-428 ["violation of the statutory procedures for disclosure of police personnel records does not give rise to a private right of action for damages"].) The loss of privacy in peace officer personnel file

information therefore constitutes irreparable harm.

Any harm suffered by enjoining a retroactive application of Senate Bill 1421's amendments is slight. Because the identified categories of personnel file information have been deemed confidential and withheld from public disclosure for over 30 years, waiting until the completion of these proceedings will not cause any undue hardship on Respondents or the public.

V. CONCLUSION

RPOA respectfully requests that this Court issue a Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction to enjoin Respondents from any retroactive application or enforcement of SB 1421's amendments to protect RPOA's represented peace officers' right to the confidentiality of their personnel file information reflecting incidents or conduct occurring before January 1, 2019.

Dated: January 24, 2019   Respectfully Submitted,

RAINS LUCIA STERN
ST. PHALLE & SILVER, PC

_____
Zachery A. Lopes
Attorneys for Petitioner/Plaintiff
Richmond Police Officers' Association

EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE