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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, a non-profit corporation,

Petitioner,

v.

CITY OF FRESNO,

Respondent.

CASE NO. 24CECG01635

NOTICE OF MOTION AND MOTION FOR JUDGMENT ON VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INJUNTIVE AND DECLARATORY RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

[Gov. Code §§ 7920.000, et seq.; Code Civ. Proc., §§ 1085, et seq.]

Date: September 18, 2024
Time: 1:30PM
Judge: Hon. Kristi Culver Kapetan
Department: 97E
Action Filed: April 22, 2024

[Filed concurrently with Declaration of Stephanie Padilla]

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on September 18, 2024 at 1:30PM, or as soon thereafter as the matter may be heard, in Department 97E of the Fresno County Superior Court, located at 2317 Tuolumne Street, Fresno, CA 93724, Petitioner the American Civil Liberties Union of Southern California ("ACLU") will and hereby does move, pursuant to California Code of Civil Procedure section 1085 et seq., the California Public Records Act (Gov. Code, §§ 7920.000, et seq.), and Article I, section 3 of the California Constitution, for judgment on the verified petition for writ of mandate and complaint for injunctive and declaratory relief, filed against Respondent the City of Fresno ("FRESNO").

ACLU seeks an order that FRESNO immediately comply with the Public Records Act and the California Constitution, release all records and information sought by the ACLU, and provide prospective relief. ACLU further seeks a declaratory judgment that FRESNO has failed to comply with their statutory and constitutional obligations. Upon successful resolution of this matter and pursuant to Government Code section 7923.115 and Code of Civil Procedure section 1021.5, the ACLU requests that the Court award them all attorneys' fees and costs incurred in bringing this action.

This motion is based upon this Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities; the supporting declaration and exhibits filed concurrently herewith; the Verified Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief; the other pleadings and papers on file in the above-captioned matter; any subsequent briefing; and any evidence or argument that may be requested or permitted by the Court.

Dated: July 15, 2024

Respectfully Submitted,

Shayla D. Harris

Shayla Harris (SBN 354010)
Angelica Salceda (SBN 296152)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.

Stephanie Padilla (SBN 321568)
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Attorneys for Petitioner, American Civil Liberties Union of Southern California

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INTRODUCTION

This action seeks to enforce the California Public Records Act ("PRA"), Gov. Code § 7920 et seq.[1] against the CITY OF FRESNO ("FRESNO"). Petitioner ACLU OF SOUTHERN CALIFORNIA ("ACLU") seeks non-privileged public records relating to the Fresno Police Department's use of police canines. The ACLU requested these records due to growing community concerns about FRESNO's egregious use of police canine force, and the disproportionate use of police attack dogs on communities of color. FRESNO produced a limited set of highly redacted records, but it has consistently and unequivocally refused to produce all responsive records in its possession, spurning its duties under the PRA, and violating the ACLU's statutory and constitutional rights. The public has a right to know about the conduct of police departments, officers, and their use of canines, especially when that conduct results in violence and serious physical injuries.

FRESNO's failure to comply with its legal obligations under the PRA and California Constitution harms the ACLU as well as the public. Despite the ACLU's request and attempts to obtain responsive records, FRESNO has ignored its obligations under the law. The ACLU therefore respectfully requests that the Court issue a writ of mandate compelling FRESNO to immediately produce all records responsive to the ACLU's request, including all responsive information improperly redacted, and enter judgment against FRESNO for declaratory and injunctive relief. Absent the issuance of a writ of mandate and judgment, the ACLU has no plain, speedy, or adequate remedy at law to enforce its rights under the PRA.

[1] Unless otherwise specified, all future statutory references are to the California Government Code.

FACTUAL BACKGROUND

A. Fresno's Use of Police Attack Dogs

Police attack dogs have been weaponized for centuries to terrorize, harass, and control people of color. The practice of using dogs to attack people dates back to slave patrols,[2] and that legacy carries over to our modern—and no less brutal—law enforcement practices. Today, police dogs are most often deployed against individuals who pose no serious danger to officers or to others. Most individuals seriously injured by police dogs are *unarmed*.[3] Accidental attacks also occur when police dogs get loose from their handlers, bite without instruction, and fail to release when commanded.[4] FRESNO's own canine unit is no exception: in the last decade FRESNO's police dogs have brutally attacked an innocent bystander,[5] a police officer at a routine training exercise[6], and a young child attending a police canine unit demonstration.[7]

The startling and grievous danger wrought by police attack dogs indicates an active need for public inquiry. The public must know—so that they can hold lawmakers and law enforcement officers accountable—when, where, how, and why police dogs attack members of the public.

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[2] See e.g., Madalyn Wasilczuk, *The Racialized Violence of Police Canine Force* (2023) 111 Georgetown L. J. 1125 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532414> (as of July 10, 2024); see also Bina Ahmad & Kiah Duggins, *U.S. Police Dogs Originated from Slavery - and Must Be Abolished* (Feb. 21, 2024) The Appeal <https://theappeal.org/police-dogs-originated-from-slavery-and-must-be-abolished/> (as of July 10, 2024).

[3] ACLU California Action, *Weaponizing Dogs: The Brutal and Outdated Practice of Police Attack Dogs* (Jan. 2024) <https://aclucalaction.org/wp-content/uploads/2024/01/ACLUReport_Weaponizing-Dogs_1.10.2024.pdf> (as of July 10, 2024) page 4 (hereafter *Weaponizing Dogs*).

[4] *Id.* at 18, 22-23.

[5] ABC30, *Fresno Police K9 Attacks Innocent Bystander* (May 20, 2015) <https://abc30.com/hanley-sell-jerry-dyer-k-9-attack/733733/> (as of July 10, 2024).

[6] ABC30, *Fresno Police K9 Fatally Shot After Biting Officer* (January 4, 2022) <https://abc30.com/fresno-police-k9-killed-officer-shot-odin-department/11425605/> (as of July 10, 2024).

[7] *Weaponizing Dogs*, *supra*, <https://aclucalaction.org/wp-content/uploads/2024/01/ACLUReport_Weaponizing-Dogs_1.10.2024.pdf> at page 19.

B. ACLU's California Public Records Act Request

On March 27, 2023, the ACLU submitted a PRA request to FRESNO seeking public records to understand the scope and impact of its police canine force. (Declaration of Stephanie Padilla (hereafter "Padilla Decl.") ¶ 2; Ex. A.)[8] As relevant to this motion, the PRA request sought the following records, all of which are "public records" under the PRA, see § 7920.530: (1) any completed use of force forms or use of force reports concerning use of a police canine; (2) use of force reports documenting police canine bite(s) and/or injur(ies); (3) records, including reports, concerning accidental police canine bite(s) and/or injur(ies); and (4) all records relating to the report, investigation, or findings of a police canine incident involving use of force resulting in death or serious bodily injury, unreasonable or excessive force, failure to intervene against another officer using unreasonable or excessive force, dishonesty about a police canine incident, or discriminatory use or threat of police canine force. (Ex. A.)

Though FRESNO sent an initial response on April 7, 2023, that message merely confirmed receipt of the ACLU's records request and asked for a two-week extension to respond. (Padilla Decl. ¶ 3; Ex. B.) Over one month later however, FRESNO still had not produced any substantive response to the request. Consequently, on May 19, 2023, ACLU reached out to the Fresno Public Records Center to inquire as to the status of the request. (Padilla Decl. ¶ 4; Ex. C.) Later that day, the Fresno Public Records Center responded that FRESNO was still gathering responsive records. They did not provide an estimate for when the records would be produced. (Padilla Decl. ¶ 5; Ex. D.)

Two weeks later, on June 2, 2023, FRESNO produced an initial set of responsive documents. (Padilla Decl. ¶ 6.) FRESNO withheld or redacted responsive information and records with regard to Requests 10 (use of police canine), 11 (canine bites), 12 (accidental bites), and 13 (reports, investigations, or findings regarding canine incidents). (Padilla Decl. ¶ 6.)

Specifically, FRESNO only produced seventy-six Use of Force Reports from years 2019-2023. (Padilla Decl. ¶ 6.) FRESNO redacted nearly all the narrative information from the Use of Force Reports and Accidental Bite Reports it did produce. Where there would be narratives detailing deployment of police canines and the resulting injuries, FRESNO's redacted reports instead proffer a parade of empty

[8] "Ex. A" refers to exhibit A attached to the Declaration of Stephanie Padilla, filed concurrently with this memorandum. All following references to exhibits likewise refer to the exhibits attached to the Declaration of Stepahanie Padilla.

gray boxes, occupying entire pages in succession. (Padilla Decl. ¶¶ 8, 9, 11; Ex. E.) Further, FRESNO did not produce any Use of Force Reports from 2021—an omission suggesting FRESNO did not conduct a proper search, let alone produce all the responsive records it located. (Padilla Decl. ¶ 7.)

On June 30, 2023, several weeks after making these partially responsive disclosures, FRESNO sent a supplemental response memorializing its response to each request and articulating its alleged justifications for withholding records and information. (Padilla Decl. ¶ 12; Ex. G.) FRESNO stated that it had redacted information from the records responsive to ACLU's request due to: 1) attorney-client privilege, 2) attorney work product doctrine, 3) the constitutional right to privacy, 4) unwarranted invasion of privacy resulting from disclosure of confidential peace officer personnel records, and 5) the investigatory records exemption. (Padilla Decl. ¶ 12; Ex. G.)

On November 17, 2023, after no further production from FRESNO, the ACLU sent a letter to the Fresno City Attorney's Office responding to FRESNO's assertions about the redactions. (Padilla Decl. ¶ 14; Ex. I.) The letter reiterated the ACLU's request for records and addressed the inapplicability of each of FRESNO's asserted justifications for nondisclosure. (Ex. I.) The ACLU's letter further advised FRESNO that the ACLU would be forced to litigate under the PRA if FRESNO did not release all responsive, non-exempt records in its possession. (Ex. I. at p. 6.) On December 4, 2023, having received no response to the letter, the ACLU sent a follow-up email to FRESNO expressing a desire to speak with FRESNO to resolve the request and asking for availability for a phone call, but FRESNO did not reply. (Padilla Decl. ¶ 15; Ex. J.)

On December 12, 2023, FRESNO sent a letter replying to the ACLU's November 17 letter, "to address the alleged deficiencies" in their disclosures. (Padilla Decl. ¶ 16; Ex. K at p. 1.) FRESNO doubled down on their initial justifications, asserting that documents responsive to the ACLU's requests were properly redacted pursuant to 1) the attorney-client privilege, 2) the constitutional right to privacy, and 3) the statutory exemption for confidential peace officer personnel records. (Ex. K at p. 2.) FRESNO further asserted that "Requests 10-12 all involve records subject to the investigatory records exemption" and that "such records remain non-disclosable." (Ex. K at p. 2.) The letter concluded with a final, unambiguous refusal, insisting that FRESNO "appropriately made disclosure in response to the ACLU's

Requests Nos. 10-12 and it will not be supplementing those responses. . . . [and] will now consider the ACLU's March 27, 2023, CPRA requests to the Fresno Police Department closed." (Ex. K at p. 3.)

ARGUMENT

The PRA and California Constitution require prompt disclosure of all non-exempt public records responsive to a records request. Despite these mandatory, non-discretionary rules, FRESNO has refused to produce all responsive records, asserting a series of unfounded blanket exemptions. No exemptions justify FRESNO's redactions or its withholding of records responsive to ACLU's request. First, the records do not fall under the PRA's "catch-all" exemption, because the public's interest weighs heavily in favor of disclosure: The Fresno community and the people of California deserve to know the extent of the damage done by FRESNO's police canines. Second, the records are not exempt from disclosure under federal or state law, and FRESNO must therefore disclose them.

A. The PRA and the California Constitution Require Prompt Disclosure of All Non-exempt Public Records.

The PRA and the California Constitution create a presumptive right of access to public records. (*City of San Jose v. Super. Ct.* (2017) 2 Cal.5th 608, 616.) The PRA defines "public record" to "cover every conceivable kind of record that is involved in the governmental process." (*Versaci v. Super. Ct.* (2005) 127 Cal.App.4th 805, 813, internal quotation and citation omitted.) "[A]ccess to information concerning the conduct of the people's business"—business conducted by public agencies on behalf of the people—is a "fundamental and necessary right of every person in this state." (§ 7921.000.) The PRA thus evinces "a strong policy in favor of disclosure of public records." (*Cal. State Univ. v. Super. Ct.* (2001) 90 Cal.App.4th 810, 831.) The Constitution further requires that any "statute, court rule, or other authority," such as the PRA, "be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (Cal. Const., art. I, § 3, subd. (b), par. (2).) Therefore, the public's right to disclosure must be construed "broadly" and exemptions to disclosure must be construed "narrowly." (See *County of L.A. v. Super. Ct.* (2012) 211 Cal.App.4th 57, 60, as modified Dec. 3, 2012.)

Because public records are presumed open to the public, the government "bears the burden of proving that one or more [exemptions] apply in a particular case." (*County of L.A. v. Super. Ct.*, *supra*,

211 Cal.App.4th at p. 63, internal quotation and citation omitted.) To do so, it must demonstrate a "clear overbalance on the side of confidentiality." (*City of San Jose v. Super. Ct.* (1999) 74 Cal.App.4th 1008, 1018, internal quotation and citation omitted.) The government must disclose all requested records unless it can prove that the records fall into 1) an exemption listed in the PRA, or 2) the PRA's "catch-all" exemption, which requires the government to demonstrate that "the public interest served by not disclosing the records clearly outweighs the public interest served by disclosure of the record." (§ 7922.000.) If a requested record contains both exempt and non-exempt material, the government must disclose the reasonably segregable non-exempt material. (§ 7922.525, subd. (b).)

The burden is on the agency to justify its claimed grounds for withholding potentially responsive records. "Conclusory or boilerplate assertions that merely recite statutory standards are not sufficient." (*ACLU of Northern Cal. v. Super. Ct.* (2011) 202 Cal.App.4th 55, 83.) This requirement also applies to records an agency seeks to withhold as "nonresponsive." (*Id.* at 86 [requiring an agency to "explain the claim [of nonresponsiveness] in the same detail needed to justify other grounds for withholding public records"].) Therefore, absent a specific, factual showing, FRESNO cannot satisfy its burden of establishing that records are nonresponsive or exempt from disclosure.

The PRA provides that a person may seek injunctive or declaratory relief or seek a writ of mandate to enforce the right to access any non-exempt public record and that a court shall order disclosure where records are being improperly withheld. (§§ 7923.000, 7923.100. See also Code Civ. Proc., §§ 1085 et seq.) The PRA requires courts to proceed "with the object of securing a decision as to the matters at issue at the earliest possible time." (§ 7923.005.)

B. The PRA's "Catch All" Exemption Does Not Apply to FRESNO'S Police Canine Records.

The PRA's "catch-all" exemption authorizes an agency to withhold responsive records *only if* it demonstrates "that on the facts of the particular case the public interest served by not disclosing the records clearly outweighs the public interest served by disclosure." (§ 7922.000.) This exemption, like all others, must be construed narrowly. (*City of Hemet v. Super. Ct.* (1995) 37 Cal.App.4th 1411, 1425.) As explained by the Court of Appeals in *Fredericks v. Super. Ct.*:

> If the records sought pertain to the conduct of the people's business there is a public interest in disclosure. The weight of that interest is proportionate to the gravity of governmental tasks sought to be illuminated and the directness with which the disclosure will serve to illuminate. The existence and weight of this public interest are

> conclusions derived from the nature of the information. [T]he issue is whether disclosure would contribute significantly to public understanding of governmental activities.

(2015) 233 Cal.App.4th 209, 226-27, internal quotation marks and citations omitted.

a. The public interest weighs in favor of disclosing the police canine records.

The public has a compelling interest in disclosure because police conduct—and police violence in particular—is a matter of grave public concern. "The public's legitimate interest in the identity and activities of peace officers is even greater than its interest in those of the average public servant. 'Law enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the state. In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers.'" (*Com. on Peace Officer Stds. & Training v. Super. Ct.* (2007) 42 Cal.4th 278, 297 (hereafter *P.O.S.T.*) [quoting *New York Times v. Super. Ct.* (1997) 52 Cal.App.4th 97, 104-105].)

Police attack dogs terrorize and mutilate hundreds of Californians each year, sometimes resulting in severe injury or death. (Verified Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief (hereafter "Compl.") ¶ 26.) These health impacts alone raise serious public safety concerns about which the public has a right to know. Moreover, police canines disproportionately attack people of color, replicating racial disparities observable in policing and police violence more broadly. (Compl. ¶ 27.) The public has a compelling interest in assessing the extent and impact of racialized policing. Few government activities can match the gravity of the governmental task of policing, with its daily, visceral, and often violent impact on individuals and communities. Public safety and accountability thus demand public access to information regarding FRESNO's use of canine force.

Further, disclosure here would directly and significantly contribute to the public understanding of the FRESNO's police canine use. Currently, the people of Fresno have almost no information regarding the circumstances under which FRESNO deploys its police canines. Disclosure of the requested records would immediately illuminate these circumstances, shedding light on the situations before, during, and after the FRESNO's deployment of canine force. FRESNO's unredacted Use of Force Reports and Accidental Bite Reports contain the narrative information ACLU seeks—information that would allow the people to assess FRESNO's decisions and to hold them publicly accountable.

FRESNO's severe redactions and withholdings unlawfully prevent this public scrutiny; disclosure would instantly enable it.

b. FRESNO'S asserted concerns are not sufficient to justify nondisclosure.

FRESNO cannot meet its burden of showing that the public's interest in nondisclosure "clearly outweighs" its interest in disclosure. (See § 7922.000.) FRESNO has vaguely asserted security concerns relating to officer privacy and interference with law enforcement. The California Supreme Court, however, has held that vague assertions about officer security are insufficient to prove that the public's interest weighs in favor of nondisclosure. In *Long Beach Police Officers Assn. v. City of Long Beach*, a police union argued that the public's interest did not weigh in favor of releasing the names of police officers involved in shootings. ((2014) 59 Cal.4th 59, 74-75 (hereafter *Long Beach*).) The Court disagreed, finding the "few vaguely worded declarations making only general assertions about the risks officers face" insufficient to satisfy the "particularized showing necessary to outweigh the public's interest in disclosure." (*Id.* at p. 75.) As the Court explained, "a mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to . . . records." (*Id.* at p. 74, internal quotation and citation omitted.) Here, not only are FRESNO's vague assertions about officer safety and law enforcement patently insufficient under *Long Beach*, they are even more attenuated from the underlying records request—unlike in *Long Beach*, ACLU's PRA request does not seek the identities of officers, but rather the circumstantial information surrounding the FRESNO's deployment of canine force. FRESNO's vague safety concerns are therefore unpersuasive.

FRESNO makes generalized (and misplaced) objections rather than any based on the facts of the particular case as required by the PRA. (See § 7922.000) They have not explained how the disclosure of the requested records would run against the public interest. Given the public's clear and weighty interest in disclosure, the records are not exempt under the PRA's "catch all" exception, section 7922.000.

C. Federal and State Law Do Not Exempt Disclosure of the Requested Police Canine Records.

The PRA bars agencies from releasing "records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." (§ 7927.705.) This PRA exemption "is not an independent exemption but incorporates exemptions 'prohibited pursuant to federal or state law.'" (*ACLU of Northern Cal.*, *supra*,

202 Cal.App.4th at pp. 67–68; see also *County of Santa Clara v. Super. Ct.* (2009) 170 Cal.App.4th 1301, 1320; *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 656.) PRA exemptions "are narrowly construed, and the agency opposing disclosure bears the burden of proving an exemption applies." (*Becerra v. Super. Ct.* (2020) 44 Cal.App.5th 897, 914, internal citations omitted.) FRESNO asserts that disclosure of information in its Use of Force Reports, Accidental Bite Reports, and other documents responsive to ACLU's request is exempted or prohibited by federal or state law. These arguments fail, for the reasons set forth below.

a. Attorney-client privilege and work product doctrine do not apply.

"The attorney-client privilege attaches to a confidential communication between the attorney and the client." (*Costco Wholesale Corp. v. Super. Ct.* (2009) 47 Cal.4th 725, 734.) The privilege protects documents transmitted between the attorney and client, "not merely information in the sole possession of the attorney or client." (*Ibid.* [quoting *Mitchell v. Super. Ct.* (1984) 37 Cal.3d 591, 600].) Further, the party claiming the privilege has the burden of establishing that a communication was made in the course of an attorney-client relationship. (*Costco Wholesale Corp. v. Super. Ct.*, *supra*, 47 Cal.4th at p. 733.)

FRESNO asserts that it has "redacted. . . information protected by the attorney-client communication privilege and the attorney work product doctrine." (Ex. G at p. 2.) However, the Use of Force Reports and Accidental Bite Reports do not fall within the attorney-client privilege because they are not communications between the attorney and the client in the course of the representation. Rather, these reports are internal reports regularly created by police department employees as part of their official duties. "[R]eports prepared by police officers in the performance of their duties are not protected by the attorney-client privilege." (*Green & Shinee v. Sup. Ct.* (2001) 88 Cal.App.4th 532, 533.) Even if FRESNO has also shared these documents with an attorney, "attorney-client privilege does not embrace matters otherwise unprivileged merely because the client has communicated those matters to his attorney." (*Id.* at p. 537.) The attorney-client privilege therefore does not protect the information FRESNO has redacted or withheld in response to Requests 10-13.

The work product doctrine likewise does not justify FRESNO's redactions and withholdings. The work product doctrine creates "a qualified privilege against discovery of [an attorney's] general work product and an absolute privilege against disclosure of writings containing the attorney's

impressions, conclusions, opinions or legal theories." (*BP Alaska Exploration, Inc. v. Super. Ct.* (1988) 199 Cal.App.3d 1240, 1250.) Again though, the documents at issue here were not created by an attorney acting in a legal capacity. The Use of Force Reports, Accidental Bite Reports, and other records concerning the deployment of FRESNO's police canines are internal reports created by the police department. Their contents are therefore not protected by the attorney work product doctrine. Neither attorney-client privilege nor attorney work product doctrine absolves FRESNO of its duty to disclose.

b. The constitutional right to privacy does not exempt FRESNO's police canine records from disclosure.

The PRA and the California Constitution recognize privacy rights alongside the right to access public records. (§ 7922.525; Cal. Const., art. I, § 3, subds. (b)(2) & (3).) Whether a record is properly subject to disclosure despite a generalized privacy interest requires balancing the interests at stake—weighing the asserted privacy interest against the public's legitimate interest in disclosure of the information. (See, e.g., *P.O.S.T.*, *supra*, 42 Cal.4th at pp. 299–300 [balancing peace officers' interest in the information sought against the public's "legitimate interest not only in the conduct of individual officers, but also in how . . . local law enforcement agencies conduct the public's business"].)

FRESNO asserts that is has "redacted . . . information protected by the constitutional right to privacy," but it does not explain how the right to privacy is violated—or even implicated—by ACLU's requests. (Ex. G at p. 2.) This is exactly the kind of "[c]onclusory or boilerplate assertion[]" that is "not sufficient" to justify nondisclosure. (See *ACLU of Northern Cal.*, *supra*, 202 Cal.App.4th at p. 83). FRESNO must "describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information." (*Ibid.*, internal quotations and citation omitted.) It has failed to do so here.

Even if, arguendo, there is a privacy interest in the redacted information, "[t]he public's interest in the . . . conduct of peace officers is substantial." (*P.O.S.T*, *supra*, 42 Cal.4th at p. 299.) The public has a pressing interest in the requested records, including in understanding when, how, and why FRESNO deploys canine force, and whether their practices are consistent across contexts. All this information pertains to ongoing concerns about public safety, police violence, and racialized policing practices.

Moreover, if any responsive records do contain information that must be redacted under the constitutional right to privacy, *reasonable* redactions can—and must—be made. FRESNO has an obligation under the PRA to produce nonexempt materials that "reasonably can be segregated" from exempt materials. (See *P.O.S.T.*, *supra*, 42 Cal.4th at p. 301 [citing former § 6253, subd. (a), now § 7922.525, subd. (b)].) "Parts of a requested document fall[ing] within the terms of an exemption does not justify withholding the entire document." (*CBS, Inc. v. Block*, *supra*, 42 Cal.3d at p. 653.) Here, careful redaction of personal identifying information, like names, phone numbers, and addresses, would likely address any privacy concerns.

FRESNO has failed to explain how disclosure threatens privacy interests or why reasonable redactions would not provide adequate protection. The conclusory assertion of privacy interests does not outweigh the public's interest in disclosure and does not justify FRESNO's block redactions and withholdings of responsive records.

c. The peace officer personnel records exemption does not apply.

FRESNO asserts that it has "redacted . . . confidential peace officer personnel records as [disclosure] would constitute an unwarranted invasion of personal privacy," citing Penal Code sections 832.7 and 832.8, and Evidence Code sections 1043-1045. (Ex. G at p. 2.) However, the requested records are not officer personnel records, so these provisions do not justify nondisclosure. And even if the records here did qualify as personnel records, the exemption would not apply with regard to any records of police canine force resulting in great bodily injury, which would likely allow for disclosure of most of the records in this case.

"Peace officer personnel records" is strictly defined to "include only the types of information enumerated in [Penal Code] section 832.8." (*P.O.S.T.*, *supra*, 42 Cal.4th 278, 293.) FRESNO's Use of Force Reports and Accidental Bite Reports do not meet section 832.7's statutory definition. They are not records relating to "personal data," "employee advancement, appraisal, or discipline," or "complaints, or investigations of complaints" regarding an officer's performance of duties, nor would these records' disclosure constitute an "unwarranted invasion of personal privacy." (See Pen. Code, § 832.8, subd. (a).) On the contrary, the requested records are routine incident reports documenting FRESNO's use of force. "[I]information contained in the initial incident reports" is "typically not 'personnel records' as that term

is defined in Penal Code section 832.8," regardless of whether that incident is ultimately investigated by the employing agency. (*Long Beach*, *supra*, 59 Cal.4th 59, 71.) This case simply does not concern personnel records.

Even if the records here did constitute "personnel records," the exemption would likely not apply to most, if not all, of the records sought. While Penal Code section 832.7, subdivision (a) states that "personnel records of peace officers . . . are confidential and shall not be disclosed," the statute goes on to clarify that "[n]otwithstanding subdivision (a) . . . the following peace officer . . . records and records maintained by a state or local agency shall not be confidential and *shall be made available for public inspection pursuant to the California Public Records Act*." (Pen. Code, § 832.7, subd. (b)(1), emphasis added.) The subsequent list of mandatorily disclosed records includes reports and investigations relating to "an incident involving the use of force against a person by a peace officer . . . that resulted in death or great bodily injury." (Pen. Code, § 832.7, subd. (b)(1)(A)(ii).) For all incidents where a canine attack results in death or great bodily injury, the statute thus *requires* FRESNO to disclose its records.[9]

Further, Penal Code section 832.7, subdivision (b)(6) now delineates the *only* lawful reasons to redact a record disclosed pursuant to section 832.7. These include removing personal data, preserving anonymity for victims and witnesses, protecting medical and financial information, and preventing "significant danger to the physical safety of the peace officer." (Pen. Code, § 832.7, subd. (b)(6).) To the extent that FRESNO's reports contain this type of sensitive information, reasonable redactions can be made. However, inclusion of the reports' narrative information, with personal identifying information removed, would not "cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about possible misconduct and use of force by peace officers." (See Pen. Code, § 832.7, subd. (b)(6)(C).) Narrative information concerning police use of force is regularly published by the news media without causing unwarranted invasions of privacy. (Padilla Decl. ¶ 13.)

[9] Due to FRESNO's redactions, the ACLU lacks information about the severity of the injuries resulting from FRESNO's use of police canine force. However, the injuries commonly wrought by police canines—including deep punctures, muscle and bone damage, disfigurement, and permanent nerve damage (Compl. ¶ 25)—constitute great bodily injury. Further, California courts interpret "great bodily injury" to encompass injuries causing "some physical pain or damage, such as lacerations, bruises, or abrasions," all of which frequently occur in the course of a police canine attack. (See *People v. Washington* (2012) 210 Cal.App.4th 1042, 1047.) The ACLU therefore believes that the reports at issue may be subject to disclosure under Penal Code section 832.7.

And especially where the media has already reported it, FRESNO's disclosure of its narrative information would not create additional privacy concerns. Because the records here are not personnel records, and disclosure of the narrative information would not substantially jeopardize officer privacy or safety, the peace officer personnel records exemption does not apply.

d. The investigatory records exemption does not apply.

Finally, FRESNO asserts that it has "withheld records that are pending administrative investigation" with regards to Requests 10 and 11, and that it has "redacted and withheld information/records not required to be disclosed under the investigatory records exemption" with regards to Request 12. (Ex. G at p. 2.) Although FRESNO did not state that it had redacted or withheld records responsive to Request 13, the ACLU believes that records responsive to Request 13 were likely redacted or withheld pursuant to the investigatory records exemption as well. (Padilla Decl. ¶ 12.)

The PRA exempts from disclosure records of investigations conducted by state or local police agencies as well as investigatory files compiled by state or local agencies for law enforcement purposes. (§ 7923.600 et seq.) However, this exemption does not apply to disclosures required by Penal Code section 832.7. As discussed above, section 832.7, subdivision (b)(1) provides that "[n]otwithstanding subdivision (a), *Section 7923.600 of the Government Code*, or any other law, the following peace officer or custodial officer personnel records . . . shall not be confidential and shall be made available for public inspection.'" (Penal Code, § 832.7, subd. (b)(1), emphasis added; see also *BondGraham v. Super. Ct.* (2023) 95 Cal.App.5th 1006, 1020-21 [holding investigatory records exemption inapplicable to required disclosures under Penal Code § 832.7].) Where Penal Code section 832.7 requires disclosure, section 7923.600 cannot prevent it.

Even if Penal Code section 832.7 did not require disclosure here, section 7923.600 would still not apply. The investigatory records exemption "protects witnesses, victims, and investigators, secures evidence and investigative techniques, encourages candor, recognizes the rawness and sensitivity of information in criminal investigations, and in effect makes such investigations possible." (*Dixon v. Super. Ct.* (2009) 170 Cal.App.4th 1271, 1276.) But disclosure of FRESNO's Use of Force Reports and Accidental Bite Reports would not compromise current or future law enforcement investigations and would not put any witnesses, victims, or investigators at risk. Other law enforcement agencies' reports

contain narrative information that elucidates the events precipitating use of canine force, providing details about how and why force was used without revealing sensitive personal or investigative information. (Padilla Decl. ¶ 10; Ex. F.) FRESNO's reports presumably contain similar information which could likewise be disclosed without jeopardizing an investigation.

Finally, even if the investigatory records exemption did apply, it also has an exception. Whether investigatory files or records of investigation, the law still requires disclosure of, among other things, "the factual circumstances surrounding the arrest." (§ 7923.610 ["Notwithstanding any other provision of this article, a state or local law enforcement agency shall make public…the factual circumstances surrounding the arrest"].) So long as the disclosure would not endanger the safety of an involved person or endanger the completion of the investigation, FRESNO is required to release investigatory records detailing the factual circumstances surrounding arrests, including arrests accomplished using canine force. (See § 7923.610.) The ACLU is thus entitled to receive the narrative information unlawfully redacted from FRESNO's records.

D. Petitioner is Entitled to Recover Their Attorneys' Fees and Costs.

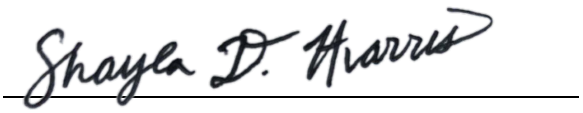
Because the Petitioner has demonstrated that FRESNO violated the PRA, they are entitled to an award of attorneys' fees and costs. (See § 7923.115, subd. (a); *L.A. Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381, 1391.)

CONCLUSION

FRESNO continues to withhold information and records unlawfully, and it cannot prove that those records are exempt from disclosure. Given the alarming violence wrought by police canines, the severity of the injuries they inflict, and the disproportionate use of canine force on people of color, the public's interest weighs heavily in favor of disclosure. ACLU seeks only non-exempt records, of which there are many yet to be disclosed. FRESNO must fulfill its duty to disclose all reasonably segregable, non-exempt information in response to the ACLU's request. For the foregoing reasons, this Court should grant the relief requested.

Dated: July 15, 2024

Respectfully submitted,

By: 

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