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COUNTY OF FRESNO

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, a non-profit corporation, Petitioner, vs. CITY OF FRESNO, Respondent.	Case No. 24CECG01635 [*Assigned for All Purposes to: Hon. Kristi Culver Kapetan*] **RESPONDENT'S OPPOSITION TO MOTION FOR JUDGMENT ON VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF** *Filed Concurrently with Declaration of Tina R. Griffin; Declaration of Abigail J.R. McLaughlin; Request for Judicial Notice* Date: September 18, 2024 Time: 1:30 p.m. Dept.: 97E Petition Filed: April 22, 2024

TO THE HONORABLE COURT, PLAINTIFF, AND COUNSEL OF RECORD:

Respondent CITY OF FRESNO ("Respondent") hereby Opposes Petitioner AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA's ("Petitioner" or "ACLU") motion for an order and judgment granting Petitioner's Verified Petition for Writ of Mandate Under the California Public Records Act ("CPRA") and the California Constitution and Complaint for Injunctive and Declaratory Relief and Respondent hereby states as follows:

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1. INTRODUCTION & SUMMARY OF ARGUMENT.

The honorable Court should Deny Petitioner's requested relief for two reasons. First, the requested records remain exempt from disclosure under the law enforcement investigative records exemption because the exception thereto for disclosure of records of police use of force causing "great bodily injury" ("GBI") does not embrace the kinds of temporary, non-disabling, non-serious injuries typically caused by police canine/dog ("K-9") bites – such as punctures, abrasions, and lacerations not requiring surgery; and because Petitioner's alternative, overbroad definition of GBI conflicts with controlling canons of statutory construction and common sense. Second, the requested records remain exempt from disclosure under other provisions of the Public Records Act.

To elaborate, Petitioner AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA ("Petitioner" or "ACLU") asserts that Respondent CITY OF FRESNO ("Respondent") improperly withheld and redacted records in response to Petitioner's California Public Records Act ("CPRA") request for records associated with the City of Fresno Police Department's ("FPD") use of police K-9 force, but such is based on the flawed premise that such records are not subject to the investigatory records exemption under Gov. Code § 7923.600(a). Yet, under applicable California case law, not only are these records subject to the investigatory records exemption, but also Petitioner wrongfully alleges that that the Penal Code § 832.7(b) exception to such exemption applies based on a flawed and overly broad definition of "great bodily injury" ("GBI") that is contrary to law, reason, and the precepts of statutory construction. Petitioner's definition would render the absurd result of causing records related to any and all uses of force by officers to be disclosable under the CPRA, contrary to Legislative intent. Rather, the plain reading and legislative history of Section 832.7(b) supports a narrower definition of GBI: a life-threatening or a potentially permanent, disabling injury. Thus, under this proper definition of GBI, it was lawful for Respondent to refuse to disclose, and to redact, records subject to the investigatory records exemption under Government Code section 7923.600(a) regarding Petitioner's CPRA request.

Additionally, Respondent's redactions of the personal information of witnesses and victims contained in such records was also appropriate pursuant to applicable law.

2. RELEVANT FACTUAL BACKGROUND.

While Petitioner's timeline of events regarding Petitioner's March 27, 2023 CPRA request to Respondent are generally correct, and Respondent does not dispute the exhibits provided in reference thereto, Respondent seeks to provide additional details as follows:

On March 27, 2023, Petitioner submitted a CPRA request to the FPD consisting of thirteen (13) requests for police records pertaining to:

(1) Canine unit statistics for each year, including the total number of canine unit radio calls, canine deployments, bites, and the deploy v. bite ratio;
(2) FPD's policies, protocol, and guidance on canine use;
(3) The training curricula for canines and officers in FPD's canine unit;
(4) Any blank forms used to report or review police canine use of force;
(5) The police canine handler handbook or manual;
(6) Any contract with outside police canine training providers;
(7) The training file, and any evaluations or activity reports for every police canine currently in service;
(8) The number of supervisors who receive formal standardized training in police canine handler procedures;
(9) The number of civilian complaints received by the Department involving police canine use of force;
(10) Any completed use of force forms or use of force reports concerning use of a police canine;
(11) Use of force reports documenting police canine bite(s) and/or injur(ies);
(12) Records, including reports, concerning accidental police canine bite(s) and/or injur(ies); and
(13) All records relating to the report, investigation, or findings of a police canine incident involving : (a) use of force involving a police canine that resulted in death or serious bodily injury; (b) unreasonable or excessive force involving a police canine; (c) failure to intervene against another officer using unreasonable or excessive force involving a police canine; (d) dishonesty about an incident involving a police canine; or (e) discriminatory use or threat of force involving a police canine.

[Padilla Decl., Exh. A.]

On June 2, 2023, Respondent responded to Petitioner's CPRA request, providing a substantive response as to each of the 12 requests, including indicating when a supplemental response would be provided, and also producing responsive documents. [Griffin Decl., ¶3, Exh. 1.] On June 30, 2023, Respondent provided the supplemental response and additional disclosure/production, stating that it provided a response to all thirteen of Petitioner's requests, but also stating which responsive records (if any) had been redacted and/or withheld based on applicable exemptions under the Government Code, Penal Code, Evidence Code, and applicable case law. [Padilla Decl., Exh. G.] In total, Respondent produced/disclosed 991 pages of police records in

response to Petitioner's CPRA request, including 788 pages of Use of Force Reports related to use of police dogs ("K-9s") and 12 pages of Accidental Bite Reports, which were appropriately redacted pursuant to applicable exemptions. [Griffin Decl., ¶4, Exh. 2.]

On November 17, 2023, Petitioner sent correspondence to Respondent alleging that Respondent had improperly withheld and/or redacted records response to Requests Nos. 7-12[1] in Petitioner's March 27, 2023 CPRA request. [Padilla Decl., Exh. I.] On December 12, 2023, Respondent replied to this correspondence and informed Petitioner that Respondent had produced all responsive documents to Request No. 7 and fully complied with Petitioner's Request Nos. 8 and 9, as Petitioner had not requested *documents* in those requests, but the *number* of supervisors and the *number* of civilian complaints received by the Department involving canine use of force: which had been provided via Respondent's June 30, 2023 supplemental response to Petitioner's March 27, 2023 CPRA request. [Padilla Decl., Exh. K at p. 1.] As to Petitioner's remaining Requests Nos. 10-12, Respondent reasserted that Respondent's redaction and/or withholding of responsive documents was appropriate under the CPRA, and Respondent continues to stand by its response that the records requested by Petitioner are not disclosable/exempt and not subject to any exception to nondisclosure because the incident does not "involv[e] the use of force against a person by a peace officer or custodial officer that resulted in death or great bodily injury" – contrary to Petitioner's assertion. (Pen. Code § 832.7(b)(1)(A)(ii).)

3. THE REQUESTED RECORDS ARE SUBJECT TO THE LAW ENFORCEMENT/POLICE INVESTIGATORY RECORDS EXEMPTION.

As an initial matter, there is no question that Requests Nos. 10-12, which seek reports and records regarding use of police K-9s and police K-9 bite(s) and/or injuri(ies), all involve records subject to the police investigatory records exemption. (Gov. Code § 7923.600(a) ["this division

[1] Of note, despite failing to mention Request No. 13 in their November 17, 2023 correspondence, Petitioner now "believe that records responsive to Request 13 were likely redacted or withheld pursuant to the investigatory records exemption as well." [Padilla Decl., ¶ 12; *id.*, Exh. I (only addressing Request Nos. 7-12).] As stated in Respondent's June 30, 2023 supplemental response to Petitioner's CPRA request, Respondent provided a response to Request No. 13 on June 2, 2023 and Respondent did not claim that it was withholding any records responsive to Request No. 13 pursuant to any exemptions. [Padilla Decl., Exh. G.] Thus, **Petitioner has no material evidence that Respondent withheld records responsive to such request**, only speculation; and thus, such allegations should not be considered by this Court. (*See* Evid. Code § 702.)

does not require the disclosure of records of complaints to, or investigation conducted by . . . any state or local police agency"]; *see id.* § 7923.605(b) ["this article does not require the disclosure of that portion of those investigative files that reflects the analysis or conclusion of the investigating officer"].)

While Petitioner attempts to argue that the investigatory records exemption does not apply because "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," such argument is contrary to law. [Motion at 19:22-20:4.[2]]

A. The Police Investigatory Records Exemption Is Broadly Construed.

In *Haynie v. Superior Court*, the California Supreme Court underscored that the records for *any* police investigation into potential crime are exempt, including use-of-force reports and canine reports, *even if the investigation is cursory or hits a dead end*: this is because "[l]aw enforcement officers may not know whether a crime has been committed until an investigation of a complaint is undertaken. An investigation may be inconclusive either as to the cause of death or the circumstances in which the death occurred. A fire may be suspicious, but after investigation[,] be found to have an accidental or natural origin." (*Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1070-71.) As a result, when it comes to the definition of police investigation records subject to the exemption, the police investigation exemption is more broadly construed.

B. The Police Investigatory Records Exemption Has No Expiration Date.

Moreover, once the law enforcement investigation exemption applies, exempt items remain exempt from CPRA disclosure *even after the investigation ends* – regardless of whether or not a criminal prosecution is brought. (*Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169, 174-75 [citations omitted]; *Williams v. Superior Court* (1993) 5 Cal.4th 337, 361-62.) Accordingly, Petitioner's Requests Nos. 10-12 for "[a]ny completed use of force forms or use of force reports

[2] Petitioner also attempts to compare Respondent's disclosures with the disclosures made by other public entities in response to similar CPRA requests, but such has no bearing on this case: as state agencies may waive exemptions by making a voluntary and knowing disclosure and it appears that the City of Bakersfield chose to do the same in response to a separate CPRA request by Petitioner. (*See Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1183; Padilla Decl., ¶ 10, Exh. F.)

concerning use of a police K-9," "[u]se of force reports documenting police canine bite(s) and/or injur(ies)," and "[r]ecords, including reports, concerning accidental police canine bite(s) and/or injur(ies)," requests records subject to the investigatory records exemption. [Padilla Decl., Exh. A.]

C. The Arrest Report Exception Does *Not* Apply Because Petitioner Requested Un-Excepted Use Of Force Records, *Not* Excepted Arrestee Information.

Moreover, Petitioner's argument that the Government Code § 7923.610 exception to such exemption from disclosure applies should be treated with short shrift, as such exception only requires a state or local law enforcement agency to make public certain information regarding the *arrest* of individuals. Petitioner did not request *arrest* reports regarding police K-9s, but *use of force* reports, which do not include the information that is disclosable under Government Code § 7923.610, *i.e.* information about the arrest of an individual, but information about the use of force itself. (*Compare* Gov. Code § 7923.610 [requesting information as to factual circumstances surrounding arrest] *with* Padilla Decl., Exh. E [providing information as to use of force, *not* arrest and stating "SEE REPORT" as to Incident Summary].)

4. POLICE K-9 FORCE RECORDS ARE NOT DISCLOSABLE BECAUSE THEY DO NOT INVOLVE A USE OF FORCE THAT RESULTS IN GREAT BODILY INJURY.

Petitioner asserts that, as to Requests Nos. 10-12, Respondent may not claim that the requested records are exempt from disclosure under Gov. Code § 7923.600(a) because Penal Code § 832.7(b)(1)(a)(ii) creates an exception[3] requiring Respondent to disclose its records "[f]or all incidents where a canine attack results in death or great bodily injury." [Motion at 18:12-13, 18:5-13, 19:12-21 (citing Gov. Code § 7923.600, Pen. Code § 832.7(b)(1).] However, Petitioner's interpretation of Penal Code § 832.7(b)(A)(ii) is overbroad and subverts the Legislature's intent in

[3] As the Court is aware, under the CPRA, there are several **exemptions** to the CPRA's public records disclosure requirements (such as the police investigatory records exemption) that make certain records non-disclosable; there are several **exceptions** to certain exemptions under certain circumstances (such as the exception that restores CPRA disclosability to police investigatory records of officer-involved shootings, or OIS); and there are also certain **caveats** to those exceptions that restore excepted records to non-disclosable status (such as during the administrative investigation of an OIS) in narrow circumstances. (*See, e.g.*, Gov. Code §§ 7921.000, 7923.600; Pen. Code § 832.7.)

enacting SB 1421 *et al.*: which amended the CPRA to allow the disclosure of records associated with select police use-of-force incidents, sexual assault, and acts of dishonesty.

A. Petitioner's Definition of "Great Bodily Injury" is Flawed and Overly Broad.

Petitioner's Motion asserts that "great bodily injury" ("GBI") (as used in Penal Code § 832.7(b)) should be defined to "encompass injuries causing 'some physical pain or damage, such as lacerations, bruises, or abrasions"; however, such definition would essentially devour the privilege afforded by Government Code § 7923.600(a). [Motion at p. 18, fn. 9.] This is because, in such an event, *virtually any and all police uses of force would fall into the CPRA-discoverable category of officer uses of force resulting in death or GBI.* In other words, the broad GBI definition would effectively void the Government Code section 7923.600(a) exemptions from disclosure for uses of force that resulted in minor scrapes, bruises, abrasions, burns, lacerations, or even physical pain.

Given Petitioner's overly broad scope of such a hole in the investigative records exemption, and given that the Legislature appeared to take great pains to preserve such privilege (as explained in more detail below), there is no support for the contention that the definition of GBI asserted by Petitioner applies to the exception to the investigative records exemption here.

1. Broad GBI Would Lower The Threshold For Use of Deadly Force.

This is particularly the case when one considers that, as shown below, relative to police uses of force, GBI is used interchangeably with serious bodily injury ("SBI") to refer to a kind of force likely to result in injuries *far more severe* than mere abrasions, contusions, lacerations, punctures, minor burns, or physical pain. (*See, e.g.*, *People v. Arnett* (2006) 139 Cal.App.4th 1609, 1613 [when it comes to police use of force standards, "great bodily injury" and "serious bodily injury" have "substantially the same meaning"].) Specifically, <u>in the context of police use of force</u>, GBI is typically paired with death as the type of result that, in order to be avoided, deadly force is authorized for use by police officers.

Under controlling case law, "deadly force" is force which, from the perspective of the force-wielding officer under the totality of the circumstances, at the time it is used, creates a foreseeable and substantial risk of death or great bodily injury. (*See. e.g.*, Pen. Code § 835a ["deadly force" is "force that creates a substantial risk of causing death or serious bodily injury"]; *accord Garner*,

supra, 471 U.S. at p. 9 n.8; *Smith*, *supra*, 394 F.3d at pp. 701, 706 ["deadly force" is "force employed [that] creates a substantial risk of causing death of serious bodily injury"]; *see also Thompson*, *supra*, 142 Cal.App.4th at pp. 163-166 [use of a police dog – whose bite injuries typically result in punctures, lacerations, and contusions – does *not* constitute deadly force under California law]; *Luchtel v. Hagemann* (9th Cir. 2010) 623 F.3d 975, 980; *Tekle v. United States* (9th Cir. 2007) 511 F.3d 839, 844-845; *Bryan*, *supra*, 630 F.3d at pp. 825-826.)

Significantly then, applying a broad definition of GBI to police use of force in the CPRA context would also have the bizarre side effect of lowering the threshold for when officers could use deadly force. This is because, under both California and federal law, law enforcement officers are authorized to use deadly force when, from the perspective of a reasonable officer under the totality of the circumstances known to the force-wielding officer at the time, it is objectively reasonable for the force-wielding officer to reasonably believe that he or she faces an immediate threat of death or *great bodily injury*. (*People v. Morales* (2021) 69 Cal.App.5th 978, 994 [holding that self-defense by deadly force is lawful when the person is facing "imminent attack that might result in death or great bodily injury"]; *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1105-1106 [concluding that officers' deadly force is authorized to prevent "great bodily injury"]; *Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [approving jury instruction that officer deadly force is reasonable where the officer "reasonably believed" a suspect "posed an immediate threat of great bodily injury or death"]; *Acosta v. City & Cnty. of San Francisco* (9th Cir. 1996) 83 F.3d 1143, 1145 fn.3 [observing that deadly force is lawful to protect against "great bodily injury"]; *see also Graham v. Connor* (1989) 490 U.S. 386, 396-397; *cf.* Cal. Penal Code § 835a (using SBI for same rule).)

Thus, if Plaintiff's broad GBI definition applied to police use of force and CPRA disclosures thereof, logically, this would also mean that officers would be authorized to shoot/kill for nothing more than a reasonable belief that they were about to face a painful bruise. *Compare People v. Washington* (2021) 210 Cal.App.4th 1042, 1047-1048 ["some physical pain or damage, such as lacerations, bruises, or abrasions" constitutes great bodily injury] *with Munoz*, *supra*, 120 Cal.App.4th at pp. 1105-1106 [concluding that officers' deadly force is authorized to prevent "great

bodily injury"].) Thus, Petitioner's proffered broad definition of GBI creates a legal absurdity that should not be perpetuated by this Court.

B. Great Bodily Injury Only Includes Life-Threatening and Potentially Permanent, Disabling Injuries.

In contrast to Petitioner's flawed, overbroad definition of GBI, the appropriate definition of GBI rests largely in the Government Code and the case law associated with police use of force: and its narrower strictures are more consistent with the canons of statutory construction and the apparent legislative history in revising and narrowing the scope of disclosability under SB 1421 *etc.*

1. In Police Use Of Force Law, GBI And SBI Mean The Same Thing.

As noted above, controlling California case law holds that, in the context of police uses of force, GBI and SBI are essentially the same thing. (*See People v. Knoller* (2007) 41 Cal. 4th 139, 143 n.2 [stating that "the two terms are 'essentially equivalent'"]; *Arnett, supra*, 139 Cal.App.4th at p. 1613; *see also* Pen. Code § 835a (amend. 2019) [an officer "is justified in using deadly force…when an officer reasonably believes, based on the totality of circumstances, that such force is necessary . . . to defend against an imminent threat of death or serious bodily injury … "].)

Moreover, in statutes relating to police use of force, such as those requiring annual reporting on officer-involved shootings and "incident[s] in which the use of force by a peace officer against a civilian results in serious bodily injury or death," SBI is defined as "a bodily injury that involves a substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ." (Gov. Code § 12525.2(d)(4).)

Additionally, the non-shooting category of CPRA-discoverable force involves two types of force: one that results in death, and another that results in great bodily injury. Particularly since rejected prior versions of the 2019 legislation were broader, and meant to include *all* uses of force ("UOF") (as discussed below), this pairing of GBI with death suggests that GBI is meant to be the kind of injury serious enough to be *comparable* to death. This would thus place the CPRA/Gov. Code definition of GBI/SBI in line with those authorities defining police-related "deadly force" as being "force that creates a substantial risk of causing death or serious bodily injury." [Pen. Code § 835a(e)(1); *Tennessee v. Garner* (1985) 471 U.S. 1, 9 n. 8; *Smith v. City of Hemet* (9th Cir. 2005)

394 F.3d 689, 706 ["deadly force" is "force employed [that] 'creates a substantial risk of causing death or serious bodily injury'"]; *accord Koussaya v. City of Stockton* (2020) 54 Cal.App.5th 902, 932-934 [explaining the 2020 amendments to Penal Code § 835a]; *Long Beach Police Officers Assn. v. City of Long Beach* (1976) 61 Cal.App.3d 364, 368, 375.)

Notably, in terms of severity of injury, case authorities on deadly force always pair "death" and a definition of SBI/GBI that is more consistent with the Government Code definition: namely, in such authorities, SBI/GBI does not include less serious injuries like abrasions, bruises, punctures, physical pain, and the like – but, rather, SBI/GBI only includes life-threatening and potentially permanent, disabling injuries. (*See id.*; *see also Thompson v. Cty. of Los Angeles* (2006) 142 Cal.App.4th 154, 165-166 [use of a police dog – whose bite injuries typically result in punctures, lacerations, and contusions – does *not* constitute deadly force under California law].) Moreover, the CPRA is also housed in the *Government* Code, where the narrower definition of SBI/GBI consistent with case law definitions of police-related SBI/GBI can be found.

Thus, properly construing GBI narrowly avoids Petitioner's absurdly broad construction, while more closely hewing to the GBI definition supported by related UOF statutory and case law.

2. Police Use Of Force Law Excludes K-9s, TASERs, Batons, And Chemical Agents From "Deadly Force" Because They Typically Do Not Cause GBI.

Significantly, as to police K-9/dog bites in particular, **it is well known in the case law and otherwise the police K-9 bites typically cause punctures and lacerations**. (*See, e.g., Hernandez v. Town of Gilbert* (D. Ariz. 2019) 2019 U.S. Dist. LEXIS 61480, *28-29 [police K-9 dog bites caused lacerations and fractures to suspect's foot]; *Vargas v. Whatcom Cty. Sheriff's Office* (W.D. Wash. 2021) 2021 U.S. Dist. LEXIS 29770, *9 [police K-9 dog bites caused punctures to foot, nerve damage, and chronic pain]; *Martus v. Terry* (D. Nev. 2011) 2011 U.S. Dist. LEXIS 36296, *4-5, 8-14 [police K-9 dog bites caused punctures to hip and loss of the tip of the suspect's index finger, but force still analyzed as non-deadly].) Thus, many courts have determined that the use of a police K-9 does not constitute a substantial risk of causing death or GBI. (*See, e.g., Lowry v. City of San Diego* (9th Cir. 2017) 858 F.3d 1248, 1254, 1257 [deployment of a police K-9 amounted to moderate force where canine bit suspect's upper hip, causing her to receive three stitches]; *Vera Cruz v. City*

of Escondido (9th Cir. 1998) 139 F.3d 659, 664 [defining "deadly force" as "that force which is reasonably likely to cause death" and finding the possibility of death from a properly trained police dog too remote to constitute deadly force]; *Robinette v. Barnes* (6th Cir. 1988) 854 F.2d 909, 912 [holding that "the use of a properly trained police dog to apprehend a felony suspect does not carry with it a 'substantial risk of causing death or serious bodily harm'"]; *Kuha v. City of Minnetonka* (8th Cir. 2003) 365 F.3d 590, 598 ["We find the likelihood of death from the use of a properly trained police dog to apprehend a suspect sufficiently remote as to preclude its characterization as deadly force."].)

It is further well known in the case law and otherwise that electronic control weapons (TASERs) typically cause punctures in their probe or dart stun mode, and they cause burn-like dots or abrasions in their drive-stun mode. (*See, e.g., Carroll v. Ellington* (5th Cir. 2015) 800 F.3d 154, 166 (acknowledging that puncture wounds on the chest and flank could be consistent with TASER probe deployments); *see also Mattos v. Agarano* (9th Cir. 2011) 661 F.3d 433, 443 (distinguishing the neuromuscular full body incapacitation of TASERs in dart mode versus the pain-only effects of TASERs in drive stun to contact mode).) It is also well known in the case law and otherwise that impact weapons, like police batons and flashlights, typically cause contusions and possibly fractures. (*See, e.g., People v. Odom* (2016) 244 Cal.App.4th 237, 241 (observing that parallel contusions could be consistent with being struck by a police baton); *Ervin v. Merced Police Dept.* (E.D. Cal. 2015) 2015 U.S. Dist. LEXIS 136655, *26-30 (police baton use that fractured teeth evaluated by court as non-deadly force); *Valiavacharska v. Celaya* (N.D. Cal. 2011) 2011 U.S. Dist. LEXIS 109164, *1-2 (police baton fractured fingers).)

Yet, under prevailing case law, **none of these uses of force are considered to be deadly force**: rather police K-9 dog bites, impact weapons like police batons, pepper spray, and a TASER in dart mode are all considered to be non-deadly/intermediate force under prevailing UOF case law. (*See Brewer v. City of Napa* (9th Cir. 2000) 210 F.3d 1093, 1098 [police K9 dogs' bites are non-deadly intermediate force]; *Thomson v. Salt Lake County* (10th Cir. 2009) 584 F.3d 1304, 1316 [potential for greater harm does not transform use of a police dog into deadly force]; *Bryan*, *supra*, 630 F.3d at pp. 825-826 [TASERs are non-lethal force, but when used in dart mode, they are non-

lethal intermediate force requiring the presence of a threat of harm to be justified; also noting that pepper spray and impact weapons are non-deadly force]; *Young v. Cty. of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1161 [pepper spray and baton strikes are non-deadly intermediate force]; *Forrester v. City of San Diego* (9th Cir. 1994) 25 F.3d 804, 806-808 [pain compliance techniques such as firm grip restraint, pressure holds, and arm/wrist twisting are non-deadly force]; *Deorle v. Rutherford* (9th Cir. 2001) 272 F.3d 1272, 1279-1280 [impact weapon, including cloth-cased shot akin to a rubber bullet, was non-deadly force as a matter of law]; *Jackson v. Cty. of San Bernardino* (C.D. Cal. 2016) 191 F.Supp.3d 1100, 1114-1115 [noting that TASERs are not lethal force unless used on a person in danger of falling to their death, *i.e.*, a known substantial risk of death].)

However, if Petitioner's broader definition of GBI were applied, because all of these force options are all likely to cause physical pain, all non-deadly force options – police K-9s, batons, pepper spray, TASERs – would automatically become "deadly force" under California law – contrary to controlling case law.

3. Petitioner's Broad GBI Definition Conflicts With Legislative History.

"In ascertaining the meaning of a statute, we look to the intent of the Legislature as expressed by the actual words of the statute[.]" (*California State University, Fresno Assn., Inc. v. Cnty. of Fresno* (2017) 9 Cal.App.5th 250, 266 [quoting *Wasatch Property Mgmt. v. Degrate* (2005) 35 Cal.4th 1111, 1117].) However, "[w]hen statutory language is reasonably subject to more than one interpretation . . . we may consider extrinsic aids, such as legislative history. But we also look to legislative history to confirm our plain-meaning construction of statutory language." (*Hughes v. Pair* (2009) 46 Cal. 4th 1035, 1046 [cleaned up].) Here, not only do the actual words of the statute support Respondents' narrower definition of GBI as life-threatening and potentially permanent, disabling injuries, but also the legislative history confirms the same.

Specifically, **the legislative history of SB 1421 reveals that Petitioner's broad definition of GBI cannot be consistent with the definition of GBI used for purposes of determining disclosability of police uses of force under the CPRA**.

Of note, a precursor to SB 1421 was SB 1286. Introduced on February 19, 2016, SB 1286 bill desired to "require . . . certain peace officer…personnel records and records relating to

complaints against peace officers and custodial officers to be available for public inspection pursuant to the [CPRA], including: [¶] [any] record related to the investigation or assessment of any use of force by a peace officer that is likely to or does cause death or serious bodily injury, including but not limited to, the discharge of a firearm, use of an electronic control weapon or conducted energy device [TASER], and any strike with an impact weapon to a person's head." (Request for Judicial Notice, Exh. A at p. 6.) Notably, SB 1286 died in committee.

Like SB 1286, the originally-introduced version of SB 1421 that amended Penal Code section 832.7 mandated disclosure, through the CPRA, of records related to: (1) incidents involving the discharge of a firearm at a person by an officer; (2) incidents involving the discharge of an electronic control weapon or conduct energy device at a person by an officer; (3) incidents involving a strike with an impact weapon or projectile to the head or neck of a person by an officer; and (4) incidents involving use of force by an officer which results in death or serious bodily injury, as defined in Penal Code section 243(f). (Request for Judicial Notice, Exh. B; *id.*, Exh. C at p. 6.) Thus, this early version of SB 1421 also defined the type of injury that rendered investigative reports disclosable under the CPRA more narrowly than Petitioner does in this matter: especially considering that, under the Penal Code, "'Serious bodily injury' means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement." (Pen. Code § 243(f)(4).)

As is evident, **this language explicitly including incidents involving non-deadly/intermediate force** along with incidents involving discharge of a firearm and that result in death and serious bodily injury **does not appear in the final statute**. (*See* Pen. Code § 832.7; *accord* AB 748 [amended on August 17, 2018 to include incidents involving TASERs and impact weapons, but final language of Gov. Code § 6354(f) (2019) removed such language].) Notably, even with this much broader range of excepted records than what was ultimately adopted, the Senate Floor Analysis explicitly stated that "SB 1421 opens police officer personnel records in *very limited* cases, allowing local law enforcement agencies and law enforcement oversight agencies to provide greater transparency around **only the most serious police complaints**." (Request for Judicial

Notice, Exh. D at p. 7 [emphasis added].) It would be absurd to interpret the legislative intent as extending "the most serious police complaints" to those that, according to the broad GBI definition, do no more than cause physical pain or abrasions (scrapes) or contusions (bruises) or punctures.

Furthermore, embracing the precept that the incidents where disclosures should be permitted should be "very limited," the bill was then *further* amended by the Legislature to *remove* from the list of CPRA-disclosable force use of an electronic control weapons (TASERs), as well as removing from the list of disclosable force strikes with impact weapons or projectiles to the head or neck of a person. (Request for Judicial Notice, Exhs. E, F; *id.*, Exh. G at p. 1.) By narrowing the scope of CPRA-disclosable force, to exclude TASERs and batons from the excepted list, and by stating that the definitions of disclosable force were intended to be "very limited" to only the "most serious" uses of force, the Legislature showed that its intent here was more consistent with the narrower construction of GBI that is used in evaluating police uses of force.

More importantly, if – in its revision of the CPRA – the Legislature intended the broader Penal Code definition of GBI to apply to police force, then the legislative history would *not* indicate (as it does) that the Legislature intended to *narrow* the scope of disclosability away from weapons that merely cause contusions, abrasions, lacerations, and punctures – as TASER, impact weapons, and police K-9s do. It would be inconsistent with the canons of statutory construction to believe that, in its attempt to *narrow* the scope of CPRA disclosability under the Penal Code section 832.7 exception, the Legislature adopted a term, GBI, that instead *broadened* the scope of disclosure to include, effectively, *all* uses of force. This is further supported by the fact that, in 2020, Senator Skinner (who introduced SB 1421) introduced SB 776 in another attempt to broaden the Penal Code section 832.7 exception to *all* uses of force: *an attempt that failed*. (Request for Judicial Notice, Exh. H.) If, as Petitioner contends, GBI was meant to be broadly construed, the new bill would have been unnecessary, even in its sponsor's eyes.

As a result, Plaintiff's broad definition of GBI is both inconsistent with how GBI is defined in the context of police use of force and it leads to absurd results; thus, the broad version cannot be the legally correct definition of CPRA GBI. This is particularly true considering the fact that California police chiefs' acquiescence to then-bill SB 1421 was reportedly contingent upon the

Legislature's addition of the "limiting" GBI language. (McLaughlin Decl., Exh. I (reporting that the California Police Chiefs Association had approved the final draft of the bill a week before passage).)

It is absurd to believe that the police community would have embraced a definition of GBI relative to use of force that is wholly alien to and broader than their understanding of GBI/SBI as a fatal or near-fatal/permanent injury situation in the context of police use of force.

4. Statutory Construction Canons Support This Narrower Definition of GBI.

Because Petitioner's GBI definition would lead to absurd results that appear contrary to the legislative intent, the narrower GBI interpretation is better supported by common notions of **statutory construction**, despite Petitioner's arguments to the contrary. To elaborate, under the canons of statutory construction for courts:

> When we interpret a statute, [o]ur fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy. [Then], we consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.

(*See Collandrez, supra,* 61 Cal.App.5th at p. 1052 (citing *Becerra v. Superior Ct.* (2020) 44 Cal.App.5th 897, 917; *Weiss v. City of Del Mar* (2019) 39 Cal.App.5th 609, 618 (internal citations and quotation marks omitted)); *see generally In re Williamson, supra,* 43 Cal.2d 651; *People v. Murphy, supra,* 52 Cal.4th 81.)

Along these lines, "whenever possible, significance must be given to every word [in a statute] in pursuing legislative purpose, and the court should avoid a construction that makes some words surplusage." (*See Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330; *accord Collandrez, supra,* 61 Cal.App.5th at p. 1052; *Office of Inspector General v. Superior Ct.* (2010) 189 Cal.App.4th 695, 708 [quoting *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22].) Thus, under the canons of statutory construction, a "statute should be interpreted to avoid an absurd result." (*Wasatch Property Mgmt. v. Degrate* (2005) 35 Cal.4th 1111, 1122 [a "statute should be interpreted

to avoid an absurd result"]; *Newark Unif. Sch. Dist. v. Superior Ct.* (2015) 245 Cal.App.4th 887, 899 [courts "may reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results."] [cleaned up] [quoting *Riverside Cty. Sheriff's Department v. Stiglitz* (2014) 60 Cal.4th 624, 630].)

Along similar lines, generally, where a broad construction of a vague statute conflicts with a narrower construction of more specific language, the narrower construction typically prevails. (*See id*.; *see generally* Code Civ. Proc. § 1859; *In re Williamson* (1954) 43 Cal.2d 651, 654 ["It is the general rule [of statutory construction] that where the general statute standing alone would include the same matter [conduct] as the special [specific] act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment."]; *accord People v. Murphy* (2011) 52 Cal.4th 81, 86; *Morton v. Mancari* (1974) 417 U.S. 535, 550 ["where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one regardless of the priority of enactment"]; *Townsend v. Little* (1883) 109 U.S. 504, 512; *Collandrez v. City of Rio Vista* (2021) 61 Cal.App.5th 1039, 1052.)

As a result, given the fact that applying the broad Penal Code construction of GBI, to police use force would result in obliterating the case law distinctions between deadly force and non-deadly force, while also lowering the threshold for use of deadly force (increasing officer shootings); and given that the broad construction of GBI would also effectively eliminate the investigatory records exemption and other guardrails the Legislature imposed to keep the scope of the SB 1421 exception's disclosability "very limited"; and given the legislative history showing that the scope of the 2019+ exception was intended to be *narrowed* by the amendments, *not* broadened, it would be absurd to interpret the SB 1421 use of the term "great bodily injury" to be consistent with the Penal Code definition of GBI, as such has been expanded by case law to include mere physical pain; and thereby to sweep virtually *all* uses of force into the CPRA-disclosable category when the Legislature *expressly rejected* such a broad sweep for the CPRA exceptions to the investigatory exemption.

As such, in light of the foregoing, the only reasonable statutory construction available here is that when the Legislature adopted the term "great bodily injury" <u>in the context of police uses of force that would become disclosable under the CPRA</u>, the Legislature meant to embrace the

interpretation of GBI that officers are trained to use when evaluating various types of police force, and distinguishing deadly force from non-deadly force. Thus, namely, **for purposes of determining whether police force incidents are disclosable under the 2019+ amendments to the CPRA, the weight of the authorities clearly supports the *narrower* definition of GBI: that only force that causes death or a life-threatening and potentially permanent, disabling injury is CPRA disclosable under the applicable exception**. In other words, when applying all of these statutory construction principles here, the proper definition of GBI for purposes of determining the disclosability of police force under the CPRA is more consistent with the Government Code definition of SBI (which case law treats as interchangeable with GBI in the context of analyzing police use of force): namely, force that involves a substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ is disclosable; while lesser force – such as non-deadly force that causes merely minor fractures, lacerations, punctures, contusions, abrasions or physical pain (like TASERs or batons) – is *not* disclosable under the exception to the police investigatory records exemption.

C. Under the Proper Definition of GBI, the Requested Records are *Not* Disclosable.

Here, none of the records responsive to Request Nos. 9-12 involved the use of police K-9s that resulted in death or GBI pursuant to the proper, narrow definition of GBI. [Griffin Decl., ¶ 5.] Rather, as case law has aptly denoted and as discussed at length above, police K-9 dog bite injuries, *i.e.* puncture wounds etc., are *not* injuries classified as GBI in the proper context of police use of force law and disclosability under the CPRA: which omitted moderate, non-lethal uses of force from disclosable force. Thus, the Penal Code § 832.7(b) exception is inapplicable to the CPRA request at issue here, and the exemption to disclosure remains under Government Code § 723.600(a). Respondents thus acted properly in asserting such exemption and withholding such records in response to Petitioner's CPRA request and, thus, Respondents' justification for nondisclosure and redaction was valid.[4]

[4] Notably, Respondent's choice to produce responsive documents with redactions was pursuant to Respondent's exercise of its discretion to allow disclosure of some responsive information to Petitioner's request, though all responsive records were subject to the investigatory records exemption. (*See Black Panther Party v. Kehoe* (1974) 42 (footnote continued)

1. Respondent Will Submit Records To In Camera Review, As Needed.

Additionally, though Respondent believes such is unnecessary because the investigatory records exemption applies to all documents sought by Petitioner in Request Nos. 9-12, Respondent is willing to present the unredacted and withheld records to the Court for *in camera* review (if the Court so desires) to further demonstrate that such exemption is applicable and Respondent appropriately claimed the same. (*See* Gov. Code § 7923.105; Evid. Code § 915.)

5. THE ADDITIONAL CLAIMED EXEMPTIONS WERE APPROPRIATE.

Though Respondent's withholding and redaction of responsive documents to Petitioner's CPRA request was appropriate pursuant to the Government Code § 7923.600 police investigatory records exemption, Respondent also appropriately redacted responsive documents based on (1) constitutional right to privacy (Gov. Code § 7927.705; U.S. Const., 14th Amend.; Cal. Const. art. I, § 1); and (2) confidential peace officers personnel records (Gov. Code § 7927.705; Pen. Code §§ 832.7, 832.8; Evid. Code §§ 1043-1045).).[5] [Padilla Decl., Exhs. G, K.]

Specifically, in regards to Respondent's redactions to the produced Use of Force and Accidental Bite Reports, Respondent appropriately redacted the identity of victims and witnesses, and Petitioner admits to the same. [*See generally* Griffin Decl., Exh. 2; *see also* Motion at 18:14-19.] When it comes to personal contact information, such as a person's name or address or phone number, whether the person is a public employee or a private citizen whose contact information is possessed by a public agency, determining the applicability of the CPRA privacy exemptions requires a case-specific inquiry. "In determining whether the public interest in nondisclosure of individuals' names and addresses [and other contact information], courts have evaluated whether

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Cal.App.3d 645, 656 [the CPRA exemptions are permissive, *not* mandatory; in general, they permit disclosures where, in the exercise of its discretion, the custodial public entity determines that the public interest favors disclosures over non-disclosure].)

[5] Oddly, Petitioner argues that the CPRA "catch all" exemption does not apply to the requested records and claims that Respondent "vaguely asserted security concerns relating to officer privacy and interference with law enforcement"; but Respondent did not claim that the CPRA "catch all" exemption applied to the requested records in its CPRA response or in its answer in this matter. [*See generally* Answer; Padilla Decl., Exhs. G, K.]

Additionally, while Respondent initially claimed an exemption regarding attorney-client privilege and work product doctrine, such was asserted in case Respondent discovered responsive documents containing such exempted material, but the actual redactions did not end up being pursuant to such exemption.

disclosure would serve the legislative purpose of 'shed[ding] light on an agency's performance of its statutory duties.'" (*City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1020.)

Thus, "[w]here disclosure of names and addresses [or contact information] would not serve this purpose, denial of the request for disclosure will be upheld." (*Id.*; *see generally Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 74-75.) "Courts have also recognized that the public interest in disclosure [of persons' identities and contact information] is minimal, even when the requester asserts that personal contact [information] is necessary to confirm government compliance with mandatory duties, where the requester has alternative, less intrusive means of obtaining the information sought." (*Id.*) "However, where the disclosure of names and addresses [and contact information] is necessary to allow the public to determine whether public officials have exercised their duties by refraining from the arbitrary exercise of official power, disclosure has been upheld." (*Id.*)

Here, the disclosure of the names, addresses, and/or contact information for those individuals who may have been bitten by police K-9s, whether accidentally or through use of force, has no bearing on whether public officials exercised their duties, rather it is just additional, non-substantive information that would violate those individual's privacy by making such information public. There is no public interest in disclosure of such information here, especially as such information is already contained in documents already exempt form disclosure under the investigatory records exemption. Accordingly, such redactions were necessary, appropriate, and CPRA-compliant.

6. CONCLUSION.

For the foregoing reasons, Respondent respectfully requests that the Court Deny Petitioner's motion in its entirety, including denying attorneys' fees, and enter judgment in Respondents' favor.

DATED: September 5, 2024 LEWIS BRISBOIS BISGAARD & SMITH LLP

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CALIFORNIA STATE COURT PROOF OF SERVICE
ACLU v. City of Fresno, et al.
FCSC Case No. 24CEG01635; Client Matter No. 54986-05

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. My business address is 633 West 5th Street, Suite 4000, Los Angeles, CA 90071.

On September 5, 2024, I served true copies of the following document(s): RESPONDENT'S OPPOSITION TO MOTION FOR JUDGMENT ON VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

SEE ATTACHED SERVICE LIST

The documents were served by the following means:

☒ (BY E-MAIL OR ELECTRONIC TRANSMISSION) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent from e-mail address Corinne.Taylor@lewisbrisbois.com to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 5, 2024, at Los Angeles, California.

/s/ Corinne Taylor
Corinne Taylor

SERVICE LIST
ACLU v. City of Fresno, et al.
FCSC Case No. 24CEG01635; Client Matter No. 54986-05

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