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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

PETITIONER'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT

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

Date: October 23, 2024
Time: 1:30PM
Judge: Hon. Kristi Culver Kapetan
Department: 97E

Action Filed: April 22, 2024

INTRODUCTION

As set forth in Petitioner ACLU of Southern California's ("ACLU") Motion for Judgment, the California Public Records Act ("CPRA") makes clear that access to public records is a "fundamental and necessary right of every person in this state." (Petitioner's Motion for Judgement at p. 11.) In their Opposition, Respondent City of Fresno ("FRESNO") abandons some of their initial arguments, including claims of attorney-client privilege and attorney work product, as grounds for withholding responsive records. Instead, FRESNO now relies primarily on a misinterpretation of the term "great bodily injury" ("GBI"). FRESNO does not disclaim the public's right to access public records or assert that the records sought here somehow fall outside the scope of "public records" that must be disclosed. Rather, FRESNO seeks an exemption from its obligation to produce such records—particularly canine use of force reports. But FRESNO cannot meet its burden to establish that any such exemption applies. The requested records must therefore be disclosed.

ARGUMENT

I. THE RESPONSIVE RECORDS ARE NOT "INVESTIGATORY RECORDS."

The CPRA mandates disclosure of public records except where specific exemptions apply. One such exemption is the "investigatory records exemption," which shields certain records related to law enforcement investigations. (Gov. Code § 7923.600 et seq.) This exemption is designed to safeguard records that pertain to ongoing investigations into criminal activity, including sensitive materials such as witness statements, evidence, and materials reflecting investigative analysis or conclusions (Gov. Code § 7923.600 et seq.; see also *Dixon v. Super. Ct.* (2009) 170 Cal.App.4th 1271, 1276 [providing reasons for the exemption].) FRESNO, a public agency, "may not shield a document from disclosure with the bare assertion that it relates to an investigation." (*Williams v. Super. Ct.* (1993) 5 Cal.4th 337, 356.)

A. THE RESPONSIVE RECORDS ARE NOT INVESTIGATORY.

The records responsive to ACLU's request are not investigatory records. ACLU's Requests 10-12[1] seek Use of Force Reports, police canine bite reports, administrative reports documenting

[1] FRESNO concedes that they have withheld responsive records to ACLU's Records Request 10-12, but claims not to have withheld records responsive to Request 13 (disclosures pursuant to Penal Code section 832.7). (Opp. at p. 3, fn. 1.) However, FRESNO's interpretation of Request 13 hinges on its interpretation of Penal Code section 832.7. Because FRESNO misinterprets section 832.7, it also misinterprets Request 13, and consequently it has failed to disclose records responsive to that request.

unintended canine bites or injuries, and other related force incident records. These records are procedural. They do not involve targeted inquiries typically associated with police investigations, such as traffic stops (*Haynie v. Super. Ct.*, (2001) 26 Cal.4th 1061, 1070–71 (hereafter *Haynie*)), corruption investigations against local officials (*Rivero v. Super. Ct.* (1997) 54 Cal.App.4th 1048, 1050), police internal affairs investigations (*Rackauckas v. Super. Ct.* (2002) 104 Cal.App. 4th 169, 171), or disciplinary proceedings against police officers (*Williams v. Super. Ct.*, (1993) 5 Cal.4th 337, 341). Rather, Use of Force Reports are created as part of routine operational procedures to document an officer's use of reportable force, including details about the level and nature of force applied. Their primary purpose is to allow an agency, like FRESNO, to evaluate whether a use of force was within policy and to comply with mandatory reporting requirements, not to investigate criminal allegations. This administrative, rather than investigative, purpose is even more pronounced for Accidental Bite Reports, which officers are required to document in an administrative report. Thus, because the records are created for administrative compliance rather than criminal investigation, they fall outside the scope of the investigatory records exemption.

II. Not All Records of Police Activity are Investigatory Records.

FRESNO's reliance on *Haynie, supra*, 26 Cal.4th 1061 to argue that all records related to police investigations are exempt from disclosure is misplaced. (Respondent's Opposition ["Opp."] at p. 4.) *Haynie* concerned records in the context of *criminal investigations*, not the routine administrative records the ACLU seeks. Moreover, *Haynie* predates amendments to Penal Code section 832.7,[2] as discussed below, and, as such, does not reflect the Legislature's clear intent to make some investigatory records, like those involving death or GBI, disclosable. Finally, in *Haynie*, the California Supreme Court clarified that the Court "d[id] not mean to shield everything law enforcement officers do from disclosure." (*Haynie,* 26 Cal.4th at p. 1071.) Yet that is exactly what FRESNO attempts to do in this case—use the exemption as a blanket justification to shield all canine use of force reports from disclosure. California law does not allow it.

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

III. EVEN IF THE RESPONSIVE RECORDS ARE CONSIDERED "INVESTIGATORY RECORDS," THEY FALL WITHIN EXCEPTIONS AND ARE DISCLOSABLE.

Even if, *arguendo*, this Court finds these records to be "investigatory," the investigatory records exemption is not absolute—it comes with multiple exceptions.[3] The investigatory records exemption does not apply to "the factual circumstances surrounding an arrest" (Gov. Code. § 7923.610), nor to records mandated for disclosure by section 832.7. The records sought by the ACLU, which involve the use of police canines, fall squarely within the scope of these exceptions.

A. FRESNO MUST DISCLOSE THE RECORDS BECAUSE THEY CONTAIN THE FACTUAL CIRCUMSTANCES SURROUNDING ARRESTS.

The investigatory records exemption includes an exception that mandates disclosure of certain information including "the factual circumstances surrounding the arrest." (*City of Santa Rosa v. Press Democrat* (1986) 187 Cal.App.3d 1315, 1320; see Gov. Code § 7923.610.) Contrary to FRESNO's assertion, nothing in the statute limits this exception to information contained in "arrest reports." (Opp. at p. 5.) By its plain terms, the exception applies to factual circumstances surrounding an arrest no matter the title of the record containing them. The ACLU thus does not need to request "arrest reports" to receive this information. FRESNO is required to release investigatory records detailing the factual circumstances surrounding arrests, including arrests accomplished using canine force. (See Gov. Code, § 7923.610.) As such, the ACLU is entitled to receive the narrative information redacted from FRESNO's responsive records.

B. FRESNO MUST DISCLOSE THE RECORDS BECAUSE THEY INVOLVE INFLICTION OF GBI.

The investigatory records exemption also does not apply to records mandated for disclosure by section 832.7. The records sought by the ACLU, which involve the use of police canines, fall within the scope of section 832.7, amended in 2018 by S.B. 1421, which mandates public access to records of force incidents resulting in GBI.

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[3] The investigatory records exemption also comes with a time limit. Although FRESNO argues that the exemption persists even after an investigation concludes, (Opp. at pp. 4-5), information withheld due to an ongoing criminal investigation must be disclosed once the reason for withholding no longer applies, when the investigation or proceeding ceases to be active, or within 18 months of the incident, whichever occurs first. (§ 832.7(b)(8)(A)-(B).) Similarly, records from an administrative investigation may be withheld for no more than 180 days from the agency's discovery of the misconduct or use of force. (§ 832.7(b)(8)(C).) These provisions prevent indefinite delays in disclosing records.

1. The language of S.B. 1421 is clear and unambiguous that incidents resulting in GBI must be disclosed.

A statute's language is generally the most reliable indicator of legislative purpose. (*Wirth v. California* (2006) 142 Cal.App.4th 131, 139 (hereafter *Wirth*).) Indeed, "the meaning of a statute is to be sought in the language used by the Legislature. [Citation]." (*City of Emeryville v. Cohen* (2015) 233 Cal.App.4th 293, 304.) Where statutory language is clear, the Court need not resort to legislative history.

As amended by S.B. 1421, the statutory language of section 832.7 is clear and unambiguous regarding GBI. "Construed in light of standard principles of interpretation, the meaning of [great bodily injury] is clear, and there is no need to resort to legislative history." (*In re Greg F.* (2012) 55 Cal.4th 393, 408; see also *Hamilton & High, LLC v. City of Palo Alto* (2023) 89 Cal.App.5th 528, 549 [where statute is clear, it is "unnecessary to resort to extrinsic interpretive aids such as the legislative history"].) S.B. 1421 requires disclosure of records about any incident in which use of force resulted in GBI. (§ 832.7, subd. (b)(1)(A)(ii).) The plain language of the statute says "great" bodily injury, not "serious" bodily injury. Thus, the relevant standard is "great"—not "serious"—bodily injury.

2. The Legislature intended to codify the GBI standard.

Even if this Court examines the legislative history of section 832.7, it should reject FRESNO's revisionist history. In construing a statute, the court's primary objective is to ascertain the Legislature's intent. (*Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 164.) Recognizing the extraordinary authority granted to peace officers and the serious harms occasioned by its misuse, the Legislature enacted S.B. 1421, amending section 832.7 to ensure that "use of force" records resulting in death or GBI are publicly accessible. (See § 832.7(b)(1)(A)(ii); see also *Becerra v. Super. Ct.* (2020) 44 Cal.App.5th 897, 909-12 [describing legislative history] (hereafter *Becerra*).)

The legislative history of S.B. 1421 reveals that, at the time the proposed amendments were pending, the Legislature perceived California as "one of the most secretive states in the nation in terms of openness when it comes to officer misconduct and uses of force." (*Becerra*, *supra,* 44 Cal.App.5th at pp. 909-10 [citing Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 1421 (2017–2018 Reg. Sess.) as amended Aug. 23, 2018, p. 8].) The Legislature also highlighted a 2006 Supreme Court ruling interpreting section 832.7 as "prevent[ing] the public from learning the extent to which police officers have been disciplined as a result of misconduct, and . . . clos[ing] to the public *all*

independent oversight investigations, hearings and reports." (*Id.* at p. 910 [citing Sen. Floor Analysis, p.8, italics added].)

The Legislature's intent with S.B. 1421 was to enhance transparency and build public trust by making records of officer-related incidents, including use of force resulting in death or GBI, and misconduct available for public inspection. (See § 832.7(b)(1)(A)(ii); see also *Becerra*, *supra*, (2020) 44 Cal.App.5th 897 at pp. 909-912.) The Legislature sought to "[g]iv[e] the public . . . access to information about actions by law enforcement [which] will promote better policies and procedures that protect everyone." (Assem. Com. on Public Safety, Rep. on Sen. Bill No. 1421 (2017–2018 Reg. Sess.) as amended June 19, 2018, p. 4.) The Legislature also noted that S.B. 1421 would "help identify and prevent unjustified use of force, make officer misconduct an even rarer occurrence, and build trust in law enforcement." (*Ibid*.)

When the Legislature uses a legal term like GBI that has already been defined in another statute, it intends to adopt that statutory definition, especially when courts have interpreted the term in prior cases. (*People v. Wells* (1996) 12 Cal.4th 979, 986; *Garibotti v. Hinkle* (2015) 243 Cal.App.4th 470, 478.) "[I]t is a cardinal rule of statutory construction that, when [a legislature] employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken. [Citation]." (*Air Wisconsin Airlines Corp. v. Hoeper* (2014) 571 U.S. 237, 248.) By choosing GBI in S.B. 1421, the Legislature signaled its intent that this term—not the narrower "serious bodily injury" ("SBI")—be applied to determine what records must be disclosed under S.B. 1421.[4] The Legislature specifically chose GBI, a term already defined in section 12022.7 and construed in the case law interpreting it. (See, e.g., *Brown v. Super. Ct.* (2016) 63 Cal.4th 335, 350 [noting that Legislature could have, but did not, use other terms, but instead adopted a term of art "with which it is quite familiar"]; Senate Floor Analysis of August 31, 2018 [legislative history showing the Legislature chose the term GBI to "clarify the level of injury that requires release of records is 'great bodily injury' due to the larger body of law interpreting that term"].)

[4] FRESNO inappropriately relies on unsuccessful legislative efforts to support its narrow and flawed interpretation of GBI. As the California Supreme Court has noted, "[w]e can rarely determine from the failure of the Legislature to pass a particular bill what the intent of the Legislature is with respect to existing law. 'As evidences of legislative intent they [unpassed bills] have little value.'" (*Ingersoll v. Palmer* (1987) 43 Cal. 3d 1321, 1349.)

3. GBI is not equivalent to SBI.

FRESNO wrongly contends that, within the context of police use of force, GBI and SBI are essentially synonymous. (Opp. at pp. 8, 9.) FRESNO's flawed argument relies on cases and statutes that are about the legal justification for police use of deadly force *rather than* disclosure obligations under the CPRA. FRESNO further contends that because earlier versions of S.B. 1421 were broader and included all uses of force, the pairing of GBI with death implies that "GBI should be interpreted as injuries serious enough to be comparable to death." (Opp. at p. 8.) This argument ignores the plain language of the statute and the Legislature's clear intent. The Legislature specifically chose GBI to ensure that this term and the case law construing it would apply to determining the disclosure of records under section 832.7.

FRESNO attempts to redefine GBI as SBI, which it argues necessitates a "life-threatening and potentially permanent, disabling injury." (Opp. at pp. 8-9). A party, however, may not "rewrite a statute to posit an unexpressed intent" or "speculate that the Legislature meant something other than what it said." (*California State University, Fresno Assn., Inc. v. County of Fresno* (2017) 9 Cal.App.5th 250, 266.) California law is clear that GBI is not synonymous with SBI. The California Supreme Court affirmed that GBI and SBI have "separate and distinct statutory definitions," and thus are neither "equivalent as a matter of law" nor "interchangeable." (*In re Cabrera* (2023) 14 Cal.5th 476, 484-485 [citing, e.g., *People v. Santana* (2013) 56 Cal.4th 999, 1008].) GBI refers to any "significant or substantial physical injury." (*Id*. at p. 484 [quoting § 12022.7, subd. (f)]). In contrast, serious bodily injury involves a "serious impairment of physical condition," including but not limited to "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." (*Ibid*. [quoting § 243, subd. (f)(4)]). Because the Legislature used GBI in S.B. 1421, it intended to adopt the established meaning of that term, not the distinct meaning of a different term. (See *ibid*. [citing *People v. Escobar*, *supra*, 3 Cal.4th at p. 750].)

4. GBI should be construed broadly and consistently with past court decisions.

Under the plain language of S.B. 1421, FRESNO must disclose all records related to any use of force that resulted in GBI, as that term has long been understood. (§ 832.7, subd. (b)(1)(A)(ii).) Further

supporting a broad construction of GBI for record disclosure is the California Constitution, which mandates that a statutory provision "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. 1, § 3, subd. (b), par. (2).) Therefore, the "usual approach to statutory construction is supplemented by a rule of interpretation that is specific" to this public records case. (*Sierra Club v. Super. Ct.* (2013) 57 Cal.4th 157, 166.) Given that S.B. 1421 was enacted to address concerns about lack of transparency in officer misconduct and use of force incidents, it must be construed broadly in favor of disclosure. Narrowing the definition of GBI to include only "life-threatening and potentially permanent, disabling injuries" (Opp. at pp. 8, 9) would not only rewrite the statute but also violate the California Constitution by severely restricting access to public records.

The term GBI is a well-understood term and refers to any "significant or substantial physical injury." (§ 12022.7, subd. (f).) As interpreted by the courts, it does not require the victim to suffer from "permanent," "prolonged," or "protracted" disfigurement, impairment, or loss of bodily function, let alone any life-threatening injuries. (*People v. Escobar* (1992) 3 Cal.4th 740, 750; see also, e.g., *People v. Saez* (2015) 237 Cal.App.4th 1177, 1188 [GBI "need not be permanent or cause lasting bodily damage"].) Rather, in line with the ACLU's argument, California courts have for decades broadly interpreted GBI as defined in section 12022.7(f). For example, courts have held that "some physical pain or damage, such as lacerations, bruises, or abrasions" constitutes GBI (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1047-48); cuts and burns from being flex-tied, and burning sensation from an insecticide-like substance qualify (*People v. Wallace* (1993) 14 Cal.App.4th 651, 665-66); multiple abrasions, lacerations, and contusions have been deemed GBI (*People v. Bustos* (1994) 23 Cal.App.4th 1747, 1755); a swollen jaw, bruises to head and neck and sore ribs were GBI (*People v. Corona* (1989) 213 Cal.App.3d 589, 592); and multiple contusions, swelling and discoloration of the body, and extensive bruises were GBI (*People v. Jaramillo* (1979) 98 Cal. App. 3d 830, 836–837).

Trial courts have reinforced the broad interpretation of GBI in the context of record requests under section 832.7(b), finding that it must be interpreted broadly and consistently with the expansive construction under *People v. Washington* and related cases. (See *Richmond Police Officers' Assn. v. City of Richmond* (Contra Costa Super. Ct., July 31, 2020, No. MSN19-0169)*; The Sacramento Bee v.*

Sacramento County Sheriff's Dept. (Sacramento Super. Ct., Nov. 8, 2019, No. 34-2019-80003062).) This Court, therefore, should follow longstanding judicial precedent and apply the broad definition of GBI to guide the release of records under section 832.7.

C. USE OF CANINE FORCE OFTEN CAUSES GBI.

Injuries frequently inflicted by police canines fit within the definition of GBI as understood by S.B. 1421 and the relevant case law. Many of Fresno's Use of Force Reports document that the bite victim was taken to a hospital (see, e.g., Declaration of Tina R. Griffin, pp. 772, 783, 804, 817, 829, 888) and one such report even self-describes the injuries as GBI (*id.* at p. 887 ["GBI – Wound Sutures" and "GBI Bone Fracture" listed under Incident Summary]). Notably, even this report had all its narrative information redacted.

Police canines are a powerful, sometimes uncontrollable, force tool that inflicts life-threatening and life-altering injuries. The bite force of a police dog exceeds 4000 pounds per square inch (psi), equivalent to the pressure of a rhinoceros balancing on a postage stamp. (Altaaf Saadi, et al., *Unleashed Brutality: An Expert Medical Opinion on the Health Harms from California Police Attack Dogs*, p. 5 (Jan. 2024) Physicians for Human Rights <https://phr.org/wp-content/uploads/2024/01/PHR-Expert-Opinion-Police-Canine-Medical-Harms-January-2024.pdf>.) A single bite from a police canine can cause deep flesh wounds, extensive tissue lacerations, avulsion (a forcible tearing off of layers of skin to expose muscles, tendons, and tissue), degloving (when a part of the skin, with or without the underlying soft tissue, becomes wholly or partially detached from the body, like a glove stripped off a hand), and bone damage. (*Ibid*.) Such wounds leave bite victims vulnerable to serious bacterial infections, life-threatening blood vessel damage, and permanent nerve damage, including loss of sensation, loss of mobility, chronic pain, and permanent disability. (*Ibid*.) The severity of police dog bites clearly creates a substantial risk of causing serious bodily injury. Given the severity of these injuries, the law requires FRESNO to disclose records of its canines' bites even if the Court accepts the spurious argument that S.B. 1421 only requires disclosure of records resulting in SBI.

D. CONSTRUING GBI BROADLY DOES NOT "DEVOUR" THE INVESTIGATORY RECORDS EXEMPTION.

The correct understanding of GBI does not "devour" the investigatory records exemption. (Opp. at p. 6). *First*, many investigations do not involve any use of force, let alone use of force resulting in injuries. *Second*, for an injury to qualify as GBI, it must be "significant or substantial," which is "greater than minor or moderate harm" or "trivial" injuries. (*In re Cabrera*, *supra*, 14 Cal.5th at p. 484.) Not all "police uses of force" of any kind (Opp. at p. 6), result in great bodily injury. For example, a simple control hold may cause little or no injury. The Legislature carefully struck a balance by requiring disclosure of records relating to GBI, not of any injury or pain of any kind, no matter how trivial. While this balance ensures certain records are subject to disclosure, it does not render the investigatory exemption irrelevant. Records involving canine use of force can and do fall under GBI, requiring disclosure under S.B. 1421, while other investigatory records will remain protected.

E. CONSTRUING GBI BROADLY DOES NOT CHANGE THE STANDARD FOR POLICE USE OF DEADLY FORCE.

FRESNO's argument that a broad definition of GBI would lower the threshold for the use of deadly force is unfounded and misrepresents the legal standards. The cases cited by FRESNO on this point are irrelevant, outdated, and rely on flawed reasoning. (Opp. at pp. 6, 7.) Under section 835a (as codified by Assembly Bill ["A.B."] 392 in 2020), officers are permitted to use deadly force only when it is necessary "to defend against an imminent threat of death or *serious* bodily injury," (§ 835a, subd. (c) [emphasis added]), not merely GBI. (Opp. at pp. 6, 7.) The California Legislature, in enacting A.B. 392, acknowledged that its provisions would exceed the standards articulated and set forth by the U.S. Supreme Court and, as such, FRESNO's reliance on cases that predate the new standards is flawed. (Eagly and Schwartz, *Lexipol's Fight Against Police Reform* (2022) 97 Ind. L.J. 1, 57, fn. 312 (citing to Senate Rules Com., Senate Floor Analysis, Assem. 392, 2019 Leg., Reg. Sess., at 6 (Cal. 2019)).) *People v. Morales* (2021) 69 Cal.App.5th 978 is also not applicable because the issue in that case was whether "a mere robbery, without more," could justify the use of deadly force in self-defense by a civilian. *Morales* has nothing to do with the standard for use of deadly force by an officer. Thus, none of the cases FRESNO relies on account for recent legislative changes brought by A.B. 392, and none are directly relevant to the disclosure of records under section 832.7.

FRESNO conflates GBI with the legal "threshold for when officers could use deadly force" (Opp. at p. 7) but the two are not equivalent. The definition of GBI in the context of record disclosure has no bearing on when officers can use deadly force. The Legislature's intent in using GBI in S.B. 1421 was to enhance transparency regarding incidents involving law enforcement while maintaining distinct standards for the justification of deadly force. Records must be disclosed when the force results in GBI, while deadly force is justified only when "serious" bodily injury or death is imminently threatened. FRESNOs' arguments conflating these different legal standards and statutory contexts are misplaced.

CONCLUSION

For the foregoing reasons, the ACLU respectfully requests that the Court grant this motion, issue a writ of mandate, and enter judgment in its favor. Should the Court find it necessary to conduct an individualized inquiry to assess whether the responsive records constitute GBI, the ACLU further requests that the Court perform an *in camera* review to make this determination.

Dated: September 11, 2024

Respectfully submitted,

By: */s/ Stephanie Padilla*

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