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LA COUNTY POLICE CHIEFS' ASSOCIATION

LEGAL UPDATE

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ATTORNEY GENERAL OPINES THAT IDENTITIES OF OFFICERS INVOLVED IN CRITICAL INCIDENTS MUST BE DISCLOSED ABSENT SPECIAL CIRCUMSTANCES

The California Attorney General recently issued an opinion (07-208) concluding: "In response to a request made under the California Public Records Act for the names of peace officers involved in a critical incident, such as one in which lethal force was used, a law enforcement agency must disclose those names unless, on the facts of the particular case, the public interest served by not disclosing the names clearly outweighs the public interest served by disclosing the names."¹

The Attorney General's opinion was published in the wake of the California Supreme Court's decision in *Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal. 4th 278. That case generally held that under the California Public Records Act (CPRA), a newspaper was entitled to receive from P.O.S.T. the names of all peace officers, their respective dates of employment, as well as their employing agencies.

In the *Commission on Peace Officer Standards and Training* case, the Supreme Court favorably cited a decade old Court of Appeal decision, *New York Times Co. v. Superior Court* (1997) 52 Cal.App.4th 97. The *New York Times* case held that the names of deputies involved in a shooting were subject to disclosure under the CPRA.

Some confusion resulted from the fact that the *New York Times Co.* case was heavily criticized by the Supreme Court the year before in *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272. Indeed, some interpreted the Supreme Court's earlier criticism of the *New York Times* case to mean that law enforcement agencies could always refuse to disclose the names of officers involved in critical incidents.

However, in *Commission on Peace Officer Standards and Training*, the Supreme Court clarified that its disagreement with the *New York Times* case was strictly limited insofar as the *New York Times* case could be read to hold that an officer's name is never confidential. However, the criticism did not mean that the *New York Times* case was overruled.

The Supreme Court explained: "**We disagreed with the statement in *New York Times Co. v. Superior Court* [citation omitted] that '[u]nder Penal Code section 832.7 and 832.8, an individual's name is not exempt from disclosure,' but our disagreement was qualified: we concluded that this broad assertion was incorrect 'at**

least insofar as it applies to disciplinary matters like the one at issue here." (*Commission on Peace Officer Standards And Training*, supra, 42 Cal.4th 278, 298 citing *Copley Press*, supra, 39 Cal.4th 1272 at 1298, [emphasis added])."

Since the Supreme Court has taken the position that an officer's identity is generally only confidential in connection with discipline taken against the officer, the Attorney General's recent opinion appears to be well reasoned.

As stated in the Attorney General's opinion, Government Code Section 6255 allows for a limited exception to withhold records, "if the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Thus, if there is a significant risk of harm to an officer as a result of the disclosure of his/her name, then a case could be made for withholding the information. A decision whether such facts exist will have to be made by an agency on a case by case basis.

If an agency refuses to disclose the identities of officers in response to a public records request, then the requesting party may file a lawsuit challenging the legal basis for withholding the requested information. If the court determines that the information should have been disclosed, then the court will award reasonable attorneys' fees to the requesting party.

What is the bottom line?

In most circumstances, the identities of officers involved in critical incidents will be subject to disclosure, although information regarding whether officers are the subjects of complaints or disciplinary proceedings remains confidential as always. *However, this office certainly urges a department to give thorough consideration to the issue of whether or not release of any particular officer's identity in a particular circumstance, would present a likely significant risk of harm to the officer. In such case, protective steps should be taken.*

A public records request does not require an immediate response. An agency has 10 days to decide whether the information requested is subject to disclosure or should be withheld. In receipt of a public records request for officers' identities following a critical incident, an agency should immediately contact its legal advisor for assistance in preparing an appropriate and timely response.

¹ Attorney General opinions, while not binding, are afforded great weight by courts.

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