Supreme Court of California
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July 8, 2021

VIA ELECTRONIC DELIVERY
Honorable Tani Cantil-Sakauye, Chief Justice
Associate Justices of the Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4783

Re: ***Oakland Police Officers Association v. City of Oakland***
Supreme Court Case No. S269186
Court of Appeal Case No. A158662
Letter in Support of Grant of Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Amicus Curiae the League of California Cities ("Cal Cities") submits this letter in support of the petition for review in the matter *Oakland Police Officers Association v. City of Oakland* ("*Oakland POA*") filed by Appellant and Petitioner City of Oakland ("City"). Cal Cities respectfully requests that the Supreme Court grant the City's Petition for Review.

The First District Court of Appeal, in reversing the trial court's decision, properly applied this Court's earlier precedent in *Pasadena Police Officers Association v. City of Pasadena* (1990) 51 Cal.3d 564 ("*Pasadena POA*") by finding that agencies have no mandatory obligation under the Public Safety Officers Procedural Bill of Rights Act ("POBR"), Government Code section 3300, *et seq*., to disclose reports and complaints prior to a second interrogation of a peace officer under investigation. The *Oakland POA* decision thus struck the proper balance between the protection of officer rights and an agency's ability to conduct fair and thorough investigations into allegations of officer misconduct.

Nevertheless, this Court should grant review of the *Oakland POA* decision. *Oakland POA* correctly allows an investigating agency to withhold reports and complaints prior to a subsequent interrogation and correctly rejected the contrary holding in *Santa Ana Police Officers Association v. City of Santa Ana* (2017) 13 Cal.App.5th 317 ("*Santa Ana POA*"). But in reaching this conclusion, *Oakland POA* added a requirement that the agency deem withheld documents confidential and then "de-designate" those records so they may later be provided to the officer under investigation and utilized for disciplinary purposes. While this decision establishes a workable procedure, Government Code section 3303, subdivision (g), does not suggest that agencies must deem records confidential to withhold disclosure prior to a second interrogation and makes no mention of "de-designation." As a result, the *Oakland POA* de-designation process will generate disputes and litigation regarding its practical implementation.

Accordingly, review is necessary to settle an important question of law, i.e., whether agencies, in an effort to maintain the integrity of investigations into alleged officer misconduct, may simply withhold reports and complaints until completion of the investigation, or whether they must deem such records confidential and then later de-designate those records for future use. (See Cal. Rules of Court, Rule 8.500, subd. (b)(1).)

I. INTERESTS OF *AMICUS CURIAE*

The League of California Cities is an association of 477 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified the *Oakland POA* case as having such significance.

The ability to thoroughly and effectively investigate allegations of police misconduct is of great importance to cities and their police departments that are tasked with conducting such investigations, as well as the public whose trust in and cooperation with police departments are essential to proper and efficient law enforcement operations. Because this case involves the interpretation of Government Code section 3303, subdivision (g), and specifically articulates the rules about when officers who are under disciplinary investigation are entitled to receive reports and complaints, this case has far-reaching impacts on public confidence in the ability of law enforcement agencies to regulate themselves.

Many Cal Cities members provide law enforcement services within their jurisdictions, and, as a result, are responsible for ensuring the lawful and ethical delivery of police services. Accordingly, Cal Cities and its members have a substantial interest in the outcome of the legal issues presented in this matter.

II. THE COURT SHOULD GRANT REVIEW TO CONSIDER WHETHER *OAKLAND POA'S* CONFIDENTIALITY PROCESS IS REQUIRED BY GOVERNMENT CODE SECTION 3303, SUBD. (G)

Government Code section 3303, subsection (g), provides:

> The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be

> confidential. No notes or reports that are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation.

Based on this Court's *Pasadena POA* decision, most agencies had understood that officers were only entitled to access a recording of their prior interrogation before a subsequent interrogation. That changed when the Fourth District Court of Appeal held in *Santa Ana POA* that under Section 3303, subdivision (g), officers under investigation were not only entitled to the recording of their first interrogation, but they were also entitled to access stenographer notes, reports and complaints prior to a subsequent interrogation. The *Santa Ana POA* holding created significant administrative and substantive concerns for effectively investigating peace officer misconduct. For example, if a police chief reviewed an investigation report and ordered investigators to conduct a follow-up interrogation of the officer, then *Santa Ana POA* suggested that investigators would have to provide the officer under investigation with a copy of the report, including statements by witnesses and investigator conclusions, prior to conducting the subsequent investigation. Agencies were reasonably concerned that, among other things, providing such extensive discovery before an interrogation may influence an officer's recollection and undermine the integrity of an investigation.

In *Oakland POA*, the First District Court of Appeal expressly and correctly disagreed with *Santa Ana POA*'s interpretation of Government Code section 3303, subdivision (g). Reminiscent of this Court's *Pasadena POA* decision, the First District determined that mandating complaints and reports be disclosed prior to a subsequent interrogation is, "inconsistent with the plain language of the statute and undermines a core objective under POBRA—maintaining the public's confidence in the effectiveness and integrity of law enforcement agencies by ensuring that internal investigations into officer misconduct are conducted promptly, thoroughly, and fairly."

In reversing the trial court's decision and finding no mandatory obligation to disclose reports and complaints prior to a second interrogation of an officer, the *Oakland POA* decision looked at both the statutory construction as well as the legislative history of the Government Code section 3303, subdivision (g). First, the court noted that under the plain language of the statute, the only investigation materials an officer was entitled to "prior to" any further interrogation was a "tape recording" of the earlier interrogation. As the Legislature did not use similar language for reports or complaints, the court concluded the Legislature did not intend to establish a post-interrogation deadline for disclosing those materials. However, rather than adopt the City's position that materials need only be disclosed at the commencement of disciplinary proceedings, the court instead concluded that an agency has the statutory right to withhold materials it deems confidential. The court further held that an agency may deem materials confidential if it finds doing so satisfies Evidence Code section 1040-1041, "or if disclosure would otherwise interfere with an ongoing investigation." Importantly, the *Oakland POA* court also held that nothing in Government Code section 3303 prohibits an agency from "de-

designating" records previously deemed confidential when the basis for confidentiality no longer exists, such as the completion of the investigation.

The *Oakland POA* court held that if punitive action is contemplated at the conclusion of an investigation, the agency will need to determine whether to de-designate the materials and disclose them, or decline to bring charges on the basis of any materials that are withheld. The court also harmonized its interpretation of Government Code section 3303, subdivision (g), with an officer's right to review and comment on adverse entries in personnel files pursuant to Government Code sections 3305 and 3306, by holding that those rights do not extend to review of materials temporarily deemed confidential under section 3303 for purposes of an active investigation. However, those rights would still attach at the conclusion of an investigation.

The *Oakland POA* decision rightly allows agencies to withhold reports and complaints in order to protect the integrity of ongoing administrative investigations, but creates a confidentiality process not set out in the statute and not suggested by any prior legal authority, thus creating uncertainty in future implementation.

While the confidentiality designation/de-designation procedure established in *Oakland POA* is workable, the decision nevertheless creates many unanswered questions which themselves may lead to additional disputes and litigation.

First, is designation/de-designation all or nothing, or can a report or complaint be deemed partially confidential/non-confidential? For example, during a subsequent interrogation of an officer, can the investigator confront the officer with excerpts from the transcript of another witness's interview (which transcript had previously been designated confidential) without disclosing the entire transcript?

Second, who has the authority to designate/de-designate records confidential? Can it be anyone, such as the investigator, or must the authority be limited to higher ranking management such as the City Attorney, the Police Chief or perhaps the Internal Affairs Captain?

Third, at what point must agencies designate or de-designate reports or complaints confidential, and exactly how should they go about doing so? Is it sufficient for the agency to simply deem the materials confidential internally, or must the records be placed in a separate "confidential" file (either electronic or physical), or must the documents be marked as confidential?

All of these questions are likely to result in additional disputes regarding investigations into officer misconduct and may lead to additional costly litigation for cities statewide. Moreover, while the court's confidentiality process creates administrative uncertainty for agencies, it provides no additional protection or benefit to officers as compared with simply allowing agencies to withhold records until all interrogations are complete.

Cal Cities and its member cities thus need clarity about whether it is truly necessary to utilize the confidentiality designation/de-designation procedure established in *Oakland POA*, or whether they can simply withhold disclosure until the end of a misconduct investigation.

Moreover, some of Cal Cities' members operate within the Fourth District Court of Appeal's jurisdiction. Cal Cities believes that most superior courts will follow *Pasadena POA* and *Oakland POA*, and reject *City of Santa Ana* as a poorly reasoned outlier. Nonetheless, Cal Cities' members in the Fourth District worry that their local courts will feel compelled to follow the decision of their local Appellate District. This Court's review can eliminate that concern.

For all the foregoing reasons, and as described in the City's Petition, the League of California Cities respectfully requests that the Supreme Court grant review of the Court of Appeal decision in *Oakland Police Officers Association v. City of Oakland*.

Thank you for your consideration of this request.

Very truly yours,

LIEBERT CASSIDY WHITMORE

/s/ Alex Y. Wong
Alex Y. Wong

AYW

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: **6033 West Century Boulevard, 5th Floor, Los Angeles, California 90045.**

On **July 8, 2021**, I served the foregoing document(s) described as **LETTER IN SUPPORT OF GRANT OF REVIEW** in the manner checked below on all interested parties in this action addressed as follows:

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☐ **(BY FACSIMILE)** I am personally and readily familiar with the business practice of Liebert Cassidy Whitmore for collection and processing of document(s) to be transmitted by facsimile. I arranged for the above-entitled document(s) to be sent by facsimile from facsimile number 310.337.0837 to the facsimile number(s) listed above. The facsimile machine I used complied with the applicable rules of court. Pursuant to the applicable rules, I caused the machine to print a transmission record of the transmission, to the above facsimile number(s) and no error was reported by the machine. A copy of this transmission is attached hereto.

☐ **(BY OVERNIGHT MAIL)** By overnight courier, I arranged for the above-referenced document(s) to be delivered to an authorized overnight courier service, FedEx, for delivery to the addressee(s) above, in an envelope or package designated by the overnight courier service with delivery fees paid or provided for.

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☒ **(BY TRUEFILING)** By filing a true and correct electronic copy thereof via the Court's electronic system in this action, TrueFiling will electronically serve a copy to those named above.

Executed on **July 8, 2021**, at Los Angeles, California.

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

/s/ Beverly T. Prater
Beverly T. Prater