LONDON BREED
MAYOR

CITY AND COUNTY OF SAN FRANCISCO
Department of Police Accountability
ONE SOUTH VAN NESS AVE., 8th FLOOR
SAN FRANCISCO, CA 94103

PAUL DAVID HENDERSON
EXECUTIVE DIRECTOR

DPA REPLY MEMORANDUM CONCERNING SFPD'S WITHOLDING OF RECORDS IN OFFICER-INVOLVED SHOOTINGS

TO: President Cindy Elias, cindy.elias@sfgov.org
Vice President Max Carter-Oberstone, max.carter-oberstone@sfgov.org
Commissioner Larry Yee, lawrence.yee1@sfgov.org
Commissioner James Byrne, jim.byrne@sfgov.org
Commissioner Kevin Benedicto, kevin.benedicto@sfgov.org
Commissioner Jesus Yañez, jesus.g.yanez@sfgov.org,
Commissioner Debra Walker, debra.walker@sfgov.org
SFPD Chief William Scott, william.scott@sfgov.org
Steven Betz, SFPD Legal Division, steven.betz@sfgov.org
Police Commission Office, SFPD.Commission@sfgov.org

FROM: Paul Henderson, Executive Director, Department of Police Accountability
Diana Rosenstein, Legal Team Manager, Department of Police Accountability

DATE: December 29, 2023

San Francisco does not have to abandon its demonstrated fair, prompt, and thorough investigations of officer-involved shootings because there is a public desire for increased policing and attention to public safety. These two goals are not mutually exclusive and can continue to productively coexist as they have for years. The sudden change in procedure unilaterally implemented by SFPD and SFDA was not precipitated by any incident where DPA violated any confidentiality requirements in OIS investigations. Rather, it was precipitated by the Chesa Boudin District Attorney's Office allegedly violating terms of the MOU that exists between SFPD and SFDA. It makes no sense, whatsoever, that such a violation would sprout an opportunity for the two agencies to collude to hamstring DPA's ability to conduct prompt and thorough OIS investigations mandated by the City Charter when DPA has not done anything wrong.

In its 11-page memo, SFPD does not provide this Commission with any examples where DPA's independent OIS investigation impeded the SFDA's criminal investigation. It also does not explain why the same SFPD-SFDA MOU that was in place in the past, now somehow changes SFPD's role in OIS investigations to transform them into a powerless agent of SFDA. **Most importantly, SFPD's memo does not follow the City Attorney's directives nor answer the main questions**:

1. "**For <u>each record</u> DPA requests from SFPD**, SFPD should work with the SFDA to determine whether disclosing information to DPA would impede the SFDA's exercise of authority under Government Code § 25303, and to document the basis for that determination."[1]

2. "Does SFPD act as an agent of the SFDA in OIS investigations, and does SFPD possess OIS investigative records on behalf of the SFDA?"[2]

3. "If so, does the SFDA have a basis to assert that disclosure of the records to DPA (but not the public) during the course of the criminal investigation would impede the SFDA's investigatory or prosecutorial functions?"[3]

Rather than discussing and answering these important directives and questions, SFPD asserts that (a) the Commission does not have the power to decide this dispute (if it did not, the City Attorney would have said so), (b) that DPA's subpoena power is not absolute (no one said it was – this is a red herring), and (c) that all criminal investigations are always completely and absolutely confidential and covered by the official information privilege.

Because SFPD does not provide the Commission with reasons to conclude otherwise, the Commission must conclude—like the City Attorney did—that, "The Charter and Administrative Code most likely require disclosure of OIS investigative records to DPA before the conclusion of the SFDA's criminal investigation as a general matter…"

I. THE POLICE COMMISSION HAS JURISDICTION TO DECIDE WHETHER SFPD IS ACTING AS AN AGENT OF SFDA'S IIB UNIT.

If the Commission did not have jurisdiction to decide the records disclosure dispute between DPA and SFPD, then the City Attorney's Office would have simply said so. The City Attorney did not. Instead, throughout their memo, the City Attorney repeatedly posed the same question in different forms:

- "[Is SFPD] acting at the direction of the SFDA as the SFDA's agent and maintaining the records on behalf of the SFDA…[4]

- "Does SFPD act as an agent of the SFDA in OIS investigation, and does SFPD possess OIS investigative records on behalf of the SFDA?"[5]

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[1] City Attorney Memorandum, "*DPA's Access to Investigative Records Related to Officer-Involved Shootings*,", dated September 20, 2023 (Hereinafter referred to as "CAO Memo"), pg. 2.

[2] CAO memo, pg. 2

[3] CAO Memo, pg. 2

[4] CAO Memo, pg. 1

[5] CAO Memo, pg. 2

- "Harmonizing the requirements of both state and local law…Does SFPD possess those records on behalf of the SFDA while acting as an agent of the SFDA?"[6]

- "In the current dispute, the Commission may ask SFPD to explain how it is acting as an agent of the SFDA OIS investigations and to establish that it possesses the records on behalf of the SFDA…."[7]

SFPD completely sidesteps this question and answers questions it self-selected that are not germane to this issue.

II. SFDA IS NOT A "REAL PARTY IN INTEREST" BECAUSE IT IS NOT A PLAINTIFF IN A LAWSUIT.

Without any legal authority, SFPD proclaims that the Commission cannot decide the controversy between DPA and SFPD because the SFDA is, "The real party in interest." Code of Civil Procedure § 367 states that "[e]very [civil] action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." "A real party in interest ordinarily is defined as the person possessing the right sued upon by reason of the substantive law…A complaint filed by someone other than the real party in interest is subject to general demurrer on the ground that it fails to state a cause of action…The purpose of this section is to protect a defendant from harassment by other claimants on the same demand." In other words, "A real party in interest 'is the owner of the cause of action'."

In this dispute, if anyone is the "real party in interest," it is the DPA because it is the prosecuting party. DPA seeks to have its right to obtain records from SFPD enforced by the Commission under a contract that exists between DPA and SFPD because SFPD refuses to perform its duty under the contract. Here, **DPA is the real party in interest as defined by law**. Thus, to the extent that SFPD seeks to argue that the Commission lacks jurisdiction to decide this dispute because seceding anything to SFDA makes the SFDA the real party in interest is an argument clearly without merit under the law.

III. SFPD'S NEW INTERPRETATION OF ITS MOU WITH SFDA FORCES SFPD TO UNNECESARILY VIOLATE THE CITY CHARTER AND THE CITY ADMINISTRATIVE CODE.

For the first time since the contract was signed in 2021, SFPD's MOU with SFDA is now being interpreted and invoked by SFPD to circumvent SFPD's Charter obligations to DPA by claiming that the contract delegated all investigative and record keeping duties in OIS investigations to the SFDA. This idea is not expressed in the SFPD-SFDA MOU. The MOU merely states, "IIB will be the lead investigating agency." Up until now, the "lead investigating agency" language was not interpreted to mean that SFPD cannot disclose materials to DPA. From 2021 to January of 2023, DPA did not experience any halts in the flow of information about OIS cases from SFPD.

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[6] CAO Memo, pg. 6

[7] CAO Memo, pg. 7

A. Plain language of the MOU does not support SFPD's assertions that SFDA leads OIS investigations.

Even the plain language of the MOU does not support SFPD's assertion that it is merely an agent of SFDA in OIS investigations. Throughout the MOU, SFPD is listed as an investigative partner:

- "SFDA and SFPD will jointly and cooperatively investigate all Covered Incidents."
- "SFPD may conduct its administrative review and investigation concurrently with all criminal investigations into a Covered Incident."
- "**SFPD shall remain the lead agency** responsible for securing the location, collecting all physical evidence, and photographing and diagramming the scene; thereby maintaining the chain of custody and proper processing of all evidence**.** Both parties agree and understand that **SFPD will be in command of and direct the activities of all SFPD personnel and SFDA will be in command of and direct the activities of all SFDA personnel**."[8]
- "**SFDA shall maintain and preserve all evidence it gathers** during its investigation of a Covered Incident and all documentation of such investigation."

This language does not represent a relationship where SFPD is subordinate to SFDA. Nor does it convey to the reader that, "…when the Police Department ceded authority to the District Attorney to investigation officer-involved shootings, the Police Department necessarily lost control over evidence subject to those investigations."[9] The last statement clearly shows that the only evidence SFDA maintains and preserves under this agreement is evidence it gathered, not evidence that SFPD gathered during the course of their investigation.

B. Practically speaking, SFPD, not SFDA, is always the lead investigating agency at OIS scenes because SFDA does not have the capacity to investigate OIS incidents.

The interpretation of the MOU sought by SFPD and SFDA is intellectually dishonest. The SFDA has virtually no control over the initial OIS investigation and no capacity to collect, process, and store evidence. It is a delusion to pretend that in this small subset of criminal investigations, the roles of SFPD and SFDA switch and SFDA miraculously now has the ability to perform the duties of a lead investigative agency in OIS cases when it cannot and does not do it with any other type of criminal case. In reality, in all OIS investigations, the crime scene is secured, and evidence is collected, without any input from the SFDA. Additionally, forensic evidence collected is processed without any input from SFDA. Also, Incident reports are written by SFPD officers without any input from the SFDA.

SFDA input only begins when witnesses are identified and willing to submit to an interview. Furthermore, as the Chief has reiterated time and again during Commission discussions, SFDA does not have the storage capacity to store collected evidence, so the evidence is stored in SFPD facilities and preserved pursuant to SFPD policies and procedures.

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8 https://www.sfdistrictattorney.org/wp-content/uploads/2020/08/MOU-SFDA-SFPD-OIS.pdf

9 See SFPD's October 13, 2023 Memo, pgs. 2-3.

In sum, SFPD responds to the incident, secures the scene, collects, and processes the evidence, and stores it in its own facility. To then proclaim that it is not the lead investigative agency under these conditions is intellectual absurdity.

C. Real Life Example – August 28, 2023 OIS of Richard Everett

On August 28, 2023 multiple officers responded to a 911 call for service in the area of Jones Street and Ellis Street. Dispatch informed officers that a Black man in his 50's was brandishing a large knife and yelling at people passing by. Officers arrived, engaged with the suspect, later identified as Richard Everett, ordered him to drop his weapon, and eventually shot him with ERIW rounds and firearm rounds that injured Everett, but did not kill him.

DPA staff, along with SFDA IIB staff responded to the scene, received a briefing about what had transpired and were allowed to view the scene after the scene was secured by SFPD staff. On August 29, 2023, DPA staff was allowed to view the BWC footage from the two officers that shot and wounded Everett with their firearms. On August 30, 2023, DPA staff listened to interviews conducted by IIB ADA Darby Williams of officers that shot at Richard Everett. Yet, when DPA requested from SFPD the BWC footage it already viewed on August 29, 2023, and additional BWC from other officers we determined would likely be relevant to our investigation, we were denied access. We also requested the Incident Report (including all supplemental reports) and Use of Force Logs. SFPD refused to provide these records to DPA.

In their denial letter, SFPD argued the same principles they asserted in their memo to the Commission—that they are acting on behalf of the SFDA and the evidence collected is confidential. However, clearly the evidence is not confidential because it has been disseminated to other parties and used in open court against defendant Everett, who survived and is currently facing trial in open court where evidence from the OIS investigation is being discussed in public.[10]

DPA received an independent complaint to investigate this incident. Attached to the complaint were all the records DPA previously tried to obtain from SFPD, including, but not limited to:

1. Multiple Inspectors Chronologicals.
2. Multiple SFPD Incident reports
3. BWC footage
4. CSI reports
5. Chain of custody reports

Most telling is what these reports show concerning which agency oversees the investigation. Excerpts from the records paint a telling picture:

1. SFPD Sergeant asserts, "I observed the crime scene was secured and being maintained by various SFPD Officers. I also observed Crime Scene Investigations members, Officers [redacted]on scene and processing the scene."

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[10] https://missionlocal.org/2023/12/da-foiled-excluding-police-shooting-richard-everett/

2. SFPD Sergeant explains, “Officer [redacted] responded to the crime and advised us that he was going to be authoring the report.” He identified the officers involved in the OIS and the less-lethal officers.
3. After witnesses are identified by SFPD officers, IIB employees and SFPD staff interview the identified witnesses.
4. Sergeant states, “I responded to SFGH clinical lab and filled out the form to make a formal request for ‘first blood’ for Everett.”
5. “Sgt. [redacted] ordered Ofc. [redacted] to seize the knife and place it in the Tenderloin CSI Locker. Sgt. [redacted] was in charge of the Public Safety Statement for Ofc. [redacted]. Sgt. [redacted] seized Ofc. [redacted] BWC and gave it to Sgt. [redacted] from Internal Affairs per department policy.”
6. “CSI responded to the scene and took charge of photographs and collected all evidence. Ofc. [redacted] seized the knife on scene and placed it in the Tenderloin Station CSI Locker. CSI also responded to Tenderloin Station and seized the knife.”
7. SFPD Sergeant notes, “I directed Officer [redacted]to accompany the subject to the hospital in the ambulance.”
8. SFPD officer notes, “I initiated a crime scene log and maintained it. It should be noted that the crime scene spanned one city block and numerous officers responded to the scene. I maintained the crime scene log to the best of my ability until the crime scene was shut down at 0421 hours. I later booked the crime scene log as evidence at Tenderloin Police Station.”
9. SFPD Officer notes, “Officer [redacted] asked me and Officer [redacted] to canvas the area on the 300 block of Jones Street to look for any markings of fired bullets on buildings, cars, and other surfaces, and to do well-being checks on neighbors. Officer [redacted] and I checked the civilian vehicles parked on the 300 block of Jones with negative results. I found possible markings of fired bullets on the south entrance of 359 Jones Street. I notified CSI upon their arrival.”
10. SFPD Officer notes, “I took photos of Evrett's injuries with a department issued cellphone, I later uploaded the photos.”
11. Chain of custody report: All physical and forensic evidence was collected, stored, and is maintained by SFPD.

Per SFPD policy, all sworn members meticulously documented what they did in the investigation and, in some instances, why. Nowhere in any of these records does it say that an IIB employee or SFDA employee directed or instructed an SFPD member on how to proceed with the investigation. Therefore, the idea that SFPD loses its ability to perform its core functions in complex incidents such as OIS investigations is nonsense. The evidence collection, analysis and storage protocols are exactly the same for OIS investigations as they are in all other criminal cases. OIS investigations do not receive special status or investigative privilege. This demonstrates that SFPD is not a subordinate agent to SFDA’s IIB Unit. In contrast, it reveals that SFPD is leading the investigation with SFDA IIB along for the ride to ask witnesses questions.

IV. SFPD HAS NOT PROVIDED ANY EVIDENCE THAT COMPLYING WITH DPA’S DOCUMENT REQUESTS WOULD IMPEDE EACH OIS INVESTIGATION WHERE IT SEEKS CONFIDENTIALITY.

The City Attorney memo is clear. DPA is not "the general public" so the question is whether disclosure of the records to DPA would impede SFPD's and SFDA's investigation. In other words, if SFPD wants to continue to withhold records from DPA, SFPD must explain how disclosure of those records **in each individual case** would harm each individual investigation. There can be no blanket invocation of absolute confidentiality by SFPD:

> **"For each record DPA requests from SFPD,** SFPD should work with the SFDA to determine whether disclosing information to DPA **would impede the SFDA's exercise of authority under Government Code § 25303, and to document the basis for that determination.**"[11]

The law is unambiguous. The City Attorney accurately stated, "But the **mere possibility** that a local law could apply in a way that impedes the SFDA's state law duties is not sufficient…"[12] In other words, the mere possibility that Chapter 96 of the SF Administrative Code and City Charter § 4.136(j) might hypothetically impede an investigation is not enough. SFPD and SFDA must identify specific reasons why disclosure to DPA would impede an individual investigation before withholding vital evidence. However, mere possibilities is all SFPD has provided to DPA and the Commission. In their memo, SFPD conjures up very generic hypothetical scenarios that could potentially occur in all cases where DPA is seeking disclosure, but no concrete evidence that those harms may occur in the pending cases or any concrete evidence that confidentiality is necessary to prevent those harms. In contrast, real case examples of pending OIS investigations where confidentiality has been invoked prove this is absurd.

A. Despite SFPD's invocation of confidentiality, DPA has obtained records in two pending OIS cases from other sources.

i. August 28, 2023 OIS

As explained, above in section II, subsection B, DPA has obtained virtually all records in the OIS investigation of Richard Everett that occurred on August 28, 2023. Additionally, Mr. Everett's criminal case is in trial, and the judge has ruled that evidence of the OIS investigation will be admitted into evidence and thereby discussed in open court. Therefore, SFPD's continued invocation of confidentiality in this investigation is without merit.

ii. January 20, 2022 SFO OIS

On January 20, 2022, SFPD officers shot a man at the San Francisco Airport who was armed with a knife and a replica firearm. The California Department of Justice ("CAL DOJ") responded and took over the investigation. CAL DOJ did not provide any records about their investigation to SFPD or DPA. However, DPA and SFPD were given an opportunity to listen to and record officer interviews conducted by CAL DOJ. On May 30, 2023, DPA made a request to the CAL DOJ pursuant to SB1421 and the Public Records Act. In response, CAL DOJ began producing records to DPA on August 15, 2023. In their October 27, 2023 letter, CAL DOJ explained:

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[11] CAO memo, pg. 2

[12] CAO memo, pg. 6

> "On August 15, 2023, the Department released copies of 14 records, including a written transcript of an interview with Detective Morgan, forensic video analysis reports, ballistic evidence examination reports, and drug chemistry examination reports. On September 8, 2023, the Department provided copies of two additional records: the audio recording of the interview with Detective Morgan and a County of San Mateo, Office of the Coroner Death Investigation Report. The Department redacted information that, if publicly released, could interfere with the Department's open investigation, as well as firearm serial numbers. (Pen. Code, §§ 832.7, subd. (b)(8)(A), 11106, subd. (a)(1).) The Department also confirmed that it had identified attorney-client privileged and/or attorney work product materials that are exempt from disclosure in their entirety and will not be provided.
>
> Since our prior correspondence, the Department has completed its review and redaction of 37 additional records, including local agency incident reports, Department of Justice Investigative reports, and laboratory reports. As with the Department's prior productions, we redacted information that, if publicly released, could interfere with the Department's open investigation, including witness names and the names of Department staff who have contributed to the investigation. (Pen. Code, § 832.7, subd. (b)(8)(A).) We also redacted certain medical information and personally identifying information based on considerations of personal privacy. (Gov. Code, § 7927.705, incorporating Cal. Const., art. I, § 1; Gov. Code, § 7922.000.) Due to the files' size, the records will be transmitted to you via the Department's secure file transfer site, FileXchange. Please look for a separate email containing a link to download the files. The files will be downloadable for seven days, after which the link will expire.
>
> The Department is continuing to review additional records that are potentially responsive to your request. We anticipate making a further production to you by December 8, 2023"[13]

After receiving the CAL DOJ records, DPA continued its investigation by interviewing all the relevant witnesses, including the involved SFPD officers. On approximately November 22, 2023, SFPD contacted DPA and requested that DPA share the records DPA received from CAL DOJ with SFPD because they still had not received anything, and they had not interviewed anyone. Although DPA would have every right to assert the Official Information Privilege to deny SFPD's request, we realize that it is in everyone's best interest that information be shared immediately so that the investigations can be wrapped up in an expeditious manner.[14]

B. "Fajita-gate:" Cautionary example of what happens with discipline cases when evidence is not promptly shared with DPA by SFPD (*Parra v. City & County of San Francisco* (2006) 144 Cal. App. 4th 977)

[13] See Exhibit A attached.

[14] See Exhibit B attached.

On November 20, 2002, two men in San Francisco's Marina district were attacked by three off-duty SFPD officers, who tried to take their fajitas. Both criminal and administrative investigations were immediately launched, and as the Appellate Court pointed out in the beginning of its decision, "And while the police department's investigations are not themselves particularly pertinent, what is pertinent is the police department's cooperation—perhaps more accurately, lack of cooperation—with the Office of Citizen Complaints (OCC), which interaction is discussed in detail below, in Section I D, post." (*Id*. at pg. 981.)[15]

On November 25, 2002, OCC, received a citizen's complaint about the incident and immediately began its investigation, which yielded 28 separate allegations against 12 officers After promptly making multiple demands for voluminous SFPD documents, OCC was informed in March of 2003 that SFPD would not disclose the records being sought because the District Attorney informed SFPD, "that the integrity of the criminal investigation may be jeopardized by the disclosure of the requested information outside of the framework of the criminal prosecution." (*Id.* at 984) "**For reasons unexplained in the record, the police department apparently began to change its tune**…In sum, it was not until mid-December 2003 that OCC finally gained meaningful access to the police department's investigation and the opportunity to interview its investigator." (*Id.* at 985.)

On July 26, 2004, the Director of OCC filed Commission charges against numerous officers, including Lt. Parra, who filed a Motion to Dismiss with the Commission, alleging that the charges filed against him violated the POBRA statute of limitations. After lengthy hearings and deliberations, the Commission, and subsequently the trial court and the appellate court denied Lt. Parra's argument of untimeliness. However, it was only due to application of tolling and the multiple officer exception. Most important, the appellate court painstakingly criticized SFPD at every opportunity for not allowing OCC access to the records in a timely manner. "**Whatever the reasons or motivations of the other agencies, the fact is that the OCC did not obtain much of what it needed until December 2003, and perhaps later**. OCC acted quickly, and with dispatch, interviewing numerous witnesses, including Appellants, and then digested all the material." (*Id.* at 995.)

In summary, if SFPD, as required by law, properly identifies specific instances where confidentiality is legitimately necessary, remedies to ensure that investigations are not compromised could be created. For example, DPA would be happy to stipulate to a protective order or agree to receive redacted records in specific cases. However, withholding all records is untenable, unnecessary, and could lead to drastic outcomes in cases where discipline may have to be forfeited because the delays prevent DPA from conducting a timely and thorough investigation.

V. DISCUSSION ABOUT DPA'S SUBPOENA POWER IS A MERITLESS RED HERRING.

In our respective memos, DPA and the City Attorney never mentioned DPA's subpoena power, which is contained in San Francisco Administrative Code § 96.6, because that power is completely irrelevant to this dispute. The Charter and all other relevant city provisions do not allow one city department to subpoena the records of another city department. The City Attorney's office would

[15] A copy of the entire opinion is attached as Exhibit C.

immediately intervene in any such attempt to obtain records. Moreover, San Francisco Administrative Code § 96.6 specifically explains:

> "The Director of the DPA shall have the authority to subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of books, papers, records or other items relevant to investigations under the jurisdiction of the DPA. This subpoena power shall not extend to departments, officers or employees of the City who are obligated to provide prompt and full cooperation to the DPA pursuant to Charter Section 4.127."

DPA never intended to use its subpoena power to obtain records from SFPD or SFDA. In contrast, DPA consistently and successfully relies on other provisions of the City Charter and the Administrative Code that require prompt and full cooperation and assistance from all departments, officers, and city employees to obtain records and argue its point. The obligation for SFPD to comply with DPA's request does not stem from DPA's subpoena power. DPA cannot and never intended to use its subpoena power to compel the production of records from either SFPD or SFDA. Therefore, it is puzzling to see SFPD mention DPA's subpoena power in this context so incorrectly.

VI. DPA'S MOU WITH SFDA IS UNENFORCEABLE AND IT WAS ENTERED INTO WHEN EVERYONE'S UNDERSTANDING OF THEIR RESPECTIVE ROLES AND APPLICABLE LEGAL PRINCIPLES WAS DIFFERENT.

It is disingenuous to argue, without more, that DPA should not bring this issue to the Commission, because an MOU exists between the SFPD and SFDA. The understanding of the landscape of OIS investigations was completely different at the time the MOUs in question were signed. Not only did the parties cooperate, coordinate, and correlate their investigations but the legal landscape was completely different. Laws such as AB 1506 (CAL DOJ investigates officer involved shootings of unarmed civilians), AB 392 (When officers can use lethal force), and SB1421 (disclosure of OIS investigation records to the public) did not exist. Therefore, when viewed considering these developments, the MOU between DPA and SFDA appears to be outdated and moot.

CONCLUSION

DPA is mandated by the City Charter to investigate OIS incidents promptly, fairly, and thoroughly. DPA has consistently and faithfully executed this obligation with fidelity to the law. Yet, SFPD continues to foster an undeserved culture of distrust against DPA and its investigative role without any proof that DPA's involvement in any OIS investigations have harmed or impeded the investigative process of any other agency. DPA's fight for access to information in this age of law enforcement transparency, aa concept repeatedly lauded by SFPD, is not only daunting, but also exhausting, and it unnecessarily wastes everyone's valuable (and DPA's scarce) resources.

DPA respectfully requests that the Commission enforce SFPD's responsibility to provide DPA with the records DPA is seeking because SFPD has not provided any evidence to the Commission that doing so would impede any investigation. Conjecture is not evidence, and valuable investigative time and City resources are being wasted on this issue.

EXHIBIT A

TO

DPA REPLY MEMORANDUM

CONCERNING SFPD'S WITHOLDING OF RECORDS IN

OFFICER-INVOLVED SHOOTINGS

ROB BONTA
Attorney General

State of California
DEPARTMENT OF JUSTICE

1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Telephone: (916) 210-6485
E-Mail: Andrew.Day@doj.ca.gov

October 27, 2023

Via Email

Stephanie Wargo-Wilson
Stephanie.wargo-wilson@sfgov.org

RE: Public Records Act Requests – DOJ No. 2023-01264

Dear Ms. Wargo-Wilson:

This letter is in further response to an electronic submission received by the California Department of Justice (Department) on May 30, 2023, in which you requested records pursuant to the California Public Records Act. (Gov. Code, § 7920.000 et seq. [PRA].) Specifically, you requested the following:

> *Documents from the officer-involved shooting by the SFPD on January 20, 2022. Your case #BI-SF2022-00001.*
> *Please prioritize the interview of San Mateo Sheriff's Deputy Jeff Morgan and any and all forensic test results.*
> *Date: 01/20/2022*
> *Decedent: Nelson Szeto*
> *Agency: San Francisco Police Department*
> *Location: San Francisco, California*
> *Involved Officer: Steven Uang, Oliver Lim, David Wakayama, and Erik Whitney*

On June 12, 2023, the Department informed you that additional time was needed to search for potentially responsive records. On June 23, 2023, the Department confirmed that the Department possesses records relating to an active investigation of the referenced shooting incident but required additional time to review and redact those records. The Department also invited you to clarify whether you are interested in receiving copies of audio and video recordings relating to the shooting incident. On June 25, 2023, you provided the following clarification:

> *I do want the audio of any interviews conducted with San Mateo law enforcement personnel.*
> *I do* not *want the following video and audio files:*
> *SFPD body-worn camera footage*
> *SFO surveillance footage*

The interviews conducted with SFPD officers at SFO where SFPD internal affairs and DPA personnel were in attendance.

On August 15, 2023, the Department released copies of 14 records, including a written transcript of an interview with Detective Morgan, forensic video analysis reports, ballistic evidence examination reports, and drug chemistry examination reports. On September 8, 2023, the Department provided copies of two additional records: the audio recording of the interview with Detective Morgan and a County of San Mateo, Office of the Coroner Death Investigation Report. The Department redacted information that, if publicly released, could interfere with the Department's open investigation, as well as firearm serial numbers. (Pen. Code, §§ 832.7, subd. (b)(8)(A), 11106, subd. (a)(1).) The Department also confirmed that it had identified attorney-client privileged and/or attorney work product materials that are exempt from disclosure in their entirety and will not be provided.

Since our prior correspondence, the Department has completed its review and redaction of 37 additional records, including local agency incident reports, Department of Justice investigative reports, and laboratory reports. As with the Department's prior productions, we redacted information that, if publicly released, could interfere with the Department's open investigation, including witness names and the names of Department staff who have contributed to the investigation. (Pen. Code, § 832.7, subd. (b)(8)(A).) We also redacted certain medical information and personally identifying information based on considerations of personal privacy. (Gov. Code, § 7927.705, incorporating Cal. Const., art. I, § 1; Gov. Code, § 7922.000.) Due to the files' size, the records will be transmitted to you via the Department's secure file transfer site, FileXchange. Please look for a separate email containing a link to download the files. The files will be downloadable for seven days, after which the link will expire.

The Department is continuing to review additional records that are potentially responsive to your request. We anticipate making a further production to you by December 8, 2023.

Sincerely,

/s/ Andrew Day

ANDREW D. DAY
Deputy Attorney General

For ROB BONTA
Attorney General

AD:

SA2023300004

EXHIBIT B

TO

DPA REPLY MEMORANDUM

CONCERNING SFPD’S WITHOLDING OF RECORDS IN

OFFICER-INVOLVED SHOOTINGS

From:	Wargo-Wilson, Stephanie (DPA)
To:	Shangaran, Ramesh (POL)
Cc:	Dolese, Ellen (DPA); Ball, Steve (DPA)
Subject:	RE: DPA Case #00049550-23 (SFO OIS)
Date:	Tuesday, December 12, 2023 4:01:32 PM
Attachments:	image001.png

Hello Sergeant Shangaran,

I have the green light to share the DPA interviews with you in this case. I created a folder in the OneDrive file I already shared with you. Please let me know if you have any trouble accessing it.

Thank you and Happy Holidays,

Stephanie Wargo
Director of Training
Attorney
1 South Van Ness Avenue · 8th Floor
San Francisco, CA 94103
Pronouns: she/her/hers
T: 415.241.7795 · **F:** 415.241.7733
http://sfgov.org/dpa/

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From: Shangaran, Ramesh (POL) <Ramesh.K.Shangaran@sfgov.org>
Sent: Wednesday, November 22, 2023 11:19 AM
To: Wargo-Wilson, Stephanie (DPA) <stephanie.wargo-wilson@sfgov.org>
Subject: Re: DPA Case #00049550-23 (SFO OIS)

Thank you so much for your assistance. Happy Thanksgiving.

Sergeant R. Shangaran #2382

Internal Affairs Division

1245 3rd St. 4th Floor

415-837-7170

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From: Wargo-Wilson, Stephanie (DPA) <stephanie.wargo-wilson@sfgov.org>
Sent: Wednesday, November 22, 2023 11:17 AM
To: Shangaran, Ramesh (POL) <Ramesh.K.Shangaran@sfgov.org>
Cc: Rosenstein, Diana (DPA) <diana.rosenstein@sfgov.org>
Subject: DPA Case #00049550-23 (SFO OIS)

Dear Sergeant Shangaran,

I should have an answer for you regarding the DPA interviews by the time I return to the office on December 11, 2023.

Thank you,

Stephanie Wargo
Director of Training
Attorney
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<u>EXHIBIT C</u>

TO

DPA REPLY MEMORANDUM

CONCERNING SFPD'S WITHOLDING OF RECORDS IN

OFFICER-INVOLVED SHOOTINGS

144 Cal.App.4th 977
Court of Appeal, First District, Division 2, California.

Henry PARRA, Plaintiff and Appellant,
v.
CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents.
Edmund Cota et al., Plaintiffs and Appellants,
v.
City and County of San Francisco et al., Defendants and Respondents.

No. A112331.
|
Nov. 13, 2006.
|
As Modified on Denial of Rehearing Nov. 30, 2006.
|
Review Denied Feb. 21, 2007.

Synopsis
Background: In disciplinary proceedings filed against police officers, the officers moved to dismiss the charges as untimely. After motions were denied by the Police Commission, officers filed petitions for administrative mandamus. The Superior Court, City and County of San Francisco, Nos. 505197 and 505205, James Warren, J., denied the petitions. Officers appealed.

The Court of Appeal, Richman, J., as a matter of first impression, held that statutory tolling and extension provisions applied to extend limitation provision and render charges timely.

Affirmed.

Attorneys and Law Firms

****823** Ropers, Majeski, Kohn & Bentley, James A. Lassart and Adrian Driscoll, San Francisco, for Plaintiff and Appellant.

Arthur K. Wachtel, San Francisco, Maitreya Badami; Furst & Pendergast, LLP, Peter Furst, San Francisco; Stiglich, Hinckley & Burrell, Lidia Stiglich; Leland Davis III, San Francisco; William Fazio, for Plaintiffs and Appellants.

Office of the City Attorney, Dennis J. Herrera, City Attorney, Danny Y. Chou, Chief of Appellate Litigation, Molly S. Stump, Chief Attorney, Public Protection Team, David A. Carrillo, Deputy City Attorney, for Defendants and Respondents.

Opinion

RICHMAN, J.

***979** This case of first impression involves the application of the one-year limitation provision governing discipline of police officers contained in the Public Safety Officers' ****824** Procedural Bill of Rights Act (Gov.Code, § 3300 et seq.), and particularly whether that provision was tolled or extended. The ***980** issue arises out of the investigation of, and the criminal charges filed in connection with, the notorious incident in November 2002 involving three off-duty San Francisco police officers which came to be known as "Fajitagate."

Appellants here, petitioners below, are seven San Francisco police officers who became involved in various ways with the incident, and were charged with violations of departmental orders and rules of conduct. The charges were not brought until July 2004, and Appellants filed motions to dismiss them as untimely. The motions were denied by the San Francisco Police Commission, and Appellants' petitions for administrative mandamus were denied by the superior court.

We conclude that at least one tolling provision and one extension provision applies in the circumstances here, the effect of which was to extend the limitation provision and render the charges timely. We thus conclude that the trial court's order was correct, and we affirm.

I. BACKGROUND

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A. The November 20, 2002 Incident And Its Aftermath

Early in the morning hours of November 20, 2002, Adam Snyder called 911, to report that he and Jade Santoro had been attacked in the Marina District of San Francisco by three men who fled in a pickup truck. Sergeant John Syme was in charge of Northern Station at the time and responded to the call, along with Officers Daniel Miller and Gene Cornyn. As they were interviewing Snyder and Santoro, a pickup truck with three men inside drove by, and Snyder identified them as the attackers; at the same time, Syme recognized the driver as an off-duty San Francisco police officer. Syme and another officer pursued the truck and stopped it several blocks away, to learn that all three men were off-duty San Francisco police officers—Matthew Tonsing, David Lee, and Alex Fagan, Jr. Fagan was the son of the newly appointed Assistant Chief of Police Alex Fagan; Lee was the son of a San Francisco police sergeant.

The incident and its aftermath became a "cause celebre," and because the charges included that an officer demanded the steak fajitas Snyder had ordered, the incident came to be referred to in the press as "Fajitagate," the fallout from which continues to this day. That fallout included criminal indictments against 10 officers, a federal civil case, a state civil case, and reams of publicity.[1] It also included extensive investigations, both criminal ***981** and administrative, by the San Francisco Police Department. And it included the disciplinary charges in issue here, brought in July 2004 against the seven appellants: Captain Gregory Corrales, Lieutenants Edmund Cota and Henry Parra, Sergeant Syme, Inspector Paul Falconer, and Officers Miller and Cornyn (when referred to collectively, Appellants.)

B. The Police Department Investigation

Immediately after the incident the San Francisco Police Department began both a criminal investigation and an administrative investigation into the conduct of the three off-duty officers and also the possible misconduct of numerous other officers in connection with their involvement and handling of the incident. The full breadth ****825** of these investigations is not particularly germane to the issues on appeal, and is not in the record in any event. What we do glean from what is before us shows that the police department investigations were extensive and far reaching, manifest, for example, by letters and memoranda from or to the chief of police, the deputy chief, the commanding officer, legal division, the commanding officer, risk management office, various personnel at the management control division, and numerous others. It was, as one appellant's counsel would later describe it, "huge in scope."

And while the police department's investigations are not themselves particularly pertinent, **what is pertinent is the police department's cooperation—perhaps more accurately, lack of cooperation—with the Office of Citizen Complaints (OCC)**, which interaction is discussed in detail below, in Section I D, *post.*

C. The District Attorney Investigation and the Criminal Charges

The San Francisco District Attorney also began his own investigation, the result of which was the presentation of a case to the grand jury. Forty-two witnesses testified, including all seven Appellants, and on February 27, 2003, the grand jury indicted a total of 10 San Francisco officers. The three off-duty officers were charged with several counts arising from the incident itself. Seven other officers were charged with conspiring to obstruct justice, including Police Chief Earl Sanders, Assistant Chief Fagan, Deputy Chiefs Gregory Suhr and David Robinson, and three appellants, Captain Corrales, Lieutenant Cota, and Sergeant Syme. These indictments generally alleged that the seven officers promoted misinformation about the incident and, as to Cota and Syme, that they failed to follow proper procedures in their investigation.

On April 4, 2003, the Superior Court dismissed the indictments against all defendants except the three off-duty officers accused in the incident. The basis ***982** of the dismissal of the other seven officers was that there was no conspiracy. While so ruling, however, the Superior Court made various observations pertinent here, including that "[c]learly preferential treatment was accorded [the off-duty officers]. Much of these actions have been clearly laid out and are known. [¶] If these actions were obstructions of justice, then those types of charges should be brought."

D. The Office of Citizen Complaints Investigation

Penal Code section 832.5 requires local agencies that employ peace officers to adopt a procedure for investigation of citizen complaints of misconduct against such officers. In 1982 the voters amended the Charter of the City and County of San Francisco (Charter) to create

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the Office of Citizen Complaints as the department responsible for investigating complaints against San Francisco officers. (See *San Francisco Police Officers' Association v. Superior Court* (1988) 202 Cal.App.3d 183, 185, 248 Cal.Rptr. 297 (*S.F. Police Officers' Assn.*; Charter sections 4.127 and A8.343 (appen.).) The OCC is under the supervision and management of the San Francisco Police Commission (Commission). (Charter section 4.127.))

The OCC is a civilian agency, separate from the police department (*S.F. Police Officers' Assn., supra,* 202 Cal.App.3d at pp. 186–188, 248 Cal.Rptr. 297.), and Charter section 4.127 imposes on the OCC the duty to investigate complaints of police misconduct and to recommend nonbinding disciplinary action to the chief of police. This recommendation is "advisory only." ****826** (*S.F. Police Officers' Assn., supra,* 202 Cal.App.3d at p. 185, 248 Cal.Rptr. 297.)[2]

On November 25, 2002, a citizen's complaint was filed with the OCC by Sean Buckley. Buckley was not involved in the incident in any way, and was complaining as a concerned citizen, apparently based on newspaper accounts he had read about the investigation of the incident. Buckley's complaint identified by name at least 10 police officers, including appellants Corrales, Parra, Syme, Miller, and Cornyn. The essence of Buckley's complaint was that the officers had committed misconduct by failing to properly investigate the underlying incident and what he referred to as "the apparent selective enforcement of the law." It went on to state, "The complainant further stated that citizens can not tolerate a double standard where police officers receive special treatment from other police officers. The complainant also expressed concerns regarding the impartiality and objectivity of having the police investigate other police officers. The complainant added that this type of activity repeatedly occurs throughout the country and he found it shocking ***983** that it would occur in San Francisco. The complainant concluded his interview by stating that these types of occurrences make the public mistrust the police and not cooperate with police."[3]

The OCC immediately began to investigate Buckley's complaint, under the supervision of OCC Director Kevin Allen. The investigation would proceed for some 20 months, and would come to involve 28 separate allegations of possible misconduct, against 12 different officers. The investigation would include the collection, assimilation, and analysis of voluminous material, including that developed independently by OCC as well as the police department and district attorney's investigations. The investigation culminated in an 80–page report from the OCC, the upshot of which was that five of the twelve officers being investigated were not charged, and that seven, Appellants here, were.

The investigation began on November 25, 2002, the day Buckley's complaint was lodged, when the OCC investigator sent a memorandum to "SFPD Legal" requesting it to "provide any and all reports to include chronologies, investigative findings and conclusions, photographs, crime scene drawings/sketches, medical examiner files/records, and all audio/video tape recordings." This was followed two days later by a request for specific telephone records of 13 officers, including those of appellants Corrales, Parra, Cota, and Syme. A third request was made on December 17, 2002, seeking seven specific categories of materials. Meanwhile, the OCC began to independently interview witnesses, conducting numerous interviews by the end of December 2002.

The record does not contain the police department's responses, if any, to the three requests from the OCC. What is in the record is a March 19, 2003 letter from the acting director of the OCC to the Commission memorializing the developments to date, and referring to various exhibits filed under seal. This letter reads in pertinent part as follows: "On January 14, 2003, the OCC requested by letter that Police Legal review the November 25, November 27 and December 14 letters again ****827** to release any documents that did not compromise the ongoing criminal investigation. As to those documents that Police Legal was not releasing, the OCC requested that Police Legal provide a reason for the non-disclosure and an estimate as to when the documents would become available. (See Exhibit C, filed under seal with the Police Commission's secretary.)

"Throughout January, February and March of 2003, in addition to numerous phone calls to Police Legal, the OCC enlisted the assistance of Deputy ***984** Chief Heather Fong, and City Attorneys Lori Giorgi, Mariam Morley and Dorji Roberts to resolve the Department's failure to comply with OCC's document requests. In mid-February, Police Legal stated that the OCC's document requests had been forwarded to the District Attorney. (See Exhibit D, filed under seal with the Police Commission's secretary.)

"On March 14, 2003 City Attorney Mariam Morley spoke with District Attorney Al Murray who informed her that the District Attorney's office was taking no position as to the OCC request for documents. Upon learning of the District Attorney's position, the OCC informed Mariam

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Morley that the OCC was demanding the immediate release of all documents in connection with the Union Street incident. The OCC called Deputy Chief Fong, informed her of the District Attorney's position and stated that the OCC was demanding the release of all documents by Wednesday, March 19 at noon.

"Today at 12:52 p.m. the OCC received a letter from Police Legal stating that it would not provide the requested materials because of the District Attorney's letter dated March 19th indicating that the integrity of the criminal investigation may be jeopardized by the disclosure of the requested information outside of the framework of the criminal prosecution. (Exhibit E, filed under seal with the Police Commission's secretary.)

"The public demands a timely and unbiased investigation into the allegations of police misconduct concerning the Union Street incident. The City Charter mandates that the OCC conduct such an investigation and this agency is more than prepared to do so. Any information obtained during an OCC investigation is confidential and cannot be released or used for any other purpose outside of an administrative investigation absent a court order. While steadfast and aggressive in its attempt to investigate the allegations of police misconduct in this complaint, the OCC is severely hampered in these efforts by the non-cooperation of the SFPD and District Attorney to provide the OCC the most basic of documents—including the incident report. We request that the Police Commission assist the OCC in acting on its Charter-granted authority to obtain the documents necessary for the timely completion of this investigation."

According to various entries in the OCC work summary, on March 28, 2003, the police department again refused requests for materials. Then, beginning on April 16, 2003, OCC began to receive what is described as "highly redacted and incomplete records consisting only of those documents 'in the possession of MCD [Management Control Division] and the media.' "

OCC Staff Attorney Marion apparently requested additional materials, again without success, as by letter of May 8, 2003, the police department ***985** offered explanations why certain of the documents requested would not, or could not, be produced. On May 12, 2003, OCC received some telephone records, and on May 14, 2003, "3 volumes of reading materials from ****828** SFPD documenting the Dept.'s investigation."

The record is virtually silent as to developments in the next few months, until a letter of September 25, 2003, in which OCC "renew[ed]" its request for various items which the police department's letter of May 8, 2003, indicated would not, or could not, be produced. On October 10, 2003, the commanding officer of the police department legal division sent a memorandum to the investigations bureau referring to four of the requests in the September 25 letter, and requesting those materials be furnished to him by October 16, 2003. This memorandum closes with the advice that the "District Attorney has been notified of the September 25, 2003 request for materials. All other materials listed in the September 25, 2003 request have been provided to OCC." Two weeks later, by letter of October 22, 2003, the commanding officer of the police department legal division advised the director of OCC that the materials in the October 10, 2003 memorandum were available.

On November 12, 2003, the risk management office of the police department issued a memorandum to the management control division, stating that "Management Control Division case files are personnel records pursuant to Section 832.5 of the California Penal Code. As such, Management Control Division Case Number A456–02 is confidential per Section 832.7 of the California Penal Code and cannot be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the California Evidence Code. [¶] Therefore, you cannot discuss or release any part of the case file with anyone who is not a member of management of the San Francisco Police Department without a court order." This memorandum was interpreted by OCC, apparently accurately, as "forbidding the Management Control Division investigator from being interviewed or providing his chronology as requested by the OCC."

For reasons unexplained in the record, the police department apparently began to change its tune, and a December 3, 2003 memorandum from Commanding Officer Keohane to OCC (and others) advised that the "City Attorney has advised the Department to release the MCD documents you sought in your letter of" September 25, 2003. This material was in fact forwarded by letter of December 5, 2003. Finally, by memorandum of December 11, 2003, Captain O'Leary of the risk management office advised that he had received advice that "allows me to rescind" the order of November 12, 2003, and instructing that "[y]ou may now cooperate with [OCC] in their investigation...." In sum, it was not until mid-December ***986** 2003 that OCC finally gained meaningful access to the police department's investigation and the opportunity to interview its investigator.

Shortly thereafter, the OCC began its interviews of Appellants and numerous other witnesses. The first

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appellant interviewed was Officer Cornyn on January 28, 2004, followed by interviews of Captain Corrales on February 20, Sergeant Syme on February 21, Lieutenant Cota on February 23, Lieutenant Parra on March 2, Officer Miller on March 8, and Inspector Falconer on March 12. In all, the OCC interviewed a total of 42 witnesses, 39 of whom were police department employees or former employees.

Meanwhile, on February 6, 2004, OCC renewed its request for the log of the operations center, which it received on February 24, 2004. And on March 15, 2004, OCC requested the SID investigative analysis. When all was said and done, OCC had obtained and reviewed over 7,000 pages of documentary evidence, countless pages of transcripts of interviews, including the 1300–plus page grand jury transcript, and ****829** those of the numerous witnesses, voluminous telephone records and photographs, and myriad other documents.[4] And the result of all this was OCC's "sustain report" and a draft of possible charges to be filed with the Commission prepared for the chief of police.

E. The Civil Lawsuit

While all that was going on at OCC, on November 5, 2003, Snyder and Santoro filed a civil action in the United States District Court, Northern District: *Snyder v. City and County of San Francisco et al.* (No. C–03–4927 JSW). The complaint named as defendants the City and County of San Francisco, Chief Sanders, Assistant Chief Fagan, Deputy Chief Robinson, Captain Corrales, and Sergeant Syme; it also named 20 Doe defendants.[5] Answers were filed in this action, and it remained pending as of the time of the proceedings below. Subsequently, in November 2005, Chief Robinson, Captain Corrales, and Sergeant Syme were dismissed on stipulation, and in April 2006 the United States District Court granted summary judgment for the remaining defendants.

***987 F. The Disciplinary Charges**

As noted, in July 2004, OCC Director Allen provided drafts of OCC's 80–page report and possible charges to the chief of police and, pursuant to the obligations under the Charter, met with her regarding the possible filing of the charges with the Commission. Following that meeting, on July 22, 2004, Director Allen signed the separate charges against each of the seven Appellants, which were served and filed with the Commission by July 26. The charges accused Appellants of various violations arising out of their roles in the incident and/or its investigation and, in the case of Captain Corrales, statements to the media. The actual facts claimed to support the charges against the officers are not in the record in any testimonial way. All we have are the allegations in the charges, yet unproved, and these claimed facts will not be set forth here. The charges themselves are as follows:

Captain Corrales—conduct reflecting discredit for making improper comments during a pending investigation, in violation of Departmental General Orders 2.01 and 8.09.

Lieutenant Parra—neglect of duty for failing to conduct a prompt and proper investigation and for engaging in selective enforcement of the law and department procedures, in violation of Department General Orders 1.06 and 2.01.

Lieutenant Cota—neglect of duty for failing to conduct a prompt and proper investigation in violation of Department General Orders 1.06, 2.01 and 8.01; neglect of duty for failing to conduct and/or cooperate with a prompt and proper administrative ****830** investigation, in violation of Department General Orders 1.06, 2.01 and 8.01; unwarranted action for ordering the prolonged detention of a civilian in violation of Department General Orders 1.06, 2.01 and 5.03; and conduct reflecting discredit for engaging in selective enforcement of the law and department procedures, in violation of Department General Order 2.01.

Sergeant Syme—neglect of duty for failure to conduct a prompt and proper investigation, in violation of Department General Orders 1.04, 1.06, 2.01 and 8.01; neglect of duty for failure to maintain proper police communications, in violation of Department General Orders 1.03 and 1.04; unwarranted action for ordering the prolonged detention of a civilian in violation of Department General Orders 1.04, 2.01 and 5.03; and conduct reflecting discredit for engaging in selective enforcement of the law and department procedures, in violation of Department General Order 2.01.

Inspector Falconer—neglect of duty for failure to conduct a prompt and proper investigation, in violation of Department General Orders 1.06 and 2.01.

***988** Officer Miller—neglect of duty for failing to take required action to preserve evidence and a crime scene, in violation of Department General Orders 2.01, 6.01 and 6.02; and neglect of duty for failing to maintain proper

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police communications in violation of Department General Orders 1.03 and 2.01.

Officer Cornyn—neglect of duty for failing to maintain proper police communications, in violation of Department General Orders 1.03 and 2.01.

G. The Public Safety Officer's Procedural Bill of Rights Act

In 1976, the Legislature enacted Chapter 9.7 of the Government Code (section 3300 et seq.), known as the Public Safety Officer's Procedural Bill of Rights Act (the Act).[6] The Act has been described as "primarily a labor relations statute. It provides a catalog of basic rights and protections that must be afforded all peace officers by the public entities which employ them. [Citations.]" (*California Correctional Peace Officers Assn. v. State of California* (2000) 82 Cal.App.4th 294, 304, 98 Cal.Rptr.2d 302, fn. omitted.) In the words of the Supreme Court, the Act is "concerned primarily with affording individual police officers certain procedural rights during the course of proceedings which might lead to the imposition of penalties against them...." (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 681, 183 Cal.Rptr. 520, 646 P.2d 191.) In sum, and as confirmed in *Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 63, 15 Cal.Rptr.3d 383, "the Act '... provides a catalog of basic rights and protections that must be afforded all peace officers by the public entities which employ them.' [Citation.] One such protection is to have a speedy adjudication of conduct that could result in discipline."

That protection is the limitation provision in issue here, which was added by amendment in 1997.[7] The provision is ****831** found in section 3304 subdivision (d), which provides a one-year limitation for disciplinary actions, subject to eight exceptions, four of which were relied on by OCC in the proceedings ***989** here. As germane to the proceedings here, therefore, section 3304(d) provides in pertinent part as follows:

"(d) Except as provided in this subdivision and subdivision (g), no punitive action ... shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. This one-year limitation period shall apply only if the act, omission, or other misconduct occurred on or after January 1, 1998. In the event that the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed disciplinary action within that year, except in any of the following circumstances:

"(1) If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period.

"[¶] ... [¶] (3) If the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies.

"(4) If the investigation involves more than one employee and requires a reasonable extension for coordination of the involved agencies.

"[¶] ... [¶] (6) If the investigation involves a matter in civil litigation where the public safety officer is named as a party defendant, the one-year time period shall be tolled while that civil action is pending."

H. The Police Commission Proceedings

As noted above, under Charter section A8.343 the Commission has the authority to discipline police officers. On October 28, 2004, Lieutenant Parra filed with the Commission a motion to dismiss the charges as untimely. It was accompanied by a memorandum of points and authorities, a brief declaration of Lieutenant Parra, and a declaration of Attorney James Lassart, attached to which were seven exhibits, some them quite lengthy. The other six appellants filed a similar motion, accompanied by a declaration of attorney Arthur Wachtel, also with exhibits.[8] On November 17, 2004, OCC filed oppositions, which included a declaration of OCC attorney Jean Field with ten exhibits, and a declaration of OCC Director Allen with three exhibits. It is ***990** primarily from these many exhibits, all in the record without objection, that the factual record set forth above is found.

Following Appellants' replies, the motions came on for hearing before the Commission on February 9, 2005. The Commission heard over two hours of argument, including from four counsel on behalf of individual appellants. The Commission then retired to deliberate, and returned to orally announce its decision, denying the motion to dismiss.

****832** By resolution of March 23, 2005, the Commission

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adopted its decision to deny the motions. There, after a lengthy recitation of facts, the Commission began its analysis, finding first, as the parties "agree[d]," that the district attorney began the criminal investigation immediately after the incident. And because that investigation resulted in the indictment of Captain Corrales, Lieutenant Cota, and Officer Syme, the one-year limitation period on the disciplinary charges against them did not begin to run until the indictments were dismissed on April 4, 2003, and thus would not expire until April 3, 2004. The Commission then concluded that, because the criminal investigation included "all of the conduct, indeed the very allegations, at issue in these administrative proceedings," the limitation provision was tolled as to all officers.

The Commission also found that, although five of the seven appellants were not named as defendants in the federal civil action, the action tolled the limitations period as to all appellants under section 3304(d)(6). The Commission noted the inclusion of the Doe defendants and concluded that the conduct of all Appellants alleged in the administrative charges was "substantially similar to the allegations of unlawful conduct set forth in the civil complaint. Because of these factual similarities, the investigation of the named officers cannot reasonably be severed from the investigation of the other officers." Following that, the Commission concluded as follows:

"In light of the Commission's conclusions expressed in sections II(A)(1) and (2), above, this Commission has determined that the charges were timely served. This Commission also concludes, however, that Government Code sections 3304(d)(3) and (4), which provide for a reasonable extension of the statute of limitations, provide separate bases for concluding that the charges were timely served.

"1. Multiple Officers

"The parties agree that this investigation involved multiple officers. The question presented is whether the extension of the one-year statute of limitations in this case is reasonable.

***991** "As the OCC argues, the scope and nature of its investigation were unprecedented. The OCC investigated 28 allegations against 12 members of the Department, including members of the command staff. The OCC was required to collect and analyze data resulting from its own efforts, and to consider as well materials provided as a result of the Department's criminal investigation, the District Attorney's criminal investigation, and the Department's administrative investigation. The OCC reviewed more than 7,000 pages of material, analyzing it for relevancy, consistency and evidentiary value. The OCC also interviewed 42 people, and compared many of those statement[s] to statements given by the same witnesses in the context of the other investigations.

"The parties agree that the statute of limitations in this investigation began to run on November 25, 2002, and that the officers were served with charges between July 22 and 26, 2004, a period of approximately 20 months. An extension of eight months beyond the twelve-month statutory period is reasonable in a multiple-officer case of this complexity. But an extension of eight months is not necessary to a finding that the service of the charges here was timely.

"As discussed above, the statute of limitations was tolled as to all the charged officers until April 4, 2003, during the pendency of the criminal investigation and prosecution. Therefore, even excluding any consideration of the tolling provided ****833** by section 3304(d)(6), disciplinary charges were served approximately three and one-half months after the one-year period expired. This Commission concludes that an extension of three and one-half months is reasonable in the context of this multiple-officer case."

Finally, the Commission found that section 3304(d)(3)—the multijurisdictional investigation provision—applied, and that a three-and-one-half month extension was reasonable.

I. The Petitions for Mandamus

On April 13, 2005, Lieutenant Parra filed a petition for administrative mandamus (Code Civ. Proc., § 1094.5), naming as respondents the City and County of San Francisco (the City), the police department, and the OCC. Two days later a similar petition was filed on behalf of the other six appellants, along with a motion to consolidate. The City filed answers and opposition to the petitions, and Lieutenant Parra, his reply. The petitions came on for hearing on July 19, 2005, before the Honorable James Warren, who at the conclusion of argument took the matters under submission. On September 1, 2005, Judge Warren issued two orders. The first ordered the petitions consolidated. The second denied them.

***992** Judge Warren's order denying the petitions expressly noted that he was properly applying the requisite test, exercising his independent judgment. (See

Bixby v. Pierno (1971) 4 Cal.3d 130, 143–144, 93 Cal.Rptr. 234, 481 P.2d 242). Doing so, Judge Warren also noted, also properly, that he must give the administrative decision a "strong presumption of correctness." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817, 85 Cal.Rptr.2d 696, 977 P.2d 693 (*Fukuda*).)

Against that background, Judge Warren analyzed each of the four tolling or exception provisions separately and concluded that the Commission had correctly determined that all four provisions applied. Specifically, Judge Warren first concluded that the Commission correctly found that the criminal investigation tolled the limitations period until April 4, 2003, as it had concluded that the " 'acts and omissions with which they are charges [sic] were the subject of a criminal investigation and prosecution within the meaning of Section 3304(d)(1).' " This determination, he found, "is both legally correct and not contrary to the weight of the evidence." Judge Warren then concluded that section 3304(d)(4) extended the limitation provision, as the Commission had determined that the "number of officers involved, the myriad investigations conducted, the seriousness of the charges and the complexities of the case" made a three-month extension reasonable. He also concluded that "because of the factual similarities, the investigation of the named officers cannot reasonably be severed from investigation of the other officers," the Commission correctly applied the civil action tolling provision to all officers, and the charges were therefore timely And based on the demonstrated need for coordinating the police department and district attorney investigations, Judge Warren concluded that the Commission "properly determined that the extension required for this coordination was reasonable." Finally, he held that the Commission's determination was not arbitrary or clearly erroneous.

Appellants filed timely notices of appeal, Lieutenant Parra on October 20, 2005, and the other appellants on November 1, 2005.

II. DISCUSSION

A. The Standard of Review

The fundamental standard of review here is substantial evidence (*Fukuda, supra,* 20 Cal.4th at p. 824, 85 Cal.Rptr.2d 696, 977 P.2d 693), unless the appeal presents pure issues of law, in which case our **834 review is independent. (*Anserv Ins. Services, Inc. v. Kelso* (2000) 83 Cal.App.4th 197, 204, 99 Cal.Rptr.2d 357, *Stermer v. Board of Dental Examiners* (2002) 95 Cal.App.4th 128, 132–133, 115 Cal.Rptr.2d 294; see *993 *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 219, 130 Cal.Rptr.2d 564 [hearing officer's interpretation of ordinance was subject to de novo review but "entitled to deference"].)

Applying the appropriate standard, we first conclude that section 3304(d)(1) applies to the setting here, which tolls the limitation provision until the criminal indictments were dismissed. We further conclude that section 3304(d)(4) also applies, which permits a reasonable extension of the limitation provision where the investigation involves more than one officer, and that substantial evidence supports that the extension here was reasonable. We thus conclude that Judge Warren properly denied the writ petitions, and we affirm.[9]

B. Section 3304(d)(1) Applies, Tolling the Limitation Provision During the Criminal Proceeding

As quoted above, section 3304(d)(1) provides that "[i]f the act, omission or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period."

There was undisputedly a criminal investigation and a criminal prosecution, albeit one that was short-lived, as it was quickly dismissed as to all but the three off-duty officers. In light of this, five of the appellants conceded that, although the district attorney's prosecution included only Captain Corrales, Lieutenant Cota, and Sergeant Syme among the appellants, it tolled the limitation period as to all. These appellants thus conceded below, and concede here, that since the prosecution ended on April 4, 2003, the one-year limitation period began to run on that date and would expire on April 3, 2004.[10]

*994 Lieutenant Parra who, as noted, filed his own motion and petition below and his own briefs here, (see fn. 8, *ante*) did not make the same concession.[11] Rather, Lieutenant Parra asserts that because he was not indicted, the criminal prosecution tolling provision does not apply to him. We disagree.

**835 Section 3304, subdivision (d)(1) is straightforward, and is to be read in accordance with the

"well-established" principles of statutory construction, most recently distilled in *Kibler v. Northern Inyo County Local Hospital District* (2006) 39 Cal.4th 192, 199, 46 Cal.Rptr.3d 41, 138 P.3d 193: "Our goal is to determine the Legislature's intent in enacting the statute ' "so that we may adopt the construction that best effectuates the purpose of the law" ' (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 625, 26 Cal.Rptr.3d 304, 108 P.3d 862.) In doing so, we look first to the statutory language, which generally is ' "the most reliable indicator of legislative intent" ' (*Ibid.*) Moreover, we give the words of the statute ' "their ordinary and usual meaning," ' construing them in their statutory context. (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818, 31 Cal.Rptr.3d 591, 115 P.3d 1233).''

Section 3304(d)(1) applies "[i]f the act, omission or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution...." Contrary to Lieutenant Parra's argument, it is the "act, omission, or other allegation" which must be the subject of the prosecution, and any objective reading of the record reflects that the criminal investigation encompassed the misconduct of all officers who were involved in connection with the incident—including Lieutenant Parra. In the words of the Commission: "the criminal investigation included all of the conduct, indeed the very allegations at issue in these administrative proceedings." We conclude that Judge Warren correctly concluded that the limitation period was tolled by the criminal investigation, the effect of which was that the one-year limitation period would not expire until April 3, 2004.

Since the charges were not filed until July 2004, the question then becomes whether another provision applies to extend the limitation period for an additional three-plus months, until July 22, 2004, when the charges were filed. In fact, the same issue is presented, though with a somewhat longer period, even if Lieutenant Parra were correct, and the criminal prosecution did not toll the limitation provision as to him. That issue is whether the limitation period is extended some eight months, from November 20, 2003 ***995** one year from the incident) to July 22, 2004, the date of the charges. We conclude that section 3304(d)(4) extends the limitation period—whether the extension necessary is for three-plus months or eight.

C. Section 3304(d)(4) Applies as the Investigation Involved More Than One Officer

Section 3304(d)(4) provides an exception to the one-year limitation provision "[i]f the investigation involves more than one employee and requires a reasonable extension." As it is undisputed that the investigation involved "more than one employee," the issue is whether an extension was "reasonable" in light of all of the circumstances here. The Commission determined it was. Judge Warren agreed. And so do we.

The OCC's efforts in connection with its investigation are set forth in detail above. It cannot be gainsaid that those efforts were extensive, and included independent investigation by the OCC and also attempts, significant attempts, to obtain information from others. Those efforts ultimately produced the voluminous materials described above, review and digestion of which culminated in the OCC's 80–page report to Chief Fong.

But it did not come easily. Whatever the reasons or motivations of the other agencies, the fact is that the OCC did not ****836** obtain much of what it needed until December 2003, and perhaps later. OCC acted quickly, and with dispatch, interviewing numerous witnesses, including Appellants, and then digested all the material. And three and one-half months after the expiration of the tolled limitation period, and some eight months after expiration of any untolled one-year limitation provision, the OCC filed the charges in issue here. The Commission concluded that such extension, including one for eight months, was reasonable.[12] While Judge Warren addressed only the three-month extension, he concluded it was reasonable. We conclude that substantial evidence supports that the extension here was reasonable.

Essentially ignoring the complexity of the circumstances as determined by the Commission and Judge Warren, Appellants focus primarily on the passage of time. Reading the record in a fashion favorable to them, Appellants argue in the joint brief as follows: "In conducting its investigation, the OCC interviewed forty-two individuals from 2002 through 2004. (Clerk's Transcript, Vol. 4, 888.) Nineteen of those interviews were summarized by the OCC and included in a section of their Sustained Case Report entitled ***996** Summary of Evidence. Seven of those nineteen interviews were completed by the close of 2003. Although the remaining twelve interviews were not conducted until early 2004, ten of those individuals had provided comprehensive testimony to the grand jury, the transcripts of which were available to the OCC as early as January 28, 2003. A comparison of the information obtained from those interviewed in 2004 with their grand jury testimony further corroborates that the OCC acquired no new facts necessary to its investigation. [¶] Thus, in 2004, the only information that was conceivably new to the OCC was from the interviews of Officer Ryan Seto and Deputy

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Chief Greg Suhr. As seen by reviewing their interviews, neither officer shed any new light on the investigation or provided the OCC with facts of which it was not already aware."

Lieutenant Parra who, as noted, filed his own papers throughout, makes the most individually fact-intensive argument. He argues essentially that his name was mentioned in Buckley's November 24, 2002 citizen's complaint; that he was interviewed by the General Works Division on December 4, 2002; and that he testified at the grand jury on January 30, 2003. Parra further asserts that his name did not appear in OCC's investigation chronology until February 9, 2004.[13] So, his argument apparently runs, the OCC could easily have investigated his involvement, and any charges against him easily filed within one year. We are not persuaded.

It is perhaps enough to note that the recitation of the record in both appellants' ****837** briefs is contrary to the rule that the evidence is to be viewed in the light most favorable to the prevailing party below. (See *Moran v. Board of Medical Examiners* (1948) 32 Cal.2d 301, 308, 196 P.2d 20; *Jaramillo v. State Bd. for Geologists and Geophysicists* (2006) 136 Cal.App.4th 880, 889, 39 Cal.Rptr.3d 170; see generally 9 Witkin, Cal. Proc. (4th ed. 1997) Appeal §§ 378–380, pp. 428–432.) But there is much more.

The record demonstrates that it was not until December 2003 that the police department was at all forthcoming, and even then some material evidence was not obtained by OCC until 2004. And until it all was analyzed, and put in the context of the other evidence, how could the OCC reasonably close its investigation? The potential misconduct, wide-ranging as it was, could not be investigated in isolation, especially as the issues in question involved how and when various officers in the department acted, or failed to ***997** act, in response to that investigation. For the OCC to determine which officer should have taken action and when, and whether he acted appropriately or inappropriately, it must have a full picture of the entirety of events. That full investigation led to the charges here to be sure. It also led, it bears noting, to five of the officers being cleared. In sum, we would assume that the officers would expect no less than the investigation conducted here—and certainly not disciplinary charges filed without a full investigation.

Moreover, the investigation did not merely involve "more than one employee" in the simple sense of two or three officers. It involved numerous officers, included among whom at one point was the chief of police, his assistant, various deputy chiefs, and many other ranking officers. It involved captains, lieutenants, lieutenants supervising sergeants, sergeants supervising line officers, and line officers themselves. The integrity of the San Francisco Police Department, top to bottom, was in focus here, providing abundant evidence supporting an extension of the limitation provision.

The succinct conclusion of the Commission following its lengthy hearing merits reiteration: "the scope and nature of [OCC's] investigation were unprecedented. The OCC investigated 28 allegations against 12 members of the Department, including members of the command staff. The OCC was required to collect and analyze data resulting from its own efforts, and to consider as well materials provided as a result of the Department's criminal investigation, the District Attorney's criminal investigation, and the Department's administrative investigation. The OCC reviewed more than 7,000 pages of material, analyzing it for relevancy, consistency and evidentiary value. The OCC also interviewed 42 people, and compared many of those statements to statements given by the same witnesses in the context of the other investigations."

Indeed, the complexity of the setting here, and the difficulties presented to the OCC, was acknowledged by one appellant's counsel at the hearing before the Commission, where he admitted "[t]his case was huge in scope." And two pages later he admitted that he was "not saying that the OCC ... cannot conduct its own investigation nor ... that they did not encounter obstacles, significant ones." Such admission says it all.

It is true, as Lieutenant Parra asserts, that the Act applies to him individually. (See *White v. County of Sacramento, supra,* 31 Cal.3d 676, 681, 183 Cal.Rptr. 520, 646 P.2d 191.) It is also true that Lieutenant Parra and the other appellants had the right to "fair treatment." That said, the public had—and has—the concomitant right in maintaining the integrity of the ****838** police department. (See *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 569, 273 Cal.Rptr. 584, 797 P.2d 608.) And this necessarily includes "assurance to the public ***998** that the OCC's investigation is neutral. As one commentator has noted: 'it is the attitude of the public toward the police discipline system that will determine the effectiveness of the system as an element of police-community relations. A system can be theoretically sound and objective in practice but if it is not respected by the public, cooperation between the police and the public can suffer.' (Brent, *Redress of Alleged Police Misconduct: A New Approach to Citizen Complaints and Police Disciplinary Procedures* (1977) 11 U.S.F. L.Rev. 587, 607–608.)" (*S.F. Police Officers' Assn., supra,* 202

Cal.App.3d at p. 191, 248 Cal.Rptr. 297.)

That policy, it appears, is what generated Buckley's citizen's complaint in the first place. And that policy was recognized early on by the OCC as well, manifest by its March 19, 2003 letter which confirmed that the "public demands a timely and unbiased investigation.... The City Charter mandates that the OCC conduct [it].... While steadfast and aggressive in its attempt to investigate ... the OCC is severely hampered ... by the non-cooperation of the [police department] and the District Attorney...." The conclusion we reach, we are satisfied, is consistent with all the purposes of the Act, and will allow the charges to proceed to a determination on the merits.[14]

We close with the observation that our conclusion to allow the disciplinary charges to proceed is fully consistent with the policy behind statutes of limitation, which the United States Supreme Court long ago noted is to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared." (*Railroad Telegraphers v. Ry. Express Agency* (1944) 321 U.S. 342, 348–349, 64 S.Ct. 582, 88 L.Ed. 788; accord *Cutujian v. Benedict Hills Estates Assn.* (1996) 41 Cal.App.4th 1379, 1387, 49 Cal.Rptr.2d 166.) No claim slumbered here. No evidence was lost. No witnesses disappeared. Not by a long shot.

***999 III. DISPOSITION**

The order denying the petitions for administrative mandamus is affirmed.

HAERLE, Acting P.J., and LAMBDEN, J., concur.

All Citations

144 Cal.App.4th 977, 50 Cal.Rptr.3d 822, 06 Cal. Daily Op. Serv. 10,498, 2006 Daily Journal D.A.R. 15,002

Footnotes

1 The publicity was so notorious that off-duty officer Fagan was successful in his motion to change the venue of the criminal case brought against him.

2 Charter section 4.127 also provides that the OCC's duty does not prohibit the chief of police from independently investigating an officer's conduct and does not otherwise limit the chief's disciplinary powers under the Charter.

3 A second citizen's complaint was filed on March 3, 2003, by Ray Hartz Jr. He, too, had no direct connection with the incident.

4 As Director Allen was coordinating the OCC investigation, in March 2004 he met with representatives of the Kroll Worldwide, an investigative agency that he understood was in negotiations with the police department to review and investigate the matters being investigated by the OCC. Allen thereafter learned that Kroll and the police department entered into some contract, in connection with which Kroll requested that the OCC provide its evidence electronically. Though this was contrary to the OCC's customary practice, during the months of June and July 2004, working in coordination with Captain Denis O'Leary of the police department, Allen personally converted and/or caused to be converted some 5,000 pages of the OCC investigative file into the PDF format requested by Kroll.

5 On November 5, 2003, Snyder and Santoro also filed a civil action in the Superior Court of San Francisco, Civil Action No. CGC–03–426098, naming as defendants the three off-duty officers.

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6 Unless otherwise indicated, all future statutory references are to the Government Code.

7 The background and significance of this amendment were discussed in *Jackson v. City of Los Angeles* (2003) 111 Cal.App.4th 899, 908–909, 4 Cal.Rptr.3d 325: "According to comments made by the author of Assembly Bill No. 1436 to Senate and Assembly committees during hearings on the 1997 amendment, the legislative purpose for enacting the section 3304, subdivision (d) statute of limitations provision was to reduce the limitations period for state peace officers from three years to one year, and to provide a one-year limitations period for local peace officers, who previously lacked any limitations period. A statute of limitations has a direct, substantial connection to the Legislature's purpose of maintaining stable employer-employee relations between public safety employees and their employers so as to provide effective law enforcement and effective services to all people of the State of California." (§ 3301.) (Fn. omitted.)

8 While each appellant has his own counsel, the six appellants other than Lieutenant Parra filed joint papers below, as they have here.

9 Counsel for appellants asserted at oral argument that among the erroneous determinations by Judge Warren were that the tolling provision of section 3304, subdivision (d)(6) and the exception provisions in section 3304, subdivision (d)(3) applied, and thus the matter had to be remanded in light of such errors. As noted *post,* at footnote 14, we do not discuss either of these issues, other than to note that the former subdivision applies to Captain Corrales and Sergeant Syme. But even if Judge Warren's conclusions on these issues were erroneous, it would not matter, in light of the settled principle that "If the *decision* of the lower court is right, the judgment or order will be affirmed regardless of the correctness of the grounds upon which the court reached its conclusion." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 340, p. 382; *Abouab v. City and County of San Francisco* (2006) 141 Cal.App.4th 643, 661, 46 Cal.Rptr.3d 206.)

10 If a limitation provision is tolled, it means the period in which one is required to act is suspended, that is, it does not run during the tolling period. (*Schrader v. Scott* (1992) 8 Cal.App.4th 1679, 1684, fn. 1, 11 Cal.Rptr.2d 433 ["to suspend or stop temporarily"].)

11 Nor apparently did Inspector Falconer. Inspector Falconer asserts in his opening brief that he did not concede this issue, an assertion he makes without citation to the record. And Judge Warren's order notes that only Lieutenant Parra disputed this issue. On the other hand, Inspector Falconer's attorney argued that he did not concede the point, and the City's opposition to the writ petition apparently conceded as much.

12 As quoted above, the Commission expressly concluded that "[a]n extension of eight months beyond the twelve-month statutory period is reasonable in a multiple-officer case of this complexity. But an extension of eight months is not necessary to a finding that the service of the charges here was timely."

13 In his opening brief Lieutenant Parra observes that "The Commission's Statement of Decision is remarkable in that both its title and its preamble on (page 1) omit any reference to Parra. (CT at 994 & 995.)" While such omission is not explained in the record, we observe that Lieutenant Parra had filed his own motion to dismiss with the Commission, and the other officers their own joint motion. But whatever the reason, Lieutenant Parra can hardly claim any benefit from this omission, as he was a participant at the Commission proceedings, and certainly knew its decision adversely affected him, as shown by his writ petition.

14 We note that the tolling provision of section 3304(d)(6) also expressly applies to Captain Corrales and Sergeant Syme. That

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section provides that "[i]f the investigation involves a matter in civil litigation where the public safety officer is named as a party defendant, the one-year time period shall be tolled while that civil action is pending." Captain Corrales and Sergeant Syme were named as defendants in the civil action, which civil action was still pending at the time the disciplinary charges were filed.

Because of the conclusion we reach, we need not consider whether section 3304(d)(6) applies to all Appellants, nor whether section 3304(d)(3), the multijurisdictional exception, applies at all. We leave these issues for another day.

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