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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE LAW FOUNDATION OF SILICON VALLEY,
Petitioner,
vs.
SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF SANTA CLARA,
Respondent,

THE CITY OF GILROY,
Real Party in Interest/Plaintiff.

After Decision by the Court of Appeal, Sixth Appellate District
Case Nos. H049552 and H049554 (as consolidated)
Santa Clara County Superior Court, Case No. 20CV362347

LAW FOUNDATION OF SILICON VALLEY'S PETITION FOR REVIEW

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ISSUES PRESENTED

The Law Foundation of Silicon Valley ("LFSV") served the City of Gilroy ("Gilroy") with multiple written requests pursuant to the California Public Records Act ("CPRA"), which demanded production of police body-camera footage of so-called unhoused encampment sweeps in Gilroy ("Sweeps"). However, without informing LFSV of these actions, Gilroy unilaterally characterized all such footage as categorically exempt under the CPRA, refused to search for the recordings, and failed to review them to determine if any content actually was non-exempt and segregable. Gilroy also destroyed most of the videos while LFSV's requests were pending.

The Superior Court conducted a trial, after which it declared that Gilroy had violated the CPRA in multiple ways, including by conducting an unreasonable search. It also found that Gilroy was not obligated to preserve the destroyed bodycam footage of Sweeps while LFSV's requests were pending. Both parties filed writs.

The Sixth Appellate District ("Sixth District"), disagreeing with the reasoning of at least two other Districts, reversed the Superior Court's findings in favor of LFSV, and concluded that

the CPRA does not permit declaratory relief to address violations of the CPRA that do not result in production of documents. It also affirmed the Superior Court's conclusion that public records need not be preserved while CPRA requests for those documents are pending, even where a dispute exists as to whether the documents are exempt under the CPRA.

The issues presented for review are:

1. Whether, given the command within Article I, §3(b)(2) of the California Constitution that courts are required to broadly construe the CPRA if doing so furthers access to public records, the CPRA and/or Code of Civil Procedure section 1060 ("CCP §1060") nonetheless preclude a Superior Court from declaring that a public entity violated the CPRA, even where the public entity refused to search for or review public records, and the public records were subsequently destroyed while the underlying requests for the documents remained pending.
2. Whether public agencies can destroy responsive public records they have selectively withheld as exempt before courts can perform the CPRA's

mandatory procedure of reviewing those records in order to ensure they are actually exempt.

INTRODUCTION

In an astonishing narrowing of the scope of the CPRA, and with no reference whatsoever to the "**constitutional imperative**" of article I, section 3(b)(2) of the California Constitution for courts to broadly construe the CPRA if doing so furthers access to public records, the Sixth District published an opinion in this case in which it held that "'[t]he CPRA provides *no* … remedy that may be utilized for any purpose other than to determine whether a particular record or class of records may be disclosed.'" (Opinion (Exhibit A) at 13 [quoting *County of San Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 127] [emphasis in original].)

Accordingly, the Sixth District held that the Superior Court was not permitted to declare that the Gilroy violated the CPRA in various ways when it impermissibly characterized all police body-camera footage of Sweeps as exempt and then failed to conduct any search, let alone a reasonable search, for such footage. (Op. at 15-16.) Instead, the Sixth District held that the underlying case immediately became moot when Gilroy's unilateral actions resulted in the requested footage being destroyed before the

recordings actually could be reviewed by the Superior Court and ordered produced to LFSV. According to the Sixth District, even if Gilroy violated the CPRA by failing to perform a reasonable search for documents that otherwise should have been produced under the CPRA, declaratory relief "was not authorized under either the CPRA or Code of Civil Procedure section 1060." (*Id.*)

This Petition invites this Court to directly address this important issue by answering two significant questions of first impression which will determine whether public agencies will face any accountability under the CPRA—be it for violating their CPRA obligations, or for the accountability that comes from disclosing damning public records.

First, LFSV asks this Court to address whether the Sixth District is correct that once agencies have destroyed responsive and improperly withheld public records, a case is moot as a matter of law and courts are powerless to award declaratory relief to hold the public agencies accountable for any past violations of their duties under the CPRA. Among other problems, the Sixth District's remarkable ruling that the CPRA does not permit declaratory relief with respect to the legality of Gilroy's past conduct in responding to CPRA requests creates a

direct conflict with the decision from the Fourth Appellate District in *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385 ("*CYAC*"), as well as this Court's own decision in *Filarsky v. Superior Court* (2002) 28 Cal.4th 419 ("*Filarsky*").

Second, and closely related to the questions raised by the first issue, LFSV asks this Court to evaluate whether the Sixth District was correct that a local agency has "no duty under the CPRA to preserve all documents that have been withheld as exempt," at least until the Superior Court can review the documents. (Op. at 20-21.) As the Sixth District acknowledged, other courts have identified such a preservation obligation exists under the Freedom of Information Act ("FOIA"), as well as under other comparable state public records acts. (*Id*. at 22.)

The joint effect of the Sixth District's rulings is to eviscerate the government accountability and transparency goals of the CPRA and California's Constitution. The opinion encourages public agencies to unilaterally characterize potentially embarrassing records as exempt and then destroy them with impunity to avoid accountability, so long as the

destruction occurs before a court can review the records to determine if any alleged exemption from disclosure applies.

This Court's review thus is "necessary to secure uniformity of decision [and] to settle … important question[s] of law." (Cal. Rules of Court 8.500(b)(1)). The Sixth District's ruling has provided a clear roadmap for public agencies to escape scrutiny or disclosure of damning public records. In fact, by granting agencies immunity from not just the accountability that is contemplated by releasing damning public records, but from all violations of the CPRA, the Sixth District's published ruling incentivizes public agencies to destroy all records that might be embarrassing or politically damaging.

The Sixth District's rulings run counter to the Legislature's purpose in passing the CPRA to make access to public records a fundamental right, and to the California electorate's intent in enshrining that right into the Constitution. The Legislature has "declare[d] that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state" (Gov. Code §7921.000), because "[o]penness in government is essential to the functioning of a democracy." (*Int'l Fed'n of Pro. & Tech. Engineers, Local 21,*

AFL-CIO v. Superior Court (2007) 42 Cal.4th 319, 328-29 ("*Local 21*")). And consistent with that policy, California voters in 2004 overwhelmingly approved Proposition 59 and voted 83% to 16% to amend the Constitution explicitly to recognize that "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., Art. I, §3(b)(1)).

The Sixth District's opinion did not just ignore the CPRA's statutory text, framework, and purpose to effectuate the goals of public access, it also wholly omitted any constitutional analysis by failing to discuss, mention, or even cite the constitutional imperative that:

> A **statute, court rule, or other authority**, including those in effect on the effective date of this subdivision, **shall be broadly construed** if it furthers the people's right of access, **and narrowly construed** if it limits the right of access.

(Cal. Const., Art I, §3(b)(2) [emphasis added]; *see also Nat'l Laws. Guild, San Francisco Bay Area Chapter v. City of Hayward* (2020) 9 Cal.5th 488, 507 ["Article I, section 3 of the state Constitution favors an interpretation that avoids erecting such substantial financial barriers to access"]; *City of San Jose v. Superior Court*

(2017) 2 Cal.5th 608, 620 ["narrow reading of CPRA's local agency definition is inconsistent with the constitutional directive of broad interpretation"]; *Am. C.L. Union Found. v. Superior Court* (2017) 3 Cal.5th 1032, 1036–37 ["In light of our constitutional obligation to broadly construe the CPRA in a manner that furthers the people's right of access to the conduct of governmental operations, … we disagree with the trial court and the Court of Appeal that the ALPR scan data at issue here are subject to section 6254(f)'s exemption for records of investigations."])

Indeed, the Sixth District effectively applied the constitutional imperative in *reverse* when, in granting Gilroy's Writ, it erroneously construed CCP §1060 and the authorities applying it broadly to limit LFSV's declaratory judgment rights under the CPRA, while narrowly construing Government Code Section 7923.000 (former Section 6258)[1] and the authorities elucidating its grant of declaratory judgment rights (*e.g.*, *CYAC* and *Filarsky*). Similarly, in denying LFSV's Writ, the Sixth District erroneously narrowly construed (and even ignored) the

[1] The CPRA was recodified by A.B. 743, which took effect January 1, 2023. The changes are "entirely nonsubstantive." (Gov. Code §7920.100.) Unless otherwise noted, all statutory references are to the recodified sections of the CPRA.

CPRA's judicial review and remedies provisions (§§7923.100-115) which contemplates a mandatory duty to preserve records withheld as exempt, at least until the Superior Court is provided an opportunity to evaluate the viability of the exemption.

Review should be granted.

STATEMENT OF FACTS

In early 2018, after receiving numerous complaints from unhoused residents about the Gilroy Police Department's ("GDP's") conduct, LFSV began investigating allegations that personal property was being destroyed rather than being stored for reclamation following the completion of Sweeps. (1-Petitioner's Appendix ["PA"] 11.) As part of that investigation, LFSV sent Gilroy multiple CPRA requests for public records related to Sweeps. (1-PA-11-14, 24-34, 44-47.) As the Superior Court later found, these requests encompassed requests for police bodycam footage generated during Sweeps. (1-PA-168-69.)

However, Gilroy did not acknowledge that responsive body-camera footage even existed in any of its written responses to LFSV. (1-PA-13-14, 34-43, 48-58.) Instead, Gilroy provided boilerplate objections that "law enforcement records generally … are exempt from disclosure under the PRA." (1-PA-13, 38.) And

simultaneously, unbeknownst to LFSV (1-PA-21-22), Gilroy destroyed and continued to destroy all responsive bodycam footage of Sweeps that was more than one-year old pursuant to its records retention policy. (4-PA-573-74, 557-58, 623-24; 1-PA-174-75; 3-PA-347, 358-63.)

In May 2019, as a result of statements made by Gilroy's Chief of Police at a public meeting, LFSV first learned that body-camera videotapes of Sweeps actually existed and had been withheld. (1-PA-14.) LFSV sent an updated CPRA request to Gilroy on May 20, 2019 specifically demanding, among other things, all videos taken by the GPD during Sweeps conducted between January 2016 and May 2019. (1-PA-14-15, 59-62.) Without reviewing even one second of any bodycam footage to determine if any content might be segregable as non-exempt (1-PA-165; 4-PA-535-36, 609, 621; 2-PA-245), Gilroy responded that all such bodycam footage was categorically "being withheld on the basis that they are investigatory files compiled for law enforcement purposes … exempt under [former] Government Code section 6254(f)" (now Section 7923.600(a)). (1-PA-15, 71.) Critically, Gilroy did not tell LFSV that any of these records had been or were being destroyed by Gilroy, let alone that the

destruction was ongoing and occurring without any review of the recordings by Gilroy to determine whether or not some portions were segregable and non-exempt. (1-PA-15, 22, 67-74.)

LFSV objected to Gilroy's blanket assertion of the investigatory exemption, stated that it must justify withholding records under former Section 6255(a), and demanded Gilroy produce non-exempt and segregable portions of bodycam footage from Sweeps. (1-PA-16, 76-78.) Despite follow-up attempts, Gilroy ignored LFSV's demands for nearly two months. (1-PA-16, 80.) Only after LFSV notified Gilroy it was going to sue for these records (1-PA-16, 82) did Gilroy, on August 22, 2019, finally institute a litigation hold covering some withheld footage of Sweeps. (4-PA-641; 3-PA-351.) At no point prior to August 22, 2019, did Gilroy try to prevent the recordings' ongoing destruction. (4-PA-559-60, 622-24.) As a result of Gilroy's failure to preserve records, numerous responsive records were destroyed. (1-PA-21-22, 174-75; 3-PA-350 at ¶16, 351-52 at ¶23; 4-PA-623-24.)

In October 2019, after finally reviewing what footage remained of Sweeps that had not been destroyed, Gilroy produced 52 minutes of footage from three Sweeps (1-PA-19-20, 4-PA-511-

15) that Gilroy admitted was both responsive to LFSV's 2018 and 2019 CPRA requests, and was "not otherwise privileged or exempt" under former Section 6254(f). (1-PA-18, 104-05.)

A. THE SUPERIOR COURT PROCEEDINGS

LFSV filed its writ petition in the Superior Court of Santa Clara County in January 2020 to enforce its right to access any remaining withheld police bodycam footage, and further requested declaratory relief that Gilroy's actions violated the CPRA. (1-PA 20-21.) Six months into the litigation, Gilroy, for the first time, informed LFSV that, except for 10 minutes of footage from two 2018 Sweeps which had separately been flagged for preservation,[2] all pre-2019 responsive videotapes of Sweeps had been destroyed while LFSV's CPRA requests remained pending. (1-PA-21, 174-75; 3-PA-350 at ¶16, 351.) Ultimately, Gilroy produced a deletion log to LFSV (4-PA-600-01), which showed that Gilroy had destroyed responsive bodycam footage from Sweeps both *after* claiming the investigatory privilege over the same in response to LFSV's 2018 CPRA requests, and *after*

[2] This 10 minutes was later reviewed by the Superior Court *in camera* and found to be properly exempted from disclosure. (1-PA-141; 3-PA-379.)

claiming the same blanket exemption in response to its 2019 CPRA request. (1-PA-22; 2-PA-245; 4-PA-557-60, 622-24.)

LFSV then amended its petition, and specifically included allegations requesting declaratory relief that Gilroy violated California's Constitution and the CPRA by failing to search for responsive records, by delaying searching for responsive records, by improperly withholding responsive records, and by destroying responsive records all while LFSV's requests for those records were pending. (2-PA-204-225.)

The Superior Court held a CPRA trial in June 2021. Relying on a robust record consisting of testimony from three GPD officers and the 52 minutes of footage produced by Gilroy, the Superior Court found that the 52 minutes of footage was non-exempt because it "depicts officers engaging in activity and communications that is clearly not investigatory, but [Gilroy] would not have known that because it did not review the footage." (1-PA-166.) The Superior Court further concluded that "a lot of the [destroyed] footage," including the footage from the June 2, 2018 sweep which Gilroy destroyed after the litigation hold, "would have been nonexempt as they were not investigatory." (1-PA-170.)

After trial, the Superior Court issued an order and Judgment granting LFSV declaratory relief based on findings that Gilroy violated the CPRA by: (1) failing to review the police body-camera footage before claiming a blanket exemption under former Section 6254(f) (1-PA-166); (2) failing to conduct a reasonable search (1-PA-168); (3) failing to timely reply to LFSV's CPRA requests (1-PA-171); and by (4) providing boilerplate objections that failed to satisfy its obligations to describe each document withheld. (1-PA-170-71.) However, the court denied injunctive and declaratory relief and further held that Gilroy did not violate the CPRA by failing to preserve responsive bodycam footage Gilroy withheld as exempt. (1-PA-171-75.)

B. WRIT PETITIONS BEFORE THE SIXTH DISTRICT

Both Gilroy and LFSV filed Petitions for Writ of Mandate, seeking review of Respondent Court's Judgment. The Sixth District granted review, consolidated the petitions, and on October 23, 2023, issued a published opinion granting Gilroy's Petition (No. H049552) and denying LFSV's Petition (No. H049554). (Ex. A.) In granting the former, it reasoned that the trial court erred "by granting declaratory relief on the basis of its

findings that City's past conduct in responding to [LFSV's CPRA] requests violated the CPRA." (Op. at 2.) In denying the latter, it reasoned that the trial court did not err in finding that Gilroy did not violate the CPRA when it destroyed records it withheld as exempt while LFSV's CPRA requests were pending. (*Id*. at 2-3.)

LFSV filed a Petition for Rehearing And/Or Modification of Opinion. LFSV sought rehearing on three grounds: the Opinion (1) misstated facts; (2) made erroneous conclusions of law; and (3) erroneously awarded costs to Gilroy in violation of the CPRA. On November 20, 2023, the Sixth District corrected the award of costs but otherwise denied the petition for rehearing. (Ex. A.)

ARGUMENT

I. THE SIXTH DISTRICT'S RULING LIMITING THE SCOPE OF DECLARATORY RELIEF UNDER THE CPRA CONFLICTS WITH CALIFORNIA'S CONSTITUTION AND THE DECISIONS OF OTHER COURTS

The Sixth District's ruling that declaratory relief under Section 7923.000 does not extend to past violations of the CPRA, but only prospectively "to determine a public agency's obligation to disclose records," (Op. at 14-15) is legally erroneous. The Sixth District's ruling conflates declaratory relief in ordinary declaratory relief actions under CCP §1060 with declaratory

relief in CPRA actions under Section 7923.000. In so doing, its holding contravenes the CPRA, the California Constitution, a contrary rule under FOIA, and this Court's decision in *Filarsky*.

Moreover, the Sixth District explicitly created a conflict of law with the Fourth District Court of Appeal's decision in *CYAC*, which holds that a trial court can issue a declaration to remedy past violations of the CPRA—even where the underlying records, as here, have been destroyed.

Crucially, the Sixth District's ruling incentivizes agencies to violate the CPRA by rewarding the same with impunity. It severely and impermissibly restricts the rights under the CPRA of not just LFSV, but all members of the public who seek records from any public agency. By declaring all CPRA actions moot where responsive records have been destroyed after an agency claims they are exempt, the Sixth District's ruling vastly reduces access to records and makes it far more difficult to compel public agencies to disclose non-exempt records. The opinion instead encourages public agencies to abuse the CPRA, especially where responsive public records may be embarrassing or reflective of controversial policies.

A. THE DECLARATORY JUDGMENT FRAMEWORK UNDER THE CPRA

The CPRA is not just a private right secured to an individual, but a broader public right of all people to ensure government transparency and accountability. (*See* Cal. Const. Art. I, §3(b)(1); Gov. Code §7921.000.) Consistent with that laudable goal, the Constitution requires public agencies "to comply with the [CPRA.]" (Cal. Const. Art. I, §3(b)(7)), and the CPRA guarantees the right of an individual to "institute a proceeding for injunctive or declarative relief . . . **to enforce that person's right** under this division to inspect or receive a copy of any public record or class of public records." (Gov. Code §7923.000 [emphasis added]). And finally, the declaratory relief contemplated by Section 7923.000 complements the Legislature's independent prohibitions limiting a public agency's ability to unilaterally dictate what the public may know about government behavior. (Gov. Code §54950.)

In order to compel compliance with the CPRA, the people must be able to enforce their right to inspect records. Declaring that a requestor possesses the right to inspect or receive a copy of public records, regardless of whether or not they are destroyed

while the request is pending, necessarily requires a court to look backwards at what has happened and to declare whether an agency complied with the CPRA. The CPRA thus contemplates that a requester may seek a declaratory relief pursuant to Section 7923.000 that the public agency violated the Act in any number of circumstances where the records may not be available through no fault of the Petitioner, such as when the public agency failed to search for records in a manner that violated the CPRA, or when it failed to segregate non-exempt from exempt records in violation of the Act.

This retroactive review also ensures future compliance with the CPRA—*i.e.*, looking at current and past practices of a public agency ensures that the public has a right to receive records in the future. Here, for example, the Superior Court declared that Gilroy "must view responsive records before asserting a blanket exemption when the details of the record are unclear on their face." (1-PA-176.) That ruling effects LFSV's future right to police bodycam footage from Sweeps. Indeed, Gilroy even admitted this fact in its pleadings in the proceedings below, stating: "Gilroy maintains that … GPD bodycam footage from

cleanups is exempt from disclosure under [former] Section 6254(f)." (Gilroy Prelim. Opp. in H049554 at 10.)

Retrospective review is consistent with the interpretation of FOIA, on which the CPRA is modeled.[3] Under FOIA, courts may declare that agencies violated FOIA by, among other errors, failing to conduct adequate searches for records and by failing to provide timely responses. (*See Nat. Res. Def. Council, Inc. v. E.P.A.* (9th Cir. 1992) 966 F.2d 1292, 1300 [granting declaratory relief under FOIA because the "court must uphold adherence to the law, and cannot condone the failure of an executive agency to conform to express statutory requirements"]; *Looney v. Walters-Tucker* (D.C. 2000) 98 F.Supp.2d 1, 2 [finding FOIA case was not moot despite plaintiff having received all requested records, because "[p]laintiff has a cognizable interest in having this Court determine whether the search for records was adequate under the standards for adequate records searches required under the FOIA"]; *Our Children's Earth Found. v. Nat'l Marine Fisheries Serv.* (N.D. Cal. 2015) 85 F.Supp.3d 1074, 1090 [declaring defendant violated FOIA's statutory deadlines].) Notably, these

[3] In construing the CPRA, caselaw interpreting the FOIA are considered persuasive authority. (*See Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1338)

examples of FOIA violations that may be permissibly subject to declaratory relief under FOIA encompass violations of the CPRA by Gilroy that the Superior Court declared had occurred in these proceedings. (1-PA-168, 171.)

B. THE SIXTH DISTRICT ERRONEOUSLY CONFLATED THE SCOPE OF DECLARATORY RELIEF UNDER CCP §1060 WITH SECTION 7923.000

The Superior Court issued declaratory relief in favor of LFSV pursuant to Section 7923.000, not CCP Section 1060. Gilroy's Writ did not argue that declaratory relief under Section 7923.000 needs to be prospective. In fact, it conceded that Section 7923.000 of the CPRA allows for declaratory relief where, as here, records have been destroyed. (Gilroy Writ at 56 [citing *CYAC*].) Amicus, however, introduced CCP §1060 into the fray for the first time by citing non-CPRA caselaw for the proposition that declaratory relief under CCP §1060 is prospective and does not reach past wrongs. (Amici Br. in H049552 at 12-13). The Sixth District, apparently adopting Amicus' reasoning, then proceeded to conflate the scope of declaratory relief under CCP §1060 with §7923.000.

But the Sixth District's conflation and harmonization of declaratory relief under CCP §1060 in non-CPRA cases (Op. at 13, 15) with declaratory relief under §7923.000 in CPRA cases belies the holding and rationale in *Filarsky*. There, this Court rejected the proposition that "ordinary declaratory relief action" under CCP §1060 had any applicability in CPRA actions. (28 Cal.4th at 423; *id*. at 428 ["judicial proceeding arising under the [CPRA] are **significantly different** from the procedures applicable in an ordinary action for declaratory relief pursuant to [CCP §]1060."] [emphasis added]; *id*. ["there are at least four **important distinctions** between proceedings arising under the Act and ordinary declaratory relief actions."] [emphasis added]]).

Filarsky thus concluded that former Government Code Sections 6258 and 6259 "specified the **exclusive procedure** … for litigating disputes regarding **a person's right** to obtain disclosure of public records under the Act." (*Id*. at 433 [emphasis added]). Among other things, said CPRA sections provide "statutory protections and incentives" not provided for under CCP §1060. (*Id*. at 423.)

Notwithstanding *Filarsky's* holding that declaratory relief under CCP §1060 is not only materially different, but

inapplicable in CPRA context, the Sixth District's opinion drew only on non-CPRA cases interpreting CCP §1060 to hold that that this case is moot because declaratory relief is not available under the facts of this case. (Op. at 13.)

The Sixth District's conflation also violated the constitutional imperative to broadly construe a statute and caselaw when it furthers the right of access (*i.e.*, §7923.000), and to narrowly construe a statute and caselaw when it would limit access (*i.e.*, CCP §1060). (Cal. Const. Art. I, §3(b)(2)). The Court of Appeal ignored this analysis and instead effectively applied it in reverse: broadly construed CCP §1060 and the authorities applying it to limit LFSV's declaratory judgment rights under the CPRA, while narrowly construing §7923.000 and the authorities elucidating its grant of declaratory judgment rights (*e.g.*, *Filarsky* and *CYAC*).

Moreover, our Constitution requires that "[a] statute, court rule, **or other authority** adopted after the effective date of this subdivision that limits the right of access **shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest**." (Cal. Const. Art. I, §3(b)(2) [emphasis added].) That is, even if CCP

§1060 applied under the CPRA, the Sixth District's opinion did not (and cannot) describe how prohibiting declaratory relief when records no longer exist because the public agency failed to search for them and then allowed them to be destroyed protects any interest served by the CPRA.

The proper rule in interpreting the scope of declaratory relief in CPRA actions is to interpret declaratory relief under §7923.000 to extend to past actions such as the agency's failure to conduct an adequate search to ensure that public agencies comply with the CPRA and Constitution in future requests.

Even if this Court were inclined to agree that on the facts of this case, LFSV's claims may be moot, given the importance of the preservation issue, the Court can and should nonetheless consider the merits where, as here, the issues presented are of importance and are capable of repetition yet tend to evade review. (*See In re Webb* (2019) 7 Cal.5th 270, 273-74.) The issue of whether or not police bodycam footage from sweeps is categorically exempt from review is guaranteed to occur again

(*see* Gilroy Prelim. Opp. at 10), and in light of Gilroy's now 60-day deletion policy,[4] it will evade review.

C. THE SIXTH DISTRICT'S OPINION CONFLICTS WITH OPINIONS FROM OTHER COURTS OF APPEAL

The published opinion of the Sixth District barring relief for CPRA violations also conflicts with opinions of other districts of the Court of Appeal—in particular, with the Fourth District's decision in *CYAC*.[5]

CYAC upheld the Superior Court's declaratory judgment ruling under current Section 7923.000 in favor of the petitioner holding that that it was a prevailing party for purposes of being awarded attorney fees. (*CYAC*, 220 Cal.App.4th at 1447.) Critically, the Superior Court found that the public agency failed to conduct an adequate search for records under the CPRA, which omission resulted in the destruction of the records both before and after litigation commenced. (*Id.* at 1446.) Importantly, *CYAC* recognized that forward-looking relief was not possible given that "the subject requested records were never produced,"

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[4] *See* Gilroy City Resolution 2020-08 at p.52 available at: http://weblink.cityofgilroy.org/WebLink/DocView.aspx?id=935534&dbid=0&repo=RECORDS&searchid=c39cf6a5-af91-43c0-8004-e1cdec4176c8

[5] The Sixth District's decision also conflicts with the Fifth District's decision in *Galbiso v. Orosi Public Utility District* (2008) 167 Cal.App.4th 1063, 1085-89.

but instead, as here, were destroyed by the time it issued its declaratory judgment. (*Id.* at 1446-47; *see also id.* at 1417, 1427.) Instead, *CYAC* looked at the public agency's past conduct, and relying on *Filarsky*, concluded that "CYAC may qualify as a 'prevailing' party, since CYAC sought and obtained declaratory relief that there **had been PRA violations**, and we have found the record supports that conclusion by the trial court." (*Id.* at 1447 [emphasis added].) The Fourth District concluded that "[i]t would **not be a practical or reasonable interpretation** of Government Code section 6259, subdivision (d)[6], to say that a public agency is protected from liability for an attorney fee award **because it cannot or will not produce the documents** due to its internal logistical problems or general neglect of duties." (*Id.* at 1447) [emphasis added].)

The Sixth District erroneously attempted to distinguish *CYAC* by claiming that the issue of mootness or whether declaratory relief was authorized was not raised or analyzed by the *CYAC* court. (Op. at 16.) But it ignored the fact that *CYAC* explicitly considered whether it could provide declaratory relief

[6] Now Gov. Code §7923.115(a)-(b).

when it recognized that it could not separately grant injunctive relief, a situation that exists in this case too. (*CYAC*, 220 Cal.App.4th at 1417.)

The Superior Court in *CYAC*, like the Superior Court below in these writ proceedings, expressly issued declaratory judgments under former Section 6258 for past wrongs, including "the City['s] [] fail[ure] to respond promptly to PRA requests," "unjustifiably claim[ing] the" requested documents "were not public records, and … fail[ing] to secure that information during litigation to prevent it from being destroyed." (220 Cal.App.4th at 1427; *see also id*. at 1396, 1430.) No records were ordered to be produced, instead, the *CYAC* court was adjudicating the rights the petitioner had—but which National City violated—when it failed to do an adequate search for records and allowed the responsive records to be destroyed. This relief, like the practice of the federal courts under FOIA, looked at past practices to declare, for the future, the rights of the petitioner and all members of the public to inspect and receive records—even though those records had been destroyed and were no longer capable of being produced.

The Sixth District's decision in this matter thus directly conflicts with the Fourth District's holding in *CYAC*: under the Sixth District's holding, the award of declaratory relief in *CYAC* pursuant to the CPRA would be impossible.

II. THE CPRA REQUIRES PRESERVATION OF RESPONSIVE RECORDS WITHHELD AS EXEMPT

This Court also should grant review of the Sixth District's conclusion that Gilroy was not obligated to preserve any record it withheld as exempt until the live dispute about that exemption was resolved. The Sixth District concluded that the CPRA does not require preservation of responsive records an agency has withheld as exempt because the CPRA "lacks any provisions pertaining to records retention" and because its "silent with respect to any obligation on the part of a public agency to keep any particular records or preserve records after a public records request has been made." (Op. at 18.) Instead, the court pointed to permissive retention statutes providing the floor for retention of certain government records, treated them as irreconcilable with an independent constitutional duty to preserve records under the CPRA, and held that Gilroy's destruction of responsive and withheld records were proper thereunder. (*Id*. at 18-20.)

The linchpin of the Sixth District's analysis was this Court decision in *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531—a *non-CPRA case* the Sixth District applied from "performing [its] independent review of the construction of the CPRA" (Op. at 20.) The Sixth District cited *Doe* for the proposition that "a court 'may not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does. Our office ... is simply to ascertain and declare what is in the relevant statutes, not to insert what has been omitted, or to omit what has been inserted.'" (Op. at 20 [quoting *Doe* at 545].) Stated differently, it held that, because the CPRA does not explicitly provide for a retention period, then it follows that the CPRA contains no duty to preserve. Not so.

The Sixth District's ruling contradicts the CPRA's purpose, its judicial review provisions, the fundamental canons of statutory interpretation, the constitutional imperative augmenting statutory interpretation in CPRA cases, and this Court's CPRA jurisprudence. It also runs counter to analogous public records laws throughout the country, including FOIA. (*See, e.g., Piper v. U.S. Dep't of Justice* (D.C. 2003) 294 F.Supp.2d 16, 22 n.1 ["Allegations of government officials destroying

documents germane to a FOIA request after that request has been initiated would compel judicial intervention on behalf of the requester."])

As discussed below, requiring preservation is not about broadening the CPRA "by reading into it language that does not appear in it" (*Doe*, 42 Cal.4th at 545.) Instead, as this Court noted in *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1184, it "begs the question of how the statutory language should be interpreted in the first place."

A. THE SIXTH DISTRICT'S RULING CONTRAVENES THE CPRA'S PURPOSE AND FRAMEWORK

As discussed above, among other laudable goals, the CPRA is designed "to expose corruption, incompetence, inefficiency, prejudice, and favoritism." (*Local 21*, 42 Cal.4th at 333.) The CPRA thus "establishes a presumptive right of access to any record **created or maintained**[7] by a public agency that relates in any way to the business of the public agency." (*Sander v. State Bar of Cal.* (2013) 58 Cal.4th 300, 323 [emphasis added].) Public

[7] LFSV does not argue that the CPRA requires agencies to *create* records *in response* to CPRA requests. The Sixth District's reliance on the *dicta* in *Los Angeles Police Dep't v. Superior Court* (1977) 65 Cal.App.3d 661, 668, a case regarding compelling answers to interrogatories, is thus irrelevant. (Op. at 18.) Stated differently, the CPRA does not require the preservation of records that never existed.

agencies "shall make [every such public] record promptly available to any person" "upon request" "except with respect to public record exempt from disclosure by express provision of law[.]" (Gov. Code §7911.530.) The CPRA sets forth numerous exceptions to the requirement of public disclosure. (*Id*. at §§7923.600-7929.610.) As relevant here, for example, the CPRA exempts from disclosure "records of investigation" conducted by and "investigatory files" compiled by law enforcement. (*Id*. at §7923.600(a).)

The CPRA does not make public agencies the judges or juries of what public records are exempt under the Act. To the contrary, recognizing the inherent conflict of interest in allowing agencies to be the arbiters of whether records are exempt, the Legislature gave the CPRA teeth by providing for judicial review in order for a court to determine whether they are actually exempt or not.

As the CPRA states, an "agency shall justify withholding any record by demonstrating that the record in question is exempt under" the CPRA. (Gov. Code §7922.000.) The CPRA also allows any person to institute legal proceedings against any agency that has withheld public records "to enforce his or her

right to inspect or to receive a copy of any public record or class of public records[.]" (*Id*. at §7923.000.) In any such legal proceedings, "the court **shall** decide the case **after** the court" "[e]xamine[s] the record **in camera**." (*Id*. at §7923.105(a) [emphasis added].) And "if the court finds that the public official's decision to refuse disclosure is not justified under" any of the CPRA's exemptions, "the court shall order the public official to make the record public." (*Id*. at §7923.110(a).)

These provisions must be construed to effectuate the will and purpose of the Legislature and California voters (*supra*, pp. 7-8) in making access to public records a fundamental right. (*See City of San Jose,* 2 Cal.5th at 616-17 [When interpreting a statute, the court's "fundamental task ... is to determine the Legislature's intent so as to effectuate the law's purpose."]; *Kaiser v. Hopkins* (1936) 6 Cal.2d 537, 538 [Constitutional provisions adopted through initiative measures like Proposition 59 are interpreted to effectuate the voters' intent].) So construed, the CPRA—like the public records acts of other states—"inherently includes the duty to preserve and maintain such records until access has been provided or a court executes an order finding the record to be exempt from disclosure" notwithstanding that "such

a requirement was not expressly provided for by the Legislature." (*Walloon Lake Water Sys., Inc. v. Melrose Twp*. (1987) 163 Mich.App. 726, 732.)

Otherwise, the CPRA's mandatory judicial review and remedies provisions cannot be faithfully executed and the Legislature's purpose is frustrated. For this reason, *Golden Door Properties, LLC v. Superior Court* (2020) 53 Cal.App.5th 733, 764, in an analogous context ruled that, CEQA's "core [] policies"[8] and "plain language" meant that an "agency may not destroy, but rather must retain writings [Public Resources Code] section 21167.6 mandates for inclusion in the record of proceedings," notwithstanding that CEQA, like the CPRA, does not explicitly require retention. It reasoned that "a complete and thorough record under section 21167.6 is crucial to enable the judicial branch to fulfill its CEQA role in assuring the agency's determinations are lawful and supported by substantial evidence." (*Id*.)

[8] Like the CPRA, CEQA's core policies include "[p]olitical accountability, [and] informed self-government[.]" (*Golden Door*, 53 Cal.App.5th at 763 [citation and quotation omitted]).

So too here.[9] The CPRA's pro-democracy purposes and mandatory judicial review provisions require retention of records that public agencies withhold as exempt. As this Court recognized in *Williams v. Superior Court* (1993) 5 Cal.4th 337, 356 [emphasis added]: "[T]he court **logically must review** the documents and hear the agency's claim for withholding them in order to determine whether **they actually relate** to the investigation and, thus, properly belong in the file. **Only** through such an examination can the court ensure that an agency has not commingled investigatory materials with other documents that have no legitimate claim to confidentiality." Stated differently, the CPRA's judicial review procedures (*e.g.*, *in camera* review) are essential to determine whether a government agency's assertion of an exemption is actually valid. Indeed, an agency's determination that a record is exempt is not entitled to any deference. (*See Sacramento Cnty. Employees' Ret. Sys. v. Superior Court* (2011) 195 Cal.App.4th 440, 466-67.)

[9] While *Golden Door's* holding concerning the need for document preservation to effect the Act's purpose was rendered in the context of CEQA, the issue presented here is the same. (*Cf. Comm'n on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 291-92 ("*Commission*") [finding cases that had considered the same issue but "for purposes of other statutes" to be persuasive.])

If public agencies do not preserve the records they have ostensibly reviewed and declared exempt, they effectively become the final arbiters of exemptions. As the Michigan Court of Appeals acknowledged when reviewing this issue under its own public records act, "The Legislature could not have intended for a public body which seeks to prevent disclosure to take justice into its own hands in such a manner." (*Walloon Lake*, 163 Mich.App. at 733.) That result is antithetical to the purpose of the CPRA and the remedy of judicial review. It creates a glaring loophole in the CPRA allowing agencies to subvert the public's right of access "simply by refusing to disclose them [as exempt] over a period of time." (*Local 21*, 42 Cal.4th at 336.)

The Sixth District's reasoning here "would not only put an increasing amount of information beyond the public's grasp but also encourage government officials to conduct the public's business" in a way to escape judicial review. (*City of San Jose*, 2 Cal.5th at 625 [citation and quotation omitted].) Specifically, if public agencies could evade the disclosure requirements of the CPRA by simply allowing an agency to assert a blanket objection and then run out the clock on preservation, important public information—especially police bodycam footage (*supra*, p. 25

n.4)—will evade public scrutiny (as it did here). Gilroy was effectively able to render the CPRA's investigatory privilege exemption "absolute" with its "bare assertion that [the footage requested] relate[d] to an investigation"—a result this Court has rejected. (*Williams*, 5 Cal.4th at 356.)

To the extent that the CPRA's silence on preservation "allows for more than one statutory construction," requiring preservation leads to a more reasonable result that is consistent with the CPRA's goals, and avoids the "unreasonable, impractical, [and] arbitrary result[]" that an interpretation permitting destruction of public records and denial of public access would otherwise permit. (*Commission,* 42 Cal.4th at 290; *see also* Gov. Code. §7922.500.)

Ardon, for instance, looked past the unambiguous language in former Section 6254.5 concerning waiver of CPRA exemptions and found a non-explicit exception for inadvertent disclosures. (62 Cal.4th at 1183.) Although Section 6254.5 categorically and unconditionally provided that any "disclosure" of exempt records constitutes waiver of the exemption, this Court stated that it did not apply to "inadvertent" disclosures—but rather to "voluntary and knowing" disclosures only. (*Id.*)

Considering "as a whole" the CPRA's "many exemptions for confidential information specified in [the CPRA,] it is doubtful the Legislature intended to enact a statutory scheme that would prevent government agencies from minimizing the damage caused by the inadvertent disclosure of private and confidential information." (*Id*. at 1183.)

Likewise, considering the CPRA's various judicial procedures (*e.g*., §7923.105) and remedies (*e.g*., §7923.110(a)) as a whole, the Legislature could not have intended that agencies could destroy records with impunity and thereby deprive the judiciary of its CPRA function (and ostensibly its jurisdiction).

Moreover, *Ardon* placed waiver of the CPRA's exemptions due to inadvertent disclosures under former section 6254.5 "in alignment with the law governing the waiver of evidentiary privileges" under the Evidence Code, reasoning there was "no reason to construe" them differently. (62 Cal.4th at 1188-89.) Likewise, the Legislature must have contemplated that courts would align the duty to preserve under the CPRA with the Civil Discovery Act. Just as it is axiomatic that "[d]estroying evidence in response to a discovery request after litigation has commenced would surely be a misuse of discovery" (*Cedars-Sinai Medical*

Center v. Superior Court (1998) 18 Cal.4th 1, 12), so too is it an abuse of CPRA's contemplated judicial evaluation of public records to destroy them after they are requested and withheld as exempt.

Furthermore, requiring preservation avoids a construction of the CPRA which renders its judicial review and remedies provisions surplusage. (*See Big Creek Lumber Co. v. Cnty. of Santa Cruz* (2006) 38 Cal.4th 1139, 1155.)

B. THE SIXTH DISTRICT IGNORED THE CONSTITUTIONAL IMPERATIVE TO BROADLY CONSTRUE THE CPRA

"In CPRA cases, th[e] [above] standard approach to statutory interpretation is augmented by a constitutional imperative" that "[a] statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (*City of San Jose*, 2 Cal.5th at 617 [citation omitted].) But, as it did with its analysis of declaratory judgment relief, the Sixth District utterly ignored the California Constitution in its analysis of whether the CPRA requires preservation of public records.

Should applying basic canons of statutory interpretation leave any doubt that the CPRA inherently includes a duty to preserve records that have been withheld as exempt, applying the constitutional imperative that Sections 7923.000, 7923.105(a), and 7923.110(a) be broadly construed, compels the conclusion that withheld records must be preserved. Indeed, applying this mandate, this Court has repeatedly construed the CPRA to broaden access to public records and effectuate the Legislature's intent. (S*ee, e.g., supra,* pp. 8-9.)

In *City of San Jose*, 2 Cal.5th at 621, for example, this Court held that, "although employees are not specifically mentioned in the [CPRA's] local agency definition, nothing in the statutory language indicates the Legislature meant to exclude these individuals from CPRA obligations." This Court held that: "[b]roadly construed, the term 'local agency' logically includes not just the discrete governmental entities listed in [former] section 6252, subdivision (a) but also the individual officials and staff members who conduct the agencies' affairs." (*Id*. at 620.)

Likewise, although the duty to preserve is not explicit in the CPRA, nothing therein suggests the Legislature intended to exclude such a duty either. Broadly construed, the CPRA's

judicial review and remedies provisions (§§7923.100-115) logically include an antecedent duty to preserve withheld documents without which judicial review wouldn't be possible—just as agencies operating without individual employees would not be possible.

C. THE SIXTH DISTRICT IGNORED THE CONSTITUTIONAL IMPERATIVE TO NARROWLY CONSTRUE LAWS RESTRICTING ACCESS

The Sixth District reasoned that, because Government Code sections 34090(d) and 34090.6(a), and Penal Code section 832.18 (together, "Retention Statutes") provide a floor for retention of certain records, that the CPRA does not and cannot independently require preservation. This reasoning is erroneous for numerous reasons.

First, unlike the mandatory provisions in the CPRA which require preservation, the Retention Statutes are *permissive*. They are also consistent with retention under the CPRA as they specifically account for public agencies' preservation obligations under the CPRA and other laws. Section 34090(d) provides that "the head of a city department **may** destroy any city record" after two years "**[u]nless otherwise provided by law**." Relatedly,

Section 34090.6 provides that: "Notwithstanding the provisions of Section 34090, the head of a department of a city or city and county, after one year, **may** destroy recordings of routine video monitoring …."

And Penal Code section 832.18(b)(5)(A) provides that under certain conditions, "video and audio recorded by a body-worn camera should be retained for a minimum of 60 days, after which it **may** be erased, destroyed, or recycled." Significantly, the Legislature stated that "[t]his section shall not be interpreted to limit the public's right to access recorded data under the California Public Records Act." (Cal. Penal. Code § 832.18(d).) The CPRA's independent retention obligation is thus consistent with the Retention Statutes. (*See Golden Door*, 53 Cal.App.5th at 772-73 [holding that the county's 60-day automatic e-mail deletion policy "was consistent with" CEQA's preservation requirement because said policy did not allow for destruction of emails "required by law to be kept" and because "e-mails within the scope of [CEQA] are required by law to be kept. Therefore, such e-mails … cannot be automatically destroyed after 60 days."])

As another court noted, "when construing the interaction of two potentially conflicting statutes, we must, where reasonably possible, harmonize them, reconcile their seeming inconsistencies, and adopt a construction that gives 'force and effect to all of their provisions.'" (*Becerra v. Superior Court* (2020) 44 Cal.App.5th 897, 924 [citation omitted].) Unlike in *Becerra*, the Sixth District erred in failing to reconcile the mandatory and independent statutory and constitutional duty to preserve documents withheld as exempt under the CPRA with the permissive retention periods in the Retention Statutes. (*See id.* at 922 ["Our interpretation of the CPRA and section 832.7 not only promotes the purposes reflected in the statutory language and legislative history, it harmonizes with the constitutional principle that the people have a right to access information concerning the conduct of the people's business and that restrictions on this right are narrowly construed."]). The Retention Statutes provide a floor, not a ceiling for retention. The Sixth District incorrectly assumes that records retention requirements cannot overlap.

Second, the Retention Statutes are inapplicable to the police bodycam footage Gilroy destroyed. The two-year retention

period in Section 34090(d) doesn't apply to "[r]ecords required to be kept by statute" (*e.g.*, the CPRA). (Gov. Code §34090(c).) And the one-year retention period in Section 34090.6 does not apply to episodic use of police bodycams at Sweeps (*see Nelson v. Superior Court* (2001) 89 Cal.App.4th 565, 567, 568-69 n.2), but rather to recording of "routine video monitoring" "designed to record the *regular and ongoing* operations of" law enforcement such as "mobile in-car video systems, jail observation and monitoring systems, and building security recording systems." (Gov. Code §34090.6(c).)

The sixty-day retention period in §832.18(b)(5)(A), moreover, does not apply to bodycam footage that "is relevant to a formal or informal complaint against law enforcement officer or a law enforcement agency." (Penal Code §832.18(b)(5)(B)(iii).) The content of the bodycam footage from Sweeps were the subject of various formal and informal complaints against GPD. Accordingly, none of these Retention Statute provided Gilroy refuge. (*See, e.g., People v. Zamora* (1980) 28 Cal.3d 88, 98.)

The statutes setting the minimum floor for retaining unrequested and non-exempt public records do not negate the obligation to preserve documents under the CPRA and

Constitution. Yet, the Sixth District broadly construed these permissive retention timelines in the Retention Statutes to override the mandatory constitutional and statutory duty to preserve records under the CPRA. In so doing, it violated the constitutional imperative to narrowly construe the Retention Statutes to the extent they limit access. Indeed, in *Commission*, this Court narrowly construed the confidentiality created for sacrosanct peace officer personnel records by Penal Code section 832.8 held that "the Court of Appeal's construction of section 832.8, although consistent with the statute's language, is unreasonable because it would lead to arbitrary and anomalous results." (42 Cal.4th at 290.)

D. OTHER JURISDICTIONS HAVE EITHER RECOMMENDED OR REQUIRED THE PRESERVATION OF RESPONSIVE RECORDS DURING THE PENDENCY OF A REQUEST FOR PUBLIC RECORDS.

The Sixth District's holding is also out of step with analogous caselaw under the FOIA, after which the CPRA was modeled. Numerous courts interpreting FOIA have found that a public agency cannot destroy responsive records *after* it has received a FOIA request. (*See, e.g., Laughlin v. C.I.R.* (S.D. Cal. 1999) 103 F.Supp.2d 1219, 1223 ["A government improperly

destroys agency records under FOIA only if it destroys them after a FOIA request has been made to the agency."]; *see also Chambers v. U.S. Dep't of Interior* (D.C. Cir. 2009) 568 F.3d 988, 1004; *SafeCard Services, Inc. v. S.E.C.* (D.C. Cir. 1991) 926 F.2d 1197, 1201; *Hoffman v. U.S. Customs and Border Protection*, No. 20-6427, 2023 WL 4237096, at *15-16 (June 28, 2023); *Wadelton v. Dep't of State* (D.C. 2015) 106 F.Supp.3d 139, 147; *Judicial Watch, Inc. v. U.S. Dep't of Commerce* (D.C. 1998) 34 F.Supp.2d 28, 41.)

Similarly, various state authorities—be it courts, attorney generals, or municipalities—have also observed that the public's right of access inherently carries with it the duty to preserve responsive records. (*See, e.g., Walloon Lake,* 163 Mich.App. at 732; *Kish v. Akron* (2006) 109 Ohio St.3d 162, 166 ["the right of access to government records is a hollow one if records are not preserved for review."]; *see also Daugherty v. Jacksonville Police Dep't* (2012) 411 S.W.3d 196, 204; 3-PA-313-23.; 3-PA-309-11.)

CONCLUSION

Access to public records is necessary and fundamental to a functioning democracy. Access to public records will be out of reach for the majority of people and organizations if they must

play a complex game to figure out whether a public agency is systematically destroying records while stalling production of records. The Sixth District's decision restricts access to public records, and this result betrays the California Constitution promise that the CPRA must be construed to broaden public access. For these reasons review should be granted. This Court should issue a corrected opinion granting Law Foundation's Writ (H049554) and denying Gilroy's Writ (H049552) in its entirety.

Dated: December 4, 2023 By */s/Neel Chatterjee*

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CERTIFICATE OF COMPLIANCE

I, Neel Chatterjee, counsel for Petitioner, the Law Foundation of Silicon Valley, hereby certify, pursuant to California Rules of Court, Rule 8.204(c)(1), that the word count for this petition, exclusive of caption page, tables, signature blocks, attachments, and this Certificate of Compliance, according to Microsoft Word's word-processing software used to prepare this brief, is 8,355 words.

Dated: December 4, 2023 By */s/Neel Chatterjee*

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EXHIBIT A

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CITY OF GILROY, Petitioner, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent; LAW FOUNDATION OF SILICON VALLEY, Real Party in Interest.	H049552 (Santa Clara County Super. Ct. No. 20CV362347) **ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING** **NO CHANGE IN JUDGMENT**
LAW FOUNDATION OF SILICON VALLEY, Petitioner, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent; CITY OF GILROY, Real Party in Interest.	H049554 (Santa Clara County Super. Ct. No. 20CV362347)

The Law Foundation of Silicon Valley's petitions for rehearing are denied. The court orders that the opinion filed October 23, 2023, be modified as follows:

1. On page five, paragraph one, lines 9-10, the sentence beginning "Law Foundation later agreed" is deleted and replaced with the following sentence:

> Law Foundation later initially agreed to limit its request to video and audio recordings produced from January 1, 2019, through the present.

2. On page 23, paragraph one, lines 1-2, the sentence "Costs in this original proceeding are awarded to petitioner City of Gilroy" is deleted and replaced with the following paragraph:

> The parties shall bear their own costs on appeal. Upon finality of this decision, the temporary stay order is vacated.

There is no change in the judgment.

Greenwood, P. J.

Danner, J.

Wilson, J.

10/23/2023

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CITY OF GILROY, Petitioner, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent; LAW FOUNDATION OF SILICON VALLEY, Real Party in Interest.	H049552 (Santa Clara County Super. Ct. No. 20CV362347)
LAW FOUNDATION OF SILICON VALLEY, Petitioner, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent; CITY OF GILROY, Real Party in Interest.	H049554 (Santa Clara County Super. Ct. No. 20CV362347)

I. INTRODUCTION

Petitioner Law Foundation of Silicon Valley (Law Foundation) is a "nonprofit legal services organization whose mission is to advance the rights of under-represented individuals and families through legal services, strategic advocacy, and educational

outreach." During its investigation of complaints by homeless persons that their personal property was being destroyed during cleanups of homeless encampments, the Law Foundation made numerous public record requests to the City of Gilroy (City).[1]

Dissatisfied with City's responses to its public records request, Law Foundation filed a petition for writ of mandate and complaint for declaratory relief alleging that City had violated the California Public Records Act (CPRA; Gov. Code, § 7920.000 et seq.)[2] In the October 1, 2021 order, the trial court denied the petition for a writ of mandate and granted declaratory relief in part, finding that City had violated the CPRA in responding to Law Foundation's public records requests but rejecting Law Foundation's request for a declaration that City had violated the CPRA by failing to preserve responsive records it claimed were exempt while Law Foundation's public records requests were pending.

Both parties filed writ petitions in this court challenging parts of the trial court's order. In case No. H049552, *City of Gilroy v. Superior Court*, City contends that the trial court erred in granting declaratory relief, failing to find that Law Foundation's claims of CPRA violations were moot, and tentatively finding that Law Foundation is the prevailing party for purposes of awarding costs and attorney fees. In case No. H049554, *Law Foundation v. Superior Court,* Law Foundation argues that the trial court erred in denying Law Foundation's request for a declaration that the City violated the CPRA by destroying responsive records after it received the Law Foundation's CPRA requests.

For the reasons stated below, we determine that (1) the trial court erred in case No. H049552, *City of Gilroy v. Superior Court* by granting declaratory relief on the basis of its findings that City's past conduct in responding to Law Foundation's public records requests violated the CPRA; and (2) the trial court did not err in case No. H049554, *Law*

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[1] To be consistent with the parties' terminology in their briefs and in the proceedings below, we will refer to unhoused persons as homeless.

[2] The CPRA was previously codified as section 6250 et seq. and was recently recodified and reorganized as section 7921.000 et seq. All further statutory references are to the Government Code unless otherwise indicated.

Foundation v. Superior Court, by denying Law Foundation's request for a declaration that City violated the CPRA by failing to preserve responsive records it claimed were exempt while Law Foundation's public records requests were pending. We will therefore issue a writ of mandate directing the trial court to vacate the October 1, 2021 order and to enter a new order denying Law Foundation's petition for writ of mandate and complaint for declaratory relief in its entirety.

II. FACTUAL BACKGROUND

A. *Records of GPD Body-Worn Camera Video Footage*

Gilroy Police Department (GPD) receives complaints about homeless encampments that have been established on private or public property, including the property of the Santa Clara Valley Water District (Water District). When requested by the Water District, GPD assists with the cleanup of homeless encampments (also known as sweeps) on Water District property. According to former Chief of Police Scot Smithee, "[d]uring an encampment cleanup, GPD officers proceed in advance of the Water District crews. The GPD officers locate and investigate individuals who have failed to comply with the prior written and oral notices to vacate the premises. Officers make contact with these individuals to investigate potential violations of the law, such as trespass or illegal storage, and direct individuals to collect their belongings and immediately vacate the property prior to the Water District personnel arriving to complete the cleanup." The Water District is responsible for collecting belongings left at the cleanup site and either disposing of them or leaving items of apparent value at the site for homeless persons to retrieve later. GPD collects and stores a few items, such as identification cards.

According to Smithee, GPD officers assisting with homeless encampment cleanups have body-worn cameras (bodycams), which they activate "if they are engaging in a criminal investigation or enforcement action." Video footage generated by GPD officers' bodycams is collected and stored in accordance with GPD's record management

system. David Boles, GPD's records manager, is responsible for the collection and maintenance of all GPD records, including video footage from bodycams. Boles is also responsible for responding to public record requests for GPD records. City's records retention policy for GPD records requires bodycam video footage to be retained for one year, then automatically deleted by a computer system unless flagged for preservation. Once a bodycam video is automatically deleted, it cannot be recovered or viewed by GPD.

B. ***Law Foundation's 2018 Public Records Requests***

After receiving complaints from homeless persons that their personal property was being destroyed during cleanups of homeless encampments, the Law Foundation began an investigation that included making numerous public record requests to City. Relevant here, Law Foundation submitted an October 9, 2018 request that included the following: (1) "Request 11: Any and all public records constituting, reflecting or relating to the proactive enforcement of Quality of Life violations between January 1, 2015 through the present"; (2) "Request 18: Any and all public records constituting, reflecting or relating to the number of encampment sweeps conducted between January 1, 2015 through the present"; and (3) "Request 24: Any and all public records constituting, reflecting or relating to the Zero Tolerance Policy regarding the homeless and Quality of Life violations between January 1, 2015 through the present."

City provided responsive materials to Law Foundation's October 9, 2018 public records requests with an October 29, 2018 response from the assistant city attorney that stated in part, "[t]he GPD's law enforcement records generally, and Quality of Life criminal code enforcement records specifically, are exempt from disclosure under the [CPRA]."[3] GPD did not provide any bodycam video footage in response to Law

[3] The CPRA exempts " '[r]ecords of complaints to, or investigations conducted by, or records of intelligence information or security procedures of . . . any state or local

Foundation's October 9, 2018 public records request, or in response to Law Foundation's subsequent public records requests to GPD dated October 15, 2018, and November 8, 2018, that similarly sought records related to cleanups of homeless encampments. Since GPD's bodycam video footage was determined by the City Attorney to be exempt, Boles did not search for or review any bodycam video footage after receiving Law Foundation's October and November public records requests.

C. *Law Foundation's May 2019 Public Records Requests*

Law Foundation staff attended a May 2019 homeless task force meeting at GPD where, according to Law Foundation, Chief Smithee stated that all homeless encampment sweeps are videotaped. Law Foundation then submitted a May 20, 2019 public records request to City that requested (1) "All videos taken by the Gilroy Police Department during sweeps in Gilroy conducted between January 1, 2016 and the present;" (2) "All videos taken by the Gilroy Police Department of the encampment sweep behind the Compassion Center on April 26, 2019;" and (3) "All audio recordings by the Gilroy Police Department during sweeps between January 1, 2016 through the present." Law Foundation later agreed to limit its request to video and audio recordings produced from January 1, 2019, through the present.

After City received the May 20, 2019 public records request, City and Law Foundation engaged in a series of communications regarding the scope of the request and City's need to review the videotapes and audio recordings to determine if any fell outside the exemption for records of investigations and investigatory files. City subsequently provided some responsive materials with a June 11, 2019 letter from the assistant city attorney, which informed Law Foundation that its request for GPD bodycam video footage from the homeless encampment sweeps was denied because the bodycam videos were exempt from disclosure.

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police agency.' " (*National Lawyers Guild v. City of Hayward* (2020) 9 Cal.5th 488, 493 [citing former § 6254, subd. (f), now § 7923.600, subd. (a)] (*National Lawyers Guild*).)

In a June 21, 2019 letter the Law Foundation demanded that City "produce video and audio recordings of sweeps in Gilroy that were not taken during a criminal investigation for a 'specific and concrete' law enforcement purpose." After further communications between the parties, on August 12, 2019, the Law Foundation notified City that it intended to file a petition for writ of mandate seeking a court order to compel City to release GPD video and audio recordings of encampment sweeps occurring between January 1, 2016 through the present. Due to Law Foundation's stated intention of filing a writ petition to obtain release of the bodycam video footage, on August 22, 2019, GPD voluntarily placed a " 'litigation hold' " on the footage to preserve it beyond the one-year retention period.

City then decided to release GPD bodycam video footage from encampment sweeps that did not relate to citations or arrests.[4] After reviewing the bodycam footage, in October 2019 City provided approximately 52 minutes of footage from homeless encampment sweeps that were conducted on June 1, 2018, February 17, 2019, and April 26, 2019. City withheld from disclosure 10 minutes and four seconds of GPD bodycam video footage from encampment sweeps conducted on February 8, 2018, and February 9, 2018, that showed two encounters in which GPD officers issued citations. According to Boles, GPD's records manager, "[a]side from the 10:04 minutes of footage that [City] continued to withhold and the 52 minutes of footage released to [Law Foundation], no other body camera footage from encampment sweeps conducted between January 1, 2016 and May 20, 2019 was located within [City's] possession."

[4] We omit any facts or discussion pertaining to City's requirement that Foundation pay for City's redaction of the bodycam videos to preserve individuals' privacy, since the record reflects that City has refunded the fees and the redaction fees are no longer at issue.

III. PROCEDURAL BACKGROUND

A. *October 8, 2020 Order*

The parties agree that the trial court performed an in camera review of the 10 minutes and four seconds of bodycam video footage that City had withheld as exempt pursuant to section 7923.600, subdivision (a) exemption for investigatory records. The parties also agree that in the October 8, 2020 order the trial court ruled that the exemption was valid and the footage was properly withheld. The October 8, 2020 order was not included in the record on appeal and is not at issue in the present original proceedings.

B. *Law Foundation's Petition for Writ of Mandate*

In December 2020 Law Foundation filed a verified first amended petition for writ of mandate and complaint for equitable relief (hereafter, writ petition or petition) alleging that City had committed several violations of the CPRA.

In the writ petition, Law Foundation asserted that City did not inform Law Foundation until July 2020 that it had destroyed potentially responsive GPD bodycam video footage while Law Foundation's public records requests were pending. At that time, City informed Law Foundation that all bodycam video footage prior to August 2019 had been destroyed, with the exception of one June 2018 video that was later provided by City. According to Law Foundation, City "did not put any kind of preservation flag or hold on police body camera footage until August 22, 2019, [and] did not begin reviewing 'potentially responsive video footage' until August 12, 2019."

Law Foundation also asserted that following its May 2019 public records requests for GPD bodycam videos pertaining to homeless encampment sweeps, City did not provide any bodycam videos until October 24, 2019, after a series of communications between the parties regarding City's response to Law Foundation's May 2019 public records requests.

Based on these and other allegations, Law Foundation asserted a cause of action for violations of former sections 6253 and 6253.9 [now sections 7922.500 and 7922.570]

and article I, section 3 of the California Constitution. The alleged violations included City's delay in responding to public records requests, City's failure to search for responsive records, and City's destruction of responsive records while Law Foundation's public records requests were pending. Law Foundations sought a writ of mandate directing City to produce all requested records not lawfully withheld and also declaratory relief, as follows: (1) a declaration that Law Foundation had a right to responses to its requests that were compliant with CPRA's time limits and rules regarding extensions of time; and (2) a declaration that City failed to produce responsive records that existed at the time of Law Foundation's requests but were subsequently destroyed. Law Foundation also sought an award of attorney fees and costs.

City filed an answer to the writ petition affirmatively asserting that Law Foundation was not entitled to the relief requested.

C. *Trial Court Proceedings*

1. Pretrial Briefing

Before the hearing in this matter, the parties submitted pretrial briefs supported by declarations and documentary evidence. Law Foundation argued in its pretrial brief that it was entitled to declarations that City's actions were unlawful under the CPRA, as follows: (1) "City conducted inadequate search(es) for public records, including police video camera footage, responsive to the Law Foundation's [CPRA] requests dated October 9, 2018; October 15, 2018; November 8, 2018; and May 20, 2019 . . .;" (2) "City provided inadequate written response(s) to each of the CPRA Requests, including by failing to specify the exempt records or representing that they no longer existed;" (3) "City unlawfully allowed potentially responsive police video camera records to be destroyed both while the CPRA Requests were pending, and after this litigation commenced;" (4) "City improperly and without notice to the Law Foundation, categorized all police video camera footage of homelessness sweeps as categorically exempt under the CPRA, and declined even to review them until after this litigation was

threatened;" (5) "City failed to meet its burden to prove that all withheld records were properly exempt and/or could not be redacted, including those it allowed to be destroyed;" and (6) "City failed to timely respond to the CPRA Requests."

Law Foundation also sought a "[d]eclaration from the Court that an adequate search requires . . . City to watch and listen to a responsive clip of bodycam footage in its entirety before determining that it is exempt from disclosure under the CPRA." Finally, Law Foundation sought "[a]n injunction that enjoins . . . City from destroying records requested under a CPRA Request and deemed exempt for a period of three years after receipt of the CPRA Request." Law Foundation did not argue that a writ of mandate should issue directing City to produce all requested records not lawfully withheld.

In its trial brief, City contended that the writ petition should be denied because its actions in response to Law Foundation's CPRA requests were reasonable and did not violate the CPRA. City also contended that the CPRA did not require City to place a litigation hold on records that were withheld as exempt. Further, City argued that Law Foundation's claims of CPRA violations were moot, because prior to litigation City had provided all responsive GPD bodycam video footage in its possession, except for the 10 minutes and four seconds of footage that the trial court had previously ruled was exempt.

2. October 1, 2021 Order

In the October 1, 2021 "order of judgment" the trial court denied the writ petition, granted declaratory relief in part, and denied the request for injunctive relief, as follows: "The Court grants declaratory relief: (1) . . . [C]ity violated the CPRA by conducting an inadequate search related to the Law Foundation's 2018 Public Records Act requests . . .; (2) with respect to the 2018 requests, . . . City had a duty to, but did not, watch the bodycam footage before asserting a blanket exemption when the details of the footage were unclear on their face in order to determine whether the exemption applies, separate the exempt and nonexempt material, if any, and share information derived from the

exempt records with the requester as to why any withheld records were exempt rather than a boilerplate response that parrots the law. . . . ; and (3) [City's] response to the November 2018 CPRA request was not timely, occurring 33 days after the request was received."

The trial court denied declaratory relief as to Law Foundation's claims that City had an obligation to preserve records, finding that "City did not violate the CPRA by failing to preserve responsive records upon receipt of the Law Foundation's multiple Public Records Act requests," and "City did not violate the CPRA by failing to preserve responsive body camera footage after placing a litigation hold."

Additionally, the trial court denied "Law Foundation's request for an injunction preventing the City from destroying any footage for three years after receiving a Public Records Act request under the CPRA . . . because it asks the Court to expand the duties imposed upon an agency by the legislature, as the CPRA does not allow for prospective relief for presumed or potential future CPRA violations."

In the October 1, 2021 order the trial court also stated a tentative ruling that costs and attorney fees would be awarded to Law Foundation as the prevailing party because City had produced public records after litigation began and because the court had "granted declaratory relief finding that . . . City violated the CPRA," with a final determination to be made upon separate motions.

D. *Petitions for Writ of Mandate*

Both parties filed writ petitions in this court challenging parts of the trial court's order. In case No. H049552, *City of Gilroy v. Superior Court*, City contends that the trial court erred in granting declaratory relief, failing to find that Law Foundation's claims of CPRA violations were moot, and tentatively finding that Law Foundation is the prevailing party for purposes of awarding costs and attorney fees. In case No. H049554, *Law Foundation v. Superior Court,* Law Foundation argues that the trial court erred in

denying Law Foundation's request for a declaration that City violated the CPRA by destroying responsive records after it received the Law Foundation's CPRA requests.[5]

In each original proceeding, this court issued a temporary stay and an order to show cause why a peremptory writ should not issue as requested in the petition, and afforded the parties the opportunity for further briefing and oral argument. We also granted the application of the League of California Cities and the California Special Districts Association for leave to file an amicus curiae brief in support of City in each original proceeding.

IV. DISCUSSION

A. *Overview of California Public Records Act*

"The California Public Records Act . . . establishes a right of public access to government records. 'Modeled after the federal Freedom of Information Act (5 U.S.C. § 552 et seq.) [FOIA], the [CPRA] was enacted for the purpose of increasing freedom of information by giving members of the public access to records in the possession of state and local agencies.' [Citation.] In enacting the statute in 1968, the Legislature declared this right of access to be 'a fundamental and necessary right of every person in this state' ([former] Gov. Code, § 6250 [now § 7921.000])—a declaration ratified by voters who amended the California Constitution in 2004 to secure a 'right of access to information concerning the conduct of the people's business' (Cal. Const., art. I, § 3, subd. (b)(1), added by Prop. 59, Gen. Elec. (Nov. 2, 2004)). [Citation.]" (*National Lawyers Guild, supra*, 9 Cal.5th at p. 492.)

Section 7923.500 provides that the trial court's order under the CPRA, "which either directs disclosure of records by a public official or supports the official's refusal to disclose records, is immediately reviewable by petition to the appellate court for issuance of an extraordinary writ. [Citation.] The standard for review of the order is 'an

[5] On the court's own motion, we ordered case Nos. H049552 and H049554 to be considered together for purposes of oral argument and disposition.

independent review of the trial court's ruling; factual findings made by the trial court will be upheld if based on substantial evidence.' [Citation.]" (*City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1016 [citing former § 6259, subdivision (c)].) In performing our review, we may consider federal " 'legislative history and judicial construction of the FOIA' " in construing the CPRA. (*Ibid*.)

B. *City of Gilroy v. Superior Court* (H049552)

City contends that the trial court erred in ruling that City violated the CPRA by (1) performing an inadequate search in response to Law Foundation's 2018 public records requests; (2) failing to review GPD bodycam video footage and separating exempt from non-exempt footage; and (3) providing an untimely response to Law Foundation's November 2018 public records request. City also contends that the trial court erred in tentatively ruling that Law Foundation is the prevailing party and may be entitled to an award of costs and attorney fees. Further, City argues that the trial court erred in granting declaratory relief since the court did not order production of records and no additional responsive, non-exempt records can be produced, and therefore the matter is moot.

Law Foundation disagrees, arguing that the trial court did not err in finding that City's conduct in responding to Law Foundation's CPRA requests violated the CPRA, and it was not necessary for the court to find that City was negligent. Law Foundation also argues that the trial court has broad authority to grant declaratory relief with respect to the right to inspect public records. Finally, Law Foundation argues that the trial court did not abuse its discretion in tentatively ruling that Law Foundation is the prevailing party for purposes of an award of costs and attorney fees.[6]

[6] We decline the parties' invitation to review the trial court's tentative ruling that Law Foundation is the prevailing party for purposes of awarding costs and attorney fees, and we express no opinion on any future award of costs and attorney fees.

We need not address the merits of the trial court's rulings that City violated the CPRA in responding to Law Foundation's public records requests, since, as we will discuss, we determine that the matter is moot and declaratory relief is not available under the circumstances of this case.

1. Mootness

" 'It is well settled that an appellate court will decide only actual controversies . . . . We will not render opinions on moot questions or abstract propositions, or declare principles of law which cannot affect the matter at issue on appeal.' " (*Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 866.) "Stated differently, moot cases 'are "[t]hose in which an actual controversy did exist but, by the passage of time or a change in circumstances, ceased to exist." [Citation.]' [Citation.]" (*Parkford Owners for a Better Community v. County of Placer* (2020) 54 Cal.App.5th 714, 722.) "A case is moot when the decision of the reviewing court 'can have no practical impact or provide the parties effectual relief. [Citation.]' " (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214 (*MHC*); see also *Committee for Sound Water & Land Development v. City of Seaside* (2022) 79 Cal.App.5th 389, 405 [same].)

Regarding the relief available under the CPRA, this court has stated that "[t]he CPRA provides *no* . . . remedy that may be utilized for any purpose other than to determine whether a particular record or class of records must be disclosed." (*County of Santa Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 127 (*County of Santa Clara*).) Thus, the CPRA "provides no remedy for failure to timely comply with a request for records." (*Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 483.)

Under the FOIA, "after the agency produces all non-exempt documents and the court confirms the agency's proper invocation of an exemption, the specific FOIA claim is moot because the injury has been remedied. [Citations.]" (*Hajro v. U.S. Citizenship & Immigration Services* (9th Cir. 2016) 811 F.3d 1086, 1103.) Under the CPRA, an action

seeking a declaration that the plaintiffs could inspect and copy primary election ballots was deemed moot because the ballots had been recycled and could not be produced in response to a public records request. (*Citizens Oversight, Inc. v. Vu* (2019) 35 Cal.App.5th 612, 615 [exercising discretion to decide moot issue as a matter of public interest].)

In this case, it is undisputed that (1) City has produced all responsive nonexempt GPD bodycam video footage in its possession; and (2) the trial court's prior October 8, 2020 order ruled that the GPD bodycam footage withheld by City was properly withheld as exempt. Since Law Foundation has not raised any issue in this original proceeding as to "whether a particular record or class of records must be disclosed," we cannot grant Law Foundation any effective relief under the CPRA. (See *County of Santa Clara*, *supra*, 171 Cal.App.4th at p. 127.) Accordingly, Law Foundation's claims regarding the propriety of City's past conduct in responding to Law Foundation's public records requests are moot.

2. Declaratory Relief

We understand the Law Foundation to contend that the matter is not moot because the trial court had broad authority to grant declaratory relief with respect to whether City's past conduct in responding to Law Foundation's public records requests violated the CPRA. We are not persuaded. The California Supreme Court has instructed that "under the [CPRA], only a person seeking disclosure . . . may seek a judicial declaration regarding the agency's obligation to disclose a document." (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 428-429 (*Filarsky*).) "The sole purpose of such an action is to permit the expeditious 'determination of the obligation to disclose records requested from a public agency . . . .' [Citation.]" (*County of Santa Clara*, *supra*, 171 Cal.App.4th at p. 128.)

Here, City's obligation to disclose the 10 minutes and four seconds of bodycam footage withheld as exempt by City was determined in City's favor in the prior October

8, 2020 order, which is not at issue in the present original proceeding. Since the CPRA does not provide for declaratory relief other than to determine a public agency's obligation to disclose records, Law Foundation may not seek declaratory relief under the CPRA with respect to the propriety of City's past conduct in responding to Law Foundation's public records requests. (See *County of Santa Clara*, *supra*, 171 Cal.App.4th at p. 128.)

Moreover, Law Foundation has not shown that declaratory relief is available under Code of Civil Procedure section 1060, which "authorizes a declaratory judgment 'in cases of actual controversy relating to the legal rights and duties of the respective parties. . . .' " (*SJJC Aviation Services, LLC v. City of San Jose* (2017) 12 Cal.App.5th 1043, 1061 (*SJJC*).) It is well established that the " '[d]eclaratory procedure operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them.' [Citations.]" (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 848.) Accordingly, "complaining of past acts" by the defendant does not constitute an actual controversy " '*relating to the legal rights and duties of the respective parties*' within the meaning of Code of Civil Procedure section 1060." (*SJJC,* at p. 1062.)

" 'The court may refuse to [grant declaratory relief] in any case where its declaration or determination is not necessary or proper at the time under all the circumstances.' (Code Civ. Proc., § 1061.) The trial court's decision to entertain an action for declaratory relief is reviewable for abuse of discretion. [Citation.]" (*Filarsky, supra*, 28 Cal.4th at p. 433.) Since the trial court's grant of declaratory relief in this case was based on Law Foundation's complaints that City's past acts in responding to Law Foundation's public records requests violated the CPRA, we determine that the trial court abused its discretion in granting declaratory relief that is not authorized under either the

CPRA or Code of Civil Procedure section 1060. (See *SJJC*, *supra*, 12 Cal.App.5th at p. 1062.)

Law Foundation relies on the decisions in *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385 (*Community Youth*) and *Galbiso v. Orosi Public Utilities Dist.* (2008) 167 Cal.App.4th 1063 (*Galbiso*), for a contrary conclusion, but those decisions are distinguishable.

In *Community Youth*, the appellate court ruled that a city had a duty under the CPRA to disclose a consultant's field survey records because the city had a contractual ownership interest in those records and the right to possess them. (*Community Youth*, *supra*, 220 Cal.App.4th at p. 1429.) The appellate court also ruled that the city had an obligation under the CPRA to produce raw crime data in response to a public records request. (*Id*. at p. 1430.) The trial court's grant of declaratory relief on the basis that the city's responses to these public record requests violated the CPRA was upheld as to both categories of records. (*Id*. at pp. 1429, 1430.)

However, no issue was raised in *Community Youth*, *supra*, 220 Cal.App.4th 1385 regarding whether the public records requests were moot or whether declaratory relief was authorized under the CPRA or Code of Civil Procedure section 1060. "An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.' [Citations.]" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620.) And, in any event, the issues raised in *Community Youth* primarily concerned a city's obligation to disclose certain records under the CPRA. (*Community Youth*, *supra*, at p. 1417.) The decision in *Community Youth, supra*, therefore does not support Law Foundation's contention that a trial court has broad authority to grant declaratory relief regarding the propriety of a city's past acts in responding to public records requests under the CPRA where, as here, a public agency's obligation to disclose public records is not at issue.

In *Galbiso*, *supra*, 167 Cal.App.4th 1063, the appellate court upheld the trial court's ruling that a public utility district's refusal to allow the plaintiff access to its office to inspect public records violated the CPRA. (*Id*. at p. 1086.) However, the appellate court reversed the trial court's order denying attorney fees to the plaintiff, ruling that she was the prevailing party for purposes of an award of attorney fees under the CPRA. (*Id.* at p. 1089.) No issue was raised in *Galbiso*, *supra*, as to whether the CPRA issue was moot or whether declaratory relief was authorized with respect to the public utilities' past acts in responding to public records requests. Instead, the attorney fees issue was resolved in the plaintiff's favor because "Galbiso prevailed by vindicating her right of access to inspect public records." (*Id.* at p. 1088.)

For these reasons, we conclude the trial court erred in granting declaratory relief with respect to City's past conduct in responding to Law Foundation's public records requests.

C. *H049554 Law Foundation v. Superior Court*

Law Foundation challenges that part of the trial court's October 1, 2021 order denying its request for a declaration that City violated the CPRA by failing to preserve responsive records it claimed were exempt while Law Foundation's public records requests were pending and prior to court review.

1. The Parties' Contentions

Law Foundation argues that the CPRA should be broadly interpreted to impose a duty upon public agencies to preserve all documents responsive to a public records request that have been withheld as exempt for three years, pursuant to the three-year limitations period provided by Code of Civil Procedure section 338. Law Foundation asserts that absent a duty to preserve, public agencies are able "to delay and obstruct the inspection of public records forever by simply allowing an agency to assert a blanket objection and then run out the clock on preservation, even if all or portions of the records actually are not exempt." According to Law Foundation, City violated the CPRA by

failing to preserve while the requests were pending numerous bodycam videos that were responsive to Law Foundation's public record requests.

City responds that the trial court did not err because the CPRA is not a records retention statute, and the CPRA does not impose a duty on a public agency to place a litigation hold or retain records while a public records request is pending. City maintains that the retention of public records is governed by specific statutes, which authorized City's records retention policy of automatically deleting bodycam video footage after one year, with certain exceptions such as retaining footage that is evidence in a criminal prosecution. Alternatively, City argues that Law Foundation's requests for disclosure of GPD's bodycam video footage of homeless encampment sweeps were not pending when the footage was automatically deleted.

2. Analysis

We agree with City that the CPRA is not a records retention statute since the CPRA lacks any provisions pertaining to records retention. The CPRA is also silent with respect to any obligation on the part of a public agency to keep any particular records or to preserve records after a public records request has been made. The CPRA "itself does not undertake to prescribe what type of information a public agency may gather, nor to designate the type of records such an agency may keep, nor to provide a method of correcting such records. Its sole function is to provide for disclosure." (*Los Angeles Police Department v. Superior Court* (1977) 65 Cal.App.3d 661, 668.)

The Government Code provides the statutory retention periods that apply to a city's retention of public records. In general, the retention period is two years: "Unless otherwise provided by law, with the approval of the legislative body by resolution and the written consent of the city attorney, the head of a city department may destroy any city record, document, instrument, book, or paper, under the department head's charge, without making a copy thereof, after the same is no longer required. [¶] . . .[¶] This

section does not authorize the destruction of: [¶] . . .[¶] Records less than two years old." (§ 34090, subd. (d).)

A separate provision applies to video recordings: "Notwithstanding the provisions of Section 34090, the head of a department of a city or city and county, after one year, may destroy recordings of routine video monitoring, and after 100 days may destroy recordings of telephone and radio communications maintained by the department. This destruction shall be approved by the legislative body and the written consent of the agency attorney shall be obtained. In the event that the recordings are evidence in any claim filed or any pending litigation, they shall be preserved until pending litigation is resolved." (§ 34090.6, subd. (a).)

The retention of data from body-worn cameras is expressly governed by Penal Code section 832.18, which provides in part: "[N]onevidentiary data including video and audio recorded by a body-worn camera should be retained for a minimum of 60 days, after which it may be erased, destroyed, or recycled. An agency may keep data for more than 60 days to have it available in case of a civilian complaint and to preserve transparency." (Pen. Code, § 832.18, subd. (b)(5)(A).) The statute also provides that "[e]videntiary data including video and audio recorded by a body-worn camera under this section should be retained for a minimum of two years under any of the following circumstances," which include recordings of officer use of force or officer involved shootings, recordings of an arrest or detention of an individual, and recordings relevant to a complaint against a law enforcement agency or officer. (Pen. Code, § 832.18, subd. (b)(5)(B).) Further, recordings from a body-worn camera that are relevant to a criminal prosecution may be retained for an additional time. (Pen. Code, § 832.18, subd. (b)(5)(C).) However, Penal Code section 832.18 also provides: "This section shall not be interpreted to limit the public's right to access recorded data under the California Public Records Act." (Pen. Code, § 832.18, subd. (d).)

City's record retention schedule for GPD bodycam videos is consistent with these statutory provisions, since it provides that police video recordings are retained for one year "unless retained as evidence associated with a crime report."

We recognize Law Foundation's concern that public records that are potentially responsive to a public records request may be deleted while the request is pending. However, as we have discussed, the CPRA does not govern the retention of public records. The CPRA also does not require public agencies to retain records that are potentially responsive to a public records request, and we may not insert such a requirement in the CPRA. Additionally, the CPRA does not impose a duty on public agencies to advise persons requesting public records of the existence of retention statutes. In performing our independent review of the construction of the CPRA, we are mindful that the California Supreme Court has instructed that a court "may not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does. 'Our office . . . "is simply to ascertain and declare" what is in the relevant statutes, "not to insert what has been omitted, or to omit what has been inserted." ' " (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545 (*Doe*); see also *Rittiman v. Public Utilities Commission* (2022) 80 Cal.App.5th 1018, 1043 [court could not revise a provision of the CPRA]; *United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2018) 4 Cal.5th 1082, 1089 [the correct interpretation of a statute is an issue of law, which we review de novo.])

Therefore, we are precluded from construing the CPRA, as Law Foundation argues, to impose a duty upon public agencies to preserve for three years all documents responsive to a public records request that have been withheld as exempt, pursuant to Code of Civil Procedure section 338 [three-year limitations period]. For that reason, even assuming that Law Foundation seeks prospective relief under Code of Civil Procedure 1060, declaratory relief is not available because City has no duty under the

CPRA to preserve all documents that have been withheld as exempt. (See *County of Santa Clara*, *supra*, 171 Cal.App.4th at p. 119.)

However, it has been held that an injunction may issue that requires a city to preserve potentially responsive emails while CPRA litigation is pending, subject to the plaintiff posting an undertaking. (*Stevenson v. City of Sacramento* (2020) 55 Cal.App.5th 545, 549.) Law Foundation did not take such action. We do not decide here whether a person requesting public records is precluded from seeking an order staying or enjoining the destruction of public records pursuant to the retention statutes while litigation is pending under the CPRA.

The Law Foundation's reliance on federal decisions construing FOIA is not persuasive, since the federal decisions are inconsistent with regard to a public agency's obligation to preserve records after a FOIA request is made. For example, in *Laughlin v. Commissioner* (S.D. Cal. 1999) 103 F.Supp.2d 1219, 1223 (*Laughlin*), the district court stated: "A government improperly destroys agency records under FOIA only if it destroys them after a FOIA request has been made to the agency. [Citation.]" In *Wadelton v. Department of State* (D.D.C. 2015) 106 F.Supp.3d 139, 147, the district court followed *Laughlin*, *supra,* 103 F.Supp.2d at page 1223, stating that an "agency *is* under an obligation not to destroy records after it receives a FOIA request."

On the other hand, it has been stated that "the bar on *intentionally* destroying material sought by a FOIA request does not forbid an agency from unintentionally destroying FOIA material in accordance with a neutral record retention policy. . . . An agency's routine record retention policy . . . is the paradigmatic example of a non-suspect explanation for destroying a document." (*Pinson v. Department of Justice* (D.D.C. 2017) 236 F.Supp.3d 338, 356, fn. 24.) An agency's failure to place a " 'litigation hold' " on potentially responsive records did not violate FOIA where no showing was made that the agency purposefully destroyed the records to avoid disclosure. (*Houser v. U.S. Department of Health & Human Services* (D.D.C. 2020) 486 F.Supp.3d 104, 114.)

Further, Law Foundation's reliance on federal decisions ruling that a public agency may not intentionally destroy documents after receiving a public records request is unavailing, since no issue of intentional destruction to evade disclosure was raised in the present proceedings. (See, e.g., *Chambers v. U.S. Department of Interior* (D.C. Cir. 2009) 568 F.3d 998, 1000 [summary judgment reversed due to issue of material fact regarding whether Department of Interior intentionally destroyed a document after it was requested].)

Finally, we need not address Law Foundation's reliance on state court decisions from other jurisdictions. Although the decisions of our sister states are not controlling on matters of state law, they may be "instructive to the extent we find their analysis persuasive." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 175.) Here, the decisions of sister state courts construing their own statutory schemes for the disclosure of public records or the FOIA do not persuade us that we may insert a records preservation requirement in the CPRA. (See *Doe*, *supra*, 42 Cal.4th at p. 545.)

For these reasons, we conclude that the trial court did not err in denying Law Foundation's request for a declaration that that City violated the CPRA by failing to preserve responsive records it claimed were exempt while Law Foundation's public records requests were pending and prior to court review.

V. DISPOSITION

In H049552, *City of Gilroy v. Superior* Court: Let a peremptory writ of mandate issue directing the superior court to vacate the October 1, 2021 order and to enter a new order denying Law Foundation's petition for writ of mandate and complaint for declaratory relief in its entirety.

In H049554, *Law Foundation v. Superior* Court: Let a peremptory writ of mandate issue directing the superior court to vacate the October 1, 2021 order and to enter a new order denying Law Foundation's petition for writ of mandate and complaint for declaratory relief in its entirety.

Upon finality of this decision, the temporary stay order is vacated. Costs in this original proceeding are awarded to petitioner City of Gilroy.

Trial Court:	Santa Clara County Superior Court Superior Court No.: 20CV362347
Trial Judge:	The Honorable Nahal Iravani-Sani
Attorneys for Petitioner City of Gilroy:	William D. Ross David Paul Schwarz Kypros Gabriel Hostetter Law Offices of William D. Ross
Attorneys for Real Party in Interest Law Foundation of Silicon Valley:	Annette Denise Kirkham Nadia Aziz Hai Tri Dao Erika Kay Fairfield Law Foundation of Silicon Valley Thomas Philip Zito Disability Rights Advocates Neel Chatterjee Wendell Lin Megan Deanne Bettles Faraz Behnamjou Monte Cooper Goodwin Procter LLP
Attorney for Amicus Curiae League Of California Cities, California Special Districts Association:	Donald A. Larkin Office of the City Attorney

H049552
City of Gilroy v. Superior Court

Trial Court:	Santa Clara County Superior Court Superior Court No.: 20CV362347
Trial Judge:	The Honorable Nahal Iravani-Sani
Attorneys for Petitioner Law Foundation of Silicon Valley:	Nadia Aziz Hai Tri Dao Brian T. Nichols Law Foundation of Silicon Valley Thomas Philip Zito Disability Rights Advocates Neel Chatterjee Wendell Lin Megan Deanne Bettles Faraz Behnamjou Monte Cooper Goodwin Procter LLP
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Attorney for Amicus Curiae League Of California Cities, California Special Districts Association:	Donald A. Larkin Office of the City Attorney

_____
Greenwood, P. J.

WE CONCUR:

_____
Danner, J.

_____
Wilson, J.

H049552
City of Gilroy v. Superior Court

_____
Greenwood, P. J.

WE CONCUR:

_____
Danner, J.

_____
Wilson, J.

H049554
Law Foundation of Silicon Valley v. Superior Court

PROOF OF SERVICE

I am employed in the County of San Mateo, State of California. I am over the age of 18 and not a party to the within action. My business address is 601 Marshall St., Redwood City, California 94063.

On **December 4, 2023**, I caused to be served the following document on the person(s) below:

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The documents were served by the following means:

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

Executed on **December 4, 2023**, at San Jose, California.

Gareth J. Oania
(Type or print name)

(Signature)

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **The Law Foundation of Silicon Valley v. Superior Court of the State of California, County of Santa Clara**
Case Number: **TEMP-C7EOLH87**
Lower Court Case Number:

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12/4/2023

Date

/s/Gareth Oania

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