

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 08/17/23 TIME: 1:30 P.M. DEPT: E CASE NO: CV0000039

PRESIDING: HON. ANDREW SWEET

REPORTER:

CLERK: S. HENDRYX

PLAINTIFF: THEO EMISON

vs.

DEFENDANT: CITY OF SAN RAFAEL

NATURE OF PROCEEDINGS: 1) WRIT OF MANDATE HEARING – MOTION FOR PEREMPTORY WRIT
2) CASE MANAGEMENT CONFERENCE

RULING

Petitioner’s Motions for Peremptory Writ are GRANTED. The City of San Rafael (“City”) is ordered to disclose the requested public records after redacting information pursuant to Penal Code §§ 832.7(b)(6) and 832.7(b)(7). The City may provide a set of proposed redactions for the Court’s review prior to public disclosure.

I.

INTRODUCTION

At 6:52 p.m. on July 27, 2022, San Rafael Police Department Officer Daisy Mazariegos observed Julio Lopez and two other men drinking beer in a public place. Officer Mazariegos decided to contact the three men to investigate what appeared to be a criminal infraction pursuant to Business and Professions Code § 25620(a).¹ Numerous beer bottles were on the ground near the three men. Officer Mazariegos was alone.

Officer Mazariegos approached the three men and directed them to put their beers down and sit on the street curb. All three men put their beers down and sat on the curb. While Officer Mazariegos talked to the men about the potential infraction, Officer Brandon Nail arrived on scene. Officer Nail arrived on scene less than two minutes after Officer Mazariegos arrived on scene.

¹ Business and Professions Code § 25620(a) states in full, “Any person possessing any can, bottle, or other receptacle containing any alcoholic beverage that has been opened, or a seal broken, or the contents of which have been partially removed, in any city, county, or city and county owned park or other city, county, or city and county owned public place, or any recreation and park district, or any regional park or open-space district shall be guilty of an infraction if the city, county, or city and county has enacted an ordinance that prohibits the possession of those containers in those areas or the consumption of alcoholic beverages in those areas.”

After Officer Nail arrived, Officer Mazariegos asked the men for their identifications. Mr. Lopez stood up to retrieve his identification from his pant pocket. Officer Nail aggressively stated, “sit the fuck down.” Mr. Lopez sat back down on the curb.

Officer Mazariegos again told Mr. Lopez to take out his identification. Mr. Lopez explained that he had to stand in order to retrieve his identification from his pant pocket and then he stood up. Officer Mazariegos commanded Mr. Lopez three times to sit back down. Simultaneously, Mr. Lopez attempted to explain that he needed to stand up in order to produce his identification. Mr. Lopez was argumentative and appeared under the influence of alcohol. He did not sit down.

When Mr. Lopez did not sit down after the third command, Officer Mazariegos and Office Nail aggressively placed hands on Mr. Lopez in order to place him in handcuffs. A struggle ensued. During the struggle, Mr. Lopez was taken to the ground where his head and body hit the pavement. When he was on the ground, Officer Nail punched Mr. Lopez in the face with a closed fist. Mr. Lopez was handcuffed approximately 60 seconds after the officers placed hand on him.

Once Mr. Lopez was handcuffed, he was face first on the pavement. He had labored breathing. He was bleeding heavily from the nose. His face was covered in abrasions. He complained of pain to his back, knees and face. He had contusions and abrasions on his knees. The police summoned medical attention. Mr. Lopez was arrested and taken by ambulance to the hospital.

At the hospital, Mr. Lopez was treated emergently. He had a CT scan, X-rays and an MRI. He was diagnosed with:

- Broken nose [“bilateral nasal bone fractures mildly depressed on the left”];
- Head injury; and
- Shoulder contusion. [His MRI was negative, but he was given a sling in case there was an injury to his rotary cuff and he was advice to seek follow up care].

Mr. Lopez was discharged the same day. He was prescribed pain medications.

On September 2, 2022, Officers Mazariegos and Nail were placed on paid administrative leave. On September 9, 2022, the City of San Rafael (“City”) hired retired police Lieutenant Paul Henry to conduct an internal affairs investigation of the incident. On April 28, 2023, the City completed its internal affairs investigation.

On May 9, 2023, Marin Independent Journal² reporter Adrian Rodriguez requested from the City access to records related to the incident pursuant to Article 1, § 3(b) of the California Constitution and the California Public Record Act, Gov. Code § 7920.000 et. seq. (“CPRA”). Specifically, Mr. Rodriguez asked the City “to inspect/copies of all records related to the investigation of police conduct and/or police reporting in connection with the July 27, 2022 arrest of Julio Lopez, including but not limited to:

² Petitioner California Newspapers Partnership does business as the Marin Independent Journal.

- The investigation report conducted and completed by Paul Henry.
- Transcripts of all interviews conducted in connection with said investigation;
- Recordings of all interviews conducted in connection with said investigation;
- Copies of all disciplinary records relating to or arising from the July 27, 2022 arrest of Julio Lopez.”

Petitioner Emison made a similar request on May 8, 2023.

On May 19, 2023, the City, through the City Attorney, wrote Mr. Rodriguez indicating that the City had records responsive to the May 9, 2023, public records request, and of its intent to release responsive records by June 2, 2023. The City wrote, “the City is willing to stipulate for purposes of the PRA requests that Mr. Lopez did experience a ‘great bodily injury’ cause it is possible that a Court might make such a ruling.”

On May 24, 2023, the City emailed Mr. Rodriguez a letter from the City to Mr. Lopez’s attorney regarding his records request. The City confirmed its disclosure decision: The City has already notified you that it is agreeing to produce the requested records under the “great bodily injury” exception to the Penal Code Section 832.7(b)(1)(A)(ii), based on the prima facie evidence you submitted in your May 9, 2023 request; therefore, it is unclear why you intend to file a petition for writ of mandate.

By June 12, 2023, the City had not produced the records and reversed course. The City sent Mr. Rodriguez a letter stating “after further review the City has determined that the records sought by your Request are confidential, pursuant to Penal Code section 832.7(a), and is therefore withholding them. ¶ The City therefore considers this Request complete.” The email also attached a June 12, 2023, letter from the City to Mr. Emison similarly stating that after further review the City would not be releasing the requested records to Mr. Lopez. In that more detailed letter, the City stated that after notifying the subject police officers, through their attorneys, that the records were being sought, the officers “threatened the City with misdemeanor liability pursuant to Government Code Section 1222....” As further justification for its complete reversal of its disclosure position, and after admitting that Mr. Lopez’s evidence presented at least a “prima facia” case of great bodily injury, the City now contended that the CPRA and the five-year-old police transparency law “provide[s] the City with no guidance as to how it is supposed to evaluate the admissibility and probative value of the evidence that you have provided.”

These actions ensued³. Petitioners filed Petitions for Writ of Mandate and Complaints for Declaratory and Injunctive Relief. The Petitions pleads causes of action alleging the City unlawfully withheld the confidential police records. Petitioners pray for a traditional writ of mandate under Code of Civil Procedure § 1085, declaratory relief under Code of Civil Procedure § 1060, and injunctive relief.

³ This Order addresses three actions that all involve the same issues. (Theo Emison v. City of San Rafael et seq., # CV0000039; California Newspapers Partnership, # CV0000041; and Larson v. City of San Rafael, # CV 0000135)
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II. ANALYSIS

Viewed through the proper procedural lens, this is not an ordinary writ of mandate where the underlying record is reviewed with deference to an agency's determination or under an abuse of discretion standard. Instead, this proceeding is governed by the CPRA as the "exclusive means ... for litigating the question whether the requested records must be disclosed..." (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 435.) Under the CPRA, the City has the burden to establish that specific statute prohibits disclosure of public records. (Gov. Code, §§ 7927.705, 7922.00.) The City relies on Penal Code § 832.7(a) as the statute that prohibits disclosure. Upon a full review of the record, the Court finds that the City has not met its burden because Penal Code § 832.7(a) is subject to an exception that the City has not shown is inapplicable. (Penal Code § 832.7(b)(1)(A)(ii) ["great bodily injury" exception discussed more fully below].) Stated another way, the record here shows that the City did not meet its burden to prohibit disclosure because Mr. Lopez did not suffer great bodily injury.

Even if ordinary mandate procedures apply, on this record, the City abused its discretion by acting arbitrarily when it first agreed to stipulate that Mr. Lopez did suffer great bodily injury, and found a prima facie case of great bodily injury under Penal Code § 832.7(b)(1)(A)(ii), and therefore agreed to produce the records at issue here, but then later changed course based on what it claimed was a further review of the same evidence, lack of clarity how to evaluate the evidence it had already reviewed and found a prima facie case of great bodily injury, and because the officers threatened to hold the City liable if the records were disclosed.

A. CPRA and Penal Code § 832.7

The CPRA "enshrines the value this state has long placed on government transparency and public access to information concerning the conduct of the people's business." (*Becerra v. Superior Court* (2020) 44 Cal. App. 5th 897, 909.)

Penal Code § 832.7(a) generally provides that personnel records of peace officers are confidential and shall not be disclose except pursuant to the rigors of Evidence Code §§ 1043 and 1046⁴.

Any constraint Penal Code § 832.7(a) had on public access to police records in certain cases was addressed by the California legislature in 2018.

"[I]n acknowledgment of the extraordinary authority vested in peace officers and the serious harms occasioned by misuse of that authority, the Legislature amended Penal Code section 832.7 to recognize the right of the public to know about incidents involving shootings by an officer or the use of force by an officer that results in death or great bodily injury, as well as sustained findings of sexual assault or dishonesty by an officer. As amended, section 832.7 specifies that records pertaining to such incidents and findings are not confidential and must be made available for public inspection pursuant to the CPRA."

(*Becerra, supra*, 44 Cal. App. 5th at pp. 909–910.)

⁴ The procedures for the public to obtain officer personnel records are explained in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and its progeny.

Specifically, Penal Code § 832.7(b) was amended to provide a means for the public to oversee and hold accountable public agencies and public servants for serious incidents of peace officer misconduct and use of force resulting in death or great bodily injury or involving sustained findings of sexual assault or dishonesty. In enacting this legislation, the Legislature declared:

The public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force. Concealing crucial public safety matters such as officer violations of civilians' rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety.

Penal Code § 832.7(b) now specifies that certain categories of police records "shall be made available for public inspection pursuant to the California Public Records Act..." Specifically, as relevant here, it requires disclosure of "records relating to the report, investigation and findings of...¶ (iii) [a]n incident involving the use of force against a person by a peace officer or custodial officer that results in ... great bodily injury." (Penal Code, § 832.7(b)(1)(A)(ii).)

Both the CPRA and Penal Code § 832.7(b) should be broadly construed to further the public's right to access, and mandate a strong presumption in favor of disclosure.

The CPRA has long recognized 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.) In California, "access to government records has been deemed a fundamental interest of citizenship." (*International Federation of Professional and Technical Eng. v. Superior Court* (2007) 42 Cal. 4th 319, 328, quoting *CBS Inc. v. Block* (1986) 42 Cal. 3d 646, 652 n.5.) By promoting prompt public access to government records, the CPRA is "intended to safeguard the accountability of government to the public." (*Register Div. of Freedom Newspapers Inc. v. County of Orange* (1984) 158 Cal. App. 3d 893, 901.)

As stated above, in enacting Penal Code § 832.7(b), the Legislature specifically intended to mandate public access to police records in specific scenarios such as this one, where a peace officer used force and inflicted great bodily injury.

B. This is Not an Ordinary Writ Proceeding

This city argues that this is an ordinary writ proceeding where the underlying record is reviewed with deference to the city's determination or under an abuse of discretion standard. The Court disagrees. The plain language of the CPRA, and case law interpreting it, make clear that §§ 7923.000-7923.105 of the Government Code set forth the "exclusive means ... for litigating the question whether the requested records must be disclosed..." (*Filarisky, supra*, 28 Cal.4th at p. 435.)

Under the CPRA, “[a]ny person may institute proceedings for injunctive or declaratory relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspection or to receive a copy of any public record...” (Gov. Code, § 7923.000.) A court must order disclosure of withheld records or issue an order to show cause “[w]henever it is made to appear by verified petition to the superior court ... that certain public records are being improperly withheld from a member of the public...” (Gov. Code § 7923.100.) The court “shall decide the case after examining the record in camera, ... papers filed by the parties and any oral argument and additional evidence as the court may allow.” (Gov. Code § 7923.105.) The California Supreme Court has expressly acknowledged that the “special statutory procedures under the [CPRA] are significantly different from the procedures applicable in an ordinary action” for equitable relief under the Code of Civil Procedure. (*Filarsky, supra*, 28 Cal. 4th at 428.)

The special procedures applicable under the CPRA (not those applicable in an ordinary writ proceeding) were recently applied by the First District Court of Appeal in *Becerra v. Superior Court* (2020) 44 Cal. App. 5th 897, involving a CPRA request for public records under the exact disclosure provision at issue here—Penal Code § 832.7(b). Reviewing the express language of § 832.7(b)(1), the court stated that “[r]ead together with its subparts, section 832.7(b)(1) deems as nonconfidential—and subject to public inspection pursuant to the CPRA—all records maintained by a state agency relating to reports, investigations, or findings from incidents involving an officer’s discharge of a weapon; and officer’s use of deadly force or force resulting in great bodily injury; and incidents involving sustained findings of a sexual assault or dishonesty by an officer.” *Id.* at 918. The court stated that “[b]ecause section 832.7(b)(1) specifies that the identified officer-related records are now nonconfidential public records that ‘shall be made available for public inspection pursuant to the [CPRA],’ we look to the CPRA provisions governing the disclosure of public records.” *Id.* (internal quotations omitted).

Under the CPRA, unlike in ordinary writ proceedings, *no deference* is given to either an agency’s interpretation of law or policy, or its own determination with respect to disclosure. (*International Federation of Professional of Professional & Technical Eng. v. Superior Court* (2007) 42 Cal. 4th 319, 336 [“[w]hether or not a particular type of record is exempt should not depend upon the particular practice of the government entity at issue—otherwise, an agency could transform public records into private ones simply by refusing to disclose them over a period of time.”]) Similarly, the court in *Sacramento County Employees’ Retirement System v. Superior Court*, 195 Cal. App. 4th 440, 466-67 (2011), rejected an agency argument that the court in a CPRA action should “grant deference to an agency’s interpretation of the statutes it is charged with administering....” While recognizing that “courts will at times grant deference” to an agency’s interpretation of such statutes “*that deference is not granted in Public Records Act cases.*” *Id.* (emphasis added). The First District Court of Appeal in *American Federation of State, County and Municipal Employees v. The Regents of Univ. of Cal.*, 80 Cal. App. 3d 913, 918 (1978), discussing the right of access under the CPRA in an analogous context, public employee wrongdoing, specifically cautioned that under the CPRA “[c]ourts should not be bound by a contrary determination of the public agency, for if that were so the Act’s decree that

‘access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state’ would be largely frustrated.”

In short, the City’s argument that this matter is subject to ordinary writ proceedings where it can be determined that the records are exempt from disclosure is unavailing.

C. The City Bears the Burden to Establish a Specific Statute Prohibits Disclosure

The CPRA includes a strong presumption in favor of public access to agency records. (*CBS, Inc., supra*, 42 Cal.3d at p.665.) To overcome the “strong presumption in favor of disclosure of public records, any refusal to disclose public information must be based on a specific exception to that policy.” (*California State Univ., Fresno Ass’n v. Superior Court* (2001) 90 Cal. App. 4th 810, 831.) Unless the public records are specifically exempt from the provisions of the CPRA, they must be made available for public inspection. (*See ACLU v. Superior Court* (2017) 3 Cal. 5th 1032, 1038-1039 (“ACLU I”).)

Here, to prevent public disclosure, the City has the burden to show the records are exempt from disclosure under Penal Code § 832.7(b) because the police did not use force and inflict great bodily injury. On this record, the City has not met its burden.⁵

D. Great Bodily Injury

Penal Code § 832.7(b) fails to define the term “great bodily injury.” However, the phrase “great bodily injury” is found elsewhere in the Penal Code and is defined in case law.⁶ The parties agree that the Legislature intended the term “great bodily injury” to have the same meaning as that term is defined in the sentencing enhancement under Penal Code § 12022.7 applicable when a criminal defendant personally inflicts great bodily injury during the commission of a felony.

Penal Code § 12022.7(f) states that “great bodily injury” “means a significant or substantial injury.” Recently, the California Supreme Court addressed this somewhat general definition and noted the statute provided no further specification, and the approved standard jury instruction CALCRIM No. 3160 adds only that great bodily injury is “greater than minor or moderate harm.” (*In re Cabrera* (2023) 14 Cal. 5th 476, 484.) The court explained that the determination of “great bodily injury” is a question of fact for which,

There is a fine line between injuries that qualify as great bodily injury and those that do not quite meet the description, and where to draw that line is for the jury to decide. For instance, juries may evaluate a broken bone along a continuum from a small hairline fracture, needing no medical intervention, to the compound fracture of a major bone, requiring surgical repair.” It is the jury’s responsibility to determine where along that continuum it believes the harm becomes a significant or substantial physical injury rather

⁵ Use of force is not contested in this proceeding; only infliction of great bodily injury.

⁶ The Legislature is presumed to adopt previous judicial constructions of terms it uses. (*Hughes v. Pair* (1985) 46 Cal.4th 1035, 1046.)

than a moderate or minor one. [E]very bone fracture is not great bodily injury as a matter of law but instead may be found by a jury to be great bodily injury as a matter of fact. (*In re Cabrera, supra*, 14 Cal.5th at pp. 484-485; internal quotations and citations omitted.)

Case law is replete with factual scenarios that can aid support to both parties. Cases uphold fact finders' conclusions that injuries more severe than those suffered by Mr. Lopez do not amount to great bodily injury and also uphold fact finders' conclusions that injuries less severe than those suffered by Mr. Lopez do amount to great bodily injury. As *In re Cabrera* points out, a bone fracture may or may not be great bodily injury. It depends on a case-by-case analysis based on the specific facts at issue. Here, having reviewed the evidence, the Court finds that the City has not established that Mr. Lopez did not suffer great bodily injury.

Officers Mazariegos and Nail aggressively initiated the physical contact with Mr. Lopez. He was grabbed and taken to the ground where his head and body hit the pavement under the weight of the two officers. While he was on the ground, Mr. Lopez was punched in the face with a closed fist by Officer Nail. Mr. Lopez had labored breathing. He bled heavily from the nose. His face was covered in abrasions. He complained of pain to his back, knees and face. He had contusions and abrasions on his knees. The injuries were apparent to the officers who summoned medical attention. Mr. Lopez was taken by ambulance to the hospital.

At the hospital, he was taken directly to the emergency room and treated. Mr. Lopez had a CT scan, X-rays and an MRI. He was diagnosed with bilateral nasal bone fractures mildly depressed on the left. Bilateral abrasions to his knees were noted but he was ambulatory. His MRI was negative, but he was given a sling in case there was an injury to his rotary cuff that could not be observed on film and he was advised to seek follow up care. The notes show that Mr. Lopez complained of shoulder pain. Mr. Lopez was prescribed pain medications and discharged.

In the Court's view, on these facts, the City falls short of showing that Mr. Lopez did not suffer great bodily injury. He was taken to the ground by two police officers where his head and body hit pavement. He was punched in the face with a closed fist. He had a head injury. He had trouble breathing. His nose was broken and depressed and bleed heavily. His face and knees were contused. He had medical attention at the scene and was taken by ambulance to the Emergency Room where he underwent significant and serious diagnostic testing. He required prescribed pain medications. In full context, on this record, the City did not show Mr. Lopez did not suffer significant or substantial injury. (*People v. Washington* (2012) 210 Cal. App. 4th 1042, 1047-48 ["some physical pain or damage, such as lacerations, bruises, or abrasions" constitutes great bodily injury); *People v. Jung* (1999) 71 Cal. App. 4th 1036, 1042 ["Abrasions, lacerations, and bruising can constitute great bodily injury."]; *People v. Wallace* (1993) 14 Cal. App. 4th 651, 665- 666 [cuts and burns from being flex-tied, burning sensation from an insecticide-like substance were great bodily injury); *People v. Bustos* (1994) 23 Cal. App. 4th 1747, 1755 [multiple abrasions, lacerations, and contusions were great bodily injury]; *People v. Corona* (1989) 213 Cal. App. 3d 589 [swollen jaw, bruises to head and neck and sore ribs were "great bodily injury"].) Great bodily injury does not require permanent, prolonged, or protracted bodily damage. (*See People v. Cross* (2008) 45 Cal. 4th 58, 64.) It does not even require that one

receive medical treatment for the injury. (*People v. Wade* (2012) 204 Cal. App. 4th 1142, 1149-1150.)⁷

E. Ordinary Writ Analysis

Even if ordinary mandate procedures apply, on this record, the City abused its discretion by acting arbitrarily when it first agreed to stipulate that Mr. Lopez did suffer great bodily injury, and found a prima facie case of great bodily injury under Penal Code § 832.7(b)(1)(A)(ii), and therefore agreed to produce the records at issue here, but then later changed course based on what it claimed was a further review of the same evidence, lack of clarity how to evaluate the evidence it had already reviewed and found a prima facie case of great bodily injury, and because the officers threatened to hold the City liable if the records were disclosed.

Although mandate will not lie to control the exercise of discretion in a particular way, it will issue to correct an abuse of discretion. (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 562 [“mandamus will lie to correct an abuse of discretion or the actions of an administrative agency which exceed the agency’s legal powers”]; *CV Amalgamated LLC v. City of Chula Vista* (2022) 82 Cal.App.5th 265, 279 [“court may issue a writ when a public agency has abused its discretion in carrying out a discretionary function.”].)

To establish an abuse of discretion, the Petitioner must show the official acted arbitrarily, beyond the bounds of reason or in derogation of the applicable legal standard. (*Ochoa v. Anaheim City School District* (2017) 11 Cal.App.5th 209, 223 n3.) An abuse of discretion occurs if an agency did not apply or properly interpret the governing law or consider all relevant factors, or if there was no rational connection between the relevant factors, the choice made, and the purposes of the enabling statute or regulation. (*Manderson-Saleh v. Regents of University of California* (2021) 60 Cal.App.5th 674, 693.)

Here, the City reviewed the evidence and agreed to stipulate the record at issue were disclosable because Mr. Lopez suffered great bodily injury. It later admitted that the evidence established a prima facie case of great bodily injury. Then the City changed its mind and claimed the records at issue were confidential. The only material change was that the officers threatened to hold the City liable under Government Code § 1222⁸ if the City released the records. The City did not consider additional evidence. The legal analysis remained the same. Changing course because the officers at issue threatened the City with liability for complying with its duty to disclose the records at issue is an abuse of discretion.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in

⁷ Petitioners claim that Mr. Lopez also suffered a concussion and months later have surgery on his shoulder for a traumatic glenoid labral tear attributed to this incident. The Court has not considered these claims in its analysis because the evidence is uncertain that Mr. Lopez suffered a concussion and without sufficient foundation that the surgery was attributable to this incident.

⁸ Government Code § states in full, “Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision is made for the punishment of such delinquency, is punishable as a misdemeanor.”

person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for August, 2023 is as follows:

<https://www.zoomgov.com/j/1605153328?pwd=eUU1OE9BTG5tWHgrOFNKMmVvd2tFQT09>

Meeting ID: 160 515 3328

Passcode: 360075

If you are unable to join by video, you may join by telephone by calling 1-669-254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

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INTRODUCTION

At 6:52 p.m. on July 27, 2022, San Rafael Police Department Officer Daisy Mazariegos observed Julio Lopez and two other men drinking beer in a public place. Officer Mazariegos decided to contact the three men to investigate what appeared to be a criminal infraction pursuant to Business and Professions Code § 25620(a).¹ Numerous beer bottles were on the ground near the three men. Officer Mazariegos was alone.

Officer Mazariegos approached the three men and directed them to put their beers down and sit on the street curb. All three men put their beers down and sat on the curb. While Officer Mazariegos talked to the men about the potential infraction, Officer Brandon Nail arrived on scene. Officer Nail arrived on scene less than two minutes after Officer Mazariegos arrived on scene.

¹ Business and Professions Code § 25620(a) states in full, “Any person possessing any can, bottle, or other receptacle containing any alcoholic beverage that has been opened, or a seal broken, or the contents of which have been partially removed, in any city, county, or city and county owned park or other city, county, or city and county owned public place, or any recreation and park district, or any regional park or open-space district shall be guilty of an infraction if the city, county, or city and county has enacted an ordinance that prohibits the possession of those containers in those areas or the consumption of alcoholic beverages in those areas.”

After Officer Nail arrived, Officer Mazariegos asked the men for their identifications. Mr. Lopez stood up to retrieve his identification from his pant pocket. Officer Nail aggressively stated, "sit the fuck down." Mr. Lopez sat back down on the curb.

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When Mr. Lopez did not sit down after the third command, Officer Mazariegos and Office Nail aggressively placed hands on Mr. Lopez in order to place him in handcuffs. A struggle ensued. During the struggle, Mr. Lopez was taken to the ground where his head and body hit the pavement. When he was on the ground, Officer Nail punched Mr. Lopez in the face with a closed fist. Mr. Lopez was handcuffed approximately 60 seconds after the officers placed hand on him.

Once Mr. Lopez was handcuffed, he was face first on the pavement. He had labored breathing. He was bleeding heavily from the nose. His face was covered in abrasions. He complained of pain to his back, knees and face. He had contusions and abrasions on his knees. The police summoned medical attention. Mr. Lopez was arrested and taken by ambulance to the hospital.

At the hospital, Mr. Lopez was treated emergently. He had a CT scan, X-rays and an MRI. He was diagnosed with:

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By June 12, 2023, the City had not produced the records and reversed course. The City sent Mr. Rodriguez a letter stating “after further review the City has determined that the records sought by your Request are confidential, pursuant to Penal Code section 832.7(a), and is therefore withholding them. ¶ The City therefore considers this Request complete.” The email also attached a June 12, 2023, letter from the City to Mr. Emison similarly stating that after further review the City would not be releasing the requested records to Mr. Lopez. In that more detailed letter, the City stated that after notifying the subject police officers, through their attorneys, that the records were being sought, the officers “threatened the City with misdemeanor liability pursuant to Government Code Section 1222....” As further justification for its complete reversal of its disclosure position, and after admitting that Mr. Lopez’s evidence presented at least a “prima facie” case of great bodily injury, the City now contended that the CPRA and the five-year-old police transparency law “provide[s] the City with no guidance as to how it is supposed to evaluate the admissibility and probative value of the evidence that you have provided.”

These actions ensued³. Petitioners filed Petitions for Writ of Mandate and Complaints for Declaratory and Injunctive Relief. The Petitions pleads causes of action alleging the City unlawfully withheld the confidential police records. Petitioners pray for a traditional writ of mandate under Code of Civil Procedure § 1085, declaratory relief under Code of Civil Procedure § 1060, and injunctive relief.

³ This Order addresses three actions that all involve the same issues. (Theo Emison v. City of San Rafael et seq., # CV0000039; California Newspapers Partnership, # CV0000041; and Larson v. City of San Rafael, # CV 0000135)
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II. ANALYSIS

Viewed through the proper procedural lens, this is not an ordinary writ of mandate where the underlying record is reviewed with deference to an agency's determination or under an abuse of discretion standard. Instead, this proceeding is governed by the CPRA as the "exclusive means ... for litigating the question whether the requested records must be disclosed..." (*Filarisky v. Superior Court* (2002) 28 Cal.4th 419, 435.) Under the CPRA, the City has the burden to establish that specific statute prohibits disclosure of public records. (Gov. Code, §§ 7927.705, 7922.00.) The City relies on Penal Code § 832.7(a) as the statute that prohibits disclosure. Upon a full review of the record, the Court finds that the City has not met its burden because Penal Code § 832.7(a) is subject to an exception that the City has not shown is inapplicable. (Penal Code § 832.7(b)(1)(A)(ii) ["great bodily injury" exception discussed more fully below].) Stated another way, the record here shows that the City did not meet its burden to prohibit disclosure because Mr. Lopez did not suffer great bodily injury.

Even if ordinary mandate procedures apply, on this record, the City abused its discretion by acting arbitrarily when it first agreed to stipulate that Mr. Lopez did suffer great bodily injury, and found a prima facie case of great bodily injury under Penal Code § 832.7(b)(1)(A)(ii), and therefore agreed to produce the records at issue here, but then later changed course based on what it claimed was a further review of the same evidence, lack of clarity how to evaluate the evidence it had already reviewed and found a prima facie case of great bodily injury, and because the officers threatened to hold the City liable if the records were disclosed.

A. CPRA and Penal Code § 832.7

The CPRA "enshrines the value this state has long placed on government transparency and public access to information concerning the conduct of the people's business." (*Becerra v. Superior Court* (2020) 44 Cal. App. 5th 897, 909.)

Penal Code § 832.7(a) generally provides that personnel records of peace officers are confidential and shall not be disclose except pursuant to the rigors of Evidence Code §§ 1043 and 1046⁴.

Any constraint Penal Code § 832.7(a) had on public access to police records in certain cases was addressed by the California legislature in 2018.

"[I]n acknowledgment of the extraordinary authority vested in peace officers and the serious harms occasioned by misuse of that authority, the Legislature amended Penal Code section 832.7 to recognize the right of the public to know about incidents involving shootings by an officer or the use of force by an officer that results in death or great bodily injury, as well as sustained findings of sexual assault or dishonesty by an officer. As amended, section 832.7 specifies that records pertaining to such incidents and findings are not confidential and must be made available for public inspection pursuant to the CPRA."

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⁴ The procedures for the public to obtain officer personnel records are explained in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and its progeny.

Specifically, Penal Code § 832.7(b) was amended to provide a means for the public to oversee and hold accountable public agencies and public servants for serious incidents of peace officer misconduct and use of force resulting in death or great bodily injury or involving sustained findings of sexual assault or dishonesty. In enacting this legislation, the Legislature declared:

The public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force. Concealing crucial public safety matters such as officer violations of civilians' rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety.

Penal Code § 832.7(b) now specifies that certain categories of police records "shall be made available for public inspection pursuant to the California Public Records Act..." Specifically, as relevant here, it requires disclosure of "records relating to the report, investigation and findings of...¶ (iii) [a]n incident involving the use of force against a person by a peace officer or custodial officer that results in ... great bodily injury." (Penal Code, § 832.7(b)(1)(A)(ii).)

Both the CPRA and Penal Code § 832.7(b) should be broadly construed to further the public's right to access, and mandate a strong presumption in favor of disclosure.

The CPRA has long recognized 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.) In California, "access to government records has been deemed a fundamental interest of citizenship." (*International Federation of Professional and Technical Eng. v. Superior Court* (2007) 42 Cal. 4th 319, 328, quoting *CBS Inc. v. Block* (1986) 42 Cal. 3d 646, 652 n.5.) By promoting prompt public access to government records, the CPRA is "intended to safeguard the accountability of government to the public." (*Register Div. of Freedom Newspapers Inc. v. County of Orange* (1984) 158 Cal. App. 3d 893, 901.)

As stated above, in enacting Penal Code § 832.7(b), the Legislature specifically intended to mandate public access to police records in specific scenarios such as this one, where a peace office used force and inflicted great bodily injury.

B. This is Not an Ordinary Writ Proceeding

This city argues that this is an ordinary writ proceeding where the underlying record is reviewed with deference to the city's determination or under an abuse of discretion standard. The Court disagrees. The plain language of the CPRA, and case law interpreting it, make clear that §§ 7923.000-7923.105 of the Government Code set forth the "exclusive means ... for litigating the question whether the requested records must be disclosed..." (*Filarisky, supra*, 28 Cal.4th at p. 435.)

Under the CPRA, “[a]ny person may institute proceedings for injunctive or declaratory relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspection or to receive a copy of any public record...” (Gov. Code, § 7923.000.) A court must order disclosure of withheld records or issue an order to show cause “[w]henever it is made to appear by verified petition to the superior court ... that certain public records are being improperly withheld from a member of the public...” (Gov. Code § 7923.100.) The court “shall decide the case after examining the record in camera, ... papers filed by the parties and any oral argument and additional evidence as the court may allow.” (Gov. Code § 7923.105.) The California Supreme Court has expressly acknowledged that the “special statutory procedures under the [CPRA] are significantly different from the procedures applicable in an ordinary action” for equitable relief under the Code of Civil Procedure. (*Filarsky, supra*, 28 Cal. 4th at 428.)

The special procedures applicable under the CPRA (not those applicable in an ordinary writ proceeding) were recently applied by the First District Court of Appeal in *Becerra v. Superior Court* (2020) 44 Cal. App. 5th 897, involving a CPRA request for public records under the exact disclosure provision at issue here—Penal Code § 832.7(b). Reviewing the express language of § 832.7(b)(1), the court stated that “[r]ead together with its subparts, section 832.7(b)(1) deems as nonconfidential—and subject to public inspection pursuant to the CPRA—all records maintained by a state agency relating to reports, investigations, or findings from incidents involving an officer’s discharge of a weapon; and officer’s use of deadly force or force resulting in great bodily injury; and incidents involving sustained findings of a sexual assault or dishonesty by an officer.” *Id.* at 918. The court stated that “[b]ecause section 832.7(b)(1) specifies that the identified officer-related records are now nonconfidential public records that ‘shall be made available for public inspection pursuant to the [CPRA],’ we look to the CPRA provisions governing the disclosure of public records.” *Id.* (internal quotations omitted).

Under the CPRA, unlike in ordinary writ proceedings, *no deference* is given to either an agency’s interpretation of law or policy, or its own determination with respect to disclosure. (*International Federation of Professional of Professional & Technical Eng. v. Superior Court* (2007) 42 Cal. 4th 319, 336 [“[w]hether or not a particular type of record is exempt should not depend upon the particular practice of the government entity at issue—otherwise, an agency could transform public records into private ones simply by refusing to disclose them over a period of time.”]) Similarly, the court in *Sacramento County Employees’ Retirement System v. Superior Court*, 195 Cal. App. 4th 440, 466-67 (2011), rejected an agency argument that the court in a CPRA action should “grant deference to an agency’s interpretation of the statutes it is charged with administering...” While recognizing that “courts will at times grant deference” to an agency’s interpretation of such statutes “*that deference is not granted in Public Records Act cases.*” *Id.* (emphasis added). The First District Court of Appeal in *American Federation of State, County and Municipal Employees v. The Regents of Univ. of Cal.*, 80 Cal. App. 3d 913, 918 (1978), discussing the right of access under the CPRA in an analogous context, public employee wrongdoing, specifically cautioned that under the CPRA “[c]ourts should not be bound by a contrary determination of the public agency, for if that were so the Act’s decree that

‘access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state’ would be largely frustrated.”

In short, the City’s argument that this matter is subject to ordinary writ proceedings where it can be determined that the records are exempt from disclosure is unavailing.

C. The City Bears the Burden to Establish a Specific Statute Prohibits Disclosure

The CPRA includes a strong presumption in favor of public access to agency records. (*CBS, Inc., supra*, 42 Cal.3d at p.665.) To overcome the “strong presumption in favor of disclosure of public records, any refusal to disclose public information must be based on a specific exception to that policy.” (*California State Univ., Fresno Ass’n v. Superior Court* (2001) 90 Cal. App. 4th 810, 831.) Unless the public records are specifically exempt from the provisions of the CPRA, they must be made available for public inspection. (*See ACLU v. Superior Court* (2017) 3 Cal. 5th 1032, 1038-1039 (“ACLU I”).)

Here, to prevent public disclosure, the City has the burden to show the records are exempt from disclosure under Penal Code § 832.7(b) because the police did not use force and inflict great bodily injury. On this record, the City has not met its burden.⁵

D. Great Bodily Injury

Penal Code § 832.7(b) fails to define the term “great bodily injury.” However, the phrase “great bodily injury” is found elsewhere in the Penal Code and is defined in case law.⁶ The parties agree that the Legislature intended the term “great bodily injury” to have the same meaning as that term is defined in the sentencing enhancement under Penal Code § 12022.7 applicable when a criminal defendant personally inflicts great bodily injury during the commission of a felony.

Penal Code § 12022.7(f) states that “great bodily injury” “means a significant or substantial injury.” Recently, the California Supreme Court addressed this somewhat general definition and noted the statute provided no further specification, and the approved standard jury instruction CALCRIM No. 3160 adds only that great bodily injury is “greater than minor or moderate harm.” (*In re Cabrera* (2023) 14 Cal. 5th 476, 484.) The court explained that the determination of “great bodily injury” is a question of fact for which,

There is a fine line between injuries that qualify as great bodily injury and those that do not quite meet the description, and where to draw that line is for the jury to decide. For instance, juries may evaluate a broken bone along a continuum from a small hairline fracture, needing no medical intervention, to the compound fracture of a major bone, requiring surgical repair.” It is the jury's responsibility to determine where along that continuum it believes the harm becomes a significant or substantial physical injury rather

⁵ Use of force is not contested in this proceeding; only infliction of great bodily injury.

⁶ The Legislature is presumed to adopt previous judicial constructions of terms it uses. (*Hughes v. Pair* (1985) 46 Cal.4th 1035, 1046.)

than a moderate or minor one. [E]very bone fracture is not great bodily injury as a matter of law but instead may be found by a jury to be great bodily injury as a matter of fact. (*In re Cabrera, supra*, 14 Cal.5th at pp. 484-485; internal quotations and citations omitted.)

Case law is replete with factual scenarios that can aid support to both parties. Cases uphold fact finders' conclusions that injuries more severe than those suffered by Mr. Lopez do not amount to great bodily injury and also uphold fact finders' conclusions that injuries less severe than those suffered by Mr. Lopez do amount to great bodily injury. As *In re Cabrera* points out, a bone fracture may or may not be great bodily injury. It depends on a case-by-case analysis based on the specific facts at issue. Here, having reviewed the evidence, the Court finds that the City has not established that Mr. Lopez did not suffer great bodily injury.

Officers Mazariegos and Nail aggressively initiated the physical contact with Mr. Lopez. He was grabbed and taken to the ground where his head and body hit the pavement under the weight of the two officers. While he was on the ground, Mr. Lopez was punched in the face with a closed fist by Officer Nail. Mr. Lopez had labored breathing. He bled heavily from the nose. His face was covered in abrasions. He complained of pain to his back, knees and face. He had contusions and abrasions on his knees. The injuries were apparent to the officers who summoned medical attention. Mr. Lopez was taken by ambulance to the hospital.

At the hospital, he was taken directly to the emergency room and treated. Mr. Lopez had a CT scan, X-rays and an MRI. He was diagnosed with bilateral nasal bone fractures mildly depressed on the left. Bilateral abrasions to his knees were noted but he was ambulatory. His MRI was negative, but he was given a sling in case there was an injury to his rotary cuff that could not be observed on film and he was advised to seek follow up care. The notes show that Mr. Lopez complained of shoulder pain. Mr. Lopez was prescribed pain medications and discharged.

In the Court's view, on these facts, the City falls short of showing that Mr. Lopez did not suffer great bodily injury. He was taken to the ground by two police officers where his head and body hit pavement. He was punched in the face with a closed fist. He had a head injury. He had trouble breathing. His nose was broken and depressed and bleed heavily. His face and knees were contused. He had medical attention at the scene and was taken by ambulance to the Emergency Room where he underwent significant and serious diagnostic testing. He required prescribed pain medications. In full context, on this record, the City did not show Mr. Lopez did not suffer significant or substantial injury. (*People v. Washington* (2012) 210 Cal. App. 4th 1042, 1047-48 ["some physical pain or damage, such as lacerations, bruises, or abrasions" constitutes great bodily injury]; *People v. Jung* (1999) 71 Cal. App. 4th 1036, 1042 ["Abrasions, lacerations, and bruising can constitute great bodily injury."]; *People v. Wallace* (1993) 14 Cal. App. 4th 651, 665- 666 [cuts and burns from being flex-tied, burning sensation from an insecticide-like substance were great bodily injury]; *People v. Bustos* (1994) 23 Cal. App. 4th 1747, 1755 [multiple abrasions, lacerations, and contusions were great bodily injury]; *People v. Corona* (1989) 213 Cal. App. 3d 589 [swollen jaw, bruises to head and neck and sore ribs were "great bodily injury"].) Great bodily injury does not require permanent, prolonged, or protracted bodily damage. (*See People v. Cross* (2008) 45 Cal. 4th 58, 64.) It does not even require that one

receive medical treatment for the injury. (*People v. Wade* (2012) 204 Cal. App. 4th 1142, 1149-1150.)⁷

E. Ordinary Writ Analysis

Even if ordinary mandate procedures apply, on this record, the City abused its discretion by acting arbitrarily when it first agreed to stipulate that Mr. Lopez did suffer great bodily injury, and found a prima facie case of great bodily injury under Penal Code § 832.7(b)(1)(A)(ii), and therefore agreed to produce the records at issue here, but then later changed course based on what it claimed was a further review of the same evidence, lack of clarity how to evaluate the evidence it had already reviewed and found a prima facie case of great bodily injury, and because the officers threatened to hold the City liable if the records were disclosed.

Although mandate will not lie to control the exercise of discretion in a particular way, it will issue to correct an abuse of discretion. (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 562 [“mandamus will lie to correct an abuse of discretion or the actions of an administrative agency which exceed the agency’s legal powers”]; *CV Amalgamated LLC v. City of Chula Vista* (2022) 82 Cal.App.5th 265, 279 [“court may issue a writ when a public agency has abused its discretion in carrying out a discretionary function.”].)

To establish an abuse of discretion, the Petitioner must show the official acted arbitrarily, beyond the bounds of reason or in derogation of the applicable legal standard. (*Ochoa v. Anaheim City School District* (2017) 11 Cal.App.5th 209, 223 n3.) An abuse of discretion occurs if an agency did not apply or properly interpret the governing law or consider all relevant factors, or if there was no rational connection between the relevant factors, the choice made, and the purposes of the enabling statute or regulation. (*Manderson-Saleh v. Regents of University of California* (2021) 60 Cal.App.5th 674, 693.)

Here, the City reviewed the evidence and agreed to stipulate the record at issue were disclosable because Mr. Lopez suffered great bodily injury. It later admitted that the evidence established a prima facie case of great bodily injury. Then the City changed its mind and claimed the records at issue were confidential. The only material change was that the officers threatened to hold the City liable under Government Code § 1222⁸ if the City released the records. The City did not consider additional evidence. The legal analysis remained the same. Changing course because the officers at issue threatened the City with liability for complying with its duty to disclose the records at issue is an abuse of discretion.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in

⁷ Petitioners claim that Mr. Lopez also suffered a concussion and months later have surgery on his shoulder for a traumatic glenoid labral tear attributed to this incident. The Court has not considered these claims in its analysis because the evidence is uncertain that Mr. Lopez suffered a concussion and without sufficient foundation that the surgery was attributable to this incident.

⁸ Government Code § states in full, “Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision is made for the punishment of such delinquency, is punishable as a misdemeanor.”

person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for August, 2023 is as follows:

<https://www.zoomgov.com/j/1605153328?pwd=eUU1OE9BTG5tWHgrOFNKMmVvd2tFQT09>

Meeting ID: 160 515 3328

Passcode: 360075

If you are unable to join by video, you may join by telephone by calling 1-669-254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 08/17/23 TIME: 1:30 P.M. DEPT: E CASE NO: CV0000135

PRESIDING: HON. ANDREW SWEET

REPORTER:

CLERK: S. HENDRYX

PLAINTIFF: TYLER LARSON

vs.

DEFENDANT: CITY OF SAN RAFAEL

NATURE OF PROCEEDINGS: 1) WRIT OF MANDATE HEARING – MOTION FOR PEREMPTORY WRIT
2) CASE MANAGEMENT CONFERENCE

RULING

Petitioner’s Motions for Peremptory Writ are GRANTED. The City of San Rafael (“City”) is ordered to disclose the requested public records after redacting information pursuant to Penal Code §§ 832.7(b)(6) and 832.7(b)(7). The City may provide a set of proposed redactions for the Court’s review prior to public disclosure.

**I.
INTRODUCTION**

At 6:52 p.m. on July 27, 2022, San Rafael Police Department Officer Daisy Mazariegos observed Julio Lopez and two other men drinking beer in a public place. Officer Mazariegos decided to contact the three men to investigate what appeared to be a criminal infraction pursuant to Business and Professions Code § 25620(a).¹ Numerous beer bottles were on the ground near the three men. Officer Mazariegos was alone.

Officer Mazariegos approached the three men and directed them to put their beers down and sit on the street curb. All three men put their beers down and sat on the curb. While Officer Mazariegos talked to the men about the potential infraction, Officer Brandon Nail arrived on scene. Officer Nail arrived on scene less than two minutes after Officer Mazariegos arrived on scene.

¹ Business and Professions Code § 25620(a) states in full, “Any person possessing any can, bottle, or other receptacle containing any alcoholic beverage that has been opened, or a seal broken, or the contents of which have been partially removed, in any city, county, or city and county owned park or other city, county, or city and county owned public place, or any recreation and park district, or any regional park or open-space district shall be guilty of an infraction if the city, county, or city and county has enacted an ordinance that prohibits the possession of those containers in those areas or the consumption of alcoholic beverages in those areas.”

After Officer Nail arrived, Officer Mazariegos asked the men for their identifications. Mr. Lopez stood up to retrieve his identification from his pant pocket. Officer Nail aggressively stated, "sit the fuck down." Mr. Lopez sat back down on the curb.

Officer Mazariegos again told Mr. Lopez to take out his identification. Mr. Lopez explained that he had to stand in order to retrieve his identification from his pant pocket and then he stood up. Officer Mazariegos commanded Mr. Lopez three times to sit back down. Simultaneously, Mr. Lopez attempted to explain that he needed to stand up in order to produce his identification. Mr. Lopez was argumentative and appeared under the influence of alcohol. He did not sit down.

When Mr. Lopez did not sit down after the third command, Officer Mazariegos and Office Nail aggressively placed hands on Mr. Lopez in order to place him in handcuffs. A struggle ensued. During the struggle, Mr. Lopez was taken to the ground where his head and body hit the pavement. When he was on the ground, Officer Nail punched Mr. Lopez in the face with a closed fist. Mr. Lopez was handcuffed approximately 60 seconds after the officers placed hand on him.

Once Mr. Lopez was handcuffed, he was face first on the pavement. He had labored breathing. He was bleeding heavily from the nose. His face was covered in abrasions. He complained of pain to his back, knees and face. He had contusions and abrasions on his knees. The police summoned medical attention. Mr. Lopez was arrested and taken by ambulance to the hospital.

At the hospital, Mr. Lopez was treated emergently. He had a CT scan, X-rays and an MRI. He was diagnosed with:

- Broken nose ["bilateral nasal bone fractures mildly depressed on the left"];
- Head injury; and
- Shoulder contusion. [His MRI was negative, but he was given a sling in case there was an injury to his rotary cuff and he was advice to seek follow up care].

Mr. Lopez was discharged the same day. He was prescribed pain medications.

On September 2, 2022, Officers Mazariegos and Nail were placed on paid administrative leave. On September 9, 2022, the City of San Rafael ("City") hired retired police Lieutenant Paul Henry to conduct an internal affairs investigation of the incident. On April 28, 2023, the City completed its internal affairs investigation.

On May 9, 2023, Marin Independent Journal² reporter Adrian Rodriguez requested from the City access to records related to the incident pursuant to Article 1, § 3(b) of the California Constitution and the California Public Record Act, Gov. Code § 7920.000 et. seq. ("CPRA"). Specifically, Mr. Rodriguez asked the City "to inspect/copies of all records related to the investigation of police conduct and/or police reporting in connection with the July 27, 2022 arrest of Julio Lopez, including but not limited to:

² Petitioner California Newspapers Partnership does business as the Marin Independent Journal.

- The investigation report conducted and completed by Paul Henry.
- Transcripts of all interviews conducted in connection with said investigation;
- Recordings of all interviews conducted in connection with said investigation;
- Copies of all disciplinary records relating to or arising from the July 27, 2022 arrest of Julio Lopez.”

Petitioner Emison made a similar request on May 8, 2023.

On May 19, 2023, the City, through the City Attorney, wrote Mr. Rodriguez indicating that the City had records responsive to the May 9, 2023, public records request, and of its intent to release responsive records by June 2, 2023. The City wrote, “the City is willing to stipulate for purposes of the PRA requests that Mr. Lopez did experience a ‘great bodily injury’ cause it is possible that a Court might make such a ruling.”

On May 24, 2023, the City emailed Mr. Rodriguez a letter from the City to Mr. Lopez’s attorney regarding his records request. The City confirmed its disclosure decision: The City has already notified you that it is agreeing to produce the requested records under the “great bodily injury” exception to the Penal Code Section 832.7(b)(1)(A)(ii), based on the prima facie evidence you submitted in your May 9, 2023 request; therefore, it is unclear why you intend to file a petition for writ of mandate.

By June 12, 2023, the City had not produced the records and reversed course. The City sent Mr. Rodriguez a letter stating “after further review the City has determined that the records sought by your Request are confidential, pursuant to Penal Code section 832.7(a), and is therefore withholding them. ¶ The City therefore considers this Request complete.” The email also attached a June 12, 2023, letter from the City to Mr. Emison similarly stating that after further review the City would not be releasing the requested records to Mr. Lopez. In that more detailed letter, the City stated that after notifying the subject police officers, through their attorneys, that the records were being sought, the officers “threatened the City with misdemeanor liability pursuant to Government Code Section 1222....” As further justification for its complete reversal of its disclosure position, and after admitting that Mr. Lopez’s evidence presented at least a “prima facia” case of great bodily injury, the City now contended that the CPRA and the five-year-old police transparency law “provide[s] the City with no guidance as to how it is supposed to evaluate the admissibility and probative value of the evidence that you have provided.”

These actions ensued³. Petitioners filed Petitions for Writ of Mandate and Complaints for Declaratory and Injunctive Relief. The Petitions pleads causes of action alleging the City unlawfully withheld the confidential police records. Petitioners pray for a traditional writ of mandate under Code of Civil Procedure § 1085, declaratory relief under Code of Civil Procedure § 1060, and injunctive relief.

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Viewed through the proper procedural lens, this is not an ordinary writ of mandate where the underlying record is reviewed with deference to an agency's determination or under an abuse of discretion standard. Instead, this proceeding is governed by the CPRA as the "exclusive means ... for litigating the question whether the requested records must be disclosed..." (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 435.) Under the CPRA, the City has the burden to establish that specific statute prohibits disclosure of public records. (Gov. Code, §§ 7927.705, 7922.00.) The City relies on Penal Code § 832.7(a) as the statute that prohibits disclosure. Upon a full review of the record, the Court finds that the City has not met its burden because Penal Code § 832.7(a) is subject to an exception that the City has not shown is inapplicable. (Penal Code § 832.7(b)(1)(A)(ii) ["great bodily injury" exception discussed more fully below].) Stated another way, the record here shows that the City did not meet its burden to prohibit disclosure because Mr. Lopez did not suffer great bodily injury.

Even if ordinary mandate procedures apply, on this record, the City abused its discretion by acting arbitrarily when it first agreed to stipulate that Mr. Lopez did suffer great bodily injury, and found a prima facie case of great bodily injury under Penal Code § 832.7(b)(1)(A)(ii), and therefore agreed to produce the records at issue here, but then later changed course based on what it claimed was a further review of the same evidence, lack of clarity how to evaluate the evidence it had already reviewed and found a prima facie case of great bodily injury, and because the officers threatened to hold the City liable if the records were disclosed.

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(*Becerra, supra*, 44 Cal. App. 5th at pp. 909–910.)

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Specifically, Penal Code § 832.7(b) was amended to provide a means for the public to oversee and hold accountable public agencies and public servants for serious incidents of peace officer misconduct and use of force resulting in death or great bodily injury or involving sustained findings of sexual assault or dishonesty. In enacting this legislation, the Legislature declared:

The public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force. Concealing crucial public safety matters such as officer violations of civilians' rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety.

Penal Code § 832.7(b) now specifies that certain categories of police records "shall be made available for public inspection pursuant to the California Public Records Act..." Specifically, as relevant here, it requires disclosure of "records relating to the report, investigation and findings of...¶ (iii) [a]n incident involving the use of force against a person by a peace officer or custodial officer that results in ... great bodily injury." (Penal Code, § 832.7(b)(1)(A)(ii).)

Both the CPRA and Penal Code § 832.7(b) should be broadly construed to further the public's right to access, and mandate a strong presumption in favor of disclosure.

The CPRA has long recognized 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.) In California, "access to government records has been deemed a fundamental interest of citizenship." (*International Federation of Professional and Technical Eng. v. Superior Court* (2007) 42 Cal. 4th 319, 328, quoting *CBS Inc. v. Block* (1986) 42 Cal. 3d 646, 652 n.5.) By promoting prompt public access to government records, the CPRA is "intended to safeguard the accountability of government to the public." (*Register Div. of Freedom Newspapers Inc. v. County of Orange* (1984) 158 Cal. App. 3d 893, 901.)

As stated above, in enacting Penal Code § 832.7(b), the Legislature specifically intended to mandate public access to police records in specific scenarios such as this one, where a peace office used force and inflicted great bodily injury.

B. This is Not an Ordinary Writ Proceeding

This city argues that this is an ordinary writ proceeding where the underlying record is reviewed with deference to the city's determination or under an abuse of discretion standard. The Court disagrees. The plain language of the CPRA, and case law interpreting it, make clear that §§ 7923.000-7923.105 of the Government Code set forth the "exclusive means ... for litigating the question whether the requested records must be disclosed..." (*Filarisky, supra*, 28 Cal.4th at p. 435.)

Under the CPRA, “[a]ny person may institute proceedings for injunctive or declaratory relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspection or to receive a copy of any public record...” (Gov. Code, § 7923.000.) A court must order disclosure of withheld records or issue an order to show cause “[w]henever it is made to appear by verified petition to the superior court ... that certain public records are being improperly withheld from a member of the public...” (Gov. Code § 7923.100.) The court “shall decide the case after examining the record in camera, ... papers filed by the parties and any oral argument and additional evidence as the court may allow.” (Gov. Code § 7923.105.) The California Supreme Court has expressly acknowledged that the “special statutory procedures under the [CPRA] are significantly different from the procedures applicable in an ordinary action” for equitable relief under the Code of Civil Procedure. (*Filarsky, supra*, 28 Cal. 4th at 428.)

The special procedures applicable under the CPRA (not those applicable in an ordinary writ proceeding) were recently applied by the First District Court of Appeal in *Becerra v. Superior Court* (2020) 44 Cal. App. 5th 897, involving a CPRA request for public records under the exact disclosure provision at issue here—Penal Code § 832.7(b). Reviewing the express language of § 832.7(b)(1), the court stated that “[r]ead together with its subparts, section 832.7(b)(1) deems as nonconfidential—and subject to public inspection pursuant to the CPRA—all records maintained by a state agency relating to reports, investigations, or findings from incidents involving an officer’s discharge of a weapon; and officer’s use of deadly force or force resulting in great bodily injury; and incidents involving sustained findings of a sexual assault or dishonesty by an officer.” *Id.* at 918. The court stated that “[b]ecause section 832.7(b)(1) specifies that the identified officer-related records are now nonconfidential public records that ‘shall be made available for public inspection pursuant to the [CPRA],’ we look to the CPRA provisions governing the disclosure of public records.” *Id.* (internal quotations omitted).

Under the CPRA, unlike in ordinary writ proceedings, *no deference* is given to either an agency’s interpretation of law or policy, or its own determination with respect to disclosure. (*International Federation of Professional of Professional & Technical Eng. v. Superior Court* (2007) 42 Cal. 4th 319, 336 [“[w]hether or not a particular type of record is exempt should not depend upon the particular practice of the government entity at issue—otherwise, an agency could transform public records into private ones simply by refusing to disclose them over a period of time.”]) Similarly, the court in *Sacramento County Employees’ Retirement System v. Superior Court*, 195 Cal. App. 4th 440, 466-67 (2011), rejected an agency argument that the court in a CPRA action should “grant deference to an agency’s interpretation of the statutes it is charged with administering...” While recognizing that “courts will at times grant deference” to an agency’s interpretation of such statutes “*that deference is not granted in Public Records Act cases.*” *Id.* (emphasis added). The First District Court of Appeal in *American Federation of State, County and Municipal Employees v. The Regents of Univ. of Cal.*, 80 Cal. App. 3d 913, 918 (1978), discussing the right of access under the CPRA in an analogous context, public employee wrongdoing, specifically cautioned that under the CPRA “[c]ourts should not be bound by a contrary determination of the public agency, for if that were so the Act’s decree that

‘access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state’ would be largely frustrated.”

In short, the City’s argument that this matter is subject to ordinary writ proceedings where it can be determined that the records are exempt from disclosure is unavailing.

C. The City Bears the Burden to Establish a Specific Statute Prohibits Disclosure

The CPRA includes a strong presumption in favor of public access to agency records. (*CBS, Inc., supra*, 42 Cal.3d at p.665.) To overcome the “strong presumption in favor of disclosure of public records, any refusal to disclose public information must be based on a specific exception to that policy.” (*California State Univ., Fresno Ass’n v. Superior Court* (2001) 90 Cal. App. 4th 810, 831.) Unless the public records are specifically exempt from the provisions of the CPRA, they must be made available for public inspection. (*See ACLU v. Superior Court* (2017) 3 Cal. 5th 1032, 1038-1039 (“ACLU I”).)

Here, to prevent public disclosure, the City has the burden to show the records are exempt from disclosure under Penal Code § 832.7(b) because the police did not use force and inflict great bodily injury. On this record, the City has not met its burden.⁵

D. Great Bodily Injury

Penal Code § 832.7(b) fails to define the term “great bodily injury.” However, the phrase “great bodily injury” is found elsewhere in the Penal Code and is defined in case law.⁶ The parties agree that the Legislature intended the term “great bodily injury” to have the same meaning as that term is defined in the sentencing enhancement under Penal Code § 12022.7 applicable when a criminal defendant personally inflicts great bodily injury during the commission of a felony.

Penal Code § 12022.7(f) states that “great bodily injury” “means a significant or substantial injury.” Recently, the California Supreme Court addressed this somewhat general definition and noted the statute provided no further specification, and the approved standard jury instruction CALCRIM No. 3160 adds only that great bodily injury is “greater than minor or moderate harm.” (*In re Cabrera* (2023) 14 Cal. 5th 476, 484.) The court explained that the determination of “great bodily injury” is a question of fact for which,

There is a fine line between injuries that qualify as great bodily injury and those that do not quite meet the description, and where to draw that line is for the jury to decide. For instance, juries may evaluate a broken bone along a continuum from a small hairline fracture, needing no medical intervention, to the compound fracture of a major bone, requiring surgical repair.” It is the jury's responsibility to determine where along that continuum it believes the harm becomes a significant or substantial physical injury rather

⁵ Use of force is not contested in this proceeding; only infliction of great bodily injury.

⁶ The Legislature is presumed to adopt previous judicial constructions of terms it uses. (*Hughes v. Pair* (1985) 46 Cal.4th 1035, 1046.)

than a moderate or minor one. [E]very bone fracture is not great bodily injury as a matter of law but instead may be found by a jury to be great bodily injury as a matter of fact. (*In re Cabrera, supra*, 14 Cal.5th at pp. 484-485; internal quotations and citations omitted.)

Case law is replete with factual scenarios that can aid support to both parties. Cases uphold fact finders' conclusions that injuries more severe than those suffered by Mr. Lopez do not amount to great bodily injury and also uphold fact finders' conclusions that injuries less severe than those suffered by Mr. Lopez do amount to great bodily injury. As *In re Cabrera* points out, a bone fracture may or may not be great bodily injury. It depends on a case-by-case analysis based on the specific facts at issue. Here, having reviewed the evidence, the Court finds that the City has not established that Mr. Lopez did not suffer great bodily injury.

Officers Mazariegos and Nail aggressively initiated the physical contact with Mr. Lopez. He was grabbed and taken to the ground where his head and body hit the pavement under the weight of the two officers. While he was on the ground, Mr. Lopez was punched in the face with a closed fist by Officer Nail. Mr. Lopez had labored breathing. He bled heavily from the nose. His face was covered in abrasions. He complained of pain to his back, knees and face. He had contusions and abrasions on his knees. The injuries were apparent to the officers who summoned medical attention. Mr. Lopez was taken by ambulance to the hospital.

At the hospital, he was taken directly to the emergency room and treated. Mr. Lopez had a CT scan, X-rays and an MRI. He was diagnosed with bilateral nasal bone fractures mildly depressed on the left. Bilateral abrasions to his knees were noted but he was ambulatory. His MRI was negative, but he was given a sling in case there was an injury to his rotary cuff that could not be observed on film and he was advised to seek follow up care. The notes show that Mr. Lopez complained of shoulder pain. Mr. Lopez was prescribed pain medications and discharged.

In the Court's view, on these facts, the City falls short of showing that Mr. Lopez did not suffer great bodily injury. He was taken to the ground by two police officers where his head and body hit pavement. He was punched in the face with a closed fist. He had a head injury. He had trouble breathing. His nose was broken and depressed and bleed heavily. His face and knees were contused. He had medical attention at the scene and was taken by ambulance to the Emergency Room where he underwent significant and serious diagnostic testing. He required prescribed pain medications. In full context, on this record, the City did not show Mr. Lopez did not suffer significant or substantial injury. (*People v. Washington* (2012) 210 Cal. App. 4th 1042, 1047-48 ["some physical pain or damage, such as lacerations, bruises, or abrasions" constitutes great bodily injury]; *People v. Jung* (1999) 71 Cal. App. 4th 1036, 1042 ["Abrasions, lacerations, and bruising can constitute great bodily injury."]; *People v. Wallace* (1993) 14 Cal. App. 4th 651, 665- 666 [cuts and burns from being flex-tied, burning sensation from an insecticide-like substance were great bodily injury]; *People v. Bustos* (1994) 23 Cal. App. 4th 1747, 1755 [multiple abrasions, lacerations, and contusions were great bodily injury]; *People v. Corona* (1989) 213 Cal. App. 3d 589 [swollen jaw, bruises to head and neck and sore ribs were "great bodily injury"].) Great bodily injury does not require permanent, prolonged, or protracted bodily damage. (*See People v. Cross* (2008) 45 Cal. 4th 58, 64.) It does not even require that one

receive medical treatment for the injury. (*People v. Wade* (2012) 204 Cal. App. 4th 1142, 1149-1150.)⁷

E. Ordinary Writ Analysis

Even if ordinary mandate procedures apply, on this record, the City abused its discretion by acting arbitrarily when it first agreed to stipulate that Mr. Lopez did suffer great bodily injury, and found a prima facie case of great bodily injury under Penal Code § 832.7(b)(1)(A)(ii), and therefore agreed to produce the records at issue here, but then later changed course based on what it claimed was a further review of the same evidence, lack of clarity how to evaluate the evidence it had already reviewed and found a prima facie case of great bodily injury, and because the officers threatened to hold the City liable if the records were disclosed.

Although mandate will not lie to control the exercise of discretion in a particular way, it will issue to correct an abuse of discretion. (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 562 [“mandamus will lie to correct an abuse of discretion or the actions of an administrative agency which exceed the agency’s legal powers”]; *CV Amalgamated LLC v. City of Chula Vista* (2022) 82 Cal.App.5th 265, 279 [“court may issue a writ when a public agency has abused its discretion in carrying out a discretionary function.”].)

To establish an abuse of discretion, the Petitioner must show the official acted arbitrarily, beyond the bounds of reason or in derogation of the applicable legal standard. (*Ochoa v. Anaheim City School District* (2017) 11 Cal.App.5th 209, 223 n3.) An abuse of discretion occurs if an agency did not apply or properly interpret the governing law or consider all relevant factors, or if there was no rational connection between the relevant factors, the choice made, and the purposes of the enabling statute or regulation. (*Manderson-Saleh v. Regents of University of California* (2021) 60 Cal.App.5th 674, 693.)

Here, the City reviewed the evidence and agreed to stipulate the record at issue were disclosable because Mr. Lopez suffered great bodily injury. It later admitted that the evidence established a prima facie case of great bodily injury. Then the City changed its mind and claimed the records at issue were confidential. The only material change was that the officers threatened to hold the City liable under Government Code § 1222⁸ if the City released the records. The City did not consider additional evidence. The legal analysis remained the same. Changing course because the officers at issue threatened the City with liability for complying with its duty to disclose the records at issue is an abuse of discretion.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in

⁷ Petitioners claim that Mr. Lopez also suffered a concussion and months later have surgery on his shoulder for a traumatic glenoid labral tear attributed to this incident. The Court has not considered these claims in its analysis because the evidence is uncertain that Mr. Lopez suffered a concussion and without sufficient foundation that the surgery was attributable to this incident.

⁸ Government Code § states in full, “Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision is made for the punishment of such delinquency, is punishable as a misdemeanor.”

person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for August, 2023 is as follows:

<https://www.zoomgov.com/j/1605153328?pwd=eUU1OE9BTG5tWHgrOFNKMmVvd2tFQT09>

Meeting ID: 160 515 3328

Passcode: 360075

If you are unable to join by video, you may join by telephone by calling 1-669-254-5252 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov