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MEMORANDUM OF LAW

DATE: July 9, 2009

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Disclosure of Employee Photographs Pursuant to the California Public Records Act

INTRODUCTION

This Memorandum is provided in response to a request by a news organization, pursuant to the California Public Records Act [Public Records Act or CPRA], for City of San Diego [City] employee photographs maintained by the Personnel Department.

QUESTION PRESENTED

Are photographs of public employees maintained by the City's Personnel Department subject to disclosure under the Public Records Act?

SHORT ANSWER

Photographs of public employees maintained by the City's Personnel Department are public records under the Public Records Act and are subject to disclosure, unless disclosure of a photograph would put an employee's safety at risk, would constitute an unwarranted invasion of personal privacy, or where the City can demonstrate based on specific facts that the public interest in nondisclosure clearly outweighs the public interest in disclosure of a photograph or photographs. The custodian of records is mandated to conduct a case-by-case analysis, which may be done in consultation with the employee or employees whose photographs are requested or their supervisors or City department directors, to determine whether an exemption may be lawfully invoked. It is the City's duty and burden to justify nondisclosure of a photograph by demonstrating that the photograph is exempt under a specific provision of the Public Records Act.

ANALYSIS

I. Employee Photographs As Public Records Under the Public Records Act

The Public Records Act, at California Government Code section 6250 *et seq.*, provides that “[p]ublic records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided.” Cal. Gov’t Code §6253. “Public records” are defined to include “any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” Cal. Gov’t Code §6252(e). Photographs are considered writings, subject to disclosure under the Public Records Act:

“Writing” means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form or communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

Cal. Gov’t Code §6252(g).

The Public Records Act “was enacted for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies.” *Filarisky v. Superior Court*, 28 Cal. 4th 419, 425-426 (2002). “All public records are subject to disclosure unless the [Public Records] Act expressly provides otherwise.” *BRV, Inc. v. Superior Court*, 143 Cal. App. 4th 742, 751 (2006), rev. denied (Dec. 13, 2006). The policy favoring disclosure has been endorsed by California voters who approved Proposition 59 in 2004, which amended the California Constitution to explicitly recognize the “right of access to information concerning the conduct of the people’s business” and to provide that “the writings of public officials and agencies shall be open to public scrutiny.” Cal. Const., art. 1, § 3 (b)(1); *County of Santa Clara v. Superior Court*, 170 Cal. App. 4th 1301, 1320 (2009). “Californians have a constitutional right to access the records of their public agencies.” *BRV, Inc.*, 143 Cal. App. 4th at 746. Proposition 59 requires that the Public Records Act “be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access.” *Id.* at 750 (citing Cal. Const., art. I, §3(b)(2).)

“The right of access to public records under the [Public Records Act] is not absolute.” *Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272, 1282 (2006). California Government Code sections 6254 and 6255 provide specific statutory exemptions to disclosure of records under the Public Records Act. The statutory exemptions largely “reflect legislative concern for privacy interests.” *County of Santa Clara*, 170 Cal. App. 4th at 1320. The exemptions are permissive, not mandatory. *CBS, Inc. v. Block*, 42 Cal. 3d 646, 652 (1986). Further, the Public

Records Act “endows [a public] agency with discretionary authority to override the statutory exceptions when a dominating public interest favors disclosure.” *County of Santa Clara*, 170 Cal. App. 4th at 1320. Exemptions can be waived, and disclosure of records to one member of the public constitutes waiver of the exemption, requiring disclosure to others who request a copy. *Id.* at 1321-1322.

II. Statutory Exemptions to Disclosure of Employee Photographs

California courts interpret the statutory exemptions to the Public Records Act narrowly and favor disclosure. *County of Santa Clara*, 170 Cal. App. 4th at 1321. “The agency opposing disclosure bears the burden of proving that an exemption applies.” *Id.* “Moreover, if only part of a record is exempt, the agency is required to produce the remainder, if segregable.” *Id.* (citing Government Code section 6253(a)).

The Public Records Act does acknowledge and protect an individual’s right of privacy, which is guaranteed by Article I, section 1 of the California Constitution. *BRV, Inc.*, 143 Cal. App. 4th at 751. The constitutional right to privacy encompasses “a variety of rights involving privacy choice in personal affairs. The right to privacy is the right to be left alone. . . . It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose.” *Robbins v. Superior Court*, 38 Cal. 3d 199, 212 (1985). *See* 91 Ops. Cal. Att’y Gen. 11, 12-13 (2008)(the Public Records Act involves “a balancing of the public’s right to access information against individual privacy rights -- both of which are fundamental interests under our state Constitution).

A. Government Code section 6254(c) – Personnel File Exemption

Public employees have a legally protected interest in their personnel files; however, that interest must be balanced against the public’s right to information about government business. *BRV, Inc.*, 143 Cal. App. 4th. at 756. California Government Code section 6254(c) provides a statutory exemption to disclosure of “[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.” Cal. Gov’t Code §6254(c). The question of whether disclosure would constitute an unwarranted invasion of personal privacy is a question of fact that must be determined and justified by the custodian of the records if the custodian seeks to exempt documents from disclosure. Further, a determinative factor in invoking the personnel file exemption is not the location of where a document is stored, such as in a personnel file, but rather, the content of the document. *Commission on Peace Officer Standards and Training v. Superior Court*, 42 Cal. 4th 278, 291 (2007). “[W]e do not believe that the Legislature intended that a public agency be able to shield information from public disclosure simply by placing it in a file” *Id.* *See also Braun v. City of Taft*, 154 Cal. App. 3d 332, 341 (1984).

The California Supreme Court has held that application of the personnel record exemption at Government Code section 6254(c) requires the balancing of two competing

interests, the public's interest in disclosure and the individual's interest in personal privacy. *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (Contra Costa Newspapers)*, 42 Cal. 4th 319 (2007).

To establish that an act constitutes an invasion of personal privacy under article I, section 1 of the California Constitution, an individual must establish (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest. *Hill v. National Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 35 (1994). "In order to determine whether an alleged invasion of privacy is sufficiently serious to constitute a violation of that constitutional right, the competing privacy and nonprivacy interests must be balanced." *Contra Costa Newspapers*, 42 Cal. 4th at 338-339 (citing *Hill*, 7 Cal. 4th at 37). "Although one does not lose his right to privacy upon accepting public employment, the very fact that he is engaged in the public's business strips him of some anonymity." *Braun*, 154 Cal. App. 3d. at 347.

The California Supreme Court has held that public employees do not have a reasonable expectation of privacy in the amount of their salaries, *Contra Costa Newspapers*, 42 Cal. 4th at 338, or the fact of their employment. *Commission on Peace Officer Standards and Training*, 42 Cal. 4th at 295. See also 25 Ops. Cal. Att'y Gen. 90, 91 (1955)(Attorney General stating that the "name of every public officer and employee . . . is a matter of public record"). Every employment contract between a state or local agency and any public official or public employee is a public record which must be disclosed and may not be withheld pursuant to a provision of Government Code section 6254 or Government Code section 6255. Cal. Gov't Code § 6254.8.

More personal information, such as marital status, identity and number of dependents, and other private business, interests, or activities, is not information that would need to be known by persons with whom employees interact in the course of performing their duties, and, therefore, may appropriately be withheld pursuant to a statutory exemption. See *Commission on Peace Officer Standards and Training*, 42 Cal. 4th at 296. Additionally, the Public Records Act specifically protects home addresses and telephone numbers of elected or appointed officials, pursuant to California Government Code section 6254.21, and social security numbers, pursuant to Government Code section 6254.29.

The question of whether employee photographs are protected under Government Code section 6254(c) or other provisions of the Public Records Act is an issue of first impression in California. Compare Ops. Arkansas Att'y Gen. No. 2001-276 (Sept. 12, 2001)("This office has previously opined that photographs are properly classified as 'personnel records,' within the meaning of the [Freedom of Information Act]. . . . Personnel records are subject to disclosure except to the extent that the disclosure would constitute a 'clearly unwarranted invasion of personal privacy' of the subject of the records. . . . The disclosure of routine file photographs of police officers normally would not constitute a clearly unwarranted invasion of the officer's personal privacy." (citations omitted)); see also Ops. Arkansas Att'y Gen. No. 2007-213.

B. Government Code section 6254(k) – Statutory Privileges Exemption

California Government Code section 6254(k) provides a statutory exemption for “[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the California Evidence Code relating to privilege.” This exemption incorporates statutory privileges, such as Evidence Code section 1040, which is the official information privilege, and Penal Code sections 832.7 and 832.8, regarding the confidentiality of peace officer personnel records. *See County of Santa Clara*, 170 Cal. App. 4th at 1320-1321.

California Evidence Code section 1040 establishes a privilege for official information defined as “information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.” Cal. Evid. Code § 1040(a). This privilege may be invoked if “[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice” Cal. Evid. Code § 1040(b)(2). “This privilege must be ‘applied conditionally on a clear showing that disclosure is against the public’s interest.’” *CBS, Inc.*, 42 Cal. 3d at 656 (citing *San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 762, 777 (1983)). “The weighing process mandated by Evidence Code section 1040 requires review of the same elements that must be considered under [Government Code] section 6255.” *Id.* at 656. “[T]he burden of demonstrating a need for nondisclosure is on the agency claiming the right to withhold the information.” *Id.*

In a case involving a request by a television news network for information contained in applications submitted to and licenses issued by the Los Angeles County Sheriff authorizing possession of concealed weapons, the California Supreme Court rejected the argument of the sheriff that Government Code section 6254(k) as it incorporates Evidence Code section 1040 and Government Code section 6255 justified nondisclosure of the names of individuals who possessed concealed weapon licenses and the reasons claimed in support of the licenses. *CBS, Inc.*, 42 Cal. 3d at 656-657. “Public inspection of the names of license holders and the reasons the licenses were requested enables the press and the public to ensure that public officials are acting properly in issuing licenses for legitimate reasons.” *Id.* at 654. The Court stated that redacting certain information may be appropriate, but blanket nondisclosure was not appropriate.

It is possible, of course, that certain information supplied by individual applicants may under certain circumstances entail a substantial privacy interest. For example, the records may contain intimate information concerning an applicant’s own or his family’s medical or psychological history. In such special cases, the confidential information may be deleted.

Id. at 655.

As to the claim of the sheriff that disclosure would put the licensees at risk, the Court stated:

The prospect that somehow this information in the hands of the press will increase the danger to some licensees cannot alone support a finding in favor of nondisclosure as to all. A mere assertion of possible endangerment does not “clearly outweigh” the public interest in access to these records. Moreover, [Government Code] section 6257 specifically provides that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt by law.” Thus, any information on the applications and licenses that indicate times or places when the licensee is vulnerable to attack may be deleted. The fact that parts of a requested document fall within the terms of an exemption does not justify withholding the entire document.

Id. at 652-653.

As to employees who are peace officers, California Penal Code section 832.7 provides that peace officer personnel records are confidential, and, as such, they are covered by the exemption set forth in California Government Code section 6254(k). However, the California Supreme Court has narrowly construed this exemption to apply only to the types of documents and information set forth in California Penal Code section 832.8, which provides:

As used in [Penal Code] Section 832.7, “personnel records” means any file maintained under the individual’s name by his or her employing agency and containing records relating to any of the following:

- (a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.
- (b) Medical history.
- (c) Election of employee benefits.
- (d) Employee advancement, appraisal, or discipline.
- (e) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.
- (f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.

Cal. Penal Code § 832.8.

The California Supreme Court has held that peace officers’ names, employing agency, employment dates, and salary information are not confidential “peace officer personnel records” even though this information is contained in personnel files, and are subject to disclosure under the Public Records Act, with limited exception. *Contra Costa Newspapers*, 42 Cal. 4th at 345-346; *Commission on Peace Officer Standards and Training*, 42 Cal. 4th at 284. “If an officer’s

anonymity is essential to his or her safety, the need to protect the officer would outweigh the public interest in disclosure and would justify withholding the officer's name." *Contra Costa Newspapers, Inc.*, 42 Cal. 4th at 337.

An additional basis that may factor in the consideration of whether there is an exemption to disclosure of employee photographs may be California Civil Code section 3344, which creates civil liability for "[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent." Cal. Civil Code §3344(a). However, this provision provides that a use for which consent is required does not include use of a photograph in connection with any news, public affairs, or sports broadcast or account, or any political campaign. Cal. Civil Code §3344(d). Further, the Public Records Act specifically states that the Act "does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure." Cal. Gov't Code §6257.5.

C. Government Code section 6255(a) – Catch-All Exemption

California Government Code section 6255(a) provides a catch-all exemption as follows: "The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." This catch-all exemption "contemplates a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality." *Michaelis, Montanari & Johnson v. Superior Court*, 38 Cal. 4th 1065, 1071 (2006).

In applying the balancing test of California Government Code section 6255(a), California courts have balanced the public interest in nondisclosure with the public interest in disclosure and have stated that the public interest in nondisclosure must clearly outweigh the public interest in disclosure to justify exemption of a document. *City of San Jose v. Superior Court*, 74 Cal. App. 4th 1008, 1018 (1999) ("Where the public interest in disclosure of the records is not outweighed by the public interest in nondisclosure, courts will direct the government to disclose the requested information."). If the records sought pertain to the conduct of the people's business, there is a public interest in disclosure. *County of Santa Clara*, 170 Cal. App. 4th at 1324. "The existence and weight of this public interest are conclusions derived from the nature of the information." *Connell v. Superior Court*, 56 Cal. App. 4th 601, 616 (1997). The question has been framed as "whether disclosure would contribute significantly to public understanding of government activities." *City of San Jose*, 74 Cal. App. 4th at 1018. The public interest in disclosure is minimal "where the requester has alternative, less intrusive means of obtaining the information sought." *Id.* at 1020.

The California Supreme Court has stated that the nature of the public interest in nondisclosure as contemplated by the California Legislature “may be fairly inferred, at least in part, from the specific exemptions contained in [Government Code] section 6254 [T]he provisions of section 6254 will provide appropriate indicia as to the nature of the public interest in nondisclosure and will thus aid the courts in determining the disclosability of a document under section 6255.” *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1338 (1991) (citations omitted). The Supreme Court has also stated: “Each request for records must be ‘considered on the facts of the particular case’ in light of the competing ‘public interests.’” *Id.* at 1338. The identified public interest in nondisclosure must *clearly outweigh* the public interest in disclosure to justify reliance on the exemption in Government Code section 6255. *Id.* at 1339.

III. Application of the Statutory Exemptions

The City maintains photographs of its employees as records within the Personnel Department for security purposes. Upon employment, the City issues official picture identification cards after completion of the Personnel Department employee background investigation. The cards are not for personal use. City employees are required to wear photo identification badges to access City buildings. The identification badges are the property of the City, and are to be returned upon termination of employment with the City. *See* City of San Diego Administrative Regulation 95.10 (Sept. 1, 2006). The photographs for the identification cards are taken pursuant to the employment relationship between the employee and the City, and employees do not sign consent forms for other uses of the photographs, including public dissemination.

In applying the statutory exemptions contained in the Public Records Act to the issue of employee identification photographs maintained by the Personnel Department, it can be argued that there is a strong public interest in protecting the confidentiality of the photographs to preserve the security of the City’s buildings and work force and the safety of the City employees and the public who use the buildings. The photographs are solely for the purpose of maintaining photographic records of the identities of City employees for security and personnel purposes. The City’s use of the photographs for security and personnel purposes may provide a public interest in nondisclosure.

Further, while there is no expectation of privacy in one’s personal appearance in that individuals are seen by others in the work place or in public, it could be argued that there is some expectation of privacy in the linkage of an employee’s name with an employee’s personal appearance or personal characteristics through a photograph. *See, e.g., Gill v. Curtis Publishing Co.*, 38 Cal. 2d 273, 279 (1952) (holding that the public interest did not require the use of any particular person’s likeness without their consent, in case involving unauthorized use of photograph of a couple taken in an ice cream shop by a magazine in an article about love at first sight). Identity theft is also a concern, with public disclosure of photographs in conjunction with employee’s names and other employment information.

California courts have recognized an actionable invasion of privacy, on the basis of the common law right of privacy, where an illustrative photograph makes a negative association between the subject matter and the subjects of the photograph. *M.G. v. Time Warner, Inc.*, 89 Cal. App. 4th 623, 631 (2001) (stating that the elements of the common law tort of public disclosure are (1) public disclosure, (2) of a private fact (3) which would be offensive or objectionable to the reasonable person and (4) which is not of legitimate public concern). However, California courts have also held that, “Photographs are not actionable if they are fair and accurate depictions of the person and scene in question, even if they place the person in a less than flattering light, so long as the photographs do not surpass the limits of decency by being highly offensive to persons of ordinary sensibilities.” *Aisenson v. American Broadcasting Company, Inc.*, 220 Cal. App. 3d 146, 161 (1990). Further, “[p]ublic officials and public figures are . . . subject to news coverage, including being photographed, so long as the interference is no greater than that necessary to protect the overriding public interest.” *Id.* at 162 (stating no invasion of privacy where television station videotaped judge walking to his car, compared to news crew entering plaintiff’s home and bedroom uninvited to film a rescue attempt by paramedics, or camera crew coming into physical contact with plaintiff, or endangering the safety of plaintiff or his family, or news crew disclosing location of plaintiff’s residence).

Many City employees interact with the public regularly in the course of their business as they work in City buildings, other City work locations, and public places. City employees give public presentations at City Council meetings or elsewhere. Many City employees wear City uniforms or City badges that identify their names. Many City employees have at least some level of interaction with the public. As the California Supreme Court has stated in regards to police officers:

Peace officers operate in the public realm on a daily basis, and identify themselves to the members of the public with whom they deal. Indeed, uniformed peace officers are required to wear a badge or nameplate with the officer’s name or identification number. . . . [B]ecause we have concluded that [the Penal Code provisions regarding peace officer confidentiality] do not protect an officer’s name, employing department, and dates of employment, they do not support the argument that peace officers have a recognized privacy interest in such innocuous information.

Commission on Peace Officer Standards and Training, 42 Cal. 4th at 301. The Supreme Court has recognized that there may be a need to protect the identities of some officers, but this need must be grounded in specific facts:

We readily acknowledge that throughout the state there are some officers working in agencies who, because of their particular responsibilities, require anonymity in order to perform their duties effectively or to protect their own safety. If the duties of a particular officer, such as one who is operating undercover, demand anonymity, the need to protect the officer’s safety and effectiveness certainly

would justify the Commission in withholding the information identifying him or her under Government Code section 6255, subdivision (a). . . .

Id. The Court concluded that the proper means to protect officers who required anonymity was to segregate the information related to them from records that are disclosed. “The Act provides that if material that is exempt from disclosure reasonably can be segregated from material that is not exempt, segregation is required.” *Id.* at 301.

It should be noted that a custodian of records may not inquire about nor consider the purpose of a request pursuant to the California Public Records Act. Cal. Gov’t Code §6257.5 (“This chapter does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure.”).

However, if the custodian of records has specific factual information regarding an employee to justify nondisclosure based on personal security interests or other public interests in nondisclosure, the custodian may justify nondisclosure so long as nondisclosure clearly outweighs the public interest in disclosure. As the Supreme Court has stated, there may be a legitimate basis to exempt an employee’s photograph from disclosure because the employee may be a peace officer working in an undercover capacity or may have personal circumstances warranting protection; however, California courts have held that a broad brush exemption based on conjecture or speculation does not justify nondisclosure. There must be specific facts. “Claims for exemption based upon facts and circumstances peculiar to an individual and his or her duties could, of course, be considered either under [Government Code] section 6254, subdivision (c) or under the catchall exemption,” at California Government Code section 6255. *Contra Costa Newspapers, Inc.*, 42 Cal. 4th at 337. However, “[t]he prospect that somehow . . . information in the hands of the press will increase the danger to some . . . cannot alone support a finding in favor of nondisclosure to all.” *CBS, Inc.*, 42 Cal. 3d at 652.

It is recommended that upon receipt of a request for employee photographs, the custodian of records consult with the affected employee or employees as well as the employee’s supervisor or City department to determine whether there is a factual basis to justify nondisclosure. For example, an employee may have a personal, family, or work situation, which justifiably mandates anonymity to the extent possible, to avoid placing the employee in harm’s way through public disclosure of the employee’s photograph. The request may pose a security risk or other potential harm to the employee, based on specific, known facts. The custodian should evaluate the facts on a case-by-case basis.

The City must justify nondisclosure by reliance on a specific statutory exemption based on specific facts. Ultimately, it is the decision of the custodian of records to withhold a record, and that decision must be legally supported. *See* Cal. Gov’t Code § 6253.3 (“A state or local agency may not allow another party to control the disclosure of information that is otherwise subject to disclosure pursuant to this chapter.”).

CONCLUSION

Photographs taken and maintained by the City as Personnel Department records are considered public records under the Public Records Act subject to disclosure, unless they are exempt under a specific statutory exemption contained in California Government Code section 6254 or the catch-all exemption in California Government Code section 6255. As a general rule, there is no expectation of privacy in a person's appearance; further, California courts have held that there is no expectation of privacy in names of public employees. However, there may be an expectation of privacy in the linking of an employee's appearance with the employee's name. Nondisclosure based on the public interest in safety of employees or efficacy of the City's security systems must be based on specific facts, not mere speculation or conjecture. A case-by-case analysis is mandated. Further, it is the City's burden to justify withholding a photograph by demonstrating that the photograph is exempt under one of the express provisions of California Government Code section 6254 or under the catch-all exemption contained in California Government Code section 6255(a). The City must be able to demonstrate that disclosure would put an employee's safety at risk, would constitute an unwarranted invasion of personal privacy, or on the facts of the particular case the public interest served by nondisclosure of the photograph clearly outweighs the public interest served by disclosure of the photograph.

JAN I. GOLDSMITH, City Attorney

By

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