IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

ARI MARKEN, Plaintiff and Appellant, vs. SANTA MONICA-MALIBU UNIFIED SCHOOL DISTRICT, Defendant and Respondent. MICHAEL CHWE, Real Party in Interest and Appellant.	CASE NO. BC454656 2d Civ. No. B231787 Appeal Arising from an Order of the Los Angeles Superior Court, Hon. Ruth Ann Kwan, Judge, (213) 974-6237 (Mr. Chwe's appeal also involves Los Angeles Superior Court Case No. BS130905 – Hon. Ann I. Jones, Presiding, (213) 974-5881)

PETITION FOR REVIEW

THOMAS R. BURKE
(STATE BAR NO. 141930)
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, California 94111
Tel: (415) 276-6500
Fax: (415) 276-6599

ALONZO WICKERS IV
(STATE BAR NO. 169454)
JEFF GLASSER (STATE BAR NO. 252596)
DAN LAIDMAN (STATE BAR NO. 274482)
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street, Suite 2400
Los Angeles, California 90017-2566
Tel: (213) 633-6800
Fax: (213) 633-6899

Attorneys for Real Party in Interest
MICHAEL CHWE

TABLE OF CONTENTS

Page

I. THE SECOND DISTRICT'S DECISION UNDERMINES THE PROTECTIONS FOR RECORDS REQUESTERS CODIFIED IN THE CPRA AND RECOGNIZED IN FILARSKY. 14

A. The Second District Has Vitiated The Carefully Crafted CPRA Protections For Public Records Requesters. 15

1. The Second District's Decision Would Eliminate The Key Incentive Of Attorneys' Fees For Prevailing Requesters. 16

2. The Reverse-CPRA Action Approved By The Second District Encourages Undue Delay 17

3. The Second District's Decision Will Ensure Duplicative Lawsuits That Waste Judicial Resources. 20

B. The Reverse-CPRA Action In This Case Is Inconsistent With The Statute and Filarsky And Is Not Otherwise Legally Justified 21

1. Public Agencies Cannot Adequately Represent The Interests Of Requesters In Reverse-CPRA Actions. 22

2. Third Parties Have An Adequate Alternative Remedy. 24

3. The Second District Misconstrued Filarsky. 25

II. THE SECOND DISTRICT'S HOLDING ON INTERVENTION AND JOINDER IS CONTRARY TO CALIFORNIA LAW 28

III. CONCLUSION 34

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

TABLE OF CONTENTS

Page

CASES

American Federation of State, etc. Employees v. Regents of University of California, 80 Cal.App.3d 913 (1978) 4

Bakersfield City School Dist. v. Superior Court, 118 Cal.App.4th 1041(2004) 4

Berkeley Police Ass'n v. City of Berkeley, 76 Cal.App.3d 931 (1977) 27

Black Panther Party v. Kehoe, 42 Cal.App.3d 645 (1974) 22

Cal.State Univ., Fresno v. Superior Court, 90 Cal.App.4th 810 (2001) 27

California Teachers Ass'n v. Governing Bd. of Rialto Unified School Dist., 14 Cal.4th 627 (1997) 2

Carrisales v. Dep't of Corrections, 21 Cal.4th 1132 (1999) 2

City of Santa Rosa v. Press Democrat, 187 Cal.App.3d 1315 (1986) 22, 25, 28

County of Los Angeles v. Superior Court, 82 Cal.App.4th 819 (2000) 28

County of Santa Clara v. Superior Court, 171 Cal.App.4th 119 (2009) 23

Filarsky v. Superior Court, 28 Cal.4th 419 (2002) ..... passim

Fontana Police Dep't v. Villegas-Banuelos, 74 Cal.App.4th 1249 (1999) 3, 17, 21

Fraser-Yamor Agency, Inc. v. County of Del Norte, 68 Cal.App.3d 201 (1977) 33

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

Galbiso v. Orosi Public Utility Dist.,
167 Cal.App.4th 1063 (2008) 17

Hodge v. Kirkpatrick Dev., Inc.,
130 Cal.App.4th 540 (2005) 29

In re Marriage of Ramirez,
198 Cal.App.4th 336 (2011) 33

In re Veterans' Industries, Inc.,
8 Cal.App.3d 902 (1970) 29

Int'l Fed'n of Prof'l & Technical Eng'rs, Local 21 v. Superior Court,
42 Cal.4th 319 (2007) 24

Jun v. Myers,
88 Cal.App.4th 117 (2001) 29, 31

Lincoln Nat'l Life Ins. Co. v. State Bd. of Equalization,
30 Cal.App.4th 1411 (1994) 32

Lindelli v. Town of San Anselmo,
139 Cal.App.4th 1499 (2006) 28

Long Beach Police Officers Ass'n v. City of Long Beach,
2012 Cal.App. LEXIS 109 (Feb. 7, 2012) ("LBPOA") 5, 23

Los Angeles County Metropolitan Transp. Auth. v. Alameda Produce Market, LLC,
52 Cal.4th 1100 (2011) 2

Los Angeles Police Dep't v. Superior Court,
65 Cal.App.3d 661 (1977) 21

Los Angeles Times Communications LLC v. S.C.,
2009 Cal. LEXIS 9685 (Sept. 9, 2009) 2

Los Angeles Times v. Alameda Corridor Transp. Auth.,
88 Cal.App.4th 1381 (2001) 7

Marken v. Santa Monica-Malibu Unified School District,
No. B231787 (Jan. 24, 2012) 2, 5, 12, 32

Mitau v. Roddan,
149 Cal.1 (1906) 34

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

Noya v. A.W. Coulter Trucking,
143 Cal.App.4th 838 (2006) 30

Powers v. City of Richmond,
10 Cal.4th 85 (1995) 7, 18

Rodgers v. Sargent Controls & Aerospace,
136 Cal.App. 4th 82 (2006) 10

Seaboard Acceptance Corp. v. Shay,
214 Cal.361 (1931) 3

Simpson Redwood Co. v. State,
196 Cal.App.3d 1192 (1987) 28

Thomas v. City of Richmond,
9 Cal.4th 1154 (1995) 3

Times Mirror Co. v. Superior Court,
53 Cal.3d 1325 (1991) 18

Truck Ins. Exchange v. Superior Court,
60 Cal.App.4th 342 (1997) 32

Washington Mutual Bank v. Blechman,
157 Cal.App.4th 662 (2007) 33

STATUTES

California Code of Civil Procedure § 387 ..... 29, 32

California Code of Civil Procedure § 387(b) 29, 30, 31

California Code of Civil Procedure § 389 34

California Code of Civil Procedure § 389(a) 33

California Code of Civil Procedure § 526a 23

California Code of Civil Procedure § 1060 ..... 15, 25, 26

California Code of Civil Procedure § 1085 26

California Education Code § 44031 27

California Government Code § 6250 14

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

California Government Code § 6253.3 21

California Government Code § 6253(a) 14

California Government Code § 6254 27

California Government Code § 6254(c) 6, 27

California Government Code § 6255 27

California Government Code § 6258 14

California Government Code § 6259(c) 6, 7, 14, 18

California Government Code § 6259(d) 3, 14, 16

California Government Code §§ 6258-59..... 14, 18, 22, 26

RULES

California Rule of Court 8.500(b)(1) 11

California Rule of Professional Conduct 3-110.....5

CONSTITUTIONAL PROVISIONS

California Constitution, Article 1, § 3(b).....5

OTHER AUTHORITIES

Black's Law Dictionary (Second Pocket Ed. 2001) 30

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

ISSUES PRESENTED FOR REVIEW

1. With the cooperation of a public agency, may an employee of the agency bring a reverse-California Public Records Act lawsuit that the agency itself is prohibited from bringing under Filarsky v. Superior Court, 28 Cal.4th 419 (2002)?

2. May a public employee or a third party sue to enjoin disclosure of public records without the fee-shifting and other unique protections of the CPRA applying, which will force many requesters to file a second lawsuit under the CPRA to ensure that their rights are protected?

3. May a Court allow a public agency employee plaintiff to appeal the denial of a preliminary injunction regarding the public agency's obligation to disclose public records, but not allow the public records requester to appeal the denial of his application to intervene in the matter to oppose enjoining the release of public records through a reverse-CPRA lawsuit?

REQUEST FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

The public records requesters of California need this Court's help. The Second Appellate District Court of Appeal has issued a published

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

decision that provides a blueprint to avoid the California Public Records Act's ("CPRA's") mandatory fee-shifting and expedited appellate relief provisions that encourage public records requesters to bring actions to vindicate the public's right of access to public records.

In Marken v. Santa Monica-Malibu Unified School District, No. B231787 (Jan. 24, 2012), the Second District stated that with the encouragement of the public agency, an employee of the agency could bring a lawsuit seeking to enjoin disclosure of public records requested under the CPRA, even though this Court has found previously that these "reverse-CPRA" lawsuits are impermissible when brought by the agency itself. See Filarsky v. Superior Court, 28 Cal.4th 419, 433 (2002).[1] The Second District's approval of this reverse-CPRA lawsuit not only is the kind of judicial legislating that this Court repeatedly has disapproved,[2] but its

---

[1] Two Justices of this Court voted in 2009 to grant review of a case raising similar reverse-CPRA issues. See Los Angeles Times Communications LLC v. S.C., 2009 Cal. LEXIS 9685, S175077 (Sept. 9, 2009).

[2] See, e.g., Los Angeles County Metropolitan Transp. Auth. v. Alameda Produce Market, LLC, 52 Cal.4th 1100, 1113 (2011) ("Our role here is to interpret the statute[s] [as they are written], not to establish policy. The latter role is for the Legislature") (quoting Carrisales v. Dep't of Corrections, 21 Cal.4th 1132, 1140 (1999)); California Teachers Ass'n v. Governing Bd. of Rialto Unified School Dist., 14 Cal.4th 627, 632-633 (1997) (stating that "[i]t cannot be too often repeated that due respect for the political branches of our government requires us to interpret the laws in accordance with the expressed intention of the Legislature. 'This court has no power to rewrite the statute so as to make it conform to a presumed

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

published opinion disregards the unique CPRA statutory scheme that the Legislature created to support requesters and ensure maximum public access to public records.

In particular, the Second District has jeopardized the key carrot of the CPRA that enables requesters to recover fees for having to litigate in court to gain access to withheld records: Gov't Code § 6259(d). This position contradicts the Fourth District's decision in Fontana Police Dep't v. Villegas-Banuelos, 74 Cal.App.4th 1249, 1253 (1999), in which the Court held a prevailing party in an action that is "the functional equivalent of a proceeding to compel production of" public records under the CPRA is "entitled to recover attorneys' fees despite the fact that he was not denominated 'plaintiff' in the action."

The Second District insists reverse-CPRA actions can proceed without the fee-shifting protection for real party in interest public records requesters on the flawed theory that requesters need not be heard because public agencies purportedly would protect the interests of the requesters in reverse-CPRA actions. Op. at 18.

This case itself shows the fallacy of that argument. Here, rather than protecting Prof. Chwe's interests, the Santa Monica-Malibu Unified School

---

intention which is not expressed'") (quoting Seaboard Acceptance Corp. v. Shay, 214 Cal.361, 365 (1931)); Thomas v. City of Richmond, 9 Cal.4th 1154, 1165 (1995) ("It is not for us to substitute our public policy judgment for that of the Legislature.").

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

district ("SMMUSD") impermissibly delayed for 45 days expressly to enable its employee, teacher Ari Marken, to file the lawsuit seeking to enjoin disclosure of the records. (The Second District found that this delay raised "serious questions" as to whether SMMUSD complied with the CPRA. Op. at 18 n.14.) When proceedings began, SMMUSD lamented its lack of discretion to deny Prof. Chwe access to the disciplinary records reflecting Mr. Marken's violation of sexual harassment policy and did not oppose a stay of the trial court's ruling that the records must be disclosed. March 10, 2011 Reporter's Transcript at 10. In the Second District, SMMUSD abandoned all pretense and joined in Mr. Marken's call for an overturning or narrowing of the cases under which the disciplinary records must be disclosed (American Federation of State, etc. Employees v. Regents of University of California, 80 Cal.App.3d 913 (1978); Bakersfield City School Dist. v. Superior Court, 118 Cal.App.4th 1041(2004)), as Mr. Marken happily trumpeted. See SMMUSD's Opening Brief at 10 and Mr. Marken's Reply Brief at 1. Even after the Second District reaffirmed that the records must be disclosed under AFSCME and Bakersfield, SMMUSD insisted in correspondence it will not release the records and anticipates further proceedings in the trial court. See Ex. A. Mr. Marken's reverse-CPRA may delay the disclosure of these records for years to come.

On this record, SMMUSD has demonstrated itself to be opposed to and incapable of advocating Prof. Chwe's interests, and certainly not willing

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

to provide the zealous and diligent advocacy required to represent public requester Prof. Chwe's interests competently in the litigation. See Cal. Rule of Professional Conduct 3-110. Essentially, the Second District has announced an aberrant procedure where the opposing parties are in fact not adverse, and neither the public agency nor its employee is representing the crucial interests of the most vulnerable party, the public records requester, who has a constitutional right of access to the requested information. See Cal. Const. Art. 1, § 3(b).[3] Because the underlying rationale claimed by the Second District for rejecting attorneys' fees in reverse-CPRA cases is both unpersuasive and contradicted by the public agency's conduct in this case, this Court should grant review to make clear that "reverse-CPRA" actions cannot take place without providing records requesters the rights they have under the CPRA, including the right to recover fees if they appear in the action and prevail in securing disclosure of the records.

---

[3] In a case decided a few weeks after Marken, the Second District allowed a reverse-CPRA lawsuit to go forward where both the public agency (the City of Long Beach) and the third-party plaintiff seeking an injunction (the Long Beach Police Officers Association) were opposed to disclosure of records reflecting the names of officers involved in shootings. See Long Beach Police Officers Ass'n v. City of Long Beach, 2012 Cal.App. LEXIS 109, B231245, at *4 (Feb. 7, 2012) ("LBPOA"). If the trial court had not ordered sua sponte that the requester, the Los Angeles Times, be served with the lawsuit and added as a party, the reverse-CPRA lawsuit would have proceeded with all parties being opposed to disclosure of the records, which would have made the judicial proceedings a farce.

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

The Second District also has rendered futile the CPRA's built-in protections (Gov't Code § 6259(c)) to ensure that public agencies and their employees cannot delay disclosure of public records through appeals with automatic stays and requests for preliminary injunctions that are not final adjudications of the merits and do not end litigation even after appellate review. Substituting the Legislature's wisdom with its own, the Second District impermissibly subordinated the expeditious review process of the CPRA to the employee's purported interest in not having records disclosed where records are made confidential by law. Op. at 19. In doing so, the Second District ignored that the requested records were not made confidential by law in Mr. Marken's case, which involved the permissive Section 6254(c) CPRA exemption and not the Pitchess statutes or another statute that made the records confidential by law.[4] Moreover, the reweighing of interests conducted by the Second District contradicts the Legislature's expressed policy goal in amending the CPRA to provide timely information to the public about the conduct of government employees. As this Court recognized in Powers v. City of Richmond, 10

[4] By the Second District's reasoning, Mr. Marken's action should have been dismissed because he did not rely on mandatory exemptions. This disconnect between the Second District's holding and the facts of the case ensures that the novel reverse-CPRA procedure invented by the Court will not be as "limited" or "carefully circumscribed" as the Second District suggests. Op. at 21.

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

Cal.4th 85, 111 (1995), the purpose of the 1984 amendment to the CPRA barring appeals and requiring expeditious resolution through the appellate writ process was to prevent "delays of the appeal process, by means of which public officials are frustrating the intent of the laws for disclosure" to a time when "the story was no longer newsworthy."[5]

The Second District's endorsement of Mr. Marken's use of a reverse-CPRA lawsuit, which was fostered by SMMUSD's delays in disclosure, has negated the expedited appellate proceedings provision of the CPRA. Here, the public agency simply encouraged its employee to file an injunctive lawsuit and then, when unsuccessful, the public employee has successfully used protracted appellate proceedings to delay disclosure for more than a year. See Powers, 10 Cal.4th at 111; Los Angeles Times v. Alameda Corridor Transp. Auth., 88 Cal.App.4th 1381, 1386 (2001) (the "exclusive purpose" of the provision for review by extraordinary writ "was to speed appellate review"). Following the Second District's blueprint, future efforts to block public access to public information are likely to proceed throughout California using these impermissible delaying tactics in plain contravention of the CPRA.

---

[5] Under the CPRA, any requests for appellate relief must proceed within 20 days by extraordinary writ. Gov't Code § 6259(c).

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

The harm of delay is exacerbated by the Second District's allowing of the employee, Mr. Marken, to bring a lawsuit seeking a preliminary injunction and not dismissing it as improper under California law. The Second District stated that the records of the teacher's being disciplined for violating sexual harassment policy with a 13-year-old girl had to be disclosed. Op. at 28. ("release of the investigation report and disciplinary record ... is required under the CPRA").

That statement would be the end of the legal proceedings on the substantive issue if the Court were following the normal CPRA process of review by writ petition, and the records would be disclosed. But by allowing the appeal from the preliminary injunction, the Second District has left open the door to further trial court proceedings, including a trial on the merits and a post-trial appeal, because a preliminary injunction is not a full adjudication of the plaintiff's claim. See Op. at 8. The Second District's ruling enables Mr. Marken and SMMUSD and future employees and public agencies to further obstruct disclosure with essentially a second baseless adjudication of whether the records must be disclosed, which is exactly the type of protracted process that the Legislature sought to avoid when enacting the CPRA.

Without the protections of the fee-shifting and expedited appellate relief provisions that undergird the CPRA, and with no guarantee that a requester may even be given notice and an opportunity to be heard in the

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

reverse-CPRA action brought by the employee or a third party, requesters will have little to no incentive to seek to participate in the reverse-CPRA action that purportedly will decide whether or not the public agency must produce the requested documents. If the requesters learn of reverse-CPRA lawsuits and want to litigate, they are unlikely to find any attorneys willing to take on reverse-CPRA cases where there is no financial incentive at the end of the day, and where the public agencies and third party employees and unions can tie up the cases through appeals, trials and post-trial appeals for years.

Any attorneys that requesters are able to hire would have to advise the requesters to file and pursue their own separate CPRA lawsuits independent of the reverse-CPRA lawsuits to ensure that all of the protections of the CPRA apply. Requesters and their attorneys simply could not leave it to chance that public agencies actually would protect their interests in the reverse-CPRA action, given the experience here and the reality that agencies frequently are at odds with requesters concerning disclosure of public records.[6] The necessity for a separate action is magnified because a public records requester like Prof. Chwe might not be

---

[6] The ruling in the reverse-CPRA litigation could not provide res judicata effect on a requester who was denied the ability to present legal arguments for disclosure. See Rodgers v. Sargent Controls & Aerospace, 136 Cal.App. 4th 82, 92-93 (2006) (recognizing that res judicata does not apply to a party excluded from the other litigation).

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

able to be heard in the reverse-CPRA lawsuit even a little more than three weeks after the litigation has begun, if the Second District's opinion remains the law. See Op. at 21 n.17. As a consequence of these problems, two lawsuits litigating the same basic legal question – whether the requested records must be disclosed – are likely to unfold in superior courts across the state. Having two adjudications of the same legal issue is precisely the kind of "waste of judicial resources" that this Court warned against in Filarsky, 28 Cal.4th at 432.

Finally, the Second District dismissed Prof. Chwe's appeal, concluding that it lacked jurisdiction because the trial court denied his request to intervene on the grounds that it was filed on an ex parte basis. Op. at 31. In addition to being internally inconsistent – under the Second District's logic, it then should not have reached the reverse-CPRA issue, because that is something that only Prof. Chwe raised – this holding creates further conflicts with established authority and unnecessarily injects confusion into California law with respect to intervention and joinder.

Because this case raises important legal issues of statewide concern, and the Second District's decision conflicts with the CPRA and case law, Prof. Chwe respectfully requests that this Court grant his Petition for Review. See Cal. Rule of Court 8.500(b)(1).

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

STATEMENT OF THE CASE

On December 14, 2010, Prof. Chwe, a parent of two children who were then attending Santa Monica High School, submitted a CPRA request to SMMUSD for public records reflecting the discipline of Mr. Marken for violating SMMUSD sexual harassment policy 5145.7 with a thirteen-year-old girl. See Prof. Chwe's Appendix ("A.A.") at 000124-000128.

On December 20, 2010, Elizabeth Zamora-Mejia, an attorney who represents SMMUSD, replied to Prof. Chwe's CPRA request and stated her client needed "an additional fourteen (14) days" to respond to the request. A.A. at 000138. On January 6, 2011, Ms. Zamora-Mejia informed Prof. Chwe in a letter that SMMUSD was granting itself an additional one-month extension until February 7, 2011 to respond to his request. A.A. at 000140-000141. Ms. Zamora-Mejia explained that SMMUSD had notified Mr. Marken of the request, and at Mr. Marken's behest, the District agreed to withhold the records for an additional month so that Mr. Marken could bring a lawsuit seeking a court order preventing the release of the records. Id.

On February 8, 2011, Mr. Marken initiated this litigation by bringing an ex parte application seeking a temporary restraining order enjoining SMMUSD from releasing the public records requested by Prof. Chwe. A.A. at 000019-000031. Prof. Chwe, who was not named in that action, appeared in pro per at the ex parte hearing held that same day before the Hon. Ruth Ann Kwan. But the clerk would not accept his written statement, and, after

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

Mr. Marken's counsel objected that he was not a party, the court refused to allow Prof. Chwe to appear. A.A. at 000193; February 8, 2011 Reporter's Transcript at A-1. The court granted Mr. Marken's request for a temporary restraining order after holding a hearing in chambers. A.A. at 000118-000119.

On February 23, 2011, Prof. Chwe, now represented by counsel, filed a CPRA writ petition seeking to enforce his right of access to the requested records. A.A. at 000116-000122. The case was assigned to the Hon. Ann I. Jones. Prof. Chwe contemporaneously filed a Notice of Related Case; upon learning that it had been denied, his counsel immediately gave notice of an ex parte application to intervene in Marken v. SMMUSD and scheduled it for the first available day. A.A. at 000052; 000172-000176.

On Monday, March 7, the trial court denied Prof. Chwe leave to intervene. A.A. at 000202-000211. The court stated that it did not believe Prof. Chwe tried to appear at the February 8 hearing, but "in any event, he couldn't have appeared in an action that didn't involve him anyways." A.A. at 000206. The court added that Prof. Chwe "did not exercise due diligence in trying to do this earlier," and it concluded by telling his counsel, "I have made my ruling, and you have your remedy with review if you would like." A.A. at 000209-000210.

On March 10, at the hearing on Mr. Marken's request for a preliminary injunction, Ms. Zamora-Mejia complained about the lack of

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

discretion under the prevailing case law to withhold the records and stated that SMMUSD officials believe that the case law does not provide "sufficient guidance frankly." 3/10/11 R.T. at 10. The trial court denied Mr. Marken's request for a preliminary injunction, but it issued an immediate stay without making any findings required by the CPRA. Id.

Mr. Marken appealed the trial court's denial of his request for a preliminary injunction, while Prof. Chwe appealed the denial of his motion to intervene. On January 24, 2012, the Court of Appeal for the Second District affirmed the trial court's denial of the preliminary injunction, holding that "release of the investigation report and disciplinary record . . . is required under the CPRA." Op. at 28. As to Prof. Chwe's appeal, the Second District determined that he "should have been joined as a party." Op. at 28.

However, the Court dismissed his appeal, concluding that the trial court had denied his motion to intervene solely on the ground that it was filed on an ex parte basis, and therefore was not appealable. Op. at 29-31. As to the procedural propriety of Mr. Marken's reverse-CPRA lawsuit, with the caveat that "this issue has not previously been resolved in a published appellate decision and is not free from doubt," the Court held that the procedure used to bring this action was acceptable. Op. at 15.

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

I.
THE SECOND DISTRICT'S DECISION UNDERMINES THE PROTECTIONS FOR RECORDS REQUESTERS CODIFIED IN THE CPRA AND RECOGNIZED IN FILARSKY.

In enacting the CPRA, the Legislature declared "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't Code § 6250. The CPRA therefore provides that "every person" has a right to inspect any non-exempt public record. Gov't Code § 6253(a).

To protect this fundamental right, the Legislature designed a special procedure for judicial review. The CPRA provides that a requester can initiate litigation "to enforce his or her right" of access, with proceedings scheduled "at the earliest possible time." Id. at § 6258 Trial court orders are reviewable only through a special writ process, also with expedited deadlines. Id. at § 6259(c) The CPRA ensures that during the appellate process, a stay of a trial court order "shall not be granted unless the petitioning party demonstrates it will otherwise sustain irreparable damage and probable success on the merits." Id. Finally, the law provides for attorneys' fees for all prevailing plaintiff-requesters. Id. at § 6259(d)

This Court held in Filarsky that the system established in Sections 6258-59 is the "exclusive procedure" for seeking a judicial determination of an individual's right to access records under the CPRA. 28 Cal.4th at 433. That landmark decision began when the city of Manhattan Beach denied a

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

CPRA request and then preemptively filed a declaratory relief action pursuant to Code of Civil Procedure § 1060 seeking "a judicial determination of its rights and duties" under the CPRA. Id. at 424. This Court held that the CPRA prohibited the city from initiating litigation to block access to public records. Id. at 423.

This Court focused on the "special statutory procedures governing a judicial proceeding arising under the" CPRA, reasoning that they "are significantly different from the procedures applicable in an ordinary action for declaratory relief." Id. at 428. Permitting public agencies to initiate litigation in this manner, this Court held, would undermine the CPRA's core purpose of providing expeditious access to public records by encouraging undue delay, while wasting judicial resources and taking away vital incentives for citizens to assert their access rights. Id. at 428-29.

A. The Second District Has Vitiated The Carefully Crafted CPRA Protections For Public Records Requesters.

The Second District erroneously believed that it confronted an issue reserved by this Court in Filarsky – the propriety of a third party's adversarial action seeking to block a public agency's unlawful disclosure. Op. at 14-15. That is not what happened here. Rather, it is a novel twist on the facts of Filarsky, where the public agency unlawfully delayed producing public records so that the employee could file a lawsuit to block disclosure. This alternative procedure suffers from all of the same flaws the Filarsky

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

Court deemed fatal: (1) it strips vital incentives from CPRA requesters; (2) it creates undue delay in the production of public records; and (3) it ensures the filing of duplicative lawsuits that waste judicial resources.

1. The Second District's Decision Would Eliminate The Key Incentive Of Attorneys' Fees For Prevailing Requesters.

The cornerstone of the CPRA's special judicial review procedure is the requirement that all prevailing requesters be awarded attorneys' fees. Gov't Code § 6259(d). In Filarsky, this Court rejected the agency's declaratory relief action to determine a CPRA requester's right of access because, under such a procedure, "the individual would not recoup attorney fees if he or she succeeded," and therefore permitting such litigation would "eliminate important incentives and protections for individuals requesting public records." 28 Cal.4th at 429.

The reverse-CPRA procedure approved by the Second District also undermines the incentive system at the core of the statute. If public agencies can use their employees to bring lawsuits to enjoin disclosure, and not face attorneys' fees if disclosure is ordered, then it would be next to impossible for requesters to obtain legal representation. As a consequence, requesters would be far less likely to file CPRA requests in the first place, let alone to pursue judicial enforcement of their rights, which effectively decimates the CPRA's incentive system. See Galbiso v. Orosi Public Utility Dist., 167 Cal.App.4th 1063, 1088 (2008) ("the very purpose of the attorney fees

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

provision is to provide 'protections and incentives for members of the public to seek judicial enforcement of their right to inspect public records subject to disclosure.'") (quoting Filarsky, 28 Cal.4th at 427).

The Second District compounded its error here by asserting that, even if Prof. Chwe were properly joined as a real party in interest, under this procedural alignment he "would not be entitled to the recovery of attorney fees." Op. at 18. This position contradicts the Fourth District's decision in Fontana Police Dep't, 74 Cal.App.4th at 1253. The view adopted by the Second District in this case that "only the party who initiates the proceeding with respect to disclosure may recover attorney's fees and costs" eviscerates the CPRA's unique protections because it allows public agencies to "defeat recovery of fees in every instance" by doing exactly what Fontana did in this case, and what SMMUSD did here, namely "beating the party seeking disclosure to the courthouse." Id.

2. The Reverse-CPRA Action Approved By The Second District Encourages Undue Delay.

This Court has consistently recognized that the Legislature intended the CPRA to ensure the prompt disclosure of public records, and that it included the expedited procedure for judicial review to serve this purpose. See Filarsky, 28 Cal.4th at 429. The legislative history of the CPRA shows that the unique procedure of Sections 6258-59 was aimed at the "perceived evil" of "the potential for . . . public agencies to delay the disclosure of

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
FAX: (213) 633-6899

public documents." Times Mirror Co. v. Superior Court, 53 Cal.3d 1325, 1335 (1991). The expedited, requester-initiated writ system had the objective of prohibiting "public agencies from delaying the disclosure of public records by appealing a trial court decision and using continuances in order to frustrate the intent of the Public Records Act." Id.

The circumstances of this case present nothing less than an abandonment of the Legislature's carefully calibrated system. The records Prof. Chwe requested should have been released in December 2010. But now, even though the Second District held that the records must be disclosed, Prof. Chwe still has not received them because of an improper stay facilitated by the procedural posture of this litigation. The trial court granted a stay (3/10/11 Hearing Transcript at 11) allowing Mr. Marken to proceed by automatic appeal in contravention of the CPRA's ban on automatic stays of rulings in favor of CPRA requesters. See Gov't Code § 6259(c); Powers, 10 Cal.4th at 119 (George, J., concurring) (explaining that legislature sought to prevent proponents of secrecy from "delaying disclosure of the records ... by simply filing an appeal from the trial court's ruling," and by requiring the proponent of secrecy to "make the substantial showing required by the statute" to obtain a stay).

With the trial court refusing Prof. Chwe's attempts to be heard, neither Mr. Marken nor SMMUSD even mentioned the CPRA's bar on automatic stays with the trial court. The Second District apparently assumed

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

that the employee can just seek a preliminary injunction and thereby circumvent any proceedings on a stay, because preliminary injunctions are appealable orders that come with automatic stays. But this position frustrates the legislative intent of the CPRA to avoid delaying disclosure of records through protracted appeals and stays that are ultimately without merit. In this case, without the automatic stay, the records would have been disclosed during the school year in which the controversy over the teacher was at its height. Instead, they remain secret more than a year later.

And there is no end to Mr. Marken's reverse-CPRA lawsuit in sight. Even though the Second District found that California law requires disclosure of the requested disciplinary records, the Second District remanded for further proceedings, perhaps because the appeal was from the order denying the preliminary injunction. As the Second District noted, a preliminary injunction is not a full adjudication of the merits of the plaintiff's claim. Op. at 8. The records sought by Prof. Chwe could conceivably be withheld until a full trial on the merits and any post-trial appeal. By not dismissing the preliminary injunction lawsuit as an improper end run of the CPRA, the Second District has endorsed a process that will subject public records requesters to multiple rounds of litigation concerning a legal issue already adjudicated by the trial court and the Second District. It may not be wise for Mr. Marken and SMMUSD to continue with such proceedings given the statements by the Second District on the substantive

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

legal issue, but it may well happen, especially considering that SMMUSD has sent the letter claiming it will not release the records until further proceedings take place in the trial court. See Ex. A. That the Second District's opinion fails to provide a definitive end to proceedings (as would occur in a normal CPRA writ lawsuit), provides additional grounds for this Court's review.[7]

3. The Second District's Decision Will Ensure Duplicative Lawsuits That Waste Judicial Resources.

In Filarsky, this Court concluded that agency-initiated lawsuits to block disclosure result in "a waste of judicial resources" because a citizen "might threaten to commence a lawsuit, but such a threat often results in no actual litigation." 28 Cal.4th at 432. The reverse-CPRA suits approved by the Second District will be even worse for judicial economy because they will inevitably result in the filing of redundant lawsuits.

By "beating the party seeking disclosure to the courthouse," Fontana Police Dep't, 74 Cal.App.4th at 1253, then failing to name him as a real party in interest and opposing his attempts to intervene, SMMUSD and Mr. Marken forced Prof. Chwe to initiate separate litigation to protect his

[7] While the Second District apparently intended its reverse-CPRA procedure to be used in limited circumstances by individuals who are the subject of public records, it will likely be seized upon by well-financed corporate third-parties who can use these delaying tactics to discourage individual citizen requesters from proceeding if they cannot recover attorneys' fees, and news media requesters if, after years of delay, the information will no longer be newsworthy.

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

interests. Prof. Chwe attempted to mitigate the burden on the courts by seeking to have these two cases related, but the trial court denied his Notice of Related Cases. Despite Prof. Chwe's best efforts, two different lawsuits are working their way through the Los Angeles County Superior Court to decide the same issue.

Under the Second District's decision, requesters will have no other realistic choice but to file separate lawsuits. Otherwise, their only alternative would be to entrust their access rights to public agencies, with no assurance that they will be able to even participate in reverse-CPRA actions to advocate for their own rights, and no ability to recover attorneys' fees if they prevail.

B. The Reverse-CPRA Action In This Case Is Inconsistent With The Statute and Filarsky And Is Not Otherwise Legally Justified.

The CPRA makes clear that 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." Gov't Code § 6253.3. In Los Angeles Police Dep't v. Superior Court, 65 Cal.App.3d 661 (1977), the court recognized that "a subject person has no right under Act to prevent disclosure of the record to any other person." Id. at 668 (quoting Black Panther Party v. Kehoe, 42 Cal.App.3d 645 (1974)). See also City of Santa Rosa v. Press Democrat, 187 Cal.App.3d 1315, 1320 (1986) (stating that "there is no provision for an action by the government agency or for any

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

action to prevent disclosure") (emphasis in original). This Court similarly has held that the requester-initiated writ process of Sections 6258-6259 is the "exclusive procedure" for litigating access to records under the CPRA. Filarsky, 28 Cal.4th at 433.

These authorities make plain both that SMMUSD was wrong to allow Mr. Marken to control whether the requested records would be disclosed and that Mr. Marken had no right under the CPRA to prevent disclosure of the records to Prof. Chwe. In endorsing a reverse-CPRA procedure that contradicts this precedent, the Second District reasoned that: (1) the requester's interests will be adequately represented by the public agency; (2) parties mentioned in public records have no other remedy; and (3) Filarsky is distinguishable. All three of these premises are erroneous.

1. Public Agencies Cannot Adequately Represent The Interests Of Requesters In Reverse-CPRA Actions.

The Second District assumed that reverse-CPRA actions will "only be filed when the public agency has decided to provide access to the requested records," and claimed based on that premise that agencies will adequately represent the interests of CPRA requesters in the litigation. Op. at 18. However, the circumstances of this case show that this is a misguided assumption.

As soon as it received Prof. Chwe's CPRA request, SMMUSD reached out to its employee, Mr. Marken, and worked with him to facilitate

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

the filing of his lawsuit to block disclosure. SMMUSD granted itself extra time to respond to his request – beyond what the CPRA permits – for no reason other than to enable Mr. Marken's lawsuit.[8] The Second District recognized that this maneuvering violated the law. Op. at 18 n.14. But the Court overlooked the extent to which the public agency failed to adequately represent the CPRA requester's interests.[9]

Even if a public agency does not behave as SMMUSD has in this case, the interests of a CPRA requester and the governmental entity receiving the request are fundamentally at odds. As this Court has recognized, "public access makes it possible for members of the public 'to expose corruption, incompetence, inefficiency, prejudice, and favoritism.'"

---

[8] Mr. Marken admitted in his Opening Brief before the Court of Appeal that the District "allowed" him to file his lawsuit. Mr. Marken's Opening Brief at 3. SMMUSD, in its briefing, endorsed Mr. Marken's call for a re-evaluation of well-established case law favoring public records access, and Mr. Marken then touted that in his Reply. SMMUSD's Opening Brief at 10 and Mr. Marken's Reply at 1.

[9] LBPOA also demonstrates that reverse-CPRA lawsuits are not limited to where the public agency favors disclosure, as claimed by the Second District. See Op. at 21. The LBPOA Court erroneously relied on County of Santa Clara v. Superior Court, 171 Cal.App.4th 119 (2009), which merely held that citizens could file suit against a public agency pursuant to Code of Civil Procedure § 526a alleging that public funds were being spent on policies and practices that obstructed access to public records. Id. at 130-31. The lawsuit "furthered," rather than "obstructed," the "purpose of the CPRA," and because it was outside the class of cases on whether public records must be disclosed, the Court stated plaintiffs could bring their lawsuit. Id. at 130. The Court did not hold that a third party could initiate litigation to block a citizen's access to public records.

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

Int'l Fed'n of Prof'l & Technical Eng'rs, Local 21 v. Superior Court, 42 Cal.4th 319, 333 (2007) (citation omitted). While the records requested by Prof. Chwe involve Mr. Marken's individual case, they also have the potential to "to expose corruption, incompetence, inefficiency, prejudice, and favoritism" in how SMMUSD has handled employee discipline.[10]

Therefore, the public agency has an inherent conflict that prevents it from truly protecting a CPRA requester's interests. But the Second District has gone farther and endorsed a procedure that essentially allows public access to be litigated without any effective adversarial process.

2. Third Parties Have An Adequate Alternative Remedy.

The Second District's reasoning that Mr. Marken and other similarly situated individuals would not have a remedy without a reverse-CPRA lawsuit (see Op. at 15-16) is also belied by the availability of an invasion of privacy tort suit for damages if a disclosure by a public agency truly violated privacy rights. See City of Santa Rosa, 187 Cal.App.3d at 1322-1323.

The City of Santa Rosa Court acknowledged that the agency had to choose between withholding the records and risking a CPRA lawsuit and an attorneys' fees payout, or disclosing the records and risking "a potential civil

---

[10] Following the Second District's guidance, other school districts may have every incentive to withhold records that may expose them to potential civil liability. Without action by this Court, the reverse-CPRA procedure that the Second District outlines will facilitate reverse-CPRA actions throughout California in virtually any context where the subject of the records does not want them to be disclosed.

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

suit for damages." Id. But the court was clear that the public agency had to make the choice; it could not rely on the Court to bail it out by bringing a reverse-freedom of information lawsuit seeking a declaration that it need not disclose the records because "such a result would be at war with the very purpose of the CPRA and would effectively discourage requests for disclosure by a member of the public or representative surrogate." Id. at 1323. What was impermissible under City of Santa Rosa should also have been impermissible here, as Mr. Marken's reverse-CPRA action with SMMUSD's encouragement similarly undermined the goals of the CPRA.

3. The Second District Misconstrued Filarsky.

The Second District justified its holding by distinguishing Filarsky based on the underlying facts of this Court's decision, but in doing so it overlooked the actual nature and scope of this Court's holding. It maintained that this Court only prohibited public agencies from initiating declaratory relief actions pursuant to Code of Civil Procedure § 1060 that seek to define the scope of an agency's discretion to disclose records that may be withheld under permissive exemptions to the CPRA. Op. at 21. The Second District concluded that a reverse-CPRA action is allowed if a third-party files a general writ petition pursuant to Code of Civil Procedure §1085 seeking to restrain an agency from disclosing records that must not be disclosed under other statutory provisions outside of the CPRA. Op. at 17.

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

This tortured distinction misses the rationale underlying the Filarsky decision. This Court held that Manhattan Beach's declaratory relief action under Code of Civil Procedure § 1060 was procedurally improper because such an action lacks the "special statutory procedures governing a judicial proceeding arising under the Act" that are unique to Sections 6258-6259. 28 Cal.4th at 428. In other words, this Court did not just hold that a declaratory relief action pursuant to Code of Civil Procedure § 1060 is an improper procedure: it held that the CPRA's own mechanism for judicial enforcement is the "exclusive procedure." Id. at 433. The alternative endorsed by the Second District– in which a third party brings a general petition for writ of mandate to try to block an agency from unlawfully disclosing records – also lacks the "special statutory procedures" of the CPRA, and so it is also inadequate.

The Second District's strained attempt to distinguish Filarsky based on permissive vs. mandatory exemptions, and declaratory relief actions vs. writ petitions, collapses when one considers how these lawsuits actually work in practice. In this case, for instance, Mr. Marken filed a Verified Complaint that sought both a writ of mandate pursuant to Code of Civil Procedure § 1085 and declaratory relief. A.A. at 000003-000012. His request for declaratory relief was identical to the public agency's request in Filarsky, as it sought a judicial determination of the scope of the school district's discretion. A.A. at 000008 (asking the court for a declaration of

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

whether disclosure "is required under Government Code section 6254(c) and/or 6255," not whether it is prohibited) (emphasis added).

Mr. Marken's Complaint cites only the permissive exemption of Section 6254(c), Education Code Section 44031 (which does not exempt any records from public access), and the constitutional right to privacy, A.A. at 000005-000010, which cannot override the discretionary nature of the 6254 exemptions. See Cal.State Univ., Fresno v. Superior Court, 90 Cal.App.4th 810, 832-33 (2001) (applying the same standard to evaluate constitutional privacy and 6254(c) claims). Therefore, Mr. Marken had no basis for arguing that SMMUSD's disclosure was "otherwise prohibited by law," and the law is clear that as an employee of a public agency, he has no standing to argue that the agency should have exercised its discretion differently to assert a privilege against disclosure under the CPRA. See Berkeley Police Ass'n v. City of Berkeley, 76 Cal.App.3d 931, 941 (1977).

The decision suggests that any time an employee or other third party makes a claim labeled "constitutional right of privacy," that party can bring a reverse-CPRA lawsuit, no matter how frivolous. Despite the Second District's apparent intention to limit reverse-CPRA lawsuits to actions to block the disclosure of information that cannot be disclosed by law, such as social security numbers or Pitchess complaints, here Mr. Marken has made no such claim, as his lawsuit raises only permissive exemptions. Therefore, under the Second District's reasoning, it would have had to reject Mr.

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

Marken's lawsuit because it is beyond the "limited nature" of the reverse-CPRA actions that it approved. Op. at 21. But the Second District did not dismiss Mr. Marken's lawsuit, which remains alive pending further proceedings in the trial court (with even further delays because SMMUSD continues to refuse to disclose the records – see Ex. A).[11]

II.
THE SECOND DISTRICT'S HOLDING ON INTERVENTION AND JOINDER IS CONTRARY TO CALIFORNIA LAW

California law has long been clear that the "'purpose of allowing intervention is to promote fairness by involving all parties potentially affected by a judgment.'" Lindelli v. Town of San Anselmo, 139 Cal.App.4th 1499, 1504 (2006) (quoting Simpson Redwood Co. v. State, 196 Cal.App.3d 1192, 1199 (1987)). Therefore, the intervention statute, Code of Civil Procedure Section 387, "should be liberally construed in favor of intervention." Id. at 1505 (emphasis added). This principle is so firmly established that courts have held that "where action by a party is 'in essence

[11] The Second District's reliance on inapposite federal authority interpreting the Freedom of Information Act ("FOIA"), Op. at 15, was also improper under these circumstances. See Filarsky, 28 Cal.4th at 431-32 (rejecting an analogy to "reverse-FOIA" actions under federal law); County of Los Angeles v. Superior Court, 82 Cal.App.4th 819, 825, 825 n.4 (2000) (explaining that while the CPRA and FOIA "have similar policy objectives and should receive a parallel construction . . . The CPRA may not, however, be construed to read into it FOIA language which the CPRA itself does not contain."); City of Santa Rosa, 187 Cal.App.3d at 1322-1323 (rejecting agency's attempt to bring reverse-freedom of information lawsuit seeking declaration that it did not have to disclosure records reflecting a teacher's alleged sleeping with a minor, as detailed in a police report).

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

an attempt to intervene and to become a party to the proceeding,' it is treated as if it were a motion to intervene and is appealable." Jun v. Myers, 88 Cal.App.4th 117, 122 (2001) (quoting In re Veterans' Industries, Inc., 8 Cal.App.3d 902, 916 (1970)) (emphasis added).

"A nonparty has a right under Code of Civil Procedure section 387, subdivision (b) to intervene in a pending action 'if the person seeking intervention claims an interest relating to the property or transaction which is the subject of the action and that person is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by existing parties." Hodge v. Kirkpatrick Dev., Inc., 130 Cal.App.4th 540, 547 (2005). "An order denying a motion for leave to intervene is directly appealable because it finally and adversely determines the moving party's right to proceed in the action." Id.

Here the trial court could not have been clearer that it was "finally and adversely determining" Prof. Chwe's "right to proceed" because it told his counsel: "I have made my ruling, and you have your remedy with review if you would like." A.A. at 000210. And yet the Second District declined to undertake the review the trial court invited, erroneously concluding that it lacked jurisdiction on the ground that the trial court denied Prof. Chwe's motion "solely because it had been filed on an ex parte basis." Op. at 29.

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

This holding is both factually and legally incorrect, and, if allowed to stand, it will bring uncertainty to California's intervention jurisprudence.

The holding conflicts with Noya v. A.W. Coulter Trucking, 143 Cal.App.4th 838 (2006). That Court held that the denial on the merits of an ex parte motion to intervene is appealable, despite its ex parte nature. Id. at 841. Here, while the trial court did mention the ex parte nature of the application in issuing its ruling, its statement to Prof. Chwe's counsel that "you have your remedy with review" could not have made it clearer that it was a final ruling on the merits. Moreover, the trial court explained that Mr. Marken's lawsuit was "an action that didn't involve [Prof. Chwe]," and that he "did not exercise due diligence." A.A. at 000206; 000209.

These were merits rulings because the "merits" refers to the "elements or grounds of a claim or defense; the substantive considerations to be taken into account in deciding a case, as opposed to extraneous or technical points, esp. of procedure." Black's Law Dictionary (Second Pocket Ed. 2001) (emphasis added). Having an interest in an action and exercising diligence are two required elements of intervention under Code of Civil Procedure § 387(b). Therefore, the trial court issued a ruling on the merits that finally and adversely determined Prof. Chwe's right to intervene. The Second District's strained reading of the record is simply not reasonable. Its conclusion that the trial court "was simply observing that, as of the date of the hearing on the temporary restraining order, Chwe was not

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

a party to the action and, as a nonparty, could not have formally 'appeared,'" misapprehends the nature of a "merits" ruling as discussed above, while ignoring the trial court's clear direction to Prof. Chwe's counsel to seek appellate review. Op. at 31.

The Second District's holding also muddies the law regarding the diligence requirement of Code of Civil Procedure § 387(b) and ex parte applications to intervene. Op. at 30. The record clearly reveals that Prof. Chwe appeared at the first hearing in this matter as soon as he became aware of the action. A.A. at 000019-000031. Prof. Chwe's attempt to appear in pro per was more than adequate to intervene under the controlling law. See Jun, 88 Cal.App.4th at 123 (reversing a trial court's denial of a non-party's "motion to sue" because it was "in essence an attempt to intervene and to become a party to the proceeding") (citation omitted).

Prof. Chwe should have been added to this action as a real party in interest at the February 8 hearing; that he was not so joined had nothing to do with a lack of diligence on his part and everything to do with improper opposition from the other parties and even the court itself, as Mr. Marken's counsel objected to Prof. Chwe's appearance and the clerk refused to accept his briefing, while the court brought Mr. Marken's attorneys and SMMUSD's counsel into chambers to hold the TRO hearing in private. A.A. at 000118-000119, 000193.

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

In the weeks that followed, Prof. Chwe obtained pro bono counsel, filed a CPRA writ petition seeking to enforce his right of access to the requested records, and filed a Notice of Related Case that was denied. A.A. at 000116-000122. Within an hour of receiving the order denying the Notice of Related Case, Prof. Chwe immediately gave notice of an ex parte application to intervene in Marken v. SMMUSD and scheduled it for the first available day. A.A. at 000068-000069.

The Second District's conclusion that Prof. Chwe lacked diligence, or that his ex parte application to intervene was in anyway unjustified, is belied by this record. Moreover, the Court's conclusion that the trial court properly denied his motion on this basis conflicts with a long line of authority holding that the intervention statute must be construed liberally, and that timeliness should not bar a real party in interest from participating in litigation when the other requirements are satisfied. See Lincoln Nat'l Life Ins. Co. v. State Bd. of Equalization, 30 Cal.App.4th 1411, 1423 (1994) ("[C]ourts have recognized California Code of Civil Procedure section 387 should be liberally construed in favor of intervention"); Truck Ins. Exchange v. Superior Court, 60 Cal.App.4th 342, 351 (1997) ("[T]imeliness is hardly a reason to bar intervention when a direct interest is demonstrated and the real parties in interest have not shown any prejudice other than being required to prove their case").

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
FAX: (213) 633-6899

Finally, the Second District erred by acknowledging that Prof. Chwe "should have been joined as a party under Code of Civil Procedure section 389, subdivision (a)," Op. at 28, but then failing to add him as a real party in interest. The Second District and Fourth District have explained in recent cases that "[a] person is an indispensable party to litigation 'if his or her rights must necessarily be affected by the judgment.' [Citation.] Stated differently, 'Where the plaintiff seeks some type of affirmative relief which , if granted, would injure or affect the interest of a third person not joined, that third person is an indispensable party.'" In re Marriage of Ramirez, 198 Cal.App.4th 336, 344 (2011) (quoting Washington Mutual Bank v. Blechman, 157 Cal.App.4th 662, 667 (2007) (emphasis added)). Here, Mr. Marken's lawsuit sought injunctive relief that, if granted, would injure the interest of the requester, Prof. Chwe, in having his request answered and the records disclosed.

At a minimum, because Prof. Chwe satisfies the definition of an indispensable party, he should have been given notice and an opportunity to be heard in Mr. Marken's lawsuit. When that did not happen in the trial court, the Second District had the authority – indeed, the obligation – to join him in the action, regardless of whether the trial court's particular ruling denying his ex parte motion to intervene was itself appealable. See Fraser-Yamor Agency, Inc. v. County of Del Norte, 68 Cal.App.3d 201, 214 (1977) ("Because the requirement that indispensable parties be before the court is

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

mandatory, it may be raised at any time and it may be raised by the appellate court on its own motion if the parties fail to make the objection") (emphasis added); Civ. Proc. Code § 389 ("If he has not been so joined, the court shall order that he be made a party") (emphasis added).

The refusal of the Second District to join Prof. Chwe as a party to the litigation over whether his records request would be fulfilled creates the distinct probability that a future requester will be unable to be heard in the courts on whether a public agency may be enjoined from producing the requested records. This result is fundamentally at odds with the "general rule" announced by this Court more than a century ago that under Section 389, "all who are interested in the subject-matter of a litigation should be made parties thereto, in order that complete justice may be done, and that there may be a final determination of the rights of all parties interested in the subject-matter of the controversy." Mitau v. Roddan, 149 Cal.1, 6-7 (1906) (emphasis added).

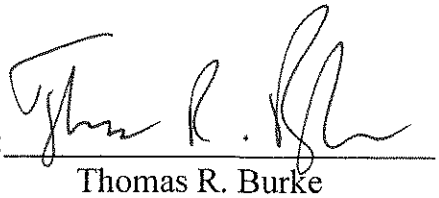
III.
CONCLUSION

For the reasons stated herein, Prof. Chwe respectfully requests that this Court grant his Petition for Review.

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

DATED: March 1, 2012

DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE
ALONZO WICKERS IV
JEFF GLASSER
DAN LAIDMAN

By: 
Thomas R. Burke

Attorneys for Real Party In Interest
and Appellant
MICHAEL CHWE

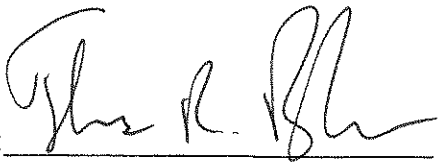
DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

CERTIFICATE OF WORD COUNT

Pursuant to CRC 28.1(e)(1), the text of this brief consists of 8,371 words, as counted by the Microsoft Word 2002 word-processing program used to generate the brief, including footnotes, but excluding the caption, the table of authorities, the table of contents, this certificate, and the signature blocks.

DATED: March 1, 2012

DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE
ALONZO WICKERS IV
JEFF GLASSER
DAN LAIDMAN

By: 
Thomas R. Burke

Attorneys for Real Party In Interest
and Appellant
MICHAEL CHWE

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

Filed 1/24/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ARI MARKEN, Plaintiff and Appellant, v. SANTA MONICA-MALIBU UNIFIED SCHOOL DISTRICT, Defendant and Respondent; MICHAEL CHWE, Movant and Appellant.	B231787 (Los Angeles County Super. Ct. No. BC454656)

APPEAL from orders of the Superior Court of Los Angeles County, Ruth Ann Kwan, Judge. Affirmed in part and, dismissed in part.

Trygstad, Schwab & Trygstad, Richard J. Schwab, Lawrence B. Trygstad, Daniel J. Kolodziej and Lillian Kae, for Plaintiff and Appellant.

Atkinson, Andelson, Loya, Ruud & Romo, James Baca, Elizabeth Zamora-Mejia, and Heather A. Dozier, for Defendant and Respondent.

Davis Wright Tremaine, Thomas R. Burke, Alonzo Wickers IV, and Jeff Glasser for Movant and Appellant.

After an investigation of a student's complaint Ari Marken, a mathematics teacher at Santa Monica High School, received a written reprimand from the Santa Monica-Malibu Unified School District (District) for violating the District's policy prohibiting the sexual harassment of students. Marken had been placed on administrative leave during the month-long investigation, but returned to his classroom following the reprimand.

Two years later Michael Chwe, a District parent, requested disclosure under the California Public Records Act (CPRA) (Gov. Code, § 6250 et seq.)[1] of records concerning the District's investigation of Marken and its findings he had violated the sexual harassment policy. Advised by the District it intended to release certain of the records (specifically, the investigation report and letter of reprimand), Marken filed a verified complaint for injunctive and declaratory relief/petition for writ of mandate, alleging disclosure of his personnel records was not authorized under the CPRA and would violate his constitutional and statutory rights of privacy. After initially issuing a temporary restraining order, the trial court denied Marken's request for a preliminary injunction. The court also denied Chwe's ex parte application to intervene in the action. We affirm the order denying the preliminary injunction and dismiss the appeal from the order denying leave to intervene.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Student Complaint, the District Investigation and the Letter of Reprimand*

In October 2008 the mother of a ninth grade student in one of Marken's classes at Santa Monica High School spoke with the student's house principal[2] expressing concern her daughter had been sexually harassed by Marken. The mother submitted a document outlining the alleged improper conduct (both comments and actions). The house principal spoke with the student and then with Marken, who admitted he had engaged in

---

[1] Statutory references are to the Government Code unless otherwise indicated.

[2] Santa Monica High School's approximately 3,000 students are divided into five smaller learning communities or "houses," each of which has its own leadership team including a house principal.

certain of the conduct alleged, explaining the context, and denied he had engaged in other conduct. The house principal then reported the complaint to the District, which retained an attorney to independently investigate the matter in accordance with the District's Board Policy 5145.7 on sexual harassment. Marken was placed on home assignment during the investigation, as required by the board policy.

The student's parents spoke with the investigator and provided information regarding the alleged misconduct but explained they had decided not to allow their daughter to be interviewed about the matter. In addition to the parents the investigator interviewed the house principal, the high school's dean of students, several staff members and Marken. The investigator prepared a report, dated November 25, 2008, which contained a summary of the evidence gathered and made "partial findings" regarding certain conduct that she concluded "more likely than not did occur." However, the report stated, because no interviews were conducted of any students, the investigation was not considered completed.

Based on the investigation report, on November 26, 2008 the District issued a "written reprimand following accusations of sexual harassment of a student," finding Marken had violated the District's board policy prohibiting the sexual harassment of students and his actions had negatively affected the student involved. The written reprimand included a number of specific directives relating to Marken's future conduct with students (including a prohibition of any further interaction with the student whose mother had initiated the complaint) and warned Marken a failure to comply with these directives or future incidents of sexual harassment or misconduct would result in further disciplinary action. Finally, the letter of reprimand stated a report of the matter had been made to law enforcement as required by District policy.[3]

Marken returned to his classroom. No criminal charges were ever filed.

---

[3] Although the investigation report and letter of reprimand remain sealed pending the determination of Marken's appeal, Marken has disclosed certain information from those documents in his complaint and the briefs filed in the trial court and on appeal.

2. *Chwe's CPRA Request and the District Response*

On December 14, 2010 Chwe, a professor of political science at UCLA and the father of two children who attend Santa Monica High School, made a CPRA request to the District, seeking "copies of all public records . . . concerning the investigation of Santa Monica High School teacher Mr. Ari Marken and the resulting decision to place him on leave in December 2008 for sexually harassing a thirteen-year-old girl, in violation of SMMUSD policy 5145.7." The request attached a copy of a letter dated December 4, 2008 from a District assistant superintendent to the mother of the student who had initiated the complaint against Marken, which stated, in part, "[T]he District hired an Independent Investigator to examine this complaint. The District found that Mr. Marken did violate Board Policy 5145.7 [on sexual harassment] and has taken appropriate action." The request also sought other public records regarding any substantial complaints about Marken's improper behavior toward students.

The District through its legal counsel notified Chwe it required additional time to respond to his request—first, a 14-day extension and then a one-month extension to February 7, 2011. Counsel explained the District had advised Marken of Chwe's request and its intention to comply with it—that is, to produce all public records relating to its investigation of the October 2008 student complaint of sexual harassment and any other public records regarding substantial complaints about Marken's improper behavior toward students—and Marken's counsel had requested the one-month period prior to production of any documents to allow him to seek a judicial determination whether the documents the District intended to release were disclosable in light of Marken's federal and state constitutional privacy rights. Counsel assured Chwe it would produce those documents by February 7, 2011 "unless a court orders otherwise."

3. *Marken's Lawsuit; Chwe's CPRA Suit*

On February 8, 2011 Marken filed a lawsuit against the District, captioned verified complaint for: temporary restraining order, preliminary and permanent injunction, declaratory relief; petition for writ of mandate. Marken alleged the District's decision to disclose the November 25, 2008 investigation report and the November 26, 2008 letter of

reprimand in response to Chwe's request was not authorized under the CPRA because the sexual harassment complaint was neither substantial in nature nor well founded. Marken further alleged the District's intended disclosure of his confidential personnel records, unless enjoined, would violate his rights of privacy protected by the California Constitution and the Education and Government Codes and cause him irreparable harm. Concurrently with the filing of his complaint/petition for writ of mandate, Marken filed an ex parte application for a temporary restraining order and an application for an order to show cause re preliminary injunction, which were supported by a memorandum of points and authorities and related declarations.

Marken's lawsuit was initially assigned to Hon. Ann I. Jones in Department 86 (writs and receivers) of the Los Angeles Superior Court. Marken filed a Code of Civil Procedure section 170.6 affidavit of prejudice, and the case was reassigned to Hon. Ruth Ann Kwan. When the court called the matter, counsel for Marken and the District stated their appearances. Chwe was also present and identified himself as the person who had filed the CPRA request. The father of the student involved in the complaint also identified himself to the court. Counsel for Marken and the District each noted that Chwe was not a party, and Marken's counsel requested the hearing be held in chambers. According to Chwe, he attempted to provide a written statement to the court; the clerk refused to accept it.

The court held an in camera hearing, on the record, so it could review the personnel records the District intended to disclose. Following argument, the court granted a temporary restraining order to preserve the status quo and set a hearing on the request for a preliminary injunction for March 10, 2011.

On February 23, 2011 Chwe filed a petition for writ of mandate to compel the District to comply with the CPRA, which was assigned to Judge Jones in Department 86 of the Los Angeles Superior Court. Chwe also filed a notice of related case and requested his lawsuit and Marken's "reverse-Public Records Act lawsuit" be related and assigned to one of the writs-and-receivers judges in Departments 85 and 86 "who normally handle[s] Public Records Act writ petitions."

On March 2, 2011 the court (Judge Jones) denied the request to relate the two cases. Chwe did not seek review of that order in Department One, as permitted by rule 3.3(f)(3) of the Local Rules of the Los Angeles Superior Court. Instead, on March 3, 2010 his counsel gave telephone notice to counsel for Marken and the District of his intention to apply ex parte for leave to intervene in Marken's lawsuit against the District. Chwe's counsel provided notice to the court of his intention to file an ex parte application on March 4, 2011.

On March 7, 2011 Chwe, identifying himself as real party in interest, filed an ex parte application for leave to intervene in the Marken action in order to oppose the request for injunctive relief. The application explained ex parte relief was necessary because the hearing on the request for a preliminary injunction was scheduled for March 10, 2011 and Chwe's right to present arguments concerning his CPRA request would be violated if his request was not granted. The application was supported by a memorandum of points and authorities, which argued not only that Chwe qualifies as an intervener under Code of Civil Procedure section 387, subdivision (b), but also that he is an indispensable party to the action pursuant to Code of Civil Procedure section 389, subdivision (a), California's compulsory joinder statute.

4. *The Trial Court's Rulings*

a. *The application for leave to intervene*

On March 7, 2011 the court heard argument and denied Chwe's application for leave to intervene. The court explained it was denying the application because it had been presented on an ex parte basis, shortly before the scheduled hearing on the request for a preliminary injunction, notwithstanding the fact Chwe had been aware of the pendency of the action since February 8, 2011 when he was present at portions of the hearing on Marken's application for a temporary restraining order: "Counsel, you are asking to intervene on an ex parte basis. The court is going to deny it on—the intervention on an ex parte because it's—your client did not exercise due diligence in trying to do this earlier so that it could be properly heard on the count's calendar so that

they could file a proper opposition for the court's consideration."[4] Chwe sought immediate appellate review of that ruling by petition for writ of mandate and request for stay of proceedings, filed March 9, 2011. His petition was summarily denied by this court. On April 28, 2011 Chwe filed a notice of appeal from the order denying leave to intervene.

b. *The application for a preliminary injunction*

On March 10, 2011, after receiving a supplemental memorandum from Marken in support of his request for a preliminary injunction, opposition papers from the District and a reply from Marken, and following argument of counsel, the court denied the request for a preliminary injunction, finding the documents at issue are subject to disclosure under the CPRA. However, the court ordered the District to redact the names and personal information of the complainant and witnesses identified in the documents and stayed the effectiveness of its order pending appellate review.[5]

In its tentative ruling, which it thereafter adopted as the final ruling, the court recognized that Marken has a legally protected privacy interest in his personnel files, including the investigation report and letter of reprimand. However, the court found "the potential harm to [Marken's] privacy interests from disclosure of the subject documents does not outweigh the public interest in disclosure. The public has a significant interest

---

[4] The court also stated, "I'm not going to reward him by summarily granting the ex parte application without proper briefing for the court to properly consider these issues."

[5] When the court indicated it would stay its order if Marken sought appellate review, Marken's counsel said, "A judgment would have to be entered at this point in time. . . . So they'll prepare the judgment, then I will take that, that's what I would appeal from." The court responded, "Okay. So why don't you submit a stipulate[d] judgment. . . . That way I can sign it immediately." The parties then prepared a "stipulated judgment," which the court signed and filed on March 21, 2011. A corrected "stipulated judgment" was thereafter signed by the court and filed on March 23, 2011. In response to a written inquiry from this court prior to oral argument, counsel for Marken and the District acknowledged the "stipulated judgment" was not necessary to allow Marken to appeal from the March 10, 2011 order denying the preliminary injunction and was not intended to convert the ruling on the preliminary injunction into a final determination on the merits of the lawsuit.

in the competence and misconduct of public school teachers teaching their children, especially allegations of misconduct that have a negative impact on their children. The public also has a significant interest in knowing how a school district responds to allegations of misconduct or improper behavior towards students by teachers." Applying the standards articulated in *American Federation of State etc. Employees v. Regents of University of California* (1978) 80 Cal.App.3d 913 (*American Federation*), *Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041 (*Bakersfield School Dist.*) and *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742 (*BRV*), the court found reasonable cause exists to believe the complaint against Marken "is well-founded and substantial in nature." The court further found the public's interest would not be furthered by disclosing the identity of the complainant or the other witnesses named in the documents at issue and directed the District to redact their names and personal information.

Marken filed a timely notice of appeal from the order denying the application for a preliminary injunction. (Code Civ. Proc., § 904.1, subd. (a)(6); *Yu v. University of La Verne* (2011) 196 Cal.App.4th 779, 786, fn. 2 ["[a]n order denying a motion for a preliminary injunction is appealable"].)[6]

DISCUSSION

Marken's Appeal

1. *Standard of Review*

"As its name suggests, a *preliminary* injunction is an order that is sought by a plaintiff *prior to a full adjudication of the merits of its claim.* [Citation.] To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." (*White v. Davis* (2003) 30 Cal.4th 528, 554.) "In deciding whether to issue a preliminary injunction, a trial court weighs two interrelated factors:

---

[6] Following Marken's appeal of the decision to deny the preliminary injunction, Chwe and the District stipulated to stay further proceedings in Chwe's separate CPRA lawsuit.

the likelihood the moving party ultimately will prevail on the merits, and the relative interim harm to the parties from the issuance or nonissuance of the injunction." (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999.)

We generally review the trial court's ruling for abuse of discretion. (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1449-1450.) An order denying an application for a preliminary injunction may be reversed only if the trial court abused its discretion with respect to *both* the question of success on the merits and the question of irreparable harm. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286-287.) However, if the "likelihood of prevailing on the merits" factor depends upon the construction of a statute or another question of law, rather than evidence to be introduced at trial, our review of that issue is independent or de novo. (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 408-409; *Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, 422.)

2. *The California Public Records Act: An Overview*

The California Constitution guarantees both the individual's right of privacy (Cal. Const., art. I, § 1; see *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 15) and the public's "right of access to information concerning the public's business" (Cal. Const., art. I, § 3, subd. (b)(1)), including "the writings of public officials and agencies." (*Ibid.*; see *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 229 (*International Federation*)). With respect to the latter right, the Supreme Court has observed, "Openness in government is essential to the functioning of a democracy. 'Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.'" (*International Federation*, at pp. 328-329.)

In the CPRA the Legislature has sought to reconcile these two fundamental, but sometimes conflicting, conditional rights.[7] While "mindful of the right of individuals to privacy" (§ 6250), the Legislature has declared "access to information concerning the conduct of the People's business is a fundamental and necessary right of every person in this state." (*Ibid.*) Thus, the CPRA generally provides "every person has a right to inspect any public record" (§ 6253, subd. (a)), "[e]xcept with respect to records exempt from disclosure by express provisions of law . . . ." (§ 6253, subd. (b).) Section 6254, in turn, lists 29 categories of documents exempt from the requirement of public disclosure, many of which are designed to protect individual privacy, including, "Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." (§ 6254, subd. (c); see also § 6254, subd. (k) [exempting "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law"].)[8] Section 6255, subdivision (a), also permits a public agency to withhold other records if it can demonstrate "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."[9]

These statutory exemptions from mandatory disclosure under the CPRA must be narrowly construed. (Cal. Const., art. I, sec. 3, subd. (b)(2) ["[a] statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be

---

[7] Initially enacted in 1968, the California Public Records Act was modeled on the federal Freedom of Information Act (FOIA) (5 U.S.C. § 552 et seq.). (See *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651.)

[8] Additional specific exceptions to disclosure are listed in sections 6253.2, 6253.5, 6253.6, 6254.1 to 6254.22, 6268 and 6276.02 to 6276.48. The initiative adopted by the voters in 2004 that added the right of access to public records to the California Constitution expressly preserves all these statutory exceptions. (Cal. Const., art. I, § 3, subd. (b)(5); *International Federation, supra*, 42 Cal.4th at p. 329, fn. 2.)

[9] Section 6255, subdivision (a), is frequently referred to as the "catchall exemption." (See, e.g., *International Federation, supra*, 42 Cal.4th at p. 329; *Sonoma County Employees' Retirement Assn. v. Superior Court* (2011) 198 Cal.App.4th 986, 991.)

broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access"]; see *Sonoma County Employees' Retirement Assn. v. Superior Court* (2011) 198 Cal.App.4th 986, 992.) Moreover, the exemptions from disclosure provided by section 6254 are permissive, not mandatory: They allow nondisclosure but do not prohibit disclosure. (*CBS v. Block* (1986) 42 Cal.3d 646, 652; *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 905; *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 656; see 68 Ops.Cal.Atty.Gen. 73 (1985).) Indeed, the penultimate sentence of section 6254 provides, "Nothing in this section prevents any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law." (See also § 6253, subd. (e) ["[e]xcept as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter"].)

3. *Litigation Under the CPRA and the Propriety of a Reverse CPRA Action*

a. *Action by the person seeking disclosure pursuant to sections 6258 and 6259*

Public records must be open for inspection at all times during a public agency's business hours. (§ 6253, subd. (a).) A state or local agency, including, as here, a local school district (§ 6252, subd. (a)), generally has only 10 days to decide if copies of public records will be provided in response to a request that reasonably describes an identifiable record or records. (§ 6253, subds. (b), (c).) In unusual circumstances (for example, the records are held off-site or the request requires the collection of "a voluminous amount of separate and distinct records that are demanded in a single request") the agency may give itself an additional 14 days to respond. (*Id.*, subd. (c).) If the agency determines the requested records are not subject to disclosure, it must promptly notify the person making the request and explain the reason for its determination. (*Ibid.*)

If the person[10] requesting the records is not satisfied with the public agency's response, the requestor may seek a judicial determination of the agency's obligation to disclose the records requested. "Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under [the CPRA]." (§ 6258; see *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 426 (*Filarsky*). "After a person commences such a proceeding, the court must set times for responsive pleadings and for hearings 'with the object of securing a decision . . . at the earliest possible time.' (§ 6258.) If it appears from the plaintiff's verified petition that 'certain public records are being improperly withheld from a member of the public,' the court must order the individual withholding the records to disclose them or to show cause why he or she should not do so. (§ 6259, subd. (a).)" (*Filarsky,* at p. 426.) A member of the public who prevails in an action to compel disclosure of public records is entitled to recover reasonable attorney fees, as well as costs. (§ 6259, subd. (d).) An unsuccessful plaintiff, however, is subject to an award of costs and reasonable attorney fees to the public agency only if the case was "clearly frivolous." (*Ibid.*)

The order of the trial court directing disclosure or supporting the decision refusing disclosure "is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ." (§ 6259, subd. (c).) The Supreme Court has explained appellate review is limited to a petition for extraordinary writ to avoid delay and expedite resolution of the public agency's obligation to disclose the requested records. (*Filarsky, supra*, 28 Cal.4th at pp. 426-427.)

---

[10] Section 6252, subdivision (c), defines "person" to include "any natural person, corporation, partnership, limited liability company, firm or association."

b. *No declaratory relief action by the public agency holding the records*

In *Filarsky, supra*, 28 Cal.4th 419 the Supreme Court held a public agency may not initiate an action for declaratory relief to determine its own obligation to disclose documents to a member of the public. Rather, an action by the person seeking disclosure pursuant to the procedures set forth in section 6258 and 6259, summarized in the preceding paragraphs, is the exclusive method as between that person and the agency for litigating this issue: "Permitting a public agency to circumvent the established special statutory procedure by filing an ordinary declaratory relief action against a person who has not yet initiated litigation would eliminate statutory protections and incentives for members of the public in seeking disclosure of public records, require them to defend civil actions they otherwise might not have commenced, and discourage them from requesting records pursuant to the Act, thus frustrating the Legislature's purpose of furthering the fundamental right of every person in this state to have prompt access to information in the possession of public agencies." (*Filarsky, supra*, 28 Cal.4th at p. 423; see *id.* at p. 429 ["Members of the public could be discouraged from requesting records, because a simple request for disclosure and a denial by the public agency could require the individual to defend a civil action in which he or she would be liable for costs if the agency prevailed, and in which the individual would not recoup attorney fees if he or she succeeded. The initiation of an ordinary declaratory relief action also could delay disclosure of the documents for a lengthy period . . ."].)

Filarsky, an attorney, sought disclosure of records relating to the City of Manhattan Beach's hiring of a police captain. The city initially denied Filarsky's request and then, in response to his letter indicating he would file a lawsuit under the CPRA if the city did not reconsider its decision, disclosed a small portion of the records requested and on the same day filed a complaint for declaratory relief pursuant to Code of Civil Procedure section 1600 to obtain "a judicial determination of its rights and duties under Government Code section 6250 et seq." (*Filarsky, supra*, 28 Cal.4th at p. 424.) Having determined the CPRA does not authorize a public agency to initiate an action to determine the agency's obligation to disclose public records, the Court explained a trial

court may properly refuse to grant declaratory relief "where an appropriate procedure has been provided by special statute and the court believes that more effective relief can and should be obtained through that procedure." (*Id.* at p. 433.) Accordingly, the Court held the trial court had abused its discretion by allowing the city to seek declaratory relief as to the propriety of its refusal to disclose the documents requested by Filarsky and should instead have sustained Filarsky's demurrer to the complaint. (*Id.* at pp. 434-435.)

c. *A reverse-CPRA action by a person whose rights would be infringed by disclosure of the documents*

The Supreme Court in *Filarsky*, *supra*, 28 Cal.4th 419, explained that FOIA, the federal counterpart of the California Public Records Act, like the California legislation, expressly provides only for a cause of action to compel disclosure, not an action to prohibit disclosure. (*Filarsky*, at p. 431, citing *Chrysler Corp. v. Brown* (1979) 441 U.S. 281, 290-294 [99 S.Ct. 1705, 60 L.Ed.2d 208].) Nonetheless, the Court observed that federal courts have allowed an action, "known as a 'reverse FOIA' case," by a third party seeking a judicial ruling precluding a public agency from disclosing documents, finding such actions to be authorized under the federal Administrative Procedures Act (APA), which authorizes judicial review of agency actions that adversely affect another person. (See *Filarsky*, at p. 431, citing 5 U.S.C. § 702 & *Campaign for Family Farms v. Glickman* (8th Cir. 2000) 200 F.3d 1180, 1184; see generally *Chrysler Corp*, at p. 317 [a party may seek judicial review under the APA of an agency's decision to disclose information when disclosure would be "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'"].) The *Filarsky* Court specifically declined to address whether a similar, reverse CPRA action could proceed in California. (*Filarsky*, at p. 431 ["[w]e have no occasion in the present case to determine whether a third party possesses the right to seek a judicial ruling precluding a public agency from disclosing documents pursuant to the CPRA"].)

In papers filed in the trial court and again on appeal, Chwe has raised the issue reserved in *Filarsky*, contending Marken has no right to file a reverse-CPRA action seeking a judicial ruling precluding the District from disclosing the documents Chwe has

requested—an issue not addressed by Marken, the District or the trial court. If Chwe were right, of course, Marken would not be entitled to a preliminary injunction or to any other form of relief. Although this issue has not previously been resolved in a published appellate decision and is not free from doubt, we conclude Chwe is wrong.

i. *No other remedy exists for an interested party to obtain judicial review of an agency's decision to improperly release confidential documents*

There are two fundamental differences between a reverse-CPRA lawsuit and the preemptive, agency-initiated declaratory relief action disapproved in *Filarsky, supra,* 28 Cal.4th 419. First, a reverse-CPRA lawsuit, like reverse-FOIA actions and an action to compel disclosure under the CPRA itself—and unlike the lawsuit filed by the City of Manhattan Beach considered in *Filarsky*—seeks judicial review of an agency decision under the CPRA. It does not ask the court to undertake the decision making in the first instance. (See *City of Santa Rosa v. Press Democrat* (1986) 187 Cal.App.3d 1315, 1322.)

As discussed, such an action to review an agency decision to disclose information under FOIA is authorized under federal law by the APA, specifically section 10(a) of the APA, which provides "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . , is entitled to judicial review thereof." (5 U.S.C. § 702; see *Chrysler Corp. v. Brown*, *supra*, 441 U.S. at p. 317; *Campaign for Family Farms v. Glickman*, *supra*, 200 F.3d at p. 1184 ["[a]lthough commonly known as reverse FOIA actions, cases like this one actually are brought under the APA"].) This statutory authorization for judicial review of federal agency actions is not functionally different, at least in the context presented here, from the right of a beneficially interested party to seek a writ of mandate (traditional mandamus) pursuant to Code of Civil Procedure section 1085 to compel a state or local agency to comply with governing law: "Mandamus will lie to compel a public official to perform an official act required by law. [Citation.] Mandamus will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner. Mandamus may issue, however, to compel an official both to exercise his discretion (if he is required by

law to do so) and to exercise it under a proper interpretation of the applicable law." (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442; see *V.S. v. Allenby* (2008) 169 Cal.App.4th 665, 670 ["'Code of Civil Procedure section 1085 authorizes a trial court to issue a writ of mandate "to compel the performance of an act which the law specifically enjoins . . . ."'" "'[T]here must be a clear, present, ministerial duty upon the part of the respondent and a correlative clear, present, and beneficial right in the petitioner to the performance of that duty.'"].)[11] Thus, mandamus should be available to prevent a public agency from acting in an unlawful manner by releasing information the disclosure of which is prohibited by law. (See *County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 973 ["A permanent injunction is an equitable remedy, not a cause of action . . . . The remedy is available in a mandamus proceeding and is appropriate to restrain action which, if carried out, would be unlawful."].)[12]

Second, and equally important, although the CPRA provides a specific statutory procedure for the resolution of disputes between the party seeking disclosure and the public agency, no comparable procedure exists for an interested third party to obtain a judicial ruling precluding a public agency from improperly disclosing confidential

---

[11] That the duty to be compelled is to refrain from taking a particular action (that is, not to disclose certain documents) rather than to perform an act does not preclude proceeding by way of mandamus. (See *Syngenta Crop Protection, Inc. v. Helliker* (2006) 138 Cal.App.4th 1135, 1180-1181[trial court erred in sustaining demurrer to count for writ of mandate directing Department of Pesticide Regulation to refrain from renewing registrations issued in violation of Food and Agricultural Code].)

[12] As discussed, the exemptions from disclosure provided by section 6254 are permissive, not mandatory. However, public agencies have no discretion to disclose certain categories of documents, for example, personnel records of peace officers as defined by Penal Code sections 832.7 and 832.8. (See § 6253, subd. (k); *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 289.) Similarly, under Education Code section 49076 a school district may not grant any person access to "pupil records" without written parental consent or judicial order except under certain express, limited circumstances. (See *BRV, supra,* 143 Cal.App.4th at p. 751.) Whether an anticipated agency disclosure of confidential information is "otherwise prohibited by law" relates to the merits of the mandamus proceeding, not the petitioner's right to bring it.

documents. If the public agency elects to disclose records in response to a CPRA request, absent an independent action for declaratory relief or traditional mandamus, no judicial forum will exist in which a party adversely affected by the disclosure can challenge the lawfulness of the agency's action.[13] In contrast to the situation in *Filarsky*, *supra*, 28 Cal.4th at page 433, where the Court cautioned "the superior court would abuse its discretion if it permitted the plaintiff, by initiating an ordinary declaratory relief action, to circumvent the particular procedures and other provisions specified by the Legislature in the statutory scheme that was intended to govern such disputes," in the case of a third party seeking to challenge an agency's decision to disclose documents, the Legislature has not specified any special procedures to resolve the issue. A petition for writ of mandate is the appropriate procedure to present the issue to the court. (Cf. *County of Santa Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 130 [nothing in *Filarsky* precludes a taxpayers' action under Code Civ. Proc., § 526a seeking declaratory and injunctive relief based on governmental entities allegedly illegal policies and practices with regard to requests for public records under the CPRA].)

ii. *Permitting a reverse-CPRA action will not impair the important procedural protections available to a party requesting information under the CPRA*

The *Filarsky* Court identified several important incentives and procedural protections for a party requesting documents under the CPRA, primarily relating to cost and delay, that would be undermined by allowing the public agency in possession of the

---

[13] The reverse-CPRA action is necessary only when the public agency agrees to provide the requested records without judicial intervention. If the agency initially refuses to disclose information sought by the CPRA request and the requesting party seeks a writ of mandate in the superior court to compel disclosure pursuant to section 6258, a person potentially affected by the disclosure is entitled to intervene in the proceeding as a real party in interest. (See *International Federation, supra*, 42 Cal.4th at p. 328; *STI Outdoor v. Superior Court* (2001) 91 Cal.App.4th 334, 336.) If the superior court grants the petition and orders disclosure, the affected party may thereafter seek further review by petition for writ of mandate in the Court of Appeal even if the agency elects not to contest the disclosure order—in effect, a "reverse-CPRA action" in the appellate court. (See, e.g., *International Federation*, at p. 328.)

records to initiate a declaratory relief action to determine its obligations under the CPRA. None should be significantly impaired by allowing a reverse-CPRA lawsuit.

First, the Court posited parties requesting access to documents might not wish to contest the public agency's decision and should not be required to defend lawsuits they otherwise might not initiate. (*Filarsky, supra*, 28 Cal.4th at p. 432.) As discussed below, the requesting party should be named as a real party in interest and, if not, allowed to intervene in a reverse-CPRA lawsuit if he or she wishes; but any active participation in the litigation would in no way be mandatory. Because a reverse-CPRA action will only be filed when the public agency has decided to provide access to the requested records (see fn. 12, above), the requesting party may elect to allow the agency itself to defend its decision. Similarly, although a requesting party who participates in a reverse-CPRA lawsuit would not be entitled to the recovery of attorney fees, as would be the case if the party had successfully litigated his or her right to access to documents against a public agency (§ 6259, subd. (d)), no fees will be incurred if the party relies on the agency to oppose the effort to bar access to the records.

The issue of potential delay is not as clear. The CPRA contains expedited procedures for determination by the superior court of the agency's obligation to disclose public records, as well as for appellate review by writ of mandate of that decision. A court would be under no statutory obligation to schedule briefing and hearings to expedite a final decision in a reverse-CPRA action. Nonetheless, if the agency has, in fact, decided to release the records requested, disclosure will proceed in accordance with the timetable set forth in section 6253 unless immediately enjoined by the superior court.[14] Briefing and hearings when temporary injunctive relief has been granted will proceed on an accelerated schedule. (See Code Civ. Proc., § 527.) Ultimately, however,

---

[14] In this case the District notified Chwe within the statutorily mandated 24-day period it intended to produce the requested records but also said it would delay providing any copies for an additional month to permit Marken's counsel to file his lawsuit. We have serious questions whether that delay was authorized under the CPRA (see § 6253, subd. (b) [copies to be provided "promptly" upon payment of fees covering direct cost of duplication or statutory fee, if applicable].)

any additional delay that may result from permitting a reverse-CPRA action is outweighed by the statutory right of an interested party to ensure that public agencies do not disclose records whose confidentiality is mandated by law.

iii. *Absent unusual circumstances, the person requesting record disclosure should be allowed to participate in a reverse-CPRA action*

Chwe advances two additional arguments in support of his contention Marken has no right to file this reverse-CPRA action. First, he contends allowing such an action between the subject of the documents, as plaintiff/petitioner, and the public agency, as defendant/respondent, deprives him, as the requestor, and the public of their right to enforce the CPRA's disclosure requirements. Second, he asserts permitting the District and Marken to cooperate in the filing of the reverse-CPRA lawsuit "facilitate[s] an end run of the California Supreme Court's decision in *Filarsky*."

Chwe's legitimate concern about protecting the rights of the party requesting document disclosure is properly addressed through the procedures specified in Code of Civil Procedure sections 389, subdivision (a) (compulsory joinder as party),[15] and 387, subdivision (b) (mandatory intervention).[16] Both sections recognize the right of someone who claims an interest in an action to participate in the case if its resolution may as a practical matter impair or impede the person's ability to protect that interest. (See *Hodge v. Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540, 556 ["[t]he description of

---

[15] Code of Civil Procedure section 389, subdivision (a), provides, "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest . . . . If he has not been so joined, the court shall order that he be made a party."

[16] Code of Civil Procedure section 387, subdivision (b), provides, "[I]f the person seeking intervention claims an interest relating to the property or transaction which is the subject of the action and that person is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by existing parties, the court shall, upon timely application, permit that person to intervene."

an indispensable party under the compulsory joinder statute is virtually identical to the description of a party who may intervene as of right"].) Compulsory joinder, however, does not require a showing the absent party's interests would not be adequately represented by the existing parties. (*Id.* at p. 557.)

A successful reverse-CPRA lawsuit seeking to prevent a public agency from releasing information on the ground the requested disclosure is prohibited by law will necessarily affect the rights of the party requesting the information—a party whose interest in access to public records is recognized by California Constitution article I, section 3, subdivision (b)(1), as well as the CPRA, and protected by specific provisions of the CPRA authorizing litigation to compel disclosure. (See *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 808 ["'[a] person is an indispensable party [only] when the judgment to be rendered necessarily must affect his rights'"].) The requestor plainly has a stake in the outcome of the reverse-CPRA proceedings; and his or her interests generally should be represented, if not by joinder as a real party in interest, then at least upon motion to be allowed to intervene in the action. (See, e.g., *Lindelli v. Town of Anselmo* (2006) 139 Cal.App.4th 1499, 1504 ["A third party may intervene (1) where the proposed intervener has a direct interest, (2) intervention will not enlarge the issues in the litigation, and (3) the reasons for the intervention outweigh any opposition by the present parties. [Citation.] 'The purpose of allowing intervention is to promote fairness by involving all parties potentially affected by a judgment.'"].) Indeed, permitting intervention by the requestor in a reverse-CPRA action is simply the corollary of the recognized practice of permitting a sufficiently interested party opposed to disclosure to participate in a lawsuit under the CPRA to compel the release of public records. (See, e.g., *International Federation, supra*, 42 Cal.4th at p. 328 [noting the superior court had granted leave to intervene to two employee unions opposed to disclosure to newspapers of the names and salaries of public employees earning $100,000 or more per year]; *STI Outdoor v. Superior Court* (2001) 91 Cal.App.4th 334, 336 [outdoor advertising company permitted to intervene in CPRA suit filed by competitor seeking disclosure of documents related to successful bid for contract with Los Angeles County Metropolitan

Transportation Authority]; *Freedom Newspapers, Inc. v. Superior Court* (1986) 186 Cal.App.3d 1102, 1105-1107 [defendant and his court-appointed criminal defense counsel actively participated in CPRA action by newspaper seeking disclosure from county regarding court-ordered payments to the defendant's lawyers and investigators].)[17]

Chwe's remaining argument, beside being predicated on an unsupported assumption the District has acted in bad faith—that it did not genuinely intend to disclose the requested documents—misapprehends the limited nature of a reverse-CPRA action. As explained, the exemptions in the CPRA protect only against required disclosure, not permissive disclosure. The interested party seeking to enjoin an agency's disclosure by a reverse-CPRA action must establish that such a disclosure "is otherwise prohibited by law." (§ 6254, 2d to last para.) The City of Manhattan Beach in *Filarsky*, in contrast, was seeking a judicial determination of the scope of its discretion to withhold documents. As we said at the outset of this section of our opinion, permitting carefully circumscribed judicial review of an agency decision to release information in a reverse-CPRA action is a far cry from authorizing the court to undertake CPRA decision making in the first instance.

4. *The Trial Court Properly Denied Marken's Request for a Preliminary Injunction*

a. *Governing law*

Marken contends disclosure of the investigation report and November 26, 2008 letter of reprimand would "constitute an unwarranted invasion of personal privacy" in violation of his state constitutional right to privacy and, as a result, not only are those documents exempt from mandatory disclosure under section 6254, subdivision (c), but also their disclosure is "otherwise prohibited by law" justifying preliminary (and,

---

[17] Whether to require joinder or permit intervention in a particular case, however, requires a fact-specific inquiry, focusing on practical considerations and resting in the first instance within the sound discretion of the trial court. (See *County of San Joaquin v. State Water Resources Control Bd.* (1997) 54 Cal.App.4th 1144, 1152-1153.)

ultimately, permanent) injunctive relief in this reverse-CPRA lawsuit.[18] There is no doubt Marken, even though a public employee, has a significant privacy interest in the information at issue. (See *BRV, supra*, 143 Cal.App.4th at p. 755; cf. *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 951-952 ["[A] public sector employee, like any other citizen, is born with a constitutional right of privacy. A citizen cannot be said to have waived that right in return for the 'privilege' of public employment, or any other public benefit unless the government demonstrates a compelling need."].)

It is equally clear an "'[i]nvasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest.'" (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 961; see *Hill v. National Collegiate Athletic Assn., supra*, 7 Cal.4th at pp. 39-40 [defining elements of, and defenses to, cause of action for violation of the state constitutional right to privacy and describing necessary balancing of interests involved].) The countervailing interest "need not be constitutionally based. Even nonconstitutional interests can outweigh constitutional privacy interests." (*Jacob B.*, at p. 961.) One such interest, grounded in both the California Constitution and the CPRA, is the "strong public policy supporting transparency in government." (*International Federation, supra*, 42 Cal.4th at p. 331 ["in light of the strong public policy supporting transparency in government, an individual's expectation of privacy in a salary earned in public employment is significantly less than the privacy expectation regarding income earned in the private sector"].)

---

[18] In *Commission on Peace Officer Standards & Training v. Superior Court, supra,* 42 Cal.4th at page 300, the Supreme Court explained an intrusion on a privacy interest need not rise to the level of an invasion of the constitutional right to privacy to be recognized by a public agency under section 6254, subdivision (c). Whatever the difference in those two standards, however, if the proposed disclosure of the investigation report and the letter of reprimand does not fall within the subdivision (c) exemption, it necessarily does not violate Marken's constitutional right to privacy; and its disclosure is not prohibited.

The scope of section 6254, subdivision (c)'s "unwarranted invasion of privacy" limitation on the personnel record exemption to mandatory disclosure under the CPRA was first addressed in a published appellate decision in 1978. (*American Federation, supra*, 80 Cal.App.3d 913.) Considering a request for release of an "audit investigation of acts of alleged financial irregularities at the University of California at San Francisco, the Court of Appeal looked for guidance to the Supreme Court's decision in *Chronicle Publishing Co. v. Superior Court* (1960) 54 Cal.2d 548, a case involving the propriety of a protective order restricting discovery of attorney disciplinary records in a private libel action, not disclosure under the CPRA. In that somewhat different context the Supreme Court had held trivial or groundless complaints of wrongdoing against members of the State Bar "are to be considered as highly confidential, and as records to which public policy would forbid the confidence to be violated.'" (*Id.* at p. 569.) But the Court also held "discovery in a proper case" should be allowed "when the conduct of the attorney merits condemnation even though the expression of condemnation be in minor form, that is, private." (*Id.* at pp. 574-575.) Not only the fact of the private discipline, but also the "information upon which it was based," were appropriately disclosed. (*Id.* at p. 575.)

Based on the *Chronicle Publishing* analysis the appellate court held a proper reconciliation between the right to information embodied in the CPRA and the constitutional right to privacy requires "the recorded complaint be of a substantial nature before public access is permitted." (*American Federation, supra,* 80 Cal.App.3d at p. 918.) "And patently, it is in keeping with the rationale of *Chronicle Publishing Co.* and the express purpose of the [CPRA] that where there is reasonable cause to believe the complaint to be well founded, the right of public access to related public records exists." (*Ibid.*) Applying those criteria following its own in camera review of the audit report, the court held the superior court had abused its discretion in failing to order disclosure of portions of the report concerning accusations that were not found to be without substance or unsupported by evidence. (*American Federation*, at p. 919.)

More than 25 years later, in *Bakersfield School Dist., supra*, 118 Cal.App.4th 1041, the appellate court applied the same standard to weigh an individual's privacy

rights against the public's right to know of an alleged wrongdoing for purposes of section 6254, subdivision (c). The superior court had granted in part a newspaper's petition for writ of mandate for access to disciplinary records of a school district employee, finding there was no reasonable cause to believe some of the complaints in the employee's personnel file were well founded but that as to one "alleged incident," although it had not been found true, "'that complaint is substantial in nature and there is reasonable cause to believe the complaint is well founded.'" (*Bakersfield School Dist.*, at p. 1044.)[19] The Court of Appeal affirmed, explaining "disclosure of a complaint against a public employee is justified if the complaint is of a substantial nature and there is reasonable cause to believe the complaint or charge of misconduct is well-found." (*Ibid.*) The court then held "neither the imposition of discipline nor a finding that the charge is true is a prerequisite to disclosure." (*Ibid.*) That is, although there is "a strong policy for disclosure of true charges" (*id.* at p. 1046), a court must also order disclosure of records relevant to charges of misconduct that have not been found true by the public agency if the documents "reveal sufficient indicia of reliability to support a reasonable conclusion that the complaint was well founded." (*Id.* at p. 1047.) In this case, the court concluded "the documents reviewed provide a sufficient basis upon which to reasonably conclude the complaint in question is well founded." (*Ibid.*)

Two years later, in *BRV, supra,* 143 Cal.App.4th 742, the Court of Appeal ordered the release of an investigation report analyzing allegations of misconduct by a school district's superintendent, who also served as the principal of a high school in the district. After receiving the report, which it had commissioned, the district board of education entered into an agreement with the superintendent accepting his resignation in exchange for terms of payment and a promise to keep the report confidential. (*Id.* at p. 747.) The superior court had denied a newspaper's petition for writ of mandate seeking disclosure

---

[19] The documents to be disclosed were redacted to exclude names, addresses and telephone numbers of all persons mentioned other than the employee who was the subject of the complaint. (*Bakersfield School Dist., supra,* 118 Cal.App.4th at p. 1044.) The redaction ordered was not challenged on appeal.

of the report, even though it tended to exonerate the superintendent. As described by the Court of Appeal, the superior court "found this to be an odd result, but felt constrained by case law not to disclose complaints that were determined not to be credible or to concern serious matters." (*Id.* at p. 749.) The appellate court disagreed, explaining that none of those prior cases had involved a public official in an important and highly visible position. "Here, members of the public were greatly concerned about the behavior of the city's high school superintendent and his governing board in responding to their complaints." (*Id.* at p. 759.) The court noted public concern that the district and the superintendent had entered into a "sweetheart deal" and concluded the public's interest in judging how the elected board had treated the situation "far outweighed" any privacy interest: "Because of [the superintendent's] position of authority as a public official and the public nature of the allegations, the public's interest in disclosure outweighed [his] interest in preventing disclosure of the [investigation] report." (*Ibid.*) Thus, release of the report was warranted even though the investigator had concluded most of the allegations were not sufficiently reliable and the report exonerated the superintendent of all serious allegations of misconduct except those relating to outbursts of anger. (*Ibid.*)[20]

b. *The public interest in disclosure of the investigation report and letter of reprimand outweighs Marken's privacy interest*

Marken, the District and Chwe agree *American Federation, Bakersfield School Dist.* and *BRV* define the proper balancing test for the section 6254, subdivision (c), personnel file exemption, although they disagree whether the superior court erred when applying those standards to the investigation report and letter of reprimand in this case. Whether reviewed de novo, as we would either a decision ordering disclosure under the CPRA itself (see *CBS v. Block, supra,* 42 Cal.3d at pp. 650-651) or a "likelihood of prevailing on the merits" determination that depended on construction of a statute and its application to undisputed facts, or for an abuse of discretion, the normal standard of

---

[20] As in *Bakersfield School Dist.*, the documents ordered released were to be redacted to exclude names, addresses and telephone numbers of individuals other than the subject of the report. (*BRV, supra*, 143 Cal.App.4th at p. 760.)

review on appeal from denial of a preliminary injunction, the superior court's denial of Marken's request for a preliminary injunction must be affirmed.

Marken contends the misconduct at issue in the investigation report and subsequent letter of reprimand was not "substantial," noting the superior court characterized it as "probably on the lowest end of the spectrum" in terms of allegations of sexual harassment. He also argues the documents sought to be released by Chwe are not based on "well-founded information," emphasizing the student whose parent had complained was not interviewed by the investigator and Marken had no opportunity to cross-examine her. These arguments rest on a fundamental misreading of the case law.

The court in *American Federation* recognized that not every claim of misconduct is substantial or well founded, and thus not every complaint need be disclosed because of the potential impact of an unjustified accusation on the reputation of an innocent public employee. (*American Federation, supra*, 80 Cal.App.3d at p. 918.) It did not hold, as Marken suggests, that a sustained accusation of misconduct may not be sufficiently "substantial" to warrant disclosure. To the contrary, under *American Federation* and *Chronicle Publishing* upon which it relied, if the complaint has been upheld by the agency involved or discipline imposed, even if only a private reproval, it must be disclosed. (*American Federation,* at p. 919.) Moreover, although disclosure is mandated if there has been a true finding by the agency, even without such a finding, if the information in the agency's files is reliable and, based on that information, the court can determine the complaint is well founded and substantial, it must be disclosed. (*Bakersfield School Dist., supra*, 118 Cal.App.4th at p. 1044.)

Here, following receipt of a complaint of sexual harassment, an independent investigator prepared a report based on interviews, including with Marken, but not the student involved, and what she identified as substantial credible corroborating evidence of certain conduct. Based on that information, the investigator found a number of

specifically described acts or comments by Marken "more likely than not did occur."[21] The report did not recommend responsive action, but the District concluded Marken's conduct as described by the investigator violated the District's board policy prohibiting the sexual harassment of students. As disclosed in the letter attached to Chwe's CPRA request, "The District found that Mr. Marken did violate Board Policy 5145.7 [sexual harassment] and has taken appropriate action." Marken concedes that action took the form of a written reprimand,[22] although he characterizes the reprimand as "more to instruct him about following proper protocol when dealing with students."

To be sure, Marken may not be a "high profile" public official, as was the school district superintendent involved in *BRV, supra*, 143 Cal.App.4th 742, but the court in *BRV* found that designation relevant only to determine when accusations of misconduct against a public official, even if not well founded, might nonetheless be subject to disclosure. (See *id.* at p. 759.) And it is also true the charges against Marken did not involve allegations of violence or sexual abuse, as was the case in *Bakersfield School Dist., supra*, 118 Cal.App.4th 1041. But Marken occupies a position of trust and responsibility as a classroom teacher, and the public has a legitimate interest in knowing whether and how the District enforces its sexual harassment policy. (Cf. *CBS, Inc. v. Block, supra*, 42 Cal.3d at p. 656 [public interest in "ascertain[ing] whether the law is being properly applied or carried out in an evenhanded manner" justifies disclosure of personal information sought].)[23]

---

[21] As discussed, the investigator did not consider the investigation completed as to all of the allegations ("findings inconclusive") because no interviews were conducted with the student whose mother initiated the complaint or any other students at Santa Monica High School.

[22] The District's board policy prohibiting sexual harassment (Board Policy 5145.7) provides, "If an employee is found to be in violation of this policy, disciplinary action shall include, at a minimum, a letter of reprimand, which shall be placed in the employee's personnel file. That letter shall not be expunged under any circumstances."

[23] Marken's argument his due process rights were violated by the manner in which the investigation was conducted is misplaced. The November 26, 2008 letter of

In light of the investigator's factual findings, the District's conclusion based on those findings that Marken had violated its board policy prohibiting the sexual harassment of students and imposition of discipline, the exemption from mandatory disclosure in section 6254, subdivision (c), is inapplicable; and release of the investigation report and disciplinary record (redacted as directed by the superior court) is required under the CPRA. Under governing case law, summarized above, the public's interest in disclosure of this information—the public's right to know—outweighs Marken's privacy interest in shielding the information from disclosure.

Chwe's Appeal

As discussed, as the person who requested disclosure of the investigation report and disciplinary record, Chwe plainly has a stake in the outcome of this lawsuit. It would appear he should have been joined as a party under Code of Civil Procedure section 389, subdivision (a), either by Marken as the plaintiff in this reverse-CPRA lawsuit or by the court on its own motion. Moreover, although the District has recognized Chwe's right to access the documents at issue and defended that position in the superior court and again on appeal, Chwe has presented a persuasive argument the District may not be adequately representing his interests, beginning with its unauthorized delay in producing the records to permit Marken to file the action and continuing with what Chwe characterizes as its tepid arguments in support of the disclosure of public records mandated by governing case law. Thus, in the absence of joinder, granting an appropriately noticed motion for leave to intervene pursuant to Code of Civil Procedure section 387, subdivisions (a) (permissive intervention) or (b) (mandatory intervention), would also seem proper. Nonetheless, we are compelled to dismiss Chwe's appeal from the denial of his ex parte

---

reprimand described the process by which Marken could appeal if he was dissatisfied with the decision to discipline him. It does not appear Marken pursued an administrative appeal or judicial review of the District's actions. (See generally *Vasquez v. Happy Valley Union School Dist.* (2008) 159 Cal.App.4th 969, 980 [ordinary mandamus is an appropriate remedy when challenging a school district's discipline of a teacher].) That decision is now final.

application to intervene and to leave to the superior court to address in the first instance Chwe's right to participate in the lawsuit (assuming our affirmance of the order denying a preliminary injunction does not effectively end the litigation).

A reviewing court lacks jurisdiction on direct appeal in the absence of an appealable order or judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 21; *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696.) "An order denying a motion to intervene is appealable when it finally and adversely determines the right of the moving party to proceed in the action." (*Noya v. A.W. Coulter Trucking* (2006) 143 Cal.App.4th 838, 841; accord, *Hodge v. Kirkpatrick Development, Inc., supra,* 130 Cal.App.4th at p. 547 ["[a]n order denying a motion for leave to intervene is directly appealable because it finally and adversely determines the moving party's right to proceed in the action"].) Even the denial of an ex parte application for leave to intervene is appealable when the party opposing the intervention filed a response "and the trial court ruled on the merits." (*Noya*, at p. 841.) In the case at bar, however, it appears the trial court denied Chwe's application on March 8, 2011 solely because it had been filed on an ex parte basis, rather than by noticed motion, not on the merits of Chwe's right to intervene in the action. This court does not have jurisdiction to review the denial of that application.

In a supplemental letter brief addressing this issue of appellate jurisdiction submitted at our request, Chwe argues the trial court's ruling was based, at least in part, on the merits of his right to intervene, specifically, its erroneous findings he lacked an interest in the litigation and his application was not timely. Therefore, he contends, denial of the ex parte application is an appealable order under *Noya v. A.W. Coulter Trucking, supra,* 143 Cal.App.4th at page 841 and *Hodge v. Kirkpatrick Development, Inc., supra,* 130 Cal.App.4th at page 547.[24] We disagree with Chwe's interpretation of what occurred.

---

[24] Chwe also contends the trial court's failure to join him as an indispensable party pursuant to Code of Civil Procedure section 389, subdivision (b), may be raised at any time, even "by the appellate court on its own motion." (*In re Marriage of Ramirez*

As Chwe argues, generally a motion for leave to intervene before any substantive hearing on the merits has taken place is timely. (See *Allen v. California Water & Tel. Co.* (1947) 31 Cal.2d 104, 108 ["it is the general rule that a right to intervene should be asserted within a reasonable time and the intervener must not be guilty of an unreasonable delay after knowledge of the suit"]; cf. *Noya v. A.W. Coulter Trucking, supra,* 143 Cal.App.4th at p. 842 [although no statutory time limit is placed on motions to intervene, trial court did not abuse its discretion in denying as untimely an application to intervene filed after several years of litigation had taken place and a comprehensive settlement agreement reached].) As we understand the record, the trial court did not rule to the contrary. Rather, because Chwe had known of the litigation since the hearing on the temporary restraining order four weeks earlier, the court concluded his attempt to intervene on an ex parte basis shortly before the hearing on the request for a preliminary injunction was not timely: "He's been aware of this proceeding having been set for next week. He is now coming in on the eve of the writ petition that's going to be heard in a week from now to try to intervene without giving the other side the opportunity to properly brief this court and oppose. Any delay[] is caused by him on his part, so I'm not going to reward him by summarily granting the ex parte application without proper briefing for the court to properly consider these issues." Later in the same hearing the court repeated it was denying "the intervention on an ex parte" because it believed Chwe had not exercised due diligence in moving to intervene earlier. This was not a ruling on the merits of Chwe's right to intervene, but rather on the propriety of proceeding ex parte.

When arguing during this hearing that his client had been diligent, counsel for Chwe stated "he tried to appear at the first hearing [while in pro per] and was told he could not submit briefing because it was not on briefing paper." The court responded,

---

(2011) 198 Cal.App.4th 336, 345.) Accordingly, he asserts we have jurisdiction to reverse the court's denial by implication of his right to be joined as a real party in this action. If Chwe's appeal were otherwise properly before us, we might be able to address this additional argument. But absent some appealable order, we lack jurisdiction to grant any relief to Chwe.

"To set the record straight, I don't believe he tried to appear. I knew he was present because he's interested in finding out what's going on with the proceeding. I don't think that there was any attempt by him to appear. But in any event, he couldn't have appeared in an action that didn't involve him anyways."

Chwe insists this was a finding he lacked any interest in the reverse-CPRA action for purposes of determining his right to participate in Marken's lawsuit under Code of Civil Procedure sections 387 and 389, subdivision (a). Again, Chwe reads far too much into the trial court's comments. It appears the trial court was simply observing that, as of the date of the hearing on the temporary restraining order, Chwe was not a party to the action and, as a nonparty, could not have formally "appeared"—the case at that point "didn't involve him." (Cf. *Lohnes v. Astron Computer Products* (2001) 94 Cal.App.4th 1150, 1153 [even if party has unconditional right to intervene in action, until a timely petition for leave to intervene is granted, "a party lacks any standing to the action"].) We do not understand the court to have found that Chwe, as the requestor of the public records at issue in Marken's lawsuit, had no interest in the litigation for purposes of joinder or intervention.

Accordingly, Chwe's appeal from the order denying his ex parte application for leave to intervene is dismissed. If the action continues, Chwe may raise in the trial court the issue of both compulsory joinder and intervention.

DISPOSITION

The order denying the preliminary injunction is affirmed. The appeal from the order denying Michael Chwe's ex parte application for leave to intervene is dismissed. The cause is remanded for further proceedings not inconsistent with this opinion. All parties are to bear their own costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J. ZELON, J.

EXHIBIT A

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

12800 CENTER COURT DRIVE, SUITE 300
CERRITOS, CALIFORNIA 90703-9364
(562) 653-3200 - (714) 826-5480

FAX (562) 653-3333
WWW.AALRR.COM

FRESNO
(559) 225-6700
FAX (559) 225-3416

IRVINE
(949) 453-4260
FAX (949) 453-4262

PLEASANTON
(925) 227-9200
FAX (925) 227-9202

RIVERSIDE
(951) 683-1122
FAX (951) 683-1144

SACRAMENTO
(916) 923-1200
FAX (916) 923-1222

SAN DIEGO
(858) 485-9526
FAX (858) 485-9412

OUR FILE NUMBER:

005332.00222
10225955v1

January 27, 2012

Jeff Glasser
Davis Wright Tremaine, LLP
865 South Figueroa Street
Suite 2400
Los Angeles, CA 90017-2566

Re: Court of Appeal Decision/Marken v. SMMUSD

Dear Mr. Glasser:

As you know, on January 24, 2012, the court of appeal issued a ruling confirming the District was correct in its determination that records involving a student's complaint against Mr. Ari Marken were disclosable records under the CPRA.

When the trial court denied the preliminary injunction, it also ruled that the release of the records was stayed pending the appeal. While the appellate court affirmed the trial court's decision denying the preliminary injunction, it did not order the District to immediately release Mr. Marken's records. Instead, the appellate court remanded the case to the lower court for further proceedings consistent with its opinion. As a result, we believe that the District's duty to disclose the records continues to be stayed until the trial court acts on the appellate court's decision. Once the remittitur is issued and the lower court schedules post-appeal proceedings, the District will, of course, comply with all orders regarding the investigative report and disciplinary document requested by Mr. Chwe.

If you disagree with the District's understanding that the order to release the records is stayed pending further action by the trial court, please contact me as soon as possible.

Very truly yours,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

Elizabeth Zamora-Mejia/mtw

Elizabeth Zamora-Mejia

EZM:mtw

Proof of Service

I, Natasha Majorko, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111. I caused to be served the following document:

PETITION FOR REVIEW

I caused the above document to be served on each person on the attached list by the following means:

☐ I enclosed a true and correct copy of said document in an envelope and placed it for collection and mailing with the United States Post Office on _____, following the ordinary business practice.
(Indicated on the attached address list by an [M] *next to the address.)*

☒ I enclosed a true and correct copy of said document in an envelope, and placed it for collection and mailing via Federal Express on **March 1, 2012**, for guaranteed delivery on **March 2, 2012**, following the ordinary business practice.
(Indicated on the attached address list by an [FD] *next to the address.)*

☐ I consigned a true and correct copy of said document for facsimile transmission on _____.
(Indicated on the attached address list by an [F] *next to the address.)*

☐ I enclosed a true and correct copy of said document in an envelope, and consigned it for hand delivery by messenger on _____.
(Indicated on the attached address list by an [H] *next to the address.)*

☐ A true and correct copy of said document was emailed on _____.
(Indicated on the attached address list by an [E] *next to the address.)*

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business. Executed on **March 1, 2012**, at San Francisco, California.

Natasha Majorko

Service List

Key:	[M] Delivery by Mail	[FD] Delivery by Federal Express	[H] Delivery by Hand
	[F] Delivery by Facsimile	[FM] Delivery by Facsimile and Mail	[E] Delivery by Email

[FD] Elizabeth Zamora-Mejia
Atkinson, Andelson, Loya, Ruud & Romo
12800 Center Court Drive, Suite 300
Cerritos, CA 90703-9364

Telephone: (562) 653-3200
Facsimile: (562) 653-3333
Email: ezamora-mejia@aalrr.com

Attorneys for Santa Monica-Malibu USD

[FD] Lillian Kae
Richard J. Schwab
Trysgstad, Schwab & Trygstad
1880 Century Park East, Suite 1104
Los Angeles, CA 90067

Telephone: (310) 552-0500
Facsimile: (310) 552-1104
Email: Lkae@trygstadlawoffice.com

Attorneys for Ari Marken

[FD] Hon. Ruth Ann Kwan, Judge
c/o Clerk, Dept. 72
Los Angeles Superior Court
111 N. Hill Street
Los Angeles, CA 90012

[FD] Hon. Ann I. Jones, Presiding
c/o Clerk, Dept. 86
Los Angeles, Superior Court
111 N. Hill Street
Los Angeles, CA 90012

[FD] Court of Appeal
Second District, Division Seven
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Telephone: (213) 830-70000