

1 **Adam Chaikin, Esq. (SBN 199458)**
2 **OLINS RIVIERE COATES & BAGULA, LLP**

2214 Second Avenue
San Diego, CA 92101

3 Tel: (619) 272-4235

4 Fax: (619) 272-4309

Email: chaikin@orcblawfirm.com

5 Attorney for Plaintiff/Petitioner, ASSOCIATION OF ORANGE COUNTY DEPUTY
6 SHERIFFS

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER**

10 ASSOCIATION OF ORANGE COUNTY
11 DEPUTY SHERIFFS,

12 Plaintiff/Petitioner,

13 v.

14 FRANK KIM, Orange County Executive
15 Officer; COUNTY OF ORANGE, State of
16 California; BOARD OF SUPERVISORS,
County of Orange; DOES 1 through 10,
inclusive,

17 Defendants/Respondents.

18 _____
19 FLASHREPORT,

20 Real Party in Interest.

CASE NO.: 30-2016-00832263-CU-WM-CJC

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITIONER'S *EX PARTE*
APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND FOR
ORDER TO SHOW CAUSE REGARDING
PRELIMINARY INJUNCTION**

Date: January 29, 2016

Time: 8:30 a.m.

Judge: Hon. Craig Griffin

Dept.: C17

Complaint Filed: January 27, 2016

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 AOCDS seeks an injunction prohibiting Respondents from producing any documents in
4 response to the January 18, 2016, California Public Records Act (“CPRA”) request made by
5 FlashReport which sought the “status and all documents of all negotiations, offers and
6 counteroffers, supposals, formal or informal between the County of Orange and the Association
7 of Orange County Deputy Sheriff’s” arising out of the collective bargaining between AOCDS
8 and the County.

9 Good cause exists to issue the TRO and OSC, as Respondents intend to comply with the
10 request forthwith. If this Court does not issue an injunction to prevent Respondents’ actions,
11 AOCDS will suffer irreparable harm, as the bell cannot be un-rung after the documents have
12 been produced, and on-going collective bargaining will be hampered through the production of
13 the documents, thereby interfering with the public safety of the citizens of Orange County.

14 Production of the materials will violate the CPRA, as the materials are exempt pursuant
15 to Government Code section 6255. The exemption applies, such as in the instant matter, when it
16 can be shown that on the facts of a particular case, the public interest served by not making the
17 record public clearly outweighs the public interest served by disclosure of the record. As
18 discussed below, **the public interest in public safety through effective law enforcement**
19 **clearly outweighs the public interest in collective bargaining materials sought prior to**
20 **reaching an agreement.**

21 Further, production of the materials will violate Government Code section 3505 of the
22 Meyers-Milias-Brown Act, Government Code Sections 3500 *et. seq.* (“MMBA”). AOCDS and
23 the County negotiated on preliminary ground rules for a limited reopener of the Memorandum of
24 Understanding (“MOU”). One of the agreed upon rules was that the collective bargaining
25 materials would not be publicized. Notwithstanding the agreed upon ground rule, the County has
26 indicated that it intends to provide some collective bargaining materials in response to
27 FlashReport’s CPRA request. Such action is a violation of the duty to bargain in good faith
28 required in Government Code section 3505. (*California Department of Personnel*

1 *Administration* (1993) PERB Dec. No. 995-S; *Compton Community College District* (1989)
2 PERB Dec. No. 728; *Stockton Unified School District* (1980) PERB Dec. No. 143.)

3 In addition, the release of the materials will compromise negotiations by undermining
4 and interfering with the process. Without the benefit of an understanding of collective
5 bargaining, the proposals and tradeoffs made by the parties can be misinterpreted by agencies
6 such as FlashReport, thereby resulting in public pressure on the County and its Board to bargain
7 politically rather than in compliance with the good faith requirement of the MMBA. This, in
8 turn, can have a negative impact on public safety, as low pay will result in problems in
9 recruitment and retention.

10 **II. FACTUAL BACKGROUND**

11 AOCDS is a recognized employee organization as that term is used in the MMBA and is
12 comprised of employees of the Orange County Sheriff's Department holding the rank of Deputy
13 Sheriff Trainee, Deputy Sheriff I, Deputy Sheriff II, Investigator and Sergeant, extra help
14 deputies and certain investigators and extra help investigators employees of the Office of the
15 Orange County District Attorney. (Declaration of Mark Nichols filed concurrently herewith,
16 para. 2.)

17 The County of Orange ("County") has formally recognized AOCDS as the employee
18 organization that represents the Peace Officer and Supervising Peace Officer Bargaining Units
19 composed of those Sheriff's Department employees holding the rank of Deputy Sheriff Trainee,
20 Deputy I, Deputy II, Investigator, and Sergeant, extra help deputies and investigators and extra
21 help investigators of the Office of the Orange County District Attorney. (Nichols decl. para. 2.)
22 As the recognized employee organization, AOCDS has the right and obligation to represent those
23 bargaining unit employees in their employment relations with their employer, County. (Nichols
24 decl. para. 2.)

25 AOCDS and the County have shared a collective bargaining relationship for many years
26 wherein they have negotiated and entered into written public sector labor agreements or
27 Memoranda of Understanding ("MOUs"), regarding the wages, hours, and other terms and
28 conditions of employment for those individuals employed by the County as members of the

1 Peace Officer and Supervising Peace Officer bargaining units. (Nichols decl. para. 3.) The
2 MOUs between the parties were entered into pursuant to the MMBA.¹ (Nichols decl. para. 3.)

3 Pursuant to the MOU at Article II, Section 2, AOCDS and the County agreed that on or
4 about June 1, 2015, the parties would commence the meet and confer process to consider an
5 hourly rate salary reopener only, with said reopener confined to the topic of a possible
6 modification to the hourly salary rate commencing after July 1, 2015.² (Nichols decl. para. 4.)

7 AOCDS and the County negotiated on preliminary ground rules for the limited reopener.
8 (Declaration of Douglas Olins filed concurrently herewith, para. 7.) One of the agreed upon
9 rules was that the collective bargaining materials would not be publicized. (Olins decl. para. 7.)

10 Thus far, there have been seven or eight bargaining sessions scheduled; however, due to
11 cancellations, the parties only met four or five times to discuss the salary reopener. (Nichols
12 decl. para. 5.) During the course of negotiations, AOCDS made two proposals. (Nichols decl.
13 para. 5.) The parties also exchanged data at the meetings. (Nichols decl. para. 5.)

14 On January 18, 2016, Kasey Reinitz, on behalf of FlashReport, sent an email to Jean
15 Pasco.³ (Nichols decl. para. 6.) Ms. Pasco is in the County's Executive Office. (Nichols decl.
16 para. 6.) The email entitled "Reoccurring Public Records Act Request" stated in pertinent part:
17 "I'm Jon Fleischman's assistant. He has asked me to submit the following request to the County
18 of Orange on a weekly basis. He told me that we should send this to you. Please let me know if
19 you need anything else or need any clarification. The request is that you send us the status and
20 all documents of all negotiations, offers and counteroffers, supposals, formal or informal
21 between the County of Orange and the Association of Orange County Deputy Sheriff's."
22 (Nichols decl. para. 6.)

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26 ¹ A true and correct copy of the 2012-2016 MOU downloaded from the County's website is
27 attached Mr. Nichols' declaration as Exhibit 1.

28 ² The MOU provides at page 1 that it will expire on June 30, 2016. Negotiations for a successor
MOU are expected to begin upon the expiration.

³ A true and correct copy of the email is attached to Mr. Nichols' declaration as Exhibit 2.

1 On January 26, 2016, at 11:27 p.m., the County (through counsel) informed AOCDS that
2 it would produce some of the materials requested by FlashReport on January 29, 2016. (Nichols
3 decl. para. 7.)

4 **III. ARGUMENT**

5 **A. The TRO And Preliminary Injunction Are Necessary To Prevent Immediate And**
6 **Irreparable Harm To Petitioner.**

7 A TRO and preliminary injunction are necessary to prevent immediate and irreparable
8 harm to AOCDS. Temporary restraining orders may be granted *ex parte* if it appears from the
9 facts set forth in the affidavit or declaration or the verified complaint that great or irreparable injury
10 would result to the applicant before the matter could be heard on notice. (Code Civ. Proc.
11 § 527(c)(1).) This satisfies the requirements of due process. (*Dickey v. Rosso* (1972) 23
12 Cal.App.3d 493, 497–498.)

13 Likewise, a preliminary injunction may be granted when it appears by the verified
14 complaint or affidavits that the commission or continuance of some act during the litigation would
15 produce waste, or great or irreparable injury, to a party in the action. (Code Civ. Proc. § 526(a)(2).)
16 Under the “irreparable injury” standard, an injunction may issue to prevent wrongs of repeated and
17 continuing character or ones that cause damages estimable only by conjecture and not by any
18 accurate standard. (*Huong Que, Inc. v. Luu*, 150 Cal. App. 4th 400, 417–418.)

19 In the instant matter, the production of the materials will cause AOCDS and the public at
20 large irreparable injury. As discussed at length below, the production of the collective bargaining
21 materials in the midst of negotiations will harm the process, thereby potentially preventing the
22 parties from reaching agreement. (Nichols decl. para. 9-13.) Unstable employer-employee
23 relations will impede effective law enforcement. (Government Code section 3301.) As such, the
24 production of the materials will have far reaching adverse consequences that cannot be corrected
25 once the bell has been rung.

26 **B. A Preliminary Injunction Is Appropriate As Petitioner Is Entitled To The Relief**
27 **Demanded.**

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1 A preliminary injunction may be granted when it appears that the party applying for relief
2 is entitled to the relief demanded, and all or part of the relief consists in restraining the commission
3 or continuance of the act complained of (or commanding certain conduct) either for a limited
4 period or perpetually. (Code Civ. Proc. § 526(a)(1).) In determining whether to issue a
5 preliminary injunction, courts consider two factors: (1) the likelihood that the plaintiff will prevail
6 on the merits of its case at trial; and (2) the interim harm that the plaintiff is likely to sustain if the
7 injunction is denied compared to the harm the defendant is likely to suffer if the court grants the
8 preliminary injunction. (*Yu v. University of La Verne* (2011) 196 Cal.App.4th 779, 786.)

9 **i. Petitioner Is Likely To Succeed At Trial.**

10 Petitioner is likely to succeed at trial, as production of the materials is a violation of
11 Government Code section 6255 and Government Code section 3505.

12 **a. Petitioner's First Cause of Action.**

13 Petitioner's first cause of action is for violation of Government Code section 6255 which
14 contains a residual or catch-all exemption that applies when it can be shown that on the facts of a
15 particular case, the public interest served by not making the record public clearly outweighs the
16 public interest served by disclosure of the record. Injunctive relief, by way of mandamus, is
17 available to prevent a public agency from acting in an unlawful manner by releasing public
18 records the disclosure of which is prohibited by law. (*Marken v. Santa Monica-Malibu Unified*
19 *School Dist.* (2012) 202 Cal.App.4th 1250, review denied, *Marken (Ari) v. Santa Monica-Malibu*
20 *Unified School District* (CHWE) (2012, Cal.) -- P.3d --, 2012 Cal. LEXIS 4200.)

21 **Public safety through effective law enforcement is the public interest served by not**
22 **making the records public.** Pursuant to Government Code section 3301 of the Public Safety
23 Officers Procedural Bill of Rights Act, Government Code section 3300 *et. seq.* ("POBRA"), the
24 Legislature found and declared that "effective law enforcement depends upon the maintenance of
25 stable employer-employee relations, between public safety employees and their employers."

26 Stable employer-employee relations are derived through the collective bargaining
27 process. Pursuant to Government Code section 3500 of the MMBA, the Legislature stated that
28 the purpose of the MMBA was "to promote full communication between public employers and

1 their employees by providing a reasonable method of resolving disputes regarding wages, hours,
2 and other terms and conditions of employment between public employers and public employee
3 organizations.”

4 As the Court determined in *Relyea v. Ventura County Fire Protection Dist.* (1992) 2
5 Cal.App.4th 875, the purpose of the MMBA is to promote full communication between
6 management and labor, and to improve employer-employee relations. (*Id.* at 880.) The MMBA
7 is based on the concept of collective bargaining, and its enactment was intended to strengthen
8 collective bargaining rights for government employees by providing a more structured collective
9 bargaining system under which both employers and employee representatives have mutual
10 obligations. (*Id.* at 880.)

11 In short, public safety turns upon effective law enforcement, which turns upon stable
12 employer-employee relations, which turns upon adherence to the collective bargaining process.
13 Production of the documents will undermine the ability of the parties to bargain effectively
14 because without the benefit of an understanding of collective bargaining, the proposals and
15 tradeoffs made by the parties can be misinterpreted by agencies such as FlashReport, thereby
16 resulting in public pressure on the County and its Board to bargain politically rather than in
17 compliance with the good faith requirement of the MMBA. (Nichols decl. para. 13.) This, in
18 turn, can have a negative impact on public safety, as low pay will result in further problems in
19 recruitment and retention. (Nichols decl. para. 13.)

20 The collective bargaining process is extremely complicated and a mystery to the average
21 citizen. (Nichols decl. para. 10.) If the County provides the public with the materials requested,
22 then the public will not have the entire picture. (Nichols decl. para. 10.) Under that scenario, the
23 public will have the materials but without the things that led to it, including but not limited to, an
24 understanding of the tradeoffs involved, as well as the data exchanged between the parties which
25 backs up their respective positions. (Nichols decl. para. 10.)

26 For example, the public is largely unaware that Orange County peace officers rank far
27 behind in terms of what they take home compared to peace officers of other jurisdictions.
28 (Nichols decl. para. 11.) This leads to problems with retention, as a peace officer is more likely

1 to go to a municipality with a higher salary. (Nichols decl. para. 11.) In turn, the County must
2 recruit and train a new peace officer which costs between \$150,000 and \$170,000 for each new
3 hire. (Nichols decl. para. 11.)

4 Additionally, should the AOCDS membership be made aware through the premature
5 release of information contained in County proposals that negatively impact them in regards to
6 wages, hours or working conditions AOCDS members, county sheriff employees, may
7 immediately seek law enforcement employment in other jurisdictions. (Nichols decl. para. 12.)
8 Such reaction will lead to lower morale and difficulty in further retention and recruitment of
9 personnel. (Nichols decl. para. 12.) Recruitment and retention issues will most likely lead to
10 staffing shortages which very well could create public safety issues for the communities served.
11 (Nichols decl. para. 12.) Additionally, the membership may become enraged by receiving pre-
12 mature information regarding County proposals and thus create an adversarial labor-management
13 atmosphere that may lead to a less effective ability to carry out operations as needed. (Nichols
14 decl. para. 12.)

15 On the other hand, there is little or no public interest served by disclosure of the records
16 in the midst of collective bargaining.

17 It is the position of AOCDS that the documents should not be released at any time in
18 order to ensure the sanctity of the process. However, should the Court be inclined to allow
19 production of the documents, then the earliest that they should be released is after the parties
20 have reached an agreement. If the bargaining process culminates in an agreement, then it will be
21 presented to the County's Board of Supervisors for review and a vote. (Government Code
22 section 3505.1.) If the governmental body votes to accept the memorandum, it becomes a
23 binding agreement. (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d
24 328, 335.)

25 Though not directly on point, the case of *Michaelis, Montanari & Johnson v. Superior*
26 *Court* (2006) 38 Cal.4th 1065 is analogous. The California Supreme Court applied the public
27 interest statutory exemption and held that the City of Los Angeles Department of Airports did
28 not have to disclose proposals for commercial use of airport property that were submitted under a

1 request for proposals process until the Department had completed negotiations with bidders. (*Id.*
2 at 1068.) Public disclosure could occur after the Department had finished negotiations and made
3 a recommendation for final approval by the awarding authority, but before the awarding
4 authority had made a final approval decision. (*Id.* at 1068.) The public interest in non-disclosure
5 at the negotiating stage outweighed the public interest in disclosure. (*Id.* at 1073-1074.)

6 Likewise, in the instant matter, public disclosure of the collective bargaining materials
7 after negotiations are complete, and before the Board finally approves the agreement would give
8 the public and all interested parties ample opportunity to scrutinize and protest the proposed
9 agreement. There is no reason why disclosure of the various proposals prior to an agreement
10 being reached would provide any significantly greater benefit to the public.

11 **b. Petitioner's Second Cause of Action.**

12 The second cause of action is for violations of Government Code section 3505 which
13 provides in pertinent part: "The governing body of a public agency... shall meet and confer in
14 good faith regarding wages, hours, and other terms and conditions of employment with
15 representatives of such recognized employee organizations ... and shall consider fully such
16 presentations as are made by the employee organization on behalf of its members prior to
17 arriving at a determination of policy or course of action. 'Meet and confer in good faith' means
18 that a public agency, or such representatives as it may designate, and representatives of
19 recognized employee organizations, shall have the mutual obligation personally to meet and
20 confer promptly upon request by either party and continue for a reasonable period of time in
21 order to exchange freely information, opinions, and proposals, and to endeavor to reach
22 agreement on matters within the scope of representation prior to the adoption by the public
23 agency of its final budget for the ensuing year..."

24 In the instant matter, production of the documents would violate the duty to bargain in
25 two separate ways. First, AOCDS and the County negotiated on preliminary ground rules for the
26 successor MOU. (Olins decl. para. 7.) One of the agreed upon rules was that the collective
27 bargaining materials would not be publicized. (Olins decl. para. 7.) Reneging on an established
28 ground rule is a violation of the duty to bargain. (*California Department of Personnel*

1 *Administration* (1993) PERB Dec. No. 995-S; *Compton Community College District* (1989)
2 PERB Dec. No. 728; *Stockton Unified School District* (1980) PERB Dec. No. 143.)

3 Second, the release of the materials will compromise negotiations by undermining and
4 interfering with the process. (Nichols decl. 9-13.) As discussed at length above in regards to the
5 violation of Government Code section 6255, turning over collective bargaining materials in the
6 midst of negotiations will undermine the negotiation process, as the parties will be less inclined
7 to make strategic concessions through the process if the proposals are used as a mechanism for
8 creating public scorn. (Nichols decl. 9-13.) In other words, the bargaining parties require some
9 breathing room in order to work through the process in good faith.

10 **ii. Respondents Will Suffer No Harm If The Injunction Is Issued.**

11 As discussed above, Petitioner will suffer immediate and irreparable harm if this Court
12 does not issue a TRO and preliminary injunction. On the other hand, neither the public nor
13 Respondents will suffer harm if the TRO and preliminary injunction are issued.


14 There is no immediate need for the production of the materials. Granting injunctive relief
15 in this instance maintains the status quo without harming Respondents. As in this case,
16 preliminary injunctive relief is proper when it is reasonably necessary and fair to both sides to
17 maintain the status quo pending the outcome of litigation. (*Lenard v. Edmonds* (1957) 151
18 Cal.App.2d 764, 769; *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.)

19 **IV. CONCLUSION**

20 Based on the foregoing, Petitioners respectfully request that this Court grant the instant *ex*
21 *parte* Application.

23 Dated: January 27, 2016

OLINS RIVIERE COATES & BAGULA, LLP

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25 _____
26 Adam Chaikin, Esq.,
27 Attorney for Plaintiff/Petitioner,
28 ASSOCIATION OF ORANGE COUNTY
DEPUTY SHERIFFS