

Case No. S206350

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RIVERSIDE COUNTY SHERIFF'S)
DEPARTMENT,)

Plaintiff and Respondent)

vs.)

JAN STIGLITZ,)

Defendant.)

RIVERSIDE SHERIFF'S)
ASSOCIATION,)

Intervenor/Appellant.)

AND RELATED ACTIONS.)
_____)

Case No. S206350

) [Riverside Superior Court
) No. RIC10004998, after
) Published Decision of the
) Fourth District Court of
) Appeal, Div. Two, No.
) E052729]

SUPREME COURT
FILED

FEB 11 2013

Frank A. McGuire Clerk

Deputy

**PETITIONER'S MOTION FOR JUDICIAL NOTICE
MEMORANDUM OF POINTS AND AUTHORITIES
SUPPORTING EXHIBIT
DECLARATION OF BRUCE D. PRAET**

Bruce D. Praet, SBN 119430
FERGUSON, PRAET & SHERMAN
1631 E. 18th Street
Santa Ana, CA 92705-7101
(714) 953-5300 Telephone
(714) 953-1143 Facsimile
Attorneys for Plaintiff/Respondent

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioner, RIVERSIDE COUNTY SHERIFF'S DEPARTMENT
(hereafter "The Department") hereby requests that this Court take judicial
notice of the attached exhibit submitted concurrently with Petitioner's
Opening Brief. Authority for this request is found in California Evidence
Code §§ 452, 453 and 459, and California Rules of Court, Rule 8.252.

The document submitted for judicial notice is a transcribed copy of
the June 25, 2012, oral argument in the matter of *Riverside County Sheriff's
Department v. Jan Stiglitz; Riverside Sheriff's Association, and related
cases*, Fourth District Court of Appeal, Division Two, Case No. E052729.

Dated: February 11, 2013

Respectfully submitted,

FERGUSON, PRAET & SHERMAN
A Professional Corporation

By: _____
Bruce D. Praet, Attorneys for
Respondent, Riverside Sheriff's Dept.

MEMORANDUM OF POINTS AND AUTHORITIES

California courts, including the Supreme Court, may take judicial of their own records, as well as the records of any court of the state. (*Evidence Code* § 452, *subd. (d)*, 453, 459.) This includes records in underlying or related actions. (See e.g. *In re Johnson (1998) 18 Cal.4th 447, 465, fn.)*

California Rules of Court, Rule 8.252(a) implements Evidence Code § 459, and requires a party seeking judicial notice to file a separate motion stating why the matter to be noticed is relevant to the appeal and whether the matter relates to the proceedings occurring after the judgment.

1. Relevance of the Exhibit

The issue before this Court is whether the appellate court erred in its decision to grant the appeal of Appellant and Real Party in Interest, Kristy Drinkwater. The transcript is relevant to this issue as oral argument clearly shows the dilemma facing the District Court of Appeal - that “*there is an ambiguity*” in the statutory scheme governing the exclusive *Pitchess* process controlling access to confidential peace officer personnel files.

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THEREFORE, Petitioner requests that this Court take judicial notice of the exhibit attached to this motion as Exhibit "2".

Dated: February 11, 2013

Respectfully submitted,

FERGUSON, PRAET & SHERMAN
A Professional Corporation

By: 
Bruce D. Praet, Attorneys for
Respondent, Riverside Sheriff's Dept.

DECLARATION OF COUNSEL

I, Bruce D. Praet, hereby declare the following to be true and correct:

1. That I am the attorney of record for Petitioner in this action and that I am duly licensed to practice before this and all other courts in the state of California. Except where expressly stated to the contrary, I make this declaration from personal knowledge and, if called as a witness, I would testify in conformity with this declaration.

2. Attached hereto as Exhibit "1" is a true and correct transcribed copy of the June 25, 2012, oral argument in the matter of *Riverside County Sheriff's Department v. Jan Stiglitz; Riverside Sheriff's Association, and related cases*, Fourth District Court of Appeal, Division Two, Case No. E052729.

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

Executed this 11th day of February 2013, in Santa An, California.

By: 
Bruce D. Praet

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I, Cathy Sherman, employed in the aforesaid County, State of California; I am over the age of 18 years and not a party to the within action. My business address is 1631 East 18th Street, Santa Ana, California 92705-7101.

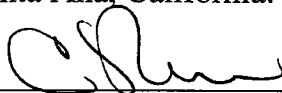
On February 12, 2013, served the **PETITIONER'S MOTION FOR JUDICIAL NOTICE, MEMORANDUM OF POINTS AND AUTHORITIES, SUPPORTING EXHIBIT, DECLARATION OF BRUCE D. PRAET** on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

SEE ATTACHED SERVICE LIST

XXX (By Mail) I placed such envelope with postage thereon fully paid to be placed in the United States mail at Santa Ana, California.

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

Executed on February 12, 2013, at Santa Ana, California.



Cathy Sherman

SERVICE LIST

Dennis J. Hayes, Esq. Adam Chaikin, Esq. Hayes & Cunningham 5925 Kearny Villa Road, Suite 201 San Diego, CA 92123	Michael P. Stone, Esq. Muna Busailah, Esq. Travis M. Poteat, Esq. Stone Busailah LLP. 200 E. Del Mar Blvd., Suite 350 Pasadena, CA 91105
Jan Stiglitz, Arbitrator California Western School of Law 225 Cedar Street San Diego, CA 92101	Clerk of the Court Riverside Superior Court 4050 Main Street Riverside, CA 92501
Clerk of the Court California Court of Appeal Fourth District, Division Two No. E052729 3389 Twelfth Street Riverside, CA 92501	Office of the Attorney General 1300 "I" Street Sacramento, CA 95814-2919

ORAL ARGUMENT

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CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

RIVERSIDE COUNTY SHERIFF'S)	
DEPARTMENT,)	
Plaintiff and Respondent,)	
v.)	E052729
JAN STIGLITZ,)	Super.Ct.No.RIC10004998
Defendant;)	OPINION
RIVERSIDE SHERIFF'S ASSOCIATION,)	
Intervenor and Appellant.)	
<hr/>		
RIVERSIDE COUNTY SHERIFF'S)	
DEPARTMENT,)	
Plaintiff and Respondent,)	
v.)	E052807
JAN STIGLITZ,)	Super.Ct.No.RIC10004998
Defendant;)	
KRISTY DRINKWATER,)	
Real Party in Interest and)	
Appellant.)	
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ORAL ARGUMENT

Reported by Jenny Craig, CSR No. 11094
CLS Job No. 23775

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ORAL ARGUMENT

1 (Beginning of Recording)

2 JUSTICE MCKINSTER: -- over the last two cases.

3 That in mind, let's call number 9, the Riverside
4 County Sheriff's Department versus Stiglitz, Drinkwater
5 Real Party in Interest.

6 And good afternoon, gentlemen. Once you're --
7 you're comfortable, if you'll give us the appearances for
8 the record and the spelling of the last name.

9 MR. STONE: Good afternoon, Justices. My name is
10 Michael P. Stone, S-t-o-n-e, and I represent the Real
11 Party in Interest Kristy Drinkwater in this case.

12 JUSTICE MCKINSTER: All right. Thanks, Mr. Stone.

13 MR. STONE: Sure.

14 MR. HAYES: Good afternoon. Dennis Hayes, H-a-y-e-s,
15 appearing on behalf of the Riverside Sheriff's
16 Association, appellant intervenor.

17 JUSTICE MCKINSTER: All right. And Respondent.

18 MR. PRAET: Good afternoon, Your Honors. Bruce Praet,
19 P-r-a-e-t, on behalf of the Respondent Riverside Sheriff's
20 Department.

21 JUSTICE MCKINSTER: All right. And I'm glad we don't
22 have an army of (inaudible) in toe also. I was going
23 to -- I was worried about that.

24 So each side has 15 minutes to argue their case.
25 The Appellant has a right to open and close. This is a

ORAL ARGUMENT

1 favorable opinion towards the Appellant if it were to hold
2 up and there are many, many interesting issues in this
3 case. We've -- we've asked for oral argument in this.
4 However you wish to proceed, you're free to do so. You
5 can reserve all of your time if you want. You can address
6 aspects of the opinion you think we have wrong. It's your
7 call.

8 How -- how did you want to proceed Mr. Stone and
9 Mr. Hayes?

10 MR. STONE: I will offer my brother Dennis Hayes 7 of
11 the 15 minutes and I would like to open with my eight.

12 JUSTICE MCKINSTER: All right.

13 MR. STONE: And I'll -- and I'll hold just a couple of
14 minutes.

15 JUSTICE MCKINSTER: Okay. So you would like to have
16 eight and you want to reserve two of that. And what will
17 happen is our clerk, once you've proceeded six minutes
18 into your argument, you'll -- you'll receive that warning
19 so you need to be heed -- heed those since you're dividing
20 your time.

21 MR. STONE: I will. Thank you.

22 JUSTICE MCKINSTER: Okay. With that in mind, go ahead
23 Mr. Stone.

24 MR. STONE: Thank you, Your Honor.

25 Once again, good afternoon. I have to say on

ORAL ARGUMENT

1 behalf of my -- all my colleagues in the room here that
2 this is a most pleasant experience to appear in front of
3 this Division in the Court of Appeal for the Fourth
4 Appellate District and we appreciate the hospitality that
5 the court shows to the litigants.

6 JUSTICE RICHLI: So -- so it's not merely because of
7 the tentative ruling.

8 MR. STONE: Well, that helped a lot. Pushed me over,
9 Your Honor.

10 JUSTICE RICHLI: Yeah.

11 MR. STONE: No. Seriously, because it is a pleasant
12 place to argue, it is.

13 All right. There are eight reasons, Your Honors,
14 why I think this case is very important to the parties and
15 why it's -- it's important to over 100,000 police officers
16 in the state of --

17 JUSTICE RICHLI: Couns- --

18 MR. STONE: -- California.

19 JUSTICE RICHLI: Counsel, I don't want to get you off
20 track, but I have a real concern there -- there are a lot
21 of concerns. We asked for oral argument on this case.
22 It's got a lot of sticky issues.

23 But one question I'd like you to answer if you
24 can, I don't know the answer. In looking at -- we're
25 talking about statutory interpretation 832.7 and then the

ORAL ARGUMENT

1 Evidence Code sections 1043, 1045. It -- it appears to me
2 that obviously the Evidence Code sections 1043 and 1045
3 are giving everybody the procedures for how you obtain the
4 discovery in a Pitchess case.

5 MR. STONE: Correct, Your Honor.

6 JUSTICE RICHLI: I'm assuming for purposes of argument
7 here that Pitchess applies to civil hearings,
8 administrative hearings, I'm -- I'm making that
9 assumption.

10 Then you -- you go to 832.7 and in 832.7 you have
11 the provision of that section that gives you the procedure
12 for the ruling on Pitchess motions. And nowhere in 1043
13 or 1045 do you have reference to anything that indicates a
14 court, chambers, anything like that. In 10 -- in 832.7
15 you have in that whole section that talks about the
16 ruling, the procedure for the ruling on the Pitchess
17 motion, it's the court, the court in chambers, it -- a
18 reiteration of the term, the court, the court, the court.

19 MR. STONE: Right.

20 JUSTICE RICHLI: It seems to me that there's no
21 vehicle here for getting -- we -- we interpret that and
22 say you have to read all of these sections together and
23 that therefore, there is no requirement that you have to
24 have a judge make a ruling on the Pitchess motion. I'm
25 going to that aspect of the decision.

ORAL ARGUMENT

1 MR. STONE: Yes.

2 JUSTICE RICHLI: But it seems to me the statutory
3 interpretation, you could look at 832.7 and say that
4 trumps -- read it with 1043 and 1045, they don't mention
5 the court, they don't mention chambers. The legislature
6 screwed up somewhere along the line. They never created a
7 vehicle where maybe you have an administrative hearing,
8 the discovery is complied with and then it should be
9 referenced to the court or a referral made to the court,
10 they make the ruling on the Pitchess motion.

11 Is that necessary here?

12 MR. STONE: Your Honor, I'm not sure that I understand
13 what it is about section 832.7 --

14 JUSTICE RICHLI: In the --

15 MR. STONE: -- that troubles the Court.

16 JUSTICE RICHLI: Because it refers to -- when it talks
17 about the procedure for the ruling on the Pitchess motion
18 as opposed to the procedures for obtaining discovery in a
19 Pitchess motion, I see those as -- 1043 and 1045 give you
20 the procedures for obtaining the discovery.

21 MR. STONE: Right. Right.

22 JUSTICE RICHLI: You have to give notice, who you have
23 to do, you have to notify the -- the hearing officer, so
24 on and so forth. But 832.7 talks about the procedure
25 that's used to actually make the ruling on the Pitchess

ORAL ARGUMENT

1 motion. And in that section they only refer to the court
2 and they only refer to the court sitting in chambers. I
3 mean, specific references that would indicate that the
4 legislature, at least when they were writing and drafting
5 that section, were assuming or intending that a judge
6 would be the one who would look at these records and make
7 that ruling.

8 MR. STONE: Okay. I -- I understand, Your Honor.

9 First of all, I think we have to construe not
10 only do we -- when we're interpreting statutory revisions
11 we have to construe them in a manner that gives every word
12 and phrase its appropriate meaning, but even when there's
13 a -- a statutory scheme -- these bills, these sections
14 were enacted in 1978 as part of a -- a -- of a -- of a
15 reform for the Pitchess discovery.

16 JUSTICE RICHLI: 1043 and 1045 were enacted in 1978.

17 MR. STONE: And 832.7 as well.

18 UNIDENTIFIED MALE JUSTICE: They all were.

19 JUSTICE RICHLI: 832.7 came out in -- the Pitchess
20 came out in '74 and the 832.7 came out '78, the
21 legislative --

22 MR. STONE: Right. Exactly.

23 So it's a statutory scheme. Those two statutes
24 do not just stand alone, 832.7 and 1043, 1045 of the
25 Evidence Code.

ORAL ARGUMENT

1 JUSTICE RICHLI: So just sloppy drafting?

2 MR. STONE: No. Well, no. But, you know, there's the
3 same answer to why does it say "court" and "administrative
4 body" and yet court, court, court, court, court, which the
5 Court's already discussed in its -- its --

6 UNIDENTIFIED MALE JUSTICE: I think Justice Richli,
7 without saying it, is suggest that assuming our innuendo
8 that you can have a Pitchess motion and administrative
9 hearing, such as this, this is the equivalent of a Skelly
10 hearing, that by looking at the code section where it says
11 the court will do all of these things, then you look at
12 915 here, I think that's the Penal Code, of how you
13 proceed, she's suggesting, I believe, that if you can make
14 this in front of administrative body, that somehow there
15 has to be a mechanism that the administrative hearing
16 officer cannot rule on it himself but must some way refer
17 it to a -- a trial court to then comply with 832.7.

18 That, I think, is what she is suggesting.

19 JUSTICE RICHLI: Yeah. There's no -- there's no
20 vehicle. There's no mechanism for that in either -- in
21 any of those statutes. But it seems to me the language --
22 that's what I'm saying, there's sloppy drafting, there's
23 oversight. It's disturbing to me.

24 MR. STONE: Yes. Okay. Well, this Court's tentative
25 opinion makes it very clear.

ORAL ARGUMENT

1 JUSTICE RICHLI: Well, remember, it is a tentative
2 opinion.

3 MR. STONE: I -- I know that. But I mean, for
4 purposes of discussion, it makes it clear that there is a
5 remedy for a judicial hearing officer error, rather, in
6 these cases.

7 JUSTICE RICHLI: Well, you go up and file a -- a -- a
8 writ.

9 MR. STONE: Under 1094.5, right.

10 The reference in 832.7 to -- to -- to in camera
11 review under 915 of the Evidence Code doesn't, in my
12 opinion, place it in conflict with 1043 and 1045. I've
13 always read them as working together.

14 UNIDENTIFIED MALE JUSTICE: But it doesn't say that
15 the administrative -- at least the way I've looked at it,
16 it doesn't say that the administrative judge gets the --
17 or the administrative hearing officer gets to look at the
18 stuff. It's the court that gets to look at the stuff.

19 JUSTICE RICHLI: Yeah.

20 MR. STONE: Under -- under 915 of the Evidence Code,
21 correct. It only talks about judicial officers.

22 UNIDENTIFIED MALE JUSTICE: So -- so the
23 administrative hearing officer can say, Gee whiz, I think
24 this stuff's relevant. I think you're entitled to it.
25 But you know what, I can't look at this stuff.

ORAL ARGUMENT

1 JUSTICE RICHLI: I got to send it to the court.

2 UNIDENTIFIED MALE JUSTICE: It can only be a -- a
3 judge that can look at this stuff so I've made my ruling
4 on what I -- I want to look at this stuff because I think
5 it's highly relevant to a defense in this case, but I
6 can't do it. And under 1045, only the court can look at
7 it and so bingo, somehow -- or whatever code section.

8 JUSTICE RICHLI: Yeah.

9 UNIDENTIFIED MALE JUSTICE: Somehow, you know, I got
10 to be able to shuffle -- this has to be shuffled upstairs
11 to some judge to in camera look at the stuff.

12 MR. STONE: Okay.

13 UNIDENTIFIED MALE JUSTICE: And if you -- if you take
14 that approach and if there's a mechanism for doing that --

15 UNIDENTIFIED MALE JUSTICE: There isn't.

16 UNIDENTIFIED MALE JUSTICE: -- then all of these
17 statute -- if there is a mechanism, I say --

18 JUSTICE RICHLI: Yeah.

19 UNIDENTIFIED MALE JUSTICE: Yeah.

20 UNIDENTIFIED MALE JUSTICE: If there is, then all of
21 these statutes can be harmonized.

22 UNIDENTIFIED MALE JUSTICE: And the -- and add a gloss
23 on all of that, assume -- assuming if you harmonize it
24 with this mechanism, legislature could have written such a
25 mechanism with the judicial activ- -- activism for us to

ORAL ARGUMENT

1 rewrite it and -- and save it. That -- that's another
2 problem.

3 MR. STONE: Uh-huh.

4 UNIDENTIFIED MALE JUSTICE: So in the absence of a
5 mechanism provided by the legislation, are we stuck with
6 this tentative opinion or do we write something in to
7 harmonize all these by simply saying, Yeah, the
8 administrative officer can -- can hear this Skelly hearing
9 if someone wants discovery so that they can -- they need
10 discovery for the purposes of raising a -- a
11 disproportionality or disparate treatment defense, which
12 it is a defense, I get to rule on this thing. I'm going
13 to order it, but now do I have to shift it off to a
14 judge --

15 MR. STONE: I don't believe so --

16 UNIDENTIFIED MALE JUSTICE: -- for them to look at it.

17 MR. STONE: I don't believe so, Your Honor.

18 UNIDENTIFIED MALE JUSTICE: Well, that's what's --
19 that's what --

20 MR. STONE: I understand.

21 UNIDENTIFIED MALE JUSTICE: Yeah. And -- and -- and
22 the problem is there is no mechanism. And I've always
23 taken the position, he who creates the mess cleans up
24 their own mess.

25 The legislature, if this is a mess, created this

ORAL ARGUMENT

1 mess and do we jump in and -- and simply say, Get out.
2 You're in the anomalous position now that you can rule on
3 this Mr. Administrative Hearing Officer, but guess what,
4 you're going to have to refer it out to somebody else.
5 They will look at this stuff. They will report back to
6 you and then you make the order and then you can continue
7 on with the -- with this administrative hearing.

8 MR. STONE: But that -- but -- Your Honor, then that
9 guts 1043, 1045 of that portion of the -- of the statute
10 that refers to the administrative body --

11 JUSTICE RICHLI: Well, no -- no, it doesn't.

12 UNIDENTIFIED MALE JUSTICE: It doesn't though.

13 JUSTICE RICHLI: It doesn't at all.

14 UNIDENTIFIED MALE JUSTICE: It doesn't because --
15 because you have -- you have this administrative hearing.
16 This is done by an MOU instead of a normal Skelly hearing.
17 By MOUs, they've -- you know, you guys pick someone off
18 the list of arbitrators, which is an odd thing to call a
19 hearing officer, but nonetheless, that's what it is. He's
20 still -- he's conducting the hearing. It's still in front
21 of an administrative body --

22 JUSTICE RICHLI: Yeah, he -- he -- he doesn't --

23 UNIDENTIFIED MALE JUSTICE: -- but -- but it's being
24 suggested that you need to farm this out on this issue to
25 a court and then bring it back and then continue with your

ORAL ARGUMENT

1 hearing.

2 JUSTICE RICHLI: He doesn't do the in chambers review
3 of whatever records may be or have been obtained for the
4 hearing. The judge does that. It's done in court in
5 chambers. That complies with 832.7.

6 But there's still -- we're not saying Pitchess
7 doesn't apply to this type of administrative hearing,
8 we're merely saying the procedure is screwed up. And
9 that's not an artful term, I know, but they messed it up.

10 MR. STONE: Well, Your Honor, my brother Dennis is
11 chafing here to get up to speak and so I'm going to leave
12 you with this parting shot, if you will. Whatever it is,
13 please publish the decision.

14 JUSTICE RICHLI: Yeah.

15 UNIDENTIFIED MALE JUSTICE: Well, I -- I assume the
16 supreme court is going to be -- we're going to go off the
17 record right now. Stop -- stop the time.

18 I'm assuming that both sides if you have access
19 to -- to legislative analyst -- or not analyst, but
20 legislative advocates, lobbyists, this is a clear -- I
21 mean, this is a problem, gentlemen. And I go back to he
22 who creates the mess ought to fix it. Whether we publish
23 this, whether we don't publish it and you go to the
24 supreme court, which should have an interest in this
25 because this is going to come up again and again. I --

ORAL ARGUMENT

1 I'm -- the procedural posture in this is -- is that
2 apparently this has been the procedure for years and
3 suddenly everyone's at battle stations.

4 So I don't understand how we can have a procedure
5 that's been followed for years and we're suddenly at
6 battle station. So whatever the supreme court does, it --
7 just like Pitchess, all these statutes were created after
8 Pitchess to create the procedures that Pitchess basically
9 require. Whatever I do, whatever -- or we do, whatever
10 the supreme court does, legislature can still undo it if
11 they don't like it.

12 And I mean, this is very problematic. This is
13 not an easy case. This is exactly why we asked for oral
14 argument in this case. It is not easy and it's a big
15 mess. These statutes are hard to reconcile unless you do
16 what we have suggested here which is the administrative
17 officer has to farm it out to -- to the judge to look at
18 the -- at the personnel records, make some sort of
19 determination, report back to the administrative hearing
20 officer who then basically says, Okay. Here are the three
21 files that pertain to what you requested of disparate
22 treatment and now we go on with this -- with this hearing.

23 The problem I'm having with the suggestion is I
24 don't now how you get there. The legislature could have
25 presided the vehicle -- or provide a vehicle, they did

ORAL ARGUMENT

1 not. They did not. And if we're going to be asked to
2 harmonize this -- I'm pointing at Mr. Praet for the
3 record -- we would have to do --

4 JUSTICE RICHLI: But we're off the record. I think
5 we're never off the record.

6 UNIDENTIFIED MALE JUSTICE: Well, I'm not off the
7 record, but we're -- we're -- no, I said I -- I just want
8 the time to --

9 JUSTICE RICHLI: Yeah, you meant -- yeah.

10 UNIDENTIFIED MALE JUSTICE: Yeah.

11 JUSTICE RICHLI: Toll the time.

12 UNIDENTIFIED MALE JUSTICE: Yeah, to make -- since
13 you've asked, I know your -- your procedure that you
14 started out, this is important to everybody, we recognize
15 this is publishable, but I'm not sure that if -- if we're
16 being -- if we either go with this opinion or we're asked
17 to write in a procedure the legislature didn't provide
18 for, it is a breathtaking exercise of -- of judicial
19 activism.

20 So at any rate, go ahead and have a seat and --

21 MR. STONE: Thank you.

22 UNIDENTIFIED MALE JUSTICE: -- we're going to hear
23 from Mr. Hayes.

24 MR. STONE: Okay.

25 UNIDENTIFIED MALE JUSTICE: And we're not insensitive

ORAL ARGUMENT

1 to the publication issue.

2 UNIDENTIFIED MALE JUSTICE: And may I please just make
3 one very quick observation?

4 UNIDENTIFIED MALE JUSTICE: Yes.

5 UNIDENTIFIED MALE JUSTICE: And it's kind of a
6 question, if you could respond or an observation.

7 Obviously, Pitchess, you know, personnel records
8 are highly privileged. You know, they're important stuff
9 and there's a lot of privacy here. Not that judges are
10 any brighter than any administrative law judge or any
11 arbitrator --

12 UNIDENTIFIED MALE JUSTICE: Yeah.

13 UNIDENTIFIED MALE JUSTICE: But one thing that's a
14 little scary about this whole thing is we don't know in
15 what context it might arise again.

16 JUSTICE RICHLI: That's right.

17 UNIDENTIFIED MALE JUSTICE: We don't know within what
18 administrative kind of proceeding or arbitration
19 proceeding it might arise. And if you go with this
20 tentative decision, it's kind of like opening it all up
21 with very little safeguards and it at least isn't one
22 safeguard -- and again, judges aren't any brighter than
23 administrative officers -- but isn't at least one
24 safeguard that it's a judge that looks at the junk?

25 MR. HAYES: Well, I think in the context of -- of what

ORAL ARGUMENT

1 was said before, that this has been going on for a long
2 period of time. The people that are involved in this are
3 all very attune to that problem. They protect the
4 records, whether it's the Department, whether it's the
5 Association --

6 UNIDENTIFIED MALE JUSTICE: Hey, this could be --

7 JUSTICE RICHLI: But -- but -- but --

8 UNIDENTIFIED MALE JUSTICE: This could be another DMV
9 hearing, it could be an agricultural hearing. This could
10 arise -- you know, all of a sudden some agricultural
11 arbitrator for one reason or another thinks that a police
12 officer's personnel files are relevant for some sort of a
13 defense on an agricultural fine.

14 MR. HAYES: Well, then The Court has --

15 UNIDENTIFIED MALE JUSTICE: I mean, it can grow -- it
16 can pop up any number of areas.

17 MR. HAYES: I think The Court then has to take it like
18 the Brown ver- -- v Valverde on an individual basis. If
19 there is a basis for not having a Pitchess motion in an
20 administrative matter --

21 UNIDENTIFIED MALE JUSTICE: But it might be highly
22 relevant in my agricultural hearing.

23 UNIDENTIFIED MALE JUSTICE: But could -- couldn't --
24 couldn't we --

25 MR. HAYES: That would be unique to those

ORAL ARGUMENT

1 circumstances.

2 UNIDENTIFIED MALE JUSTICE: Well --

3 JUSTICE MCKINSTER: Could -- yeah, but couldn't we
4 circumvent that by making it clear in this opinion
5 whenever it's finalized, assuming we stay with this, which
6 is a big assumption, as saying that basically our holding
7 only applies to a Pitchess motion in a Skelly type of
8 hearing which has been farmed out under an MOU to an
9 administrative hearing officer and -- and -- and say it's
10 circumscribed by that. We -- we imply -- I -- I do not
11 want to do a Brown versus Valverde and say that it applies
12 in all administrative hearings, otherwise, we're going to
13 be in the position that -- that Justice King suggests and
14 I think we can circumvent that and hopefully we're not
15 going to say that this is going to apply in any
16 administrative hearing; otherwise, you get the problem
17 that Valverde created.

18 MR. HAYES: Right.

19 JUSTICE MCKINSTER: Or at least allegedly created. It
20 really did not.

21 MR. HAYES: It really did not.

22 JUSTICE MCKINSTER: Did not.

23 MR. HAYES: I think it was unique on its circumstances
24 and it analyzed, okay, .08 blood alcohol, the need for a
25 quick -- a quick decision and all the reasons why that

ORAL ARGUMENT

1 wasn't appropriate, but -- but Brown didn't talk about
2 3304(b) hearings. They didn't talk about --

3 JUSTICE MCKINSTER: Of course not.

4 MR. HAYERS: -- the agricultural one. And maybe you
5 do have to take it on a case by case basis and you would
6 have to rule here.

7 But any time The Court is called upon to
8 reconcile language in -- in -- in two different pieces of
9 legislation, it's not because --

10 JUSTICE RICHLI: Well, in two different codes.

11 MR. HAYES: -- it's harmonious --

12 JUSTICE RICHLI: I mean it's -- you got the Evidence
13 Code you got the Penal Code.

14 MR. HAYES: Right, right.

15 JUSTICE RICHLI: I mean --

16 MY HAYES: It always comes to you in a non harmonious
17 form.

18 JUSTICE RICHLI: Yes.

19 MR. HAYES: And -- and you have --

20 JUSTICE RICHLI: It's fractured.

21 MR. HAYES: -- basically, you know, door number one
22 and door number two. With door number one, you have 1043
23 which specifically says the court or an administrative
24 body. And -- and to -- to have a holding that there's
25 some blanket exception to a Pitchess motion for an

ORAL ARGUMENT

1 administrative body would be in effect a line item veto
2 through that provision, so we can't do that.

3 Door number two -- or was that B? Door number
4 two is that where -- where you -- you have to say, okay.
5 It gives you the right to bring the -- an evidentiary
6 motion, besides it's an evidentiary motion --

7 JUSTICE RICHLI: Yes.

8 MR. HAYES: -- to discover peace officer records.
9 That's what it's being authorized to do. It's not --
10 well, why would you farm it out to the court if, in fact,
11 the legislature had said you have an evidentiary motion to
12 discover peace officer records. Bring it before the
13 administrative body. Oh, wait, you can't rule on it.
14 Well, that makes no sense either.

15 The only one that does make sense is -- is the
16 one where you do have the right to bring it and the
17 court -- I mean, the legislature did not say the court or
18 the administrative body.

19 UNIDENTIFIED MALE JUSTICE: See, I don't know why the
20 administrative body can't rule on it. The administrative
21 body just can't be the group that initially looks at it.

22 UNIDENTIFIED MALE JUSTICE: Yeah.

23 JUSTICE RICHLI: Yeah.

24 UNIDENTIFIED MALE JUSTICE: The administrative body
25 like here can say yes, this is highly relevant, it's

ORAL ARGUMENT

1 highly probative, you're entitled to it.

2 UNIDENTIFIED MALE JUSTICE: But I can't look at it
3 because --

4 UNIDENTIFIED MALE JUSTICE: Now I can't take a look at
5 the junk.

6 UNIDENTIFIED MALE JUSTICE: -- because the code says
7 the court has to look at it so we're going to ship it to
8 the court.

9 UNIDENTIFIED MALE JUSTICE: To the court. And the
10 court will --

11 MR. HAYES: But why is the administrative body even
12 looking at it if it can't rule on the motion?

13 JUSTICE RICHLI: Well, they will ultimately look at
14 it --

15 UNIDENTIFIED MALE JUSTICE: They'll -- they'll
16 ultimately get it back.

17 JUSTICE RICHLI: -- once the court has --

18 UNIDENTIFIED MALE JUSTICE: It's an excellent
19 question. It's an excellent question.

20 MR. HAYES: Oh, okay.

21 UNIDENTIFIED MALE JUSTICE: They'll ultimately get it
22 back.

23 MR. HAYES: Now that The Court has determined it's
24 relevant, I will look at it and determine that it's
25 relevant. Oh, hey, it's relevant. That -- that seems --

ORAL ARGUMENT

1 UNIDENTIFIED MALE JUSTICE: No, see, I don't think so.

2 UNIDENTIFIED MALE JUSTICE: Well, actually, it seems
3 absurd -- and how would we get there? Let's assume that
4 you bought into this. You're saying it's absurd to say as
5 an administrative hearing officer, you get to rule on this
6 motion. It's silly to send it off to the court.

7 MR. HAYES: Contradictory.

8 UNIDENTIFIED MALE JUSTICE: It's not in the least.

9 UNIDENTIFIED MALE JUSTICE: Well, it's --

10 MR. HAYES: What would -- what would they send it off
11 for? All right. I have --

12 UNIDENTIFIED MALE JUSTICE: Okay. I think --

13 MR. HAYES: I have the right to hear a motion.

14 UNIDENTIFIED MALE JUSTICE: Yes.

15 MR. HAYES: What do I do when I hear a motion?

16 UNIDENTIFIED MALE JUSTICE: Okay. Okay. The
17 administrative law judge in this case says, These rel--
18 these -- these records of these officers are highly
19 relevant as to this issue. It goes up to the superior
20 court judge.

21 JUSTICE RICHLI: He does the in chambers.

22 UNIDENTIFIED MALE JUSTICE: It is the judge that looks
23 at the records and says, Okay. The parameters that I have
24 from the administrative law judge are that I want to find
25 other people that have been disciplined, that have

ORAL ARGUMENT

1 committed this sort of an -- an offense and I want to find
2 out how they've been disciplined. I'm going to look at
3 them and I'm only going to give the administrative law
4 judge those particular things that are -- that are within
5 the relevant order of the administrative law judge, but
6 I'm not going to let this administrative law judge --

7 JUSTICE RICHLI: Decide.

8 UNIDENTIFIED MALE JUSTICE: -- go through police
9 officer Smith's records and see that he's beaten up his
10 wife, he's stealing money and all this stuff.

11 JUSTICE RICHLI: Yeah.

12 UNIDENTIFIED MALE JUSTICE: I'm not going to let the
13 administrative law judge see this stuff. I'm going to
14 look at it as a superior -- the administrative law judge
15 has deemed it's relevant, there's good cause for it. I am
16 just now going to do --

17 JUSTICE RICHLI: The redaction.

18 UNIDENTIFIED MALE JUSTICE: -- my ministerial act --
19 act and look at the documents and tell the administrative
20 law judge noth- -- nothing here, you get nothing or, yeah,
21 there's one little thing here. You get this one little
22 thing, everything's going back to the police headquarters.

23 MR. HAYES: Well, that is an interesting structure
24 that could be created by the legislature, but -- but they
25 never did that --

ORAL ARGUMENT

1 UNIDENTIFIED MALE JUSTICE: Maybe it has been.

2 MR. HAYES: -- because I think it would be clear
3 that -- that the issue would be bifurcated and that the
4 hearing officer would determine whether the requested
5 information, without looking at it, is relevant to the
6 case, but somebody else, a judicial officer, has to review
7 the actual records in part two --

8 JUSTICE RICHLI: But -- but see, Counsel, the 83- --

9 MR. HAYES: -- that's not laid out.

10 JUSTICE RICHLI: The 832.7, the language of 832.7, to
11 me does -- you can't harmonize it with 1045 or 1043
12 because in -- and I agree -- Justice King, I think we're
13 on the same page on this -- the -- the administrative law
14 judge gets to say, Yeah, you can obtain the discovery.
15 You give the proper notice, but the superior court judge
16 actually looks at the police officer's records and redacts
17 what he or she thinks needs to be redacted, if anything
18 and what goes back to the administrative law judge as part
19 of the hearing that everybody then is privy to in terms of
20 the Skelly hearing.

21 MR. HAYES: Again, I -- I don't find that.

22 JUSTICE RICHLI: But -- but 832.7 just -- it bothers
23 me enormously that they write these sections all at the
24 same time. One is giving you the procedures for obtaining
25 the discovery. And it seems to me the other, 832.7, gives

ORAL ARGUMENT

1 you the procedure for ruling on the discovery. And in
2 that section, nowhere do they refer to anything other than
3 the court. And they even go so far as to say, The court
4 in its chambers, sitting in chambers.

5 I mean, I -- I'm not trying to be pedantic about
6 it. It seems to me that's very specific, artful language
7 and they've chosen that for a purpose, for a reason.

8 MR. HAYES: Well, that's not how it's been operated.
9 That's not --

10 UNIDENTIFIED MALE JUSTICE: No, that's fine. We're
11 not --

12 MR. HAYES: That's not how it's operated. That's not
13 how people have interpreted it and --

14 JUSTICE RICHLI: Well, this is the first appeal in all
15 the years this has been going on that we've had on this
16 issue, Counsel.

17 UNIDENTIFIED MALE JUSTICE: Because heretofore, none
18 of you cared about this stuff.

19 MR. HAYES: Yeah, that's because the system worked
20 fine.

21 UNIDENTIFIED MALE JUSTICE: I'm just sitting here
22 incredulous for years, no one's ever objected to a hearing
23 officer conducting a Pitchess motion and suddenly the sky
24 is falling. I don't get it.

25 MR. HAYES: Well, this wasn't either. This wasn't

ORAL ARGUMENT

1 either. When -- when the -- when the Department first
2 went in to court, they went in to court that there wasn't
3 sufficient evidence to support having the arbitrator look
4 at anything in chambers and so --

5 UNIDENTIFIED MALE JUSTICE: No. They -- they
6 didn't -- they didn't dispute the authority to rule.

7 MR. HAYES: No, and -- and --

8 UNIDENTIFIED MALE JUSTICE: But -- but they
9 disputed --

10 MR. HAYES: And it wasn't the issue. Valverde came
11 down later.

12 UNIDENTIFIED MALE JUSTICE: But they disputed the good
13 cause.

14 MR. HAYES: Right.

15 UNIDENTIFIED MALE JUSTICE: Kind of to put what
16 Justice Richli just said in context, if we try to
17 harmonize all this stuff, you know, one of the Penal Code
18 sections talks about criminal proceedings or civil
19 proceedings.

20 MR. HAYES: Yes.

21 UNIDENTIFIED MALE JUSTICE: Another -- another
22 different code section talks about an administrative body.
23 The code section that Justice Richli keeps honing in on
24 talks about, The Court shall, blah, blah, blah, and this
25 is how you do it under 915. It's very detailed.

ORAL ARGUMENT

1 It seems to me if we follow the usual rules of
2 statutory construction, we can't write out administrative
3 body and we can't write out civil procedures. We're not
4 supposed to render any section of any statute surplusage.
5 I think we can all agree on that, okay.

6 But it seems to me that the legislature in
7 drafting all of this stuff, while they threw out civil
8 proceedings, which encompasses everything, I see
9 administrative proceedings as a subset of that. I hope
10 you would agree with that. You can disagree if you want.

11 MR. HAYES: Yes.

12 JUSTICE MCKINSTER: Okay. In setting out these little
13 rules and stuff that the judge shall do this and how you
14 do all of this stuff, the legislature, even though they
15 said administrative body, that's the only time it's ever
16 mentioned. They set up no procedures for it. It
17 virtually contemplates in a criminal proceeding you're
18 always going to be in front of the trial court, a judge.

19 And most civil proceedings -- let's -- let's
20 assume that Officer Thumper uses excessive force is now
21 being sued for assault in, perhaps, a 108 -- a 1983
22 action, in that kind of a civil proceeding, because
23 there's a lawsuit, you're in front of a trial judge.

24 The problem is when you're in front of an
25 administrative body, there ain't no judge and they did not

ORAL ARGUMENT

1 provide any procedure other than what we're saying here is
2 we agree that there is the power of the administrative
3 officer to hear this hearing and even to rule on the
4 motion.

5 What I'm hearing from my colleagues on either
6 side is, but you've got to some way throw this out of the
7 administrative hearing, send it to a judge, they look at
8 this stuff. I understand exactly where Justice King is
9 coming from. Normally, your -- your association protects
10 a -- an officer's personnel records like a junk yard dog.

11 MR. HAYES: Yes. True.

12 JUSTICE MCKINSTER: You are now in -- in the anomalous
13 position of helping another one of your members get into
14 somebody else's shorts. You have a conflict. You do.

15 MR. HAYES: I -- I -- I -- I'm not necessarily -- I
16 don't agree it's a conflict.

17 JUSTICE MCKINSTER: Well, it is. If you -- if --
18 if -- if you -- if you represent peace officers, peace
19 officers do not want anybody in their personnel records.

20 You're now going on behalf of Miss Drinkwater and
21 Mr. Stone saying, Well, in this case, we are going to get
22 into your personnel records because due process requires
23 as -- as a part of the termination proceeding, is that
24 we -- we get to have any relevant information that would
25 help us establish a defense. Whether she can or not, I

ORAL ARGUMENT

1 don't know. That's down the road someplace. But she has
2 a right to that stuff.

3 So how can you as -- as an RSA representative
4 say, Okay. We will sacrifice one category of peace
5 officer's privacy rights and sacrifice on the alter of
6 Miss Drinkwater's rights to get this stuff. That's a
7 different issue.

8 All I'm saying is this code section provides no
9 basis for this transfer that both of my colleagues are
10 suggesting and I don't see how I write that in so --

11 MR. HAYES: I think it -- it comes out of the kind of
12 patchwork quilt from which this came. This came in
13 criminal actions and civil actions. And even in the -- in
14 the DMV, there is public disclosure.

15 The creature we're talking about here is not that
16 kind of public trial, criminal trial. The public isn't
17 allowed into it and -- and it's closed --

18 JUSTICE MCKINSTER: Which -- which --

19 MR. HAYES: -- and third parties are not allowed.

20 So you can make an argument there isn't even a
21 disclosure. And besides, with these other people, don't
22 you think at some point in time -- in fact, the
23 Association represented these other people and knows
24 exactly who it is and what they got, but we still bring
25 the motion to the arbitrator in order to do that. So

ORAL ARGUMENT

1 it's -- for us it's not even a disclosure.

2 JUSTICE RICHLI: But see, you get to 837, -- 832.7(c)
3 it says -- the other sections about the criminal arena.

4 MR. HAYES: Right.

5 JUSTICE RICHLI: This says, In determining relevance
6 where the issue in litigation concerns the policies or
7 pattern of conduct of the employing agency -- that's this
8 case -- the court shall consider. It says, Where in
9 litigation concerns the policies or pattern of conduct of
10 the employing agency, the court shall consider whether the
11 information sought may be obtained from other records,
12 blah, blah, blah, maintained by the employing agency in
13 the regular course of business, so on and so forth.

14 So they're talking about this case. When they
15 talk about -- we're talking about concerns the policies or
16 pattern of conduct of the employing agency.

17 MR. HAYES: That seems more like a --

18 JUSTICE RICHLI: That's the facts of this case.

19 MR. HAYES: That seems more like a 11883 claim that --
20 that they're talking about the practices and policies --

21 JUSTICE RICHLI: But it could --

22 MR. HAYES: -- in order to be successful on that.

23 What we're talking about is disparate treatment.

24 JUSTICE RICHLI: We -- I understand, but it's that in
25 disparate treatment is being asserted as in your case

ORAL ARGUMENT

1 Miss Drinkwater is asserting that's dis- -- dispair- --
2 disparate treatment because I got terminated and these
3 other people have been doing this same thing and that's
4 the conduct of the employing agency. You're choosing to
5 read that very narrowly.

6 I'm choosing to read it rather broadly because,
7 again, we have -- you're saying they -- they just didn't
8 consider it administrative -- they didn't -- you're
9 talking about litigation. You're talking about lawsuits
10 in front of the, quote, the courts, but there they are.

11 MR. HAYES: Yeah, the public. But these are not
12 public. And -- and what we're talking about is the --
13 just the -- the term- -- termination without good cause
14 because you violated the rule of giving dissimilar
15 penalties for like offenses. It -- it -- it is just
16 establishing that a number of people were treated
17 differently for whatever reason. It's not -- may not
18 necessarily be the -- the policy and practices of -- of
19 the agency for that, but I -- this is --

20 JUSTICE RICHLI: But again, they're referring to --
21 again, they use the term "the court." They could use the
22 court and/or administrative agency.

23 UNIDENTIFIED MALE JUSTICE: That would solve the whole
24 problem, wouldn't it?

25 JUSTICE RICHLI: They do that, you know, at the -- at

ORAL ARGUMENT

1 the beginning of -- in any case in which discovery in
2 1043, they talk about in any case in which discovery. But
3 here they specifically refer to terms of art that we use
4 specifically to refer to the court.

5 MR. HAYES: Don't you think it was the intent of the
6 legislature though --

7 JUSTICE RICHLI: I think they messed up.

8 MR. HAYES: -- to allow the administrative body to
9 determine this? Look where we are now. The Department --

10 JUSTICE RICHLI: It depends on which administrative
11 body.

12 MR. HAYES: The Department didn't like the ruling,
13 the -- the arbitrator or hearing officer never got the --
14 the documents. The Department didn't like the ruling
15 that the -- there was sufficient evidence even though
16 there were individuals named as to who received
17 the lesser -- lesser penalty and went into court to make
18 that determination.

19 So -- so in -- you have that ability to go into
20 court. You still have that ability. It was exercised
21 here, but we think it belongs in -- in the -- in the
22 administrative body, in which case here is the arbitrator.

23 And again, all these problems that you envision
24 have not manifested in all the years that this has been
25 going on. It's a system that works well. This was an

ORAL ARGUMENT

1 opportunistic thing. We ended up with an administrative
2 per se hearing. We had a ruling that did not establish
3 the general rule, but established an exception to the
4 general rule that administrative hearing officers can hear
5 these. And this was an exception to it.

6 And I think you could rule on it by -- by case by
7 case by case as -- as Brown started.

8 JUSTICE RICHLI: So then it shouldn't be published?
9 If it's so specific and so unique doesn't that militate
10 against publishing?

11 MR. HAYES: Well, the trouble is here you have peace
12 officers, you have labor relations. You're -- you're
13 dealing with a lot of cases and -- and they need direction
14 after Brown is -- is -- are counties all over California
15 going to jump up and say, Look, Brown invalidated that
16 portion of the 1043 that says administrative bodies.
17 You -- you can't take that ball and run with it. You have
18 to tell them that, no, they didn't in the context of a
19 3304(b) hearing, a -- a hearing officer still can do that;
20 although, they maintain confidentiality of those records.

21 JUSTICE MCKINSTER: Well, that gets back to what
22 Justice King was suggesting that it's -- there may --
23 there's good reason to have a court do it rather than a
24 mere hearing officer. I -- I think that was sort of
25 implicit of what he was suggesting.

ORAL ARGUMENT

1 MR. STONE: Or it's better to have a hearing officer
2 do it rather than a mere judge.

3 MR. HAYES: I would just think, the court calendar is
4 clogged enough to have additional issues that don't have
5 to be heard to change a system that works perfectly.

6 There is no disclosures. Where -- where is the
7 history? Where is the evidence of any disclosure through
8 these confidential, private -- you saw even Copley Presley
9 tried to get through a California Public Records Act of
10 what was disclosed at an administrative hearing and that
11 wasn't allowed. You can't get this information and nobody
12 gives it away. That's what makes this process unique.

13 JUSTICE RICHLI: So Mr. Hayes, basically you're saying
14 that if we stick with the tentative, but we narrowly --

15 UNIDENTIFIED MALE JUSTICE: It doesn't apply --

16 JUSTICE RICHLI: -- tailor it to Skelly type
17 administrative hearings, then you would agree that it
18 should be published?

19 MR. HAYES: Well, Skelly type -- well, Skelly's just
20 part of the personnel procedure, but if -- if you mean
21 in -- in terms of if this applies to discipline for peace
22 officers --

23 JUSTICE RICHLI: How -- I mean, you make it too broad
24 and I think you've got a real problem.

25 MR. HAYES: Well, I think that was the concern with --

ORAL ARGUMENT

1 with Brown. Even Brown said --

2 JUSTICE RICHLI: And that's why --

3 MR. HAYES: -- look, we're invalidating the ability of
4 an administrative hearing officer for an administrative
5 per se hearing, but we're saying there might be other
6 ones, you know, that can or can't --

7 JUSTICE RICHLI: Well, this -- this opinion then would
8 simply say, this is the type of hearing that --

9 MR. HAYES: Yes, that would be great. 3304 hearing
10 officer, they keep the confidentiality. They can keep
11 going with this and that would be fine.

12 JUSTICE RICHLI: All right.

13 UNIDENTIFIED MALE JUSTICE: All right. Let's -- let's
14 hear from -- we're way over on time. Let's hear from
15 Mr. Praet.

16 JUSTICE RICHLI: Yeah, and there's another case.

17 UNIDENTIFIED MALE JUSTICE: Yeah, and -- and
18 Mr. Praet, if -- if you like what you're hearing here,
19 you're still going to need to address why in the hell
20 didn't the legislature provide for this administrative
21 officer to ship it off to a court, what is that
22 procedure -- there isn't one that I see -- and do we
23 create it out of -- or pull that procedure out of thin air
24 or some other dark stuffy place.

25 Go ahead.

ORAL ARGUMENT

1 MR. PRAET: Thank you.

2 I assume I won't have just 15 minutes? I'll try.

3 UNIDENTIFIED MALE JUSTICE: Try and stay within your
4 15, but we've -- we've allowed time on the other side.
5 I'm going to be liberal with you.

6 MR. PRAET: Thank you.

7 Let me offer -- before I get to the Courts'
8 suggestion, which is not a bad suggestion, let me offer
9 another explanation for the term "administrative body,"
10 which exclusively lies within 1043.

11 As the court has pointed out, everywhere else it
12 says "court" and there's this one little phrase
13 "administrative body" in 1043. There are administrative
14 law judges, there are workers' comp appeal judges, there
15 are state Bar judges who are judicial officers that sit in
16 an administrative context, not in the sense of a superior
17 court or something else, which I believe the legislature
18 contemplated saying this is not just in civil proceedings,
19 this is not just in criminal proceedings, this whole
20 Pitchess process, but the court said, There may be other.
21 They anticipated there may be other administrative
22 contexts where this would apply and by limiting it to
23 court said, Administrative law judges, workers' comp,
24 et cetera. That would reconcile with the -- this court
25 has stated on page 26 seems to be this irreconcilable

ORAL ARGUMENT

1 conflict which I -- I certainly acknowledge.

2 UNIDENTIFIED MALE JUSTICE: So you want that -- us to
3 read that the court to include administrative judges?

4 MR. PRAET: Administrative law judges, not hearing
5 officers.

6 UNIDENTIFIED MALE JUSTICE: Yeah, because they're not
7 an administrative law judge.

8 MR. PRAET: Exactly. Administrative law judges,
9 worker's comp because there's a lot of peace officer
10 proceedings that --

11 UNIDENTIFIED MALE JUSTICE: And -- and nowhere in any
12 of the statutory scheme do we hear the word
13 "administrative law judge."

14 MR. PRAET: No, but you do hear "court," which those
15 at least are judges and they hold court.

16 UNIDENTIFIED MALE JUSTICE: I think most judges would
17 take issue with calling an administrative law judge
18 hearing that we would call them "the court."

19 JUSTICE RICHLI: They are referred to as judges.

20 UNIDENTIFIED MALE JUSTICE: Yeah, but they're not
21 sworn. They're not appointed by the governor. They don't
22 stand election. They can be hired and fired by the
23 administrative body that hires them.

24 JUSTICE RICHLI: They take an oath.

25 UNIDENTIFIED MALE JUSTICE: Okay. Keep going.

ORAL ARGUMENT

1 MR. PRAET: I offer it as an explanation to reconcile
2 the irreconcilable conflict.

3 UNIDENTIFIED MALE JUSTICE: Yeah.

4 MR. PRAET: Now let me address The Courts' suggestion
5 and you've -- suggestion, and you've all had varying
6 versions of that.

7 And Justice King lays a -- a very important
8 observation. These hearing officers and these person- --
9 peace officer personnel matters, some of them are not even
10 attorneys. They are the fact finder who will determine
11 whether or not there's good cause for the discipline.

12 If they conducted the in camera review, they
13 would be subject to irrelevant information, whether this
14 officer beat his wife or had some other issue, that would
15 taint their impartiality which calls for reconciling the
16 legislative language to say, Fine. The process, bringing
17 the motion, the administrative hearing officer can hear
18 whether there's good cause or is this a frivolous motion,
19 whatever. I see there's good cause, now send it to the
20 court simply for the in camera review.

21 UNIDENTIFIED MALE JUSTICE: What -- what -- what is
22 the procedure for doing that? Tell me one Code of Civil
23 Procedure, one -- one rule of court that allows an
24 administrative law judge to send a specific issue in the
25 middle of his trial to a court. Tell me, where does it

ORAL ARGUMENT

1 exist?

2 MR. PRAET: Well, I -- I don't know that it exists
3 other than in --

4 UNIDENTIFIED MALE JUSTICE: And so you want us to
5 create that procedure?

6 MR. PRAET: Well, in the Code of Civil Procedure there
7 are prelitigation discovery, but I am not saying that that
8 necessarily applies here, that the court can entertain
9 jurisdiction prelitigation --

10 UNIDENTIFIED MALE JUSTICE: But you're suggesting a
11 vehicle, as my colleagues have on both sides, that does
12 not exist. And I'm supposed to create that out of thin
13 air; correct?

14 MR. PRAET: The other problem -- well, I don't know.
15 And I agree, it's a -- it's a legislative faux pas at
16 best, okay.

17 UNIDENTIFIED MALE JUSTICE: We -- we don't know.

18 MR. PRAET: Well, we don't, but --

19 UNIDENTIFIED MALE JUSTICE: That's the whole problem.

20 MR. PRAET: We're all being called upon to reconcile
21 this issue and -- and I suggest that --

22 UNIDENTIFIED MALE JUSTICE: I think you're in the
23 wrong forum. I think you need to be beating on
24 legislators' doors, you're clearly -- regardless of what
25 we do here -- even the supreme court. I think the supreme

1 court would love to take this. What -- I don't think
2 you're going to get any better play with a published
3 opinion than an unpublished one.

4 And even then, the leg- -- if the legislature
5 doesn't like what the supremes do on this, they can just
6 legislate around it and -- and -- and use their own pooper
7 scooper. Why should I use mine?

8 MR. PRAET: As the tentative is written now, however,
9 it -- it doesn't allow for an in camera by a court. It
10 suggests that the hearing officer can do the whole
11 process.

12 And another problem that the court hasn't
13 identified is how would you enforce -- let's say the
14 hearing officer says, All right. I'm going to issue a
15 protective order. It has zero weight, zero enforceability
16 without the power of the court behind it.

17 UNIDENTIFIED MALE JUSTICE: That's interesting, yeah.

18 MR. PRAET: So that's another problem. Not only does
19 it taint the fact finder by putting irrelevant information
20 in front of them if they are the hearing officer, it's
21 completely unenforceable. A lot of these people are not,
22 as I say, attorneys.

23 The other thing that The Court pointed out is --
24 and suggesting that counsel for RSA may have a conflict --
25 unlike typical Pitchess discovery and -- and The Court did

ORAL ARGUMENT

1 an excellent job of going through the history and
2 everything of the whole Pitchess process, but the one
3 thing that nobody addressed is 1047 of the Evidence Code
4 which specifically says that Pitchess discovery shall be
5 limited to those officers who were present or involved.

6 It's a very important factor here because what
7 they're doing now is some poor officer who had discipline
8 that was unique unto themselves, is behind them now -- and
9 in -- in the Drinkwater case, for example, says falsified
10 time sheets, or whatever the issue may have been, now some
11 other officer in the past, I'm done with mine, but now
12 forever my records are going to be subject because RSA
13 knows when they represented me in the past that I happened
14 to be a person with similar misconduct.

15 A court needs to decide that if at all whether or
16 not the scope of this discovery, whatever we call it, can
17 go beyond 1047. And I submit to you there could be a
18 case.

19 UNIDENTIFIED MALE JUSTICE: This is not in your
20 briefing, is it?

21 MR. PRAET: Well, no, because the whole history of
22 Pitchess wasn't really there and -- and the court --

23 UNIDENTIFIED MALE JUSTICE: Yeah, but -- but these are
24 new arguments. And in all -- in the pounds of briefs that
25 I plowed through, this was never raised. And maybe it's

ORAL ARGUMENT

1 because we're raising it here, maybe we surprised
2 everyone. Okay.

3 MR. PRAET: Well, and -- and I suggest that The Court,
4 everyone is searching for a process here.

5 JUSTICE RICHLI: Well, we're talking about harmonizing
6 a statutory scheme --

7 MR. PRAET: Exactly.

8 JUSTICE RICHLI: -- which would include all those
9 statutes that were put -- pulled together, drafted and
10 came out at the same time for the same purpose.

11 MR. PRAET: And if this Court is suggesting that the
12 hearing officer, whoever that might be, and peace
13 officer -- and I agree that this opinion, whatever it's
14 going to be, needs to be limited to the 3304(b) peace
15 officer type thing so we don't get into a Brown --

16 UNIDENTIFIED MALE JUSTICE: Right.

17 MR. PRAET: -- situation.

18 UNIDENTIFIED MALE JUSTICE: And it only applies to
19 this case because of the MOU. This person is not a peace
20 officer.

21 MR. PRAET: Right.

22 UNIDENTIFIED MALE JUSTICE: It's -- she was conferred
23 the rights under that just by virtue of the contract so --

24 MR. PRAET: But clearly, this opinion, whatever it is,
25 is going to be extended to peace officer issues under

1 3304 (b) .

2 So if -- if that's the case then we're trying to
3 come up with a process, whatever that process may be, and
4 that process needs to say that, first of all, there may be
5 a situation where let's say five officers are involved in
6 the same situation and they're all being subjected to
7 discipline.

8 Even under 1047, arguably officer A would have
9 the right to at least bring a Pitchess motion, so to
10 speak, as to officers B through E. However, officer A
11 can't go on the proverbial fishing expedition and say, I
12 want everybody that RSA attorneys ever knew were
13 disciplined for the same kind of stuff. How does that
14 protect the privacy interest of those officers?

15 So procedurally, I think The Court has two
16 options. One, reconcile the legislative language by
17 saying the legislative -- legislature meant administrative
18 body to include administrative law judges, worker's comp,
19 in which there's a lot of peace officer proceedings that
20 are judges, perhaps not to the elevated level of superior
21 court judge or yourselves, but that would reconcile it.
22 If not --

23 UNIDENTIFIED MALE JUSTICE: But that's writing a hell
24 of a lot into the legislation, isn't it, Mr. Praet?

25 MR. PRAET: Well, we have to do something. Either

ORAL ARGUMENT

1 that or say it doesn't apply.

2 UNIDENTIFIED MALE JUSTICE: There's not one case that
3 applies the term "court" to all these other judges that
4 you're suggesting. Not one that I'm aware of.

5 MR. PRAET: And there's not one case that applies the
6 Pitchess process to peace officer personnel disciplinary
7 hearings.

8 UNIDENTIFIED MALE JUSTICE: And therein lies the
9 problem.

10 The basic problem here, I'm going to just ask if
11 you disagree.

12 We have a lady who says, I was terminated. I did
13 wrong, but I was terminated. There are other people who
14 did the same thing who did not get the same punishment.
15 If you -- I assume you agree that a defense is -- is
16 disparate or disproportional treatment.

17 MR. PRAET: Absolutely.

18 UNIDENTIFIED MALE JUSTICE: Then how in the hell can
19 you tell someone that they are not entitled to due process
20 to get the information they need to just raise it? Now
21 she may not be -- she may be successful if she gets the
22 information, she may not be. Someone could say, These
23 people did it one time. You did it for three years. I do
24 not know the underlying facts. This is a threshold issue.

25 But how can you deny her the ability to get

ORAL ARGUMENT

1 information that's necessary to -- to -- to establish the
2 defense, one that you concede exists, and if she can't get
3 this stuff, shouldn't it be overturned automatically
4 because she's now been denied due process?

5 MR. PRAET: The trial court, and I assume this court,
6 is recognizing that the only Pitchess discovery even in
7 this context that could be brought would be to
8 specifically named officers. They can't just say --

9 UNIDENTIFIED MALE JUSTICE: Which she did. Which
10 she's done.

11 JUSTICE RICHLI: Yeah, she -- yeah.

12 MR. PRAET: Exactly.

13 UNIDENTIFIED MALE JUSTICE: Initially she did not.

14 MR. PRAET: So she knows who those people are.

15 UNIDENTIFIED MALE JUSTICE: Yeah.

16 MR. PRAET: Call them as witnesses. If they have no
17 objection to presenting their facts to the hearing officer
18 or a declaration that this is my situation, this is not,
19 that remedies the whole thing. There's no need for
20 Pitchess. They know the names. Go to those people, call
21 them as witnesses on the --

22 UNIDENTIFIED MALE JUSTICE: In this case they did. In
23 another, they may not. They may simply say, you know,
24 there's been some scuttlebutt. When I heard I was getting
25 fired over this, some of the old timers who have been here

ORAL ARGUMENT

1 for 25 years -- you know, there was a guy, I can't
2 remember his name and another gal I can't remember her
3 name and they did the same thing. It didn't happen. I
4 don't have the name. How do they get it?

5 MR. PRAET: First of all, I suggest that probably
6 going back 25 years is not going to be much of an issue
7 given that most agencies destroy their stuff after five
8 years.

9 UNIDENTIFIED MALE JUSTICE: Well --

10 MR. PRAET: So it's going to be minimal.

11 UNIDENTIFIED MALE JUSTICE: -- what I'm trying to
12 suggest is that there may be circumstances which the
13 person doesn't know the -- they think that there are
14 people, but they don't know the specific names.

15 How would you do that?

16 MR. PRAET: But -- but now you're going to open the
17 flood gates.

18 JUSTICE RICHLI: That's right.

19 MR. PRAET: If you allow discovery, give me every
20 person who was ever disciplined for drunk driving --

21 UNIDENTIFIED MALE JUSTICE: Well, it's -- there's also
22 a burden on -- on the agency to cull all the records to
23 find this. I'm not suggesting that that should be done.

24 Okay. Go on.

25 MR. PRAET: So as I say, the -- the issue I think

ORAL ARGUMENT

1 is -- and you're right, this Court is going to have to
2 come up with a solution, a procedure. If you can't
3 reconcile the language, the legislative language, come up
4 with a procedure.

5 And I suggest the only procedure is, all right.
6 The first filter, if you will, will be the hearing
7 officer, whether that's a -- an attorney, whether it's an
8 administrative law judge, they are the first filter.

9 UNIDENTIFIED MALE JUSTICE: They make -- and -- well,
10 and this judge, he said they're clearly material and
11 relevant.

12 MR. PRAET: Right.

13 UNIDENTIFIED MALE JUSTICE: He said that.

14 MR. PRAET: Right.

15 UNIDENTIFIED MALE JUSTICE: So then the next step is,
16 okay. I have to ship this off to a trial court.

17 How do I do that?

18 MR. PRAET: Well, you certainly can't have him or her
19 making the decision because they're the fact finder.

20 UNIDENTIFIED MALE JUSTICE: Okay. So what -- what --
21 he makes a referral order?

22 MR. PRAET: Well, I -- I don't know unless -- The
23 Court, perhaps, is going to have to come up with a
24 solution or jurisdiction for a trial court to then hear
25 these in camera proceedings. I don't know how else you

ORAL ARGUMENT

1 reconcile that.

2 UNIDENTIFIED MALE JUSTICE: Why -- why shouldn't that
3 be a legislative problem? Why -- why -- why am I being
4 asked to legislate and come up with rules of court or
5 other -- or other statutes that's -- the legislature
6 easily could have provided? Normally we don't do that.
7 We're not in the legislation business. Why -- why should
8 I do that?

9 MR. PRAET: And that's the Court's prerogative. But
10 if that's the prerogative The Court's going to exercise
11 then The Court must deny the appeal and say, Go to the
12 legislature. You don't say then, Okay. It applies in
13 these peace officer personnel hearings, but we just don't
14 know who's going to do the hearing.

15 We understand 915 can't be read in a vacuum.
16 1043, 1045 and 832.7 all say "court." You can't just
17 disregard that language and say, You can bring a Pitchess
18 motion in a peace officer disciplinary matter, but we
19 don't know how to get it to the court.

20 The only solution there is either reconcile the
21 legislative language saying that the legislature meant
22 administrative body, administrative law judges, et cetera,
23 or come up with a process for that first level of
24 filtration and then in camera review, or deny the appeal
25 and then everybody goes to the legislature and says, What

ORAL ARGUMENT

1 a terrible dilemma you've put us in.

2 And -- and this is the first time -- and I would
3 suggest there's probably over 75 years of history of us --
4 the three of us doing this stuff. It's the first time
5 I've ever seen a Pitchess motion brought in an
6 administrative appeal.

7 So for whatever reason it is before the three of
8 you which you probably prefer not, but it's here.

9 UNIDENTIFIED MALE JUSTICE: (Inaudible)

10 MR. PRAET: So yeah. And if The Court comes up with
11 that process then two things that I would ask The Court
12 to -- to consider.

13 One, at what point is the grievant, the officer,
14 permitted, at what point during the whole disciplinary
15 process? Is it post Skelly; in other words, once the
16 arbitrator is selected, does the arbitrator now get
17 jurisdiction to be that filtration level to hear the good
18 cause and then somehow get it to a judge.

19 And also, this Court suggested that the
20 Department had abandoned its determination -- or having
21 the trial court determine good cause, which essentially is
22 what the Court's now suggesting.

23 Why would we have asked The Court to determine
24 good cause when The Court said the process doesn't even
25 apply? You know, okay. If it doesn't apply then there's

ORAL ARGUMENT

1 no need for the trial court to determine good cause under
2 The Court's suggested process now. Fine. Remand it back
3 to the trial court for a determination in camera of good
4 cause -- not even good cause, but whether or not it meets
5 the criteria of 1043, 1045 and so on.

6 UNIDENTIFIED MALE JUSTICE: I'm -- I'm going to ask
7 the same question again.

8 Normally peace officers' records, it's a huge
9 deal getting into them. Whether you're the Sheriff or
10 whether you're RSA, isn't there a conflict at some point
11 in time if someone's asking to get into a -- an officer's
12 record? The natural protector now has divided loyalties.
13 They -- they do because if -- if one person's asking
14 one -- and in fact, a peace officer. This lady's
15 effectively a peace officer because of the MOU by
16 contract, she wants to get into another officer's records.

17 The person asking for it probably has a
18 concomitant duty to the person whose records he's
19 requesting not to pony them up. So how do we get around
20 that?

21 MR. PRAET: That's not the Department's problem. I
22 agree wholeheartedly, RSA has one heck of a conflict when
23 they represented --

24 UNIDENTIFIED MALE JUSTICE: Well, wait a minute.
25 Normally, any time I've been in a criminal matter, there's

ORAL ARGUMENT

1 usually a lieutenant there with records and stuff, mad as
2 hell that he's going to have to turn over his officer's
3 records.

4 The Sheriff has -- has an interest in keeping
5 their own personnel records private if for no other reason
6 a morale problem.

7 So when you say it's his problem, it seems to me,
8 as a representative of the Sheriff, the Sheriff normally
9 is a pretty good advocate in keeping those records from --
10 from being gone into in camera. I -- I --

11 MR. PRAET: And I agree. We would certainly continue
12 to protect those files. But if there's a judicial in
13 camera review and a judicial officer, a judge in court
14 says, Department, there is good cause for disparate
15 treatment, or whatever the argument is, we would, with a
16 court order, enforceable protective order, release them to
17 the individual officer who's now entitled to that
18 disparate treatment argument.

19 UNIDENTIFIED MALE JUSTICE: Can't we just do this
20 procedure that we did this time, let the administrative
21 officer make it and then if somebody doesn't stinking like
22 it, they can appeal it up?

23 MR. PRAET: Well, but how --

24 UNIDENTIFIED MALE JUSTICE: This procedure worked
25 okay.

ORAL ARGUMENT

1 MR. PRAET: Well, it didn't actually because we
2 wouldn't be here.

3 But actually, I think the problem with that is --
4 and I've already identified it, that one problem with that
5 is that the -- there's no enforceability, the -- it taints
6 the hearing officer, who is the fact finder, because now
7 the pink elephant has walked through the room. And it
8 also doesn't protect the legislatively declared privacy
9 interests of these officers who want no more part of this.
10 It's behind me. I don't want every single officer now
11 who's been disciplined to bring up my case over and over
12 and over again, which is what's going to happen if
13 this court says Pitchess --

14 UNIDENTIFIED MALE JUSTICE: I know we're out of time.
15 I'm giving Mr. Harvey (sic) 30 seconds to answer one
16 question.

17 You reacted to the -- Mr. Praet's response, you
18 don't need discovery, your client knows the names of these
19 people, just call them as witnesses.

20 What's your response? 30 seconds.

21 MR. HAYES: Not allowed to do it. In fact, I've tried
22 and the objection is, Mr. Hayes, you have to bring a
23 Pitchess motion every time. You can't -- you can't get
24 around a Pitchess motion with a witness in court and --
25 and ask the question about their background without having

ORAL ARGUMENT

1 first done a Pitchess motion. So that's the procedure we
2 use.

3 UNIDENTIFIED MALE JUSTICE: Well, plus, aren't you
4 also trusting the honesty of the person inquiring, what --
5 what they're telling you may not be what's in the files?

6 MR. HAYES: Well, they -- no, because they're --
7 they're peace officers. Their employer's representative
8 is there. They can't be dishonest under oath. They'd be
9 fired. They can't do that. But we -- we don't ask them
10 that. We bring the Pitchess motion before the arbitrator.

11 UNIDENTIFIED MALE JUSTICE: Thank you, gentlemen. I
12 just thank you very loosely.

13 The matter stands submitted.

14 Much of what was said here this afternoon is not
15 in the briefs. It stands admitted. If -- if The Court
16 were to feel that it needed additional briefing, we'll ask
17 for it. If not, we'll proceed to pace.

18 Thank you, gentleman.

19 UNIDENTIFIED MALE SPEAKER: You're welcome.

20 MR. PRAET: Thank you, Your Honor.

21 (End of recording)
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ORAL ARGUMENT

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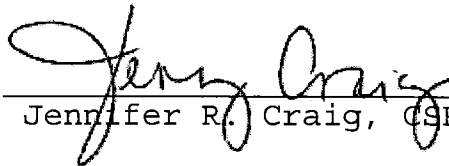
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That the foregoing CD audio files were transcribed by me at the time and place therein set forth.

That all audible testimony of the parties were transcribed, said transcript being a true and correct copy of the proceedings thereof.

In witness whereof, I have subscribed my name, this date: October 22, 2012.



Jennifer R. Craig, CSR No. 11094