



LEGAL DEFENSE TRUST TRAINING BULLETIN

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CITY'S WRONGFUL DISCLOSURE OF OFFICER'S PERSONNEL RECORDS DOES NOT PERMIT THE OFFICER TO SUE

*APPELLATE COURT SAYS LEGISLATURE DID NOT INTEND TO CREATE A DAMAGES
ACTION FOR OFFICERS WHOSE CONFIDENTIAL PERSONNEL RECORDS ARE ILLEGALLY
RELEASED TO THIRD PARTIES*

Oh my. Once again, we revisit the hot topic of "peace officer personnel records" (*see: Penal Code §832.7*), to see what an appellate court recently had to say about what affected officers can do about their employers' wrongful handling and disclosure of their personnel records. The answer is, according to this ruling, not much.¹

This case, although it has profound consequences for all California law enforcement members and their employers, has not received much attention. Well, we tried to bring it to the forefront. Unfortunately, the Court of Appeal

blocked those efforts.

The PORAC Legal Defense Fund (LDF) commissioned our firm to seek leave to file and to file, on behalf of thousands of LDF members and associations, an *amicus curiae* ("friend of the court") brief in the Second Appellate District where this case has been pending. Usually, the appellate courts grant these applications from proposed *amici* routinely. So, we were dismayed when the Court denied our application, commenting that it did not anticipate the "need" for briefs from *amici*. We thought perhaps, the Court did not intend to necessarily deal with the primary topic of our concern: may an officer bring a suit for damages when his employer wrongfully discloses his personnel records? Perhaps the Court did not intend to "publish" its opinion, regardless of the issues disposed of. Well, we were wrong. The *Rosales* opinion *does* dispose of this primary issue, and it is a *published* opinion, meaning it is precedent, and under the principles of *stare decisis*, is binding in California trial courts.

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In a recent training bulletin, we highlighted a new California Attorney General's opinion that reasoned that such violations by public officials could constitute misdemeanor crimes under *Government Code §1222*. *See: "ATTORNEY GENERAL'S OFFICE ISSUES OPINION DECLARING VIOLATIONS OF §832.7 A CRIME"*, Vol III, Issue 9, February, 2000. This is to be distinguished from a *civil damages* remedy.

The ramifications go beyond the extinguishment of an officer's right to sue for wrongful release of personnel records (if there ever was a right). The holding is also closely connected with the so-called *Brady* issue, about which we have written so much. The more our members' records are bandied about in the public domain, the greater the likelihood of *Brady* problems affecting the officers' careers.²

Rosales involved a Los Angeles officer who was terminated for alleged gross sexual misconduct with explorer scouts.

The young females brought suit against the City and *Rosales*. The City naturally declined to defend and indemnify *Rosales*, who had to retain private counsel. During discovery, a deputy city attorney representing the City turned over *Rosales*' personnel records (including the investigation of these incidents) to the plaintiffs' counsel in an informal exchange.

Penal Code §832.7 and *Evidence Code* §§ 1043-1045 prohibit this, and require that such disclosures be made only after a hearing, on a noticed motion, and *in camera* review of the records by the court. So, *Rosales* sued the City, leading to the present controversy. The trial court dismissed *Rosales*' suit, finding that these sections did not create a right of action on the part of the affected officer. *Rosales* appealed.

In *Rosales*, the former officer sued on theories of negligence, invasion of privacy, violation of statute, abuse of process and infliction of emotional distress. In affirming the dismissal of these claims, the Court examined the legislative

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See: Training Bulletins, "THE "NEW" THREAT TO POLICE CAREERS: Revisiting *Brady v. Maryland*", Vol II, Issue 10, December 1999, "MORE ON THE BRADY ISSUE Attorney General Takes An Unexpected Position", Vol II, Issue 10b, December, 1999, "STILL MORE ON BRADY AND POLICE PERSONNEL RECORDS", Vol III, Issue 7b, July, 2000, "

history of the statutory scheme regulating disclosure of peace officer personnel records (*Penal Code* §832.7 and *Evidence Code* §1043-1045) and found that the term "confidential" in §832.7 at best creates a "conditional privilege" in those records on the part of the subject officer. But, the officer has no reasonable expectation of privacy in the records because they are *always* subject to disclosure in a proper case, provided that the statutory requirements are met. Without an expectation of privacy, any claim for invasion of privacy is doomed, says this Court. Also, there is no evidence that the Legislature intended to create a private right of action in the statutes, so this Court declined to find one. Since the officer *could not prevent* disclosure of his records simply because he did not want them disclosed, he has no claim because they were disclosed, albeit outside the statutory requirements. The statute created no duty of care, the breach of which could lead to damages.

This is the second judicial blow to an officer-turned-plaintiff seeking to vindicate (by way of a lawsuit for damages) violation of the disclosure provisions of §832.7, by a city official. The first was *Bradshaw v. City of Los Angeles* (1990) 221 Cal.App.3d 908, where the Court dumped a Los Angeles officer's suit for disclosure of such records to the media. We hoped this Court would not follow *Bradshaw's* holding. It not only did so, it expressly endorsed the *Bradshaw* rule.

So, unless the legislature does something more, the outlook for an officer suing his employer for "wrongful disclosure" of personnel records is akin to the hope and optimism in pumping a dry well—nothing will come of it. Important to note, on the other hand, nothing in *Rosales* concerns potential entity liability if the disclosures are false and defamatory, which may present a proper case for a defamation action.

However, as we have said, these records continue to be a "hot topic", so we're sure we will be discussing them again.

Stay safe!

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