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To: All Sheriffs &amp; Chiefs of Police

From: James R. Touchstone, Esq. and Keith F. Collins, Esq.

**POBAR PROVIDES THAT COPIES OF PRIOR INTERROGATION RECORDINGS  
MUST BE PROVIDED BEFORE SECOND INTERROGATION**

On July 6, 2017, the California Court of Appeal published the case of Ana v. City of Santa Ana, Cal. App. LEXIS 608 (Cal. App. 4th Dist. June 13, 2017) where it held that two Santa Ana police officers' suits against the City of Santa Ana Police Department ("Department") can proceed after internal affairs investigators failed to provide the officers with recordings of prior interrogations and other documents prior to a second interrogation. The Court also held that the officers could not have had a reasonable expectation of privacy while executing a search warrant inside a marijuana dispensary.

**Background**

In 2015, two Santa Ana Police Officers participated in the execution of a search warrant at a marijuana dispensary. After disabling the video surveillance systems present there, the officers "let down their guard and began communicating with one

another as they would in a non-public setting[.]" These officers at times "joked and made light of the situation in order to relieve stress." However, their actions were recorded on a hidden surveillance camera, and when this footage was released to the media, the Department initiated an internal investigation into the officers' conduct.

The officers objected to the investigation at the outset, claiming it was based solely on the illegal recordings of the officers made in violation of the Invasion of Privacy Act (Pen. Code § 630 et seq.) The Department dismissed the objection and the officers complied with the Department's order to cooperate with the interrogation.

Later, the Department obtained more of the hidden camera footage, and notified the officers of the need for further interrogation. Pursuant to the Public Safety Officers Bill of Rights Act ("POBAR"), specifically Government Code section 3303(g), the

officers requested access to the tape recordings of the first interrogations, along with copies of any stenographer notes and any reports or complaints. The Department did not produce these materials.

The officers filed suit for injunctive relief claiming violation of the Invasion of Privacy Act and POBAR. The Department demurred to the officers' complaint, alleging that it had no legal basis. The trial court sustained, without leave to amend, the Department's demurrer to the officers' complaint.

### **Discussion**

The Court of Appeal affirmed the judgment sustaining the Department's demurer to the Invasion of Privacy claim. In doing so, the Court held that the officers could not have had a reasonable expectation of privacy while executing a search warrant inside a marijuana dispensary. Accordingly, the officers could not state a cognizable claim for invasion of privacy.

However, the Court of Appeal reversed the judgment of the trial court sustaining the demurer to the POBAR claim. The Court found that the Department should have produced the materials set forth in Government Code section 3303(g) prior to the second round of interrogations. Section 3303(g) provides, in pertinent part: "The complete interrogation of a public safety officer may be recorded. *If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any*

*notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential.*" (Emphasis in the original.)

In reversing the judgment of the trial court, the Court, in analyzing the statutory construction of the Section, held that "discovery rights to reports and complaints are coextensive with discovery rights to tape recordings of interrogations, and tape recordings must be produced prior to any further investigation." Because the officers alleged that the Department did not produce all required documents under Section 3303(g), the Court found that the officers properly alleged a second cause of action that should be allowed to proceed.

### **HOW THIS AFFECTS YOUR AGENCY**

POBAR imposes several procedural requirements with respect to how law enforcement agencies conduct internal affairs investigations. This case reiterated a somewhat nuanced provision of POBAR, by affirming that the timing requirement that prior interrogation recordings be produced "prior to any further interrogation" also applied to transcribed copies of stenographer notes, reports or complaints even though the statute does not explicitly require these documents be produced "prior to any further interrogation[.]" The California Supreme Court initially resolved this timing requirement a number of years ago in the case entitled Pasadena Police Officer Assn. v. City of Pasadena (1990) 51 Cal.3d 564. The Santa Ana decision serves as an

important reminder of this provision of POBAR.

It is also worth noting that the Court found it objectively unreasonable for a peace officer to believe there are no unknown recording devices while executing a search warrant during a drug operation, something all officers should be aware of.

As always, if you wish to discuss this matter in greater detail, please feel free to contact us at (714) 446 – 1400 or via email at [jrt@jones-mayer.com](mailto:jrt@jones-mayer.com) [for James Touchstone] or [kfc@jones-mayer.com](mailto:kfc@jones-mayer.com) [for Keith Collins].

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