

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
DESIGNATED HEARING OFFICER FOR THE  
BOARD OF THE LOS ANGELES CITY ETHICS COMMISSION  
STATE OF CALIFORNIA

In the Matter of:

LEWIS JAMES PARKER III,

Respondent.

Case No. 2015-02

OAH No. 2016040132

**PROPOSED DECISION**

This matter came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Los Angeles, California, on September 26 and 27, 2016.

Sergio Perez (Petitioner), Director of Enforcement, Los Angeles City Ethics Commission (Commission), and Kirsten M. Pickenpugh, Deputy Director of Enforcement, represented Petitioner.

Lawrence J. Hanna and Daphne Stegman, Attorneys at Law, represented Lewis James Parker III (Respondent).

Petitioner seeks to fine Respondent \$10,000 for alleged violation of Los Angeles Municipal Code (LAMC) sections 49.5.3 (misuse or disclosure of confidential information) and 49.5.5, subdivision (A) (misuse of position or resources). Petitioner alleges that Respondent misused his position as a police officer for personal gain when he provided a media outlet with a confidential recording of a September 11, 2014 on-duty encounter with two individuals. Respondent counters that the recording was made with his personal recorder and that it was not designated as confidential at the time he released it to the media. His release was consistent with his understanding of the nature of the recording and the actions of other officers who had used personal recordings in court proceedings or television programs. Respondent further argues that enforcement of the LAMC provisions is unwarranted because neither the Commission nor the Los Angeles Police Department (LAPD) had made him or other line officers aware that disclosure of the recording would violate the requirements of laws enforced by the Commission. As concluded below, Respondent violated the charged LAMC provisions, but because of mitigating factors no actual fine should be imposed.

Oral and documentary evidence was received at the hearing, and the matter was submitted for decision on September 27, 2016.

## FACTUAL FINDINGS

### *Parties and Jurisdiction*

1. The Commission was established by voters in the City of Los Angeles (City) to administer and implement the City Charter (Charter), statutes, and ordinances concerning campaign finance, lobbying, conflicts of interest and governmental ethics. (Charter, § 702.) The Commission has responsibility for enforcing the City Governmental Ethics Ordinance (Ethics Ordinance), LAMC section 49.5.1, et seq. (Los Angeles Administrative Code (LAAC), § 24.22.)
2. On October 13, 2015, the Executive Director of the Commission found probable cause to believe Respondent violated the Ethics Ordinance.
3. Petitioner filed the Accusation on October 27, 2015, acting in his official capacity.
4. Respondent was employed by LAPD for 26 years, until his retirement in June 2015.<sup>1</sup>

### *September 11, 2014 Incident*

5. On September 11, 2014, Respondent was assigned to LAPD's North Hollywood Division. His rank was that of sergeant, and he worked as a supervising patrol officer.
6. On that date, while on duty and driving without a partner in a marked black and white patrol vehicle, Respondent heard a general LAPD broadcast of a 911 emergency call in which a member of the public reported that two people were having sex in a parked car on Radford Avenue and Ventura Boulevard in Studio City. If true, these allegations would constitute a violation of criminal law.
7. Respondent was about 30 seconds from the location, and responded to the radio call. He was the first LAPD officer to arrive at the scene, and observed two individuals matching the description of those in the radio call standing next to a vehicle.
8. At the time, Respondent had received permission from LAPD to use his personal digital audio recording device to record contacts with members of the public.

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<sup>1</sup> Factual finding numbers 4 through 21 are based on the parties' Stipulated Facts (Joint Exhibit 1), on Respondent's testimony, and on his September 30, 2014 statements to the Los Angeles City Police Commission (Police Commission) (Exhibit 4), as corroborated and supplemented by Respondent's September 11, 2014 digital recording (Exhibit 3) and by his statements to the media (Exhibits 2, 5, 6, 11, 12, 13, 14, and 16).

9. As was his standard procedure, Respondent activated his personal audio recorder as he approached the two individuals. Both were outside the vehicle. One of the individuals was a Black woman, later identified as Danielle Watts (Watts), and the other was a White man, whom Watts referred to as her boyfriend. Respondent did not inform them that he was recording the conversation.

10. Respondent had no plans of arresting or citing the two individuals. He asked the two for identification. Early in the exchange, Watts accused Respondent of stopping them because of her race. Respondent denied he had done so, and reported he was responding to a call for service. Respondent asked for identification, and Watts refused to provide it. Watts subsequently announced that she was walking away, and did so. Respondent remained with the man, and called for a female officer to detain Watts. Watts was later detained and placed in handcuffs. Respondent obtained Watts's identification while she was handcuffed. Respondent did not arrest or cite either individual, and left approximately 25 minutes after arriving.

11. Respondent testified at the hearing that the individuals entered into a plea following the incident, but no details were presented about the nature of the plea. No evidence was presented at the hearing about whether the audio recording was used or was planned to be used in connection with the prosecution of any crime.

12. At the end of his shift on September 11, 2014, Respondent uploaded the contents of the digital personal audio recorder into the Department computer system, known as the Local Area Network or LAN. Respondent stored the digital file of his encounter with the two individuals in a password-protected area of the computer system accessible to him and his supervisor.

13. Also at the end of his shift, Respondent informed the assistant watch commander, Lieutenant William Mann (Mann), about the incident, and told Lieutenant Mann that he had a tape in case it was needed. Respondent did not write a detailed police report about the incident, but made a log entry, or a brief synopsis, of the incident in LAPD records.

#### *Events Following the September 11, 2014 Incident*

14. Watts publicized her encounter with Respondent on Facebook, and leveled public accusations of racial profiling against Respondent.

15. Respondent testified that word of Watts' public accusations of racial profiling reached him by Sunday, September 14, 2014. He received multiple calls, texts, and emails telling him that Watts's accusations were all over the Internet.

16. On September 15, 2014, between 10:00 and 11:00 a.m., in order to counter the claims of racism and to defend himself and LAPD against the allegations, Respondent provided a copy of the digital audio recording to TMZ, a media outlet. He did so by sending the digital file via electronic mail from his work computer.

17. On September 15, 2014, TMZ published an article on its website regarding the September 11, 2014 incident entitled “ ‘Django Unchained’ Actress – Cops: After Car Sex She Pulls Race, Fame Card (Police Audio).” The article contained a link to the recording made by Respondent.

18. On September 15, 2014, at approximately 4:00 p.m., Captain Carmona informed Respondent that LAPD was opening a formal inquiry into his release of audiotape to TMZ. Captain Carmona told Respondent that the matter was confidential and admonished him against discussing it with anyone, except his attorney, internal affairs, or anyone else specifically designated as exempted by an LAPD captain or higher ranking official.

19. After his release of the audiotape to TMZ, Respondent spoke about the incident with Watts and her boyfriend to several other media outlets, including print media, radio stations, and cable and broadcast television stations.

20. On September 30, 2014, Respondent spoke during the public comment session of a meeting of the Los Angeles Police Commission (Police Commission). He referred to his release of the audiotape during comments about discipline issues at LAPD. He told the Police Commission that he released the tape to TMZ to stop the racial tumult that was engulfing the City following Watts’s allegations on social media. During his comments, Respondent stated: “Was it against LAPD policy? Yes; Was it the right thing to do? Yes.” (Exh. 4.)

21. At the hearing, Respondent testified that his reference to violating LAPD policy was with respect to his subsequent communications with the media not with respect to the release of the audiotape to TMZ. He had spoken to the media, despite an order from Captain Carmona not to do so. This testimony is inconsistent with Respondent’s public statements to the Police Commission and is not credited.

#### *Use of Personal Recorders by Other Officers<sup>2</sup>*

22. At the time he released the tape to TMZ, Respondent was aware that other officers had used audiotapes recorded with their personal recorders in public forums such as small claims court, traffic court, and television shows. He was not aware of any of discipline suffered by the officers who released the recordings.

23. a. Four officers testified about their experiences in releasing audio recordings in public settings. All used personal recorders, and considered the recorders and the resulting audiotapes their personal property. None of the officers were disciplined for releasing the recordings. None were contacted by Commission staff about the release of the recordings.

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<sup>2</sup> Factual Finding numbers 22 and 23 are based on the testimonies of Respondent, Hector Steve Carbajal (Carbajal), Mark Cronin (Cronin), James Kang (Kang), and Lieutenant Craig D. Lally (Lally), as corroborated and explained by the recordings the witnesses discussed in their testimony (Exhibits B, C, and H).

b. Carbajal is a 20-year LAPD officer assigned to the San Fernando Valley Traffic Division. In 2007, he filed a lawsuit in small claims court against a person who had accused him of misconduct. Both parties agreed to have the matter adjudicated on the Judge Mathis television show. Carbajal informed his supervisor that he was going to use an audio recording of the incident in question made with his personal recorder in the case. Carbajal used the audio in the show. He won the case and was awarded damages.

c. Cronin used his personal recorder to record a 2008 encounter with a suspect. He thereafter used the recording during a Judge Mathis reality television show in which his small court claim against the former suspect was adjudicated. The audiotape had been previously been used by LAPD managers in resolving a citizen complaint regarding the encounter. Cronin told his supervisor that he was using the audiotape on the show.

d. In 2012, in support of his small claims lawsuit, Kang used his recording during an appearance on the Judge Judy television show. Kang informed his captain of his intention to use the tape before going on the show.

e. Lieutenant Lally, a 35-year LAPD veteran, testified about responding to the Nicole Brown-O.J. Simpson residence following a report of potential domestic violence. He activated his personal recorder upon arrival to the residence. Lieutenant Lally subsequently provided the recording to Marcia Clark, one of the prosecutors in a subsequent criminal case against O.J. Simpson. The audiotape and a transcript of the recording were provided to the criminal court. Lieutenant Lally thereafter played and talked about the audiotape during a nationally-televised episode of the news magazine "Prime Time Live," hosted by Diane Sawyer.

#### *Department Authorization for the Use of Personal Recorders*

24. Department policy and procedures regarding the use of personal recorders is contained in Special Order number 20, which has been codified in the LAPD Manual (Manual), Volume 3,<sup>3</sup> section 570. In part, the section provides:

"An officer in an [*sic*] uniformed assignment may use a personal tape recorder to record **in-person** community contacts at the officer's option. When an officer chooses to tape record community contacts, the procedures outlined in this section shall be followed.

**"Note:** The recordings of suspects' statements and recordings made during criminal investigations shall be made in accordance with existing law and procedures for these types of recordings. Tape recordings involving proceedings shall be made in accordance with existing personnel practices and the Public Safety Officer's Procedural Bill of Rights.

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<sup>3</sup> All further Manual references are to Volume 3.

**“Officer’s Responsibility.** Uniformed officers wishing to use personal tape recorders to record community contacts shall submit a Request to Use a Personal Tape Recorder, Form 12.45.00. . . .

“Officers who use personal tape recorders to record community contacts are responsible for maintaining the recorders in proper working order, providing their own tapes, storing tapes, and maintaining personal records to ensure tapes of incidents are retrievable if needed. . . .

“[¶] . . . [¶]

**“Retention of Tapes.** All tape recordings shall be retained and maintained by the officer making the recording for a minimum of **two years**.

**“Recordings of Contacts Resulting in Arrest or Crime Reports, Personnel Complaints, and Civil Lawsuits.** Whenever an incident is tape recorded and:

“An Arrest Report, Form 05.02.00, is completed;

“A release From Custody Continuation Report, Form 05.02.08, is completed;

“A crime report is completed;

“The recording involves a personnel complaint; or

“The recording involves a civil suit against the City, [LAPD], or the officer.

“The fact that a tape recording was made shall be documented in the related reports, discovery questionnaires, or employee’s Report, Form 15.07.00 (civil suits).

“Officers shall provide tapes containing discoverable material or information relevant to personnel investigations, criminal investigations, and civil suits to prosecutors, defense attorneys, and personnel complaint/civil suit/criminal investigators upon request under existing Department discovery, criminal, and complaint investigation procedures. . . .” (Exh. 17, at pp. 153-154; emphasis in original.)

Unlike other Manual sections pertaining to recordings discussed below, Manual section 570 does not expressly state that the audio tapes are confidential, or makes reference to or incorporates a broad confidentiality provision, such as Manual section 405, which is also discussed below.

25. a. In order to use a personal tape recorder, officers must complete a “Request to Use a Personal Tape Recorder” Form for approval by his or her commanding officer. The Form contains the following statement: “I request authorization to use a personal

tape recorder to tape record community contacts in accordance with Department guidelines for use of personal tape recorders. I have read and agree to comply with each of the requirements listed below. I understand failure to comply with the below requirements will be considered misconduct.” (Exh. E, at p. 6.)

b. Six specific requirements follow the above statement, and the officer’s initials must be entered next to each requirement. The requirements are: “Personal tape recorders shall be used in compliance with the provisions of this request and the procedures contained in Department Manual Section 3/570, Use of Personal Tape Recorders to Record Community Contacts. [¶] Failure to comply with Department procedures for the use of personal tape recorders will result in this authorization being revoked and may result in discipline. [¶] The tape recorder and tapes are to be provided and maintained at my expense. [¶] Tapes shall be retained by me for at least two years. Tape recordings must be produced upon request when needed for criminal prosecutions or investigations relating to criminal, personnel, or civil lawsuit matters even if there may be self-incriminating material on the recordings. [¶] My tapes and record keeping system shall be made available for audit or administrative review by a Department supervisor upon request. [¶] Failure to provide a specific tape or tape recording in a timely manner to a supervisor upon request is neglect of duty and may result in discipline.” (Exh. E, at p. 6.)

26. The testimonies of Respondent, Carbajal, Cronin, Mark Kelly, and Lieutenant Lally establish the following practices with respect to the use of personal recorders by LAPD officers. The officers were responsible for purchasing their equipment and audio tapes and for maintaining custody of the tapes for a period of two years. LAPD obtained possession of the recordings if they were necessary for adjudication of a criminal or administrative matter.

#### *LAPD Policies and Procedures Regarding Confidential Information*

27. Commander David Grimes (Grimes) testified that the Department operates under the general rule that any information received by officers in the course and scope of their duty is to remain confidential unless the officers are specifically called on to reveal it. In support of his testimony, he cited the “Law Enforcement Code of Ethics,” which is given to all LAPD officers, initially at the police academy. It provides, in pertinent part, “[W]hatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.” (Exh. J.) Grimes’s testimony was partially contradicted by the testimonies of Respondent, Carbajal, Cronin, Kang, and Lieutenant Lally, and has been evaluated in connection with the pertinent LAPD policies and procedures.

28. Manual section 405 provides: **“CONFIDENTIAL NATURE OF DEPARTMENT RECORDS, REPORTS, AND INFORMATION.** All official files, documents, records, reports, photographs/imaging/recordings and information held by the Department or in the custody or control of an employee of the Department must be regarded as

confidential. Employees must not disclose or permit the disclosure or use of such files, documents, reports, records, photographs/imaging/recordings or information except as required in the performance of their official duties. The unauthorized use of information obtained through employment with the [LAPD] can subject the employee to possible disciplinary action and/or criminal prosecution. This includes information obtained from manually stored records, as well as information obtained from automated records. [¶] . . . [¶]. (Exh. 17, at p. 118; emphasis in original.)

29. a. Certain records are specifically made confidential. For instance, Manual section 409 provides that records of incidents that could result in liability to the City must be classified and processed as confidential.

b. Under Manual section 566.10, personal recording devices may be used during criminal investigations in limited circumstances in which LAPD equipment is not available and evidence could be lost or destroyed. However, the section provides that “All recordings and images captured during the course and scope of official duties are confidential, and must not be used except as required in the performance of official duties per [Manual] Section [405]. Additionally, personal recording devices must not be used to capture photographs and/or video of persons in police custody, victims, witnesses, evidence, dead bodies, traffic collisions, Department employees, crime scenes, or evidence for monetary gain or private use.” (Exh. 17, at p. 143.)

c. Manual section 579.13 governs the use of the Digital In-Car Video System (DICVS), and states, in part: “[A]ll data and imagery captured by the DICVS are the sole property of [LAPD]. Employees are reminded that any misuse of DICVS audio and/or video recordings may result in disciplinary action. [¶] [Manual] section [405] outlines the Department’s policy regarding confidential files, documents, records and reports. The unauthorized use of recordings in the custody of Department personnel is prohibited and could subject the employee to disciplinary action and/or criminal prosecution.” (Exh. 17, at p. 157.)

30. Provisions governing the release of information are contained in other sections of the Manual. Thus, for example, Manual section 406 governs release of information in police records. Manual section 408 governs release of criminal offender record information. Manual section 410 governs the release of traffic records.

31. Commander Richard Webb (Webb) worked for LAPD for 35 years before his retirement in 2014. He held several management positions with LAPD and is familiar with the foregoing as well as other LAPD policies and procedures. In his opinion, having a rule such as Manual section 570, which does not clearly state that audio recordings made on personal recorders are confidential, presents a management problem. Manual section 570 does not offer clear guidance to officers about how they may use recordings made with their own equipment or about whom to inform if they choose to use the recordings. Clarity is not provided by the broad proscription contained in Manual section 405 because Manual section 570 contains no reference to Manual section 405.



### *Ethics Ordinance and Training of LAPD Officers Regarding Ethics Rules*

32. As required by the Ethics Ordinance, LAPD has adopted an LAPD Conflict of Interests Code (Code), which was approved by the City Council on January 9, 2001. (Exh. D.) The Code designates positions whose incumbents are required to file statements disclosing financial interests. Included in the designated positions are those of managers and employees who may be involved in purchasing decisions. Positions of Training Division sergeants, Community Affairs Group sergeants, and specified detectives are designated within the Code, but no any patrol sergeant positions, such as that occupied by Respondent, are included in the designated positions. (Exh. D.) Those in designated positions received training and were required to pass an ethics test. (Testimony of Commander Grimes.)

33. The Office of the Inspector General (OIG) conducted an investigation of LAPD procurement practices and issued a report on September 29, 2015. (Exh. A.) “[T]he OIG also determined that the [LAPD]’s personnel may not be properly educated on existing ethics rules that govern their contacts with vendors who are doing business with [LAPD]. In order to ensure the quality of future product evaluations, prevent fraud or abuse involving vendors, or the appearance of such, and to ensure high ethical standards, the OIG makes the following recommendations to the [Police Commission]: [¶] 2. The OIG recommends that [LAPD] ensure that all [Policy and Procedures Division] personnel involved in product evaluations certify that they have received and read the relevant ethics provisions. . . . [¶] 4. The OIG recommends that [Policy and Procedures Division] incorporate the [Ethics Ordinance] into the Department Manual and shall update those provisions by reference into the updated [Product Evaluation Manual]. The OIG further recommends that the [LAPD] educate its personnel on these ethical requirements.” (Exh. A, at p. 8.)

34. As established by the testimonies of Carbajal, Sergeant Gabriel Kearney, Lieutenant Lally, and Commander Webb, the requirements of the Ethics Ordinance were not taught at the LAPD Academy before Respondent’s release of the audiotape to TMZ.

35. Starting in October 2015, the online “Ethics and Open Government” course was offered to over 700 civilian and sworn LAPD members. (Exhs. 8 and 9.) The course contains information about the California Public Records Act (CPRA), Government Code section 6250, et seq.

36. Respondent has not completed the online “Ethics and Open Government” course or taken the ethics test. At the time he released the tape to TMZ, Respondent was not aware of any Commission action against any police officer.

37. No evidence was presented at the hearing to establish that the Commission has cited or filed an accusation against any other LAPD patrol officer who is not involved in purchasing.

## LEGAL CONCLUSIONS

1. The Ethics Ordinance lists the following purposes: to assure that individuals and interest groups have a fair and equal opportunity to participate in the government process; to assure that the governmental process itself promotes fairness and equity for all residents of the City; to require elected City officers and key City officials to disclose investments, interests in real property and income in order to prevent conflicts of interest; to prevent elected City officers and key City officials from receiving outside earned income that creates a potential conflict of interest; to prevent City officials from lobbying the City for certain periods after they leave City service; to increase understanding of the Charter and ordinances, the roles of elected City officers and other public officials, the roles of City agencies, and the City election process; to help restore public trust in governmental and electoral institutions; and to assure that the Ethics Ordinance is vigorously enforced.

2. LAMC section 49.5.3. states: “A current or former City official or agency employee shall not misuse or disclose confidential information acquired as a result of City service.”

3. LAMC section 49.5.2.A defines “agency” as a City department required to adopt a conflict of interest code. LAPD meets this definition and is an “agency” within the meaning of LAMC sections 49.5.2.A and 49.5.3. (Factual Finding 32.) Respondent was employed as an LAPD sergeant at the time he made the digital recording at issue. (Factual Findings 4 and 5.) He made the recording during the course and scope of his duties as a police sergeant. (Factual Findings 4 through 13.) Respondent therefore acquired the audio recording of his encounter with Watts “as a result of City service” while a “current agency employee.” (LAMC, § 49.5.3.) Respondent disclosed the digital recording to TMZ. (Factual Finding 16.) The remaining issue regarding violation of LAMC section 49.5.3 is whether the recording was “confidential.”

4. LAMC section 49.5.2, subdivision (D), defines confidential information as “[i]nformation that, if it were contained in a document, would not be subject to disclosure under the [CPRA].”

5. The CPRA contains a broad declaration of Legislative intent: “In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.” (Gov. Code, § 6250.) Accordingly, “Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.” (Gov. Code, § 6253, subd. (a).)

6. Petitioner relies on Government Code section 6254, subdivision (f), in support of his argument that Respondent’s audio recording would not be subject to disclosure under the

CPRA and is, therefore, confidential. The statute provides, in pertinent part: “Except as provided in Sections 6254.7 [air pollution records] and 6254.13 [education testing questions and materials], this chapter does not require the disclosure of any of the following records: [¶] . . . [¶] (f) Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, the Office of Emergency Services and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes. . . .”

In *Haynie v. Superior Court* (2001) 26 Cal.4th 1061 (*Haynie*), the California Supreme Court addressed contentions regarding the confidentiality of recordings made by police officers under Government Code section 6254, subdivision (f). In *Haynie*, a deputy sheriff responded to a call for service about several males with guns entering a blue Ford van. The deputy stopped a van matching the description of the one involved in the call. The deputy questioned the driver and his three passengers and searched the van. The deputy released the occupants of the van and no criminal charges were filed. The driver of the van, Haynie, subsequently filed a request pursuant to the CPRA, requesting various records, including any tape recording of the deputy’s conversations with him.

The court held that audio recordings of the exchange between the deputy and Haynie were confidential under Government Code section 6254, subdivision (f), as “record of investigation.” In doing so, the court disposed of several of Haynie’s claims. Haynie argued that the exemption to disclosure should not apply to “routine” or “everyday police activity,” such as the traffic stop in question. (*Haynie, supra*, 26 Cal.4th 1061, at 1070.) The court rejected the argument, stating: “[H]aynie’s proposed limitation finds no support in the statute. Moreover, he offers no principled basis for determining which investigations are sufficiently lengthy or important to be accorded the status of ‘investigations’ within the meaning of section 6254(f)-nor any way to predict, at the outset, what might result in a lengthy or important investigation. One ‘third-rate burglary attempt,’ for example, ultimately toppled a president. [footnote omitted.]” (*Ibid.*)

The court concluded: “[H]ere, the investigation that included the decision to stop Haynie and the stop itself was for the purpose of discovering whether a violation of law had occurred and, if so, the circumstances of its commission. Records relating to that investigation are exempt from disclosure by section 6254(f). The Court of Appeal erred in ordering them to be disclosed.” (*Haynie, supra*, 26 Cal.4th 1061, at 1071.)

As in *Haynie*, Respondent made the recording of his discussions with Watts during an encounter that occurred for the purpose of discovering whether a violation of law had occurred. Therefore, it constitutes a “record of investigation” under Government Code section 6254, subdivision (f). As in *Haynie*, the recording does not lose its confidential nature because it involved a relatively brief or routine police stop. As in *Haynie*, the recording does not become any less confidential because Respondent had not yet decided to charge Watts with a crime.

7. Respondent therefore disclosed confidential information acquired as a result of City service, in violation of LAMC section 49.5.3. (Legal Conclusions 2 through 6, and Factual Findings 4 through 21.)

8. LAMC section 49.5.5, subdivision (A), states: “City officials, agency employees, appointees awaiting confirmation by the City Council, and candidates for elected City office shall not misuse their positions or prospective positions to create or attempt to create a private advantage or disadvantage, financial or otherwise, for any person.”

9. Respondent was in possession of the audiotape by virtue of his position as an LAPD sergeant. (Factual Findings 4 through 9, 24.) Since he released the recording to TMZ in violation of LAMC section 49.5.3, the disclosure constitutes “misuse” under LAMC section 49.5.5, subdivision (A). Respondent released the audiotape to defend himself and LAPD against allegations of racial profiling. (Factual Findings 14 through 16 and 20.) The release created a private advantage for Respondent, as it protected his reputation against allegations of racism.

10. Respondent violated LAMC section 49.5.5, subdivision (A), by releasing the audiotape to TMZ. (Legal Conclusions 2 through 9, and Factual Findings 4 through 21, and 24.)

11. Respondent argues that the Commission must be estopped from enforcing ethics rules against him because he had no notice that ethics rules would apply against police officers in the exercise of their duties. In his view, prosecution outside of lobbying activities or the bidding process have been non-existent, ethics rules are not mentioned in the LAPD Manual, and ethics rules are not taught in the LAPD Academy or on the job. Petitioner maintains that application of the Ethics Ordinance to City peace officers is clear from the language of the Ethics Ordinance and that estoppel of its enforcement activities is not warranted.

The doctrine of equitable estoppel is available in certain circumstances to those who detrimentally rely on representations made by another. In order for equitable estoppel to apply, the following requirements must be met: “(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true facts; and (4) he must rely upon the conduct to his injury.” (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 399, quoting *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.) Although the doctrine can be applied against the government “where justice and right require it,” it cannot be applied against the government where to do so would effectively nullify a “strong rule of policy, adopted for the benefit of the public . . . .” (*City of Long Beach v. Mansell, supra*, 3 Cal.3d at p. 493.)

Respondent may not avail himself of the equitable estoppel doctrine to obtain relief. No evidence was presented at the hearing that the Commission made any representations to Respondent about the applicability of the Ethics Ordinance or that he actually relied on any representations from the Commission in deciding to release the audiotape to TMZ.

12. Charter section 706, subdivision (c)(3), authorizes the imposition of monetary penalties in an amount up to \$5,000 for each violation established. LAAC section 24.27, subdivision (f)(3)(A), sets forth the following factors to consider in determining the appropriate monetary penalty: “(i) The severity of the violation; [¶] (ii) The presence or absence of any intention to conceal, deceive, or mislead; [¶] (iii) Whether the violation was deliberate, negligent or inadvertent; [¶] (iv) Whether the violator demonstrated good faith by consulting the Commission staff in a manner not constituting a complete defense under Charter Section 705; [¶] (v) Whether the violation was an isolated incident or part of a pattern, and whether the violator has a prior record of violations of the City Charter, ordinances or similar laws; [¶] (vi) The degree to which the violator cooperated with Commission staff in order to provide full disclosure, remedy a violation, or cooperate voluntarily with an investigation; and [¶] (vii) The overall interests of justice.”

Violation of provisions intended to ensure good, fair, and honest government is a serious matter. (LAAC, section 24.27, subdivision (f)(3)(A)(i).) However, the severity of Respondent’s violations is lessened once the facts and circumstances surrounding his actions are taken into account. While ignorance of the law is no excuse, Respondent’s conduct must be viewed in the context of LAPD’s policies, procedures, and practices. Despite the general proscriptions against the release of confidential information contained in the Law Enforcement Code of Ethics and Manual section 405, use of personal recorders and recordings made on such recorders are the subject of its own policy and procedures. Manual section 570 carved out a specific and unique procedure governing the use of personal recorders, and, unlike Manual provisions governing other records and recordings, it does not expressly provide that recordings made on the personal recorders are confidential. The section appears to balance recognition of the officers’ private property rights and LAPD needs. The testimony at the hearing established not only the widespread personal use of the recordings but also the widely held belief that the recordings were the private property of the officers. Therefore, it was not unreasonable for Respondent to treat audiotapes in question as personal property he had to maintain subject to specific requirements and directives from LAPD. The public disclosure of the audiotape to TMZ occurred after Respondent had released Watts and her companion without arresting or citing them and before he was told that he was the subject of an administrative inquiry that may involve use of the recording. With respect to the violation of LAMC section 49.5.5, subdivision (A), the private gain did not involve pecuniary gain and LAPD was also an intended beneficiary.

Respondent did not seek to conceal his conduct or to deceive or mislead by his actions. (LAAC, section 24.27, subdivision (f)(3)(A)(ii).) The violation was an isolated incident and there is no evidence of prior violations of the City Charter, ordinances or similar laws. (LAAC, 24.27, subdivision (f)(3)(A)(v).) The violation was deliberate, but as noted above, there are mitigating factors. (LAAC, section 24.27, subdivision (f)(3)(A)(iii).) There is no evidence that Respondent demonstrated good faith by consulting the Commission staff in a manner not constituting a complete defense under Charter Section 705. (LAAC, section 24.27, subdivision (f)(3)(A)(iv).) There is no record evidence of the degree to which Respondent cooperated with Commission staff in order to provide full disclosure, remedy a violation, or cooperate

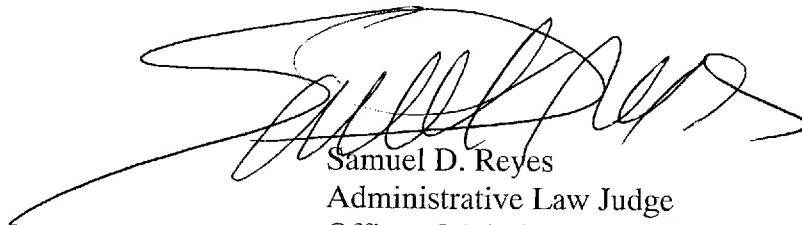
voluntarily with an investigation. (LAAC, section 24.27, subdivision (f)(3)(A)(vi).) Petitioner argues that Respondent did not meaningfully cooperate in the investigation, but no evidence of lack of cooperation was presented. Moreover, vigorous defense and assertion of jurisdictional and procedural defenses is not deemed lack of cooperation.

Taking into account the pertinent factors in LAAC, section 24.27, subdivision (f)(3)(A), the facts presented at the hearing, the fact that Respondent's case is one of first impression, and the overall interests of justice (LACC, section 24.27, subdivision (f)(3)(A)(vii)), it is concluded that no penalty should be imposed in this matter.

#### ORDER

The Accusation is sustained, except for the imposition of monetary penalties.

Dated: 10/14/16



Samuel D. Reyes  
Administrative Law Judge  
Office of Administrative Hearings