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November 10, 2021

VIA EMAIL AND MAIL

Eric M. Ferguson
Deputy District Attorney
Office of the District Attorney of San Bernardino County
303 West Third Street, 5th Floor
San Bernardino, CA 92415
Email: eferguson@sbcda.org

Re: California Public Records Act Request

Dear Mr. Ferguson:

I write in response to your September 8, 2021 letter regarding our CPRA Request. Thank you for your letter.

In your letter, you asserted that all of your office's policies, memoranda, guidance documents and trainings are protected by attorney work product privilege. This interpretation is wholly contradictory to the spirit and text of the California Public Records Act, which favors disclosure and narrowly construes exemptions.¹ Further, nearly every other district attorney's office in the state has produced at documents for the categories of our request for which you generally assert work product privilege.

Your response letter also lacks some legally required information. To the extent you intend to deny access to a requested record, you must justify that denial by demonstrating either (1) that the "record in question" – that is, the particular record we have requested – falls under a specific legal exemption, which you must cite, or (2) that the public interest served by your denial for that particular record "clearly outweighs" the public interest that would be served by its disclosure.² You must also provide the names and titles or positions of each person responsible for the denial.³

¹ Cal. Const., art. I, § 3, subd. (b)(2); *Board of Trustees of California State University v. Superior Court* (2005) 132 Cal.App.4th 889, 896, 34 Cal.Rptr.3d 82.

² Gov't Code § 6255(a).

³ Gov't Code § 6253(d)(3).

In your response letter, you provided conditional objections, asserting not that an exemption applies to a particular record we requested – as required under the law – but rather that, as a general matter, you will not produce records that fall under particular exemptions if our request seeks such records. Because we are not able to effectively respond to these objections without the more specific information described above and required by law, we ask that you provide it now.

In connection with certain requested records (or portions of records), you have asserted the “catchall exemption” (that “the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record”). As you know, the agency bears the burden of demonstrating, “on the facts of the particular case,” the overriding public interest in withholding agency records.⁴ We request the identification of the specific records or categories of records you are seeking to withhold, and a specific explanation as to why the public interest clearly favors withholding the requested records here.

Regarding the requested records (or portions of records) you may identify and assert clear grounds for withholding, we would like to know if you would consider waiving any, or all, of the asserted exemptions. Exemptions, as you know, are permissive, not mandatory, and it is our goal – and yours, we imagine – to avoid unnecessary litigation, which can be costly and time consuming. If you are open to this possibility, please let us know. We would be happy to discuss this matter over the phone if you believe we may be able to find a solution that satisfies everyone. We would also be willing to provide further legal support and explanation for why we do not believe that the exemptions you have asserted are legally sound in this instance.

However, if you do not believe further discussions would be helpful and intend to deny some of our requests, please advise us of this position and tell us whether your office has adopted a formal process for an administrative appeal. Should we determine that we are entitled to documents you have refused to produce – whether before an administrative appeal or after – we may litigate to obtain them. In that event, we will seek all attorney’s fees and costs for the litigation.⁵

To the extent you have not yet produced any records for which you do not claim an exemption, please let us know the status of these records and produce them promptly and on a rolling basis.

Thank you again for your responses to our earlier letters and, generally, for your assistance with our requests. We look forward to any further discussion and your production of records.

⁴ Gov’t Code § 6255(a). *Michaelis, Montanari & Johnson v. Superior Ct.*, 38 Cal. 4th 1065, 1071 (2006) (“this provision contemplates a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality”).

⁵ Gov’t Code § 6259(d). We note that courts have awarded costs and fees if even a single document was improperly withheld. *See, e.g., Los Angeles Times v. Alameda Corridor Transp. Auth.*, 88 Cal. App. 4th 1381, 1391 (2001).

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Very truly yours,

A handwritten signature in blue ink, appearing to read 'E. Leonida', with a long horizontal flourish extending to the right.

Ellen V. Leonida