

February 10, 2022

VIA U.S. MAIL AND EMAIL

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Re: California Public Records Act Request

Dear Eric Ferguson:

Thank you for your September 8 and November 19, 2021 communications (“September 8 Letter” and “November 19 Letter,” respectively) concerning our July 23, 2021 request (“Request”) for records pursuant to the California Public Records Act (“CPRA”). In response to much of our Request, you have apparently refused to even search for most of the requested records based on your contention that any responsive records would be inherently protected from disclosure. (Nov. 19 Letter at p. 2.) This self-serving assertion is unsupported by law. The exemptions that you have asserted are also overbroad as applied to the Request here. “Since disclosure is favored, all exemptions are narrowly construed” with the agency bearing the burden. (*County of Santa Clara v. Superior Court* (2019) 170 Cal.App.4th 1301, 1321 [citations omitted].) It is our goal to avoid unnecessary litigation. Upon reviewing these responses, please let us know what further documents you intend to produce and which, if any, exemptions you will continue to assert as a basis for nondisclosure, and for which specific responsive records.

I. The Request Is Not Overbroad; Blanket Exemptions Are Inappropriate.

You asserted in your November 19 Letter that our Request is overbroad. You appear to confirm that you did not perform the requested search because you took the position that any responsive documents would be categorically withheld. You refused to assert exemptions with specificity because it would be “exponentially more work.” (Nov. 19 Letter at p. 1.)

In adopting the CPRA, the Legislature declared 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.) The Act evinces “a strong policy in favor of disclosure of public records” (*California State University v. Superior Court* (2001) 90 Cal.App.4th 810, 831.) The CPRA creates “a presumptive right of access” to public records. (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616 [quoting *Sander v. State Bar of California* (2013) 58 Cal.4th 300, 323].) Indeed, “[a]ll public records are subject to disclosure unless the Act expressly

provides otherwise.” (*BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 751; *see also Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 223 [“The CPRA generally presumes that all documents maintained by a public entity are subject to disclosure to any member of the public, unless a statutory exemption applies or the catchall exemption, section 6255, is satisfied (when public interest served by nondisclosure of records clearly outweighs the public interest in disclosure).”], disapproved on another ground in *N.L.G., San Francisco Bay Area Chapter v. City of Hayward* (2020) 9 Cal.5th 488, 508, fn. 9.) Moreover, by “constitutional mandate,” statutes, like the CPRA, that further the people’s right of access to information must be broadly construed, while those that limit the right of access must be narrowly construed. (*City of San Jose v. Superior Court, supra*, 2 Cal.5th at pp. 617, 629 [citing Cal. Const., art. I, § 3, subd. (b), par. (2)]; *see also Becerra v. Superior Court* (2020) 44 Cal.App.5th 897, 913 [emphasizing same].)

The CPRA places the burden on you to find a solution to disclose the requested documents. To the extent you believe our request is unclear or overbroad, the CPRA imposes further obligations on you, and you may not use such a blanket assertion to exempt yourself from your duty to disclose responsive documents. It is your responsibility, for example, to “assist” us in making a “focused and effective request.” (Gov. Code, § 6253.1, subd. (a).) You did not do this.

You also claim that fulfilling your legal duty to comply with our request is an undue burden simply because we request many records. The CPRA by its nature imposes burdens on government agencies. (*See State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1190 fn.14; *see also Connell v. Superior Court* (1997) 56 Cal.App.4th 601, 614.) You are not exempt from your legal obligation to identify responsive records and legally justify your asserted exemptions (rather than simply state that they are “obvious”) based on the number of records. Further, we identified a clear purpose for our request—enforcing the Racial Justice Act. The RJA encompasses many, if not all, areas of prosecution. (*See Stats. 2020, ch. 317, § 3.*) It follows, then, that a wide range of prosecutorial records would be necessary to enforce the RJA’s important goals.

II. Attorney Work Product Cannot Support the Withholding of All Policy and Training Records Requested (Requests 1, 2 & 4(c)).

In your September 8 Letter, you asserted that “*any* ... internal policies, memoranda and guidance documents” (emphasis added) and “internally-generated training materials of any kind” are “self-evidently the product of attorney labor” protected from disclosure as “confidential core attorney work product.” (Sept. 8 Letter at pp. 2-3 [citing Gov. Code, § 6254, subd. (k) & Code Civ. Proc., § 2018.030].)

Your position that all policies, memoranda, guidance documents and training materials are exempt as attorney work product stretches the exemption beyond its breaking point. This exemption serves to protect from discovery a “writing that reflects an attorney’s impressions, conclusions, opinions, legal research or theories.” (Code Civ. Proc., § 2018.030, subd. (a).) It must be narrowly construed. (Cal. Const., art. I, § 3, subd. (b), par. (2) [“A statute, court rule, or

other authority . . . shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access.”]; *see also Los Angeles Cnty. Bd. of Supervisors* (2016) 2 Cal.5th 282, 292 [emphasizing same]; *Coastal States Gas Corp. v. United States Department of Energy* (D.D.C. 1980) 617 F.2d 854, 864 [“The work-product rule does not extend to every written document generated by an attorney.”]¹; *League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 994 [denying work-product exemption where work was not performed on behalf of client].)

Public records such as the general policies, practices, and guidelines, as well as the training materials, requested here cannot be withheld as protected or privileged work product. These documents are public records that lay out “general standards to guide the Government lawyers.” (*ACLU of N. Cal. v. United States Department of Justice* (9th Cir. 2018) 880 F.3d 473, 484-89 [affirming that agency manuals, guidance documents, and other materials conveying agency policy fall outside work product protection and thus are discoverable]; *Judicial Watch, Inc. v. United States Department of Homeland Security* (D.D.C. 2013) 926 F.Supp.2d 121, 142-44 [ruling that memoranda communicating policies, guidelines, and “general standards” to ICE staff attorneys not protected by work-product privilege].)

III. The Deliberative Process Privilege Cannot Justify the Withholding of the Requested Policy and Training Records (Requests 1, 2 & 4(c)).

You further assert that “memoranda” and “guidance documents” requested are categorically exempt from disclosure pursuant to the deliberative process exemption. (Sept. 8 Letter at p. 3 [citing Gov. Code, § 6255, subd. (a)].) The deliberative process privilege does not support the withholding of policy and training records requested. The deliberative process privilege is designed to protect the ability of policymakers “to test ideas and debate policy and personalities uninhibited by the danger that [their] tentative but rejected thoughts will become subjects of public discussion.” (*ACLU of N. Cal. v. Superior Court* (2011) 202 Cal.App.4th 55, 76 [quoting *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1341].) This privilege is inappropriately asserted here.

In establishing the deliberative process privilege, the California Supreme Court identified “the key question” in examining the applicability of the deliberative process privilege as “whether disclosure of the materials would expose an agency’s decision-making process in such a way as to discourage candid discussion with the agency and thereby undermine the agency’s ability to perform its functions.” (*Times Mirror Co. v. Superior Court, supra*, 53 Cal.3d at p. 1342.) Thus, the exemption applies only to “predecisional” and “deliberative” documents. A “policy cannot be properly. . . characterized as predecisional if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the

¹ As many courts have recognized, the CPRA is modeled after the federal Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the “legislative history and judicial construction of the FOIA thus ‘serve to illuminate the interpretation of its California counterpart.’” (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1338 [quoting *ACLU of N. Cal. v. Deukmejian* (1982) 32 Cal.3d 440, 447]; *see also Community Youth Athletic Ctr. v. City of Nat’l City* (2013) 220 Cal.App.4th 1385, 1400, fn.6 [“Judicial interpretations of the FOIA in the federal courts may be used to construe the [C]PRA.”].)

public.” (*ACLU of N. Cal. v. Superior Court, supra*, 202 Cal.App.4th at p. 76 [internal quotation marks omitted]; *see also ibid.* [“The deliberative process privilege does not justify nondisclosure of a document merely because it was the product of an agency’s decision-making process; if that were the case, the [C]PRA would not require much of government agencies.”]; *Citizens for a Better Environment v. United States Department of Food & Agriculture* (1985) 171 Cal.App.3d 704, 713 [ruling that “memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context” are not exempt from disclosure].)

Office policies, guidance documents, and training materials do not categorically “expose an agency’s decision-making process,” but rather articulate finalized decisions after deliberations have concluded (*Times Mirror Co. v. Superior Court, supra*, 53 Cal.3d at p. 1342.) These documents do not expose the ideas that were proposed, but ultimately rejected. There is simply no privilege for ideas once they have become office policy as elaborated in memoranda or incorporated into trainings.²

IV. The Catchall Exemption Cannot Justify the Withholding of the Requested Policy and Training Records (Requests 1, 2, 3a).

You asserted that the “catchall” exemption permits the withholding of training materials because the disclosure of such materials “could undermine [the] operations” of a public agency. (Sept. 8 Letter at p. 4 [citing Gov. Code, § 6255].) You provide no substantiation for your suggestion that the disclosure of training materials would undermine the operations of a public prosecutor.

The CPRA’s “catchall exemption,” set forth at Government Code section 6255 subdivision (a), does not support the withholding of training materials, particularly where such records are relevant to the RJA. The CPRA’s catchall exemption permits an agency to withhold records if, on the facts of a particular case, the agency can demonstrate that there is a weightier public interest in withholding the records than disclosing them. (*See* Gov. Code, § 6255, subd. (a); *see also ACLU of N. Cal. v. Deukmejian, supra*, 32 Cal.3d at p. 453 [“Section 6255 speaks broadly of the ‘public interest,’ a phrase which encompasses public concern with the cost and efficiency of government.”]; *Weaver v. Superior Court* (2014) 224 Cal.App.4th 746, 752 [emphasizing same].)

Withholding certain information based on this catchall public interest exemption requires an express elaboration of the public interest that is being protected by nondisclosure. (*See, e.g., ACLU of N. Cal. v. Superior Court, supra*, 202 Cal.App.4th at p. 74 [rejecting a governmental assertion that the public interest compelled withholding because “the record provide[d] no basis upon which to exempt the information at issue under . . . the catch-all exemption”].) The burden is not met, as here, where the agency simply asserts the exemption broadly without any explanation of the purported burden imposed.

² Without reason, you “interpret [the Request] as seeking internal materials relating to the *formulation* of the ‘policies’” sought. (Sept. 8 Letter at p. 3 [emphasis in original].)

The burden also falls on the agency to demonstrate the “clear overbalance” in favor of withholding the records sought. (*Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1071 [“[T]his 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.”].) You have not met this burden.

Further, Requesters believe the agency cannot meet the requirements of the catchall exemption for the records requested here. The RJA strengthens the case for disclosure in the face of an agency’s assertion of the catchall exemption. In enacting the RJA, the Legislature expressed its intent “to eliminate racial bias from California’s criminal justice system,” “to remedy the harm to the defendant’s case and to the integrity of the judicial system,” “to actively work to eradicate” racial disparities in the judicial system, and “to ensure that individuals have access to all relevant evidence, including statistical evidence, regarding potential discrimination in seeking or obtaining convictions or imposing sentences.” (Stats. 2020, ch. 317, § 2, subd. 2(i)-(j).) The effective implementation of the RJA, and the realization of this legislative intent, requires that the public be able to *access* policies and training materials which inform decisions about how district attorneys prosecute cases and whether such prosecutions are or may be tainted by bias.³ This goal substantially outweighs any theoretical burden to your office.

V. Request 3b: Your Asserted Exemptions Do Not Support the Withholding of Communications Concerning the RJA.

In your letter, you affirm that you have identified 70 email messages, as well as internally-generated summaries and guidance documents attached to some of those email messages, which are responsive to Request 3b, which seeks communications concerning the RJA. (Sept. 8 Letter at pp. 4-5.) However, your letter asserts that none of these records are disclosable and all are protected from disclosure pursuant to exemptions related to 1) the attorney work product, 2) deliberative process privilege, 3) records pertaining to pending litigation (section 6254(b)), and/or 4) because they are “not public records, but merely unofficial comment or personal opinion that have not been created or maintained pursuant to official duty.” (*Ibid.*) The only responsive documents you produced were externally-generated summary documents attached to responsive emails, and a PowerPoint presented by a member of your office to an outside group of attorneys; all but the PowerPoint had previously been publicly available. These exemptions are improper and/or unsupported.

First, regarding the communications concerning the Racial Justice Act which you claim are protected by attorney work product, more context as to the purpose of the communication is needed. The work product exemption “does not extend to every written document generated by

³ The RJA specifically provides that a defendant may present evidence of racial bias by showing “statistical evidence or aggregate data demonstrat[ing] a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have committed similar offenses and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity.” (Stats. 2020, ch. 317, § 3 [establishing Pen. Code, § 745, subd. (h)(1)].) In recognizing that the disclosure of racial and ethnic disparities may depend on the statistical evidence or aggregate data, the Legislature has *presumed* public access to such information.

an attorney.” (*League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 994 [denying work-product exemption where work was not performed on behalf of client].) Communications laying out “general standards to guide the Government lawyers,” constitute public records and are not work product. (*ACLU of N. Cal. v. United States Department of Justice* (N.D. Cal. 2014) 70 F.Supp.3d 1018, 1030-32.) Please explain why you have asserted this exemption for each set of communications and produce communications articulating general standards or guidance or which are not otherwise properly withheld by attorney work product.

Second, regarding the communications concerning the Racial Justice Act which you claim are protected by the deliberative process exemption, please explain what adopted policy was being deliberated and confirm that each set of communications reflects deliberations which were ultimately rejected. (*ACLU of N. Cal. v. Superior Court, supra*, 202 Cal.App.4th at p. 76.) Further, please explain why the public interest in nondisclosure clearly outweighs the public interest in enforcing the Racial Justice Act described in the previous section and/or produce any records not properly withheld pursuant to the deliberative process privilege.

Third, you have not substantiated that any identified responsive records are properly withheld as records pertaining to pending litigation (section 6254(b)). “[B]ecause of the narrow construction given to section 6254’s exemptions, cases interpreting the section 6254(b) pending litigation exemption have, based upon the facts of those particular cases, given it a more restricted reading. Thus, ‘[a] document is protected from disclosure under the pending litigation exemption only if the document *was specifically prepared for use in litigation.*’” (*Board of Trustees of California State Univ. v. Superior Court* (2005) 132 Cal.App.4th 889, 897 [citing *County of Los Angeles v. Superior Court (Axelrad)* (2000) 82 Cal.App.4th 819, 830] [italics added].) Courts have interpreted the exemption to protect against disclosure limited records where disclosure would permit a litigant from “taking unfair advantage of the public agency status of his or her opponent.” (*See Board of Trustees of California State Univ. v. Superior Court, supra*, 132 Cal.App.4th at p. 897.) Please confirm whether the identified responsive records were prepared for use in litigation and/or disclose all records improperly withheld relying on this exemption.

Finally, regarding the emails that concern the Racial Justice Act which you claim are not public records, you have not provided enough information for us to know whether the emails in question pass the *City of San Jose* test. Please inform us what type of email account the messages were sent from (private or managed by your office), the position in your office of the sender and recipient, and a characterization of the content of the email that allows the email to not be considered a public record. (*City of San Jose v. Superior Court* (2017) 2 Ca1.5th 608, 618.) As you know, the *City of San Jose* court ruled that any “record ... kept by an officer because it is necessary or convenient to the discharge of his official duty ... is a public record.” (*Ibid.*) This is a broad definition encompassing most communications, particularly in the context of this request, which seeks to enforce a law removing racial animus from law enforcement activities.⁴

⁴ In enacting the RJA, the Legislature expressed its intent “to eliminate racial bias from California’s criminal justice system,” “to actively work to eradicate” racial disparities in the judicial system, and “to ensure that individuals have access to all relevant evidence, including statistical evidence, regarding potential discrimination in seeking or obtaining convictions or imposing sentences.” (Stats. 2020, ch. 317, § 2, subds. (i), (j).)

Without more information, we reject the validity of the assertion that any of the identified records are not public records and therefore not disclosable.

VI. Your Response to Request 4 Is Incomplete.

Your September 9 Letter asserted that you had no records responsive to Request 4(b) [*Batson-Wheeler* motions granted] or 4(d) [Reports to the State Bar relating to any *Batson-Wheeler* motions made and granted] on the grounds that “no *Batson-Wheeler* motions [had been] granted against San Bernardino County prosecutors in at least the last 10 years.” (Sept. 9 Letter at p. 5.) You updated your response on November 19 to report that a court had granted a *Batson-Wheeler* motion in the intervening months. We look forward to your prompt production of records responsive to this request concerning that motion and investigation.

Moreover, you did not provide any response as to whether you searched for, and/or identified, any investigations into *Batson-Wheeler* motions, whether or not they have been granted. In particular, you did not provide any information concerning whether you searched for and/or identified records responsive to Request 4(a) (*Batson/Wheeler* motions filed) and 4(c) (any internal discipline related to *Batson/Wheeler* investigations). We request a complete response as to the remainder of this request.

VII. Blanket Exemptions Are Inappropriate.

You may not invoke blanket objections and still satisfy your statutory obligations under the CPRA. Rather, you are required to “provide the requesting party ‘adequate specificity to assure proper justification by the governmental agency.’” (*ACLU of N. Cal. v. Superior Court, supra*, 202 Cal.App.4th at p. 82 [quoting *Vaughn v. Rosen* (D.C. Cir. 1973) 484 F.2d 820, 827].) You bear “the burden of affirmatively showing that withheld materials need not be disclosed.” (*Ibid.*; see also *ibid.* [“[W]e do not believe an agency’s bare conclusion that information is not responsive to a request is any more self-explanatory than its bare conclusion that information is exempt.”].) And even where a portion of a record is exempt from production, an agency must still disclose any reasonably segregable non-exempt portion of that record. (Gov. Code, § 6253, subs. (a), (c).) Thus, you have an obligation to produce nonexempt materials that can be reasonably segregated from exempt materials and may not rest on blanket exemptions as you have done here.

As the agency opposing disclosure, you bear the burden of proving that an exemption applies. Government Code section 6255 specifically commands that an “agency *shall* justify withholding any record.” (Gov. Code, § 6255, subd. (a) [emphasis added]; *Becerra v. Superior Court, supra*, 44 Cal.App.5th at p. 914.) Thus, you must provide specific reasons to give us a meaningful opportunity to contest the withholding of certain documents and to enable a court to determine whether an exemption even applies. (*See Golden Door Properties, LLC v. Superior Court* (2020) 53 Cal.App.5th 733, 790 [to justify withholding, an agency must describe each document or portion withheld, and “for each withholding it must discuss the consequences of

disclosing the sought-after information”].) You have not done so here.

VIII. Your Proposed Fee-Shifting Is Unsupported.

We have concerns regarding your proposed fee-shifting, which appears to extend beyond that permitted by statute. (Gov. Code, §§ 6253, 6253.9. *See also National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward* (2020) 9 Cal.5th 488, 507.) The CPRA requires your fee shifting for programming services to be necessary. (Gov. Code, § 6253.9, subd. (b)(2) [permitting fee-shifting for “the cost of programming and computer services necessary to produce a copy of the record when . . . [t]he request would require data compilation, extraction, or programming to produce the record”].) We do not find your estimate of 120 hours of programmer time at the rate of \$71.33/hour to write code and conduct searches necessary or supported by the nature of the requests. We request a more reasonable cost estimate.

Inherent in the CPRA is a requirement that agencies bear some financial cost to ensure access to public information. Courts have recognized that financial costs to an agency do not eliminate the agency’s obligation to disclose public information. (*See, e.g., CBS Broadcasting Inc. v. Superior Court* (2001) 91 Cal.App.4th 892, 909 [\$43,000 cost of compiling an accurate list of names not “a valid reason to proscribe disclosure of the identity of such individuals”].) Excessive programming costs would defeat the constitutional and statutory right to information and cannot be permissible. The California Supreme Court has affirmed that “Article I, section 3 of the state Constitution favors an interpretation that avoids erecting [] substantial financial barriers to access.” (*National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward, supra*, 9 Cal.5th at p. 507 [considering relevant that the nearly \$3,000 of proposed redaction costs were “nontrivial” and “prohibitive” for “many requesters”]; *see also id.* at p. 508 [“Consideration of that right [of access to government information] favors a rule that avoids shifting routine redaction costs as a condition of gaining the access the [C]PRA promises.”].)

IX. You Have Discretion To Disclose Requested Records in the Public Interest.

As you know, the CPRA’s exemptions are “not mandatory.” (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 652.) Rather, the exemptions “allow nondisclosure but do not prohibit disclosure.” (*National Conference of Black Mayors v. Chico Community Publishing, Inc.* (2018) 25 Cal.App.5th 570, 579.) Thus, even if an exemption applies, it is within the agency’s discretion to disclose the requested records unless a statute bars disclosure.

As the CPRA makes clear, none of its exemptions “prevent[s] any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.” (Gov. Code, § 6254.) Thus, the CPRA “endows the agency with discretionary authority to override the statutory exceptions when a dominating public interest favors disclosure.” (*CBS, Inc. v. Block, supra*, 42 Cal.3d at p. 652 [citing *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 656].)

Here, there is a dominating public interest in the disclosure of the requested records. Requester seeks to use these records to implement the California Racial Justice Act. Underlying

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the law is the Legislature's intent "to eliminate racial bias from California's criminal justice system" and "to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing." (*See* Stats. 2020, ch. 317, § 2, subd. (i).) The requested records serve these purposes. Considering the dominating public interest in these records, we respectfully request that you exercise your discretion to override the statutory exemptions that you have cited to the extent which they apply.

Thank you for your careful reconsideration of your asserted exemptions. We would be happy to set up a time to speak on the phone as well if you think such discussion would be productive. We would welcome the opportunity to further elaborate the records we seek or attempt to narrow the requested records. However, we do not think such a conversation would be productive with regards to Requests 1 & 2 if it remains the Agency's position that *all* policies, guidance documents, and training materials are categorically exempt from disclosure. We look forward to hearing from you.

Very truly yours,



Ellen V. Leonida