

February 10, 2022

VIA U.S. MAIL AND EMAIL

Karun Tilak
Deputy County Counsel
Office of the District Attorney of Santa Clara
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Email: karun.tilak@cco.sccgov.org

Re: California Public Records Act Request

Dear Karun Tilak:

Thank you for your August 17, 2021 letter (“Response Letter”) responding to our July 23 request (“Request”) pursuant to the California Public Records Act (“CPRA”) seeking records relevant to the implementation of the Racial Justice Act (“RJA”). In response to your November 18, 2021 email seeking further information about our position, we discuss below the specific exemptions that you have asserted and which we believe lack a factual or legal basis. For the reasons elaborated, we believe your asserted exemptions are both overbroad and deficient.

Upon reviewing these responses, please let us know what further documents you intend to produce. If there are responsive records for which you intend to continue asserting exemptions, please let us know to which records those exemptions apply. We believe it is in the interests of all parties to avoid unnecessary litigation.

A. Background

In connection with your Response Letter, you produced the following records:

1. DA Office’s Procedure and Policy Manual (6 sections under the “Administrative Policies and Procedures” article of the manual redacted)
2. Document describing DA Office’s Bend the Arc Reform Efforts
3. Misdemeanor Diversion Services Amended Letter of Understanding
4. Misdemeanor Diversion Guidelines Penal Code Sec. 1001.05-1001.97
5. DA Office’s Inquisitive Prosecutor’s Guide for 2015-21 (available online)
6. DA Office’s Race and Prosecutions Reports (available online)
7. Training Log
8. GFU Team Recognition of Bias Trainings
9. Various records concerning *Batson-Wheeler* challenges

With respect to Requests 1-3, you noted that “[c]ertain documents are being withheld or redacted on the basis of attorney work product (CCP 2018.030), official information privilege (Evidence Code 1040), and/or deliberative process privilege.” [Response Letter at p. 1.] However, you provided no information on how many responsive documents were being withheld on these bases, the substance of the withheld documents, or any justifications for the asserted exemptions.

B. Challenges to Asserted Exemptions

1. Blanket Exemptions Are Improper; Exemptions Must Be Narrowly Tailored.

You may not assert categorical and unsupported exemptions to unidentified responsive public records. The CPRA creates a burden for public entities to narrowly assert exemptions and justify any withholding. You have failed to do so here.

“Since disclosure is favored, all exemptions are narrowly construed.” (*County of Santa Clara v. Superior Court* (2019) 170 Cal.App.4th 1301, 1321 [citations omitted].) “In enacting the CPRA, the Legislature sought to provide the public broad access to documents regarding how government agencies carry out their responsibilities.” (*Weaver v. Superior Court* (2014) 224 Cal.App.4th 746, 750.) 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* (2017) 2 Cal.5th 608, 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 agency opposing disclosure bears the burden of proving that an exemption applies.” (*County of Santa Clara v. Superior Court, supra*, 170 Cal.App.4th at p. 1321.) A government agency may not invoke blanket objections and still satisfy its statutory obligations under the CPRA. Rather, an agency is required to “provide the requesting party ‘adequate specificity to assure proper justification by the governmental agency.’” (*ACLU of N. Cal. v. Superior Court* (2011) 202 Cal.App.4th 55, 82 [quoting *Vaughn v. Rosen* (D.C. Cir. 1973) 484 F.2d 820, 827].) The government thus bears “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.”].)

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, subds. (a), (c).) Thus, you have an obligation to produce nonexempt materials that can be reasonably segregated from exempt materials.

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.

2. The Categorical and Unexplained Exemptions Asserted Cannot Support the Withholding of the Requested Policy and Training Materials.

You have generally asserted three exemptions—attorney work product, official information, and deliberative process—to support your redactions and your withholding of an unidentified number of responsive records. You have not provided sufficient support to justify either the redactions or the withholding; and, regardless, these exemptions should not justify the nondisclosure of the requested policy and training materials.

a. Attorney Work Product Exemption

Your use of the attorney work product exemption in response to our requests for policy records and training materials 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. (*See* 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].)

Public records such as the general policies, practices, guidelines, and training materials requested here cannot be withheld on the basis of the attorney work product exemption. 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].)¹

b. Official Information Exemption

Official information is defined as “information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.” (Evid. Code, § 1040, subd. (a).) It strains credulity

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 “judicial construction of the FOIA thus ‘serve[s] 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.”].)

that records reflecting constitutionally mandated and/or basic prosecutorial duties could only be “acquired in confidence.”

Under Evidence Code, section 1040, an agency may withhold information as privileged “only upon a finding that . . . its disclosure would be ‘against the public interest.’” (*Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 125 [quoting Evid. Code, § 1040, subd. (a)], disapproved on another ground in *People v. Holloway* (2019) 33 Cal.4th 96, 131.) Your response does not expressly aver or establish how disclosure of the requested records would be against the public interest. Thus, you have not properly invoked this exemption to withhold the requested records.

Further, the official information privilege only applies where the public interest in nondisclosure outweighs the interest in disclosure. (Evid. Code, § 1040, subd. (b)(2); *see also Caldecott v. Superior Court* (2015) 243 Cal.App.4th 212, 227 [“The ‘important role’ of senior administrators supports disclosure of claims against them and the public’s right to know how they are performing in their offices.”].) The official information privilege on which the agency relies is not a rigid privilege, but rather requires weighing the costs and benefits of disclosure. (*ACLU of N. Cal. v. Superior Court, supra*, 202 Cal.App.4th at p. 68.) This requires “a particularized assessment of the applicability of the privilege as to *each* item a public entity seeks to keep confidential in the face a . . . request for disclosure.” (*Michael P. v. Superior Court* (2001) 92 Cal.App.4th 1036, 1043 [emphasis in original].)

The agency cannot meet the requirements of Evidence Code section 1040 for the records requested here. The public interest served by the disclosure of the requested records is especially weighty. The RJA strengthens the case for disclosure in the face of an agency’s assertion of the official information 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, subds. (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. This goal substantially outweighs any theoretical burden to your office.

3. Deliberative Process Privilege

The deliberative process privilege also 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, supra*, 202 Cal.App.4th at p. 76 [quoting *Times Mirror Co. v. Superior Court, supra*, 53 Cal.3d at p. 1341].) This privilege is inappropriately asserted here.

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 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. 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 “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.

Moreover, the deliberative process exemption is made operative under the “catchall” exemption contained in Government code section 6255. 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.

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.

February 10, 2022

Page 6

Thank you for your careful reconsideration of your asserted exemptions. We would be happy to set up a time to speak further about these concerns if you think such discussion would be productive. We look forward to hearing from you.

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