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January 11, 2023

***Via Electronic Mail***

Kory DeClark  
BraunHagey & Borden LLP  
351 California Street, 10th Floor  
San Francisco, CA 94104  
[Wilner@braunhagey.com](mailto:Wilner@braunhagey.com)

**Re: California Public Records Act Request follow up response**

Dear Mr. DeClark:

Thank you for the recent email communications. I am placing this follow-up reply on letterhead in an attempt to better organize and summarize the issues.

### **Cost Issue**

On August 8, 2022, the County sent you a letter by email explaining that,

“...for category 2.A., pursuant to Government Code subsection 6253.9(b)(2) and consistent with *National Lawyers Guild v. City of Hayward* (2020) 9 Cal.5th 488, the costs for data extraction and programming are the responsibility of the requester. The County IT Department has inquired with an outside vendor, which estimates the time needed to program and extract items marked 2.A. will be approximately 8 hours at \$200/hr plus a 20% management fee, resulting in an estimated total cost of \$1820.

...At this time, it appears that production of non-protected data in category “(1) exists and is digitally accessible for 2015 to present” has been completed. Please let us know if you wish to proceed with hiring an outside vendor to program and extract the remaining existing and non-protected data points, and I will provide further payment instructions upon consultation with the IT Department.”

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You waited almost 6 months to respond to this cost issue, and on December 26, 2022, Mr. Wilner from your firm wrote in part, “An estimate for \$200/hour exceeds what is reasonable in these circumstances. Further, the additional 20 percent fee is simply adding cost to the public's right to access records and does not cover any actual work performed. This is clearly not necessary. Please request that your vendor waive this fee and provide a more reasonable rate.”

On January 3, 2023, I replied that “I did check in with County IT regarding the vendor’s quoted fee of \$1,820 for the data extraction, but IT informs me tentatively that this price is set. However, I will attempt to work with IT and/or the vendor to see if the fee can possibly be reduced.”

On January 9, 2023, you replied in part, “...this request is now over a year old. We’re going to need final responses soon. We propose that your client respond regarding these final two issues—a firm data cost quote and the diversion and plea offer exemptions—by January 16.”

To respond, the quoted fee of \$1,820 was a “firm data cost quote” at the time it was quoted, and to my knowledge, the “diversion and plea offer” objections were only recently raised. That being said, I have spoken with the IT Department, and they have authorized me to reach out directly to the vendor on pricing. However, since the quote is already months old, it may have changed. I will attempt to obtain a new quote from the vendor by January 16, but I cannot make any promises since they appear to be a fairly large organization and it may take them a while to process this new request.

### **Plea Offers Issue**

On December 26, 2022, Mr. Wilner from your firm objected, I believe for the first time, that:

“We also object to your withholding of diversion and plea offers as work product. The protection offered by the work product privilege can be waived by the attorney’s ‘disclosure to a person, other than the client, who has no interest in maintaining the confidentiality of a significant part of the work product.’ ... [citations] ... Because the plea offers are shared with defendants, that material is not protected by the work-product privilege. We ask that you produce this data.”

In the County’s letter dated March 18, 2022, we wrote,

“In addition, Government Code § 6255 also underpins a deliberative process privilege, which exempts records under express provisions or where the public interest served by nondisclosure clearly outweighs the public interest served by disclosure. A record reflecting an analysis of a deputy district attorney about a decision whether or not to prosecute a case is exempt under the deliberative process exemption in Government Code subsection 6254(p) and (f). *Rackauckas v. Superior Court* (2002) 104

Cal.App.4th 169, 174-176 [“The investigation exemption does not terminate when the investigation terminates” and a memorandum of a deputy district attorney about his decision not to bring charges prepared as part of a criminal investigation is exempt if it contains his “legal opinions, thoughts, impressions and conclusions.”]. Given exposure of confidential and sensitive factors considered in deciding whether or not to file charges or **offer plea deals** to potential future offenders, the public interest in effective law enforcement, and the hindering of future prosecutions, the interests involved here support nondisclosure. Government Code § 6254(c), (f), (p); *Los Angeles School District v. Superior Court* (2014) 228 Cal.App.4th 222; *County of Orange v. Superior Court* (2000) 79 Cal.App.4th 759; and *Eskaton Monterey Hospital v. Meyers* (1982) 134 Cal.App.3d 788 [no public interest in disclosing information that may assist violators in evading detection.].) Such records reflect the thought processes of those whose responsibility it was to decide whether or not to file charges; thus, disclosure would expose the decision-making process in such a way as to discourage candid discussion, and thereby undermine the ability of local prosecutors to perform their functions.” [emphasis added]

The reasons for declinations to prosecute involve similar mental processes as those involved in offering plea deals. In our letter dated August 8, 2022, we listed similar exemptions in the chart: “Exempt from disclosure pursuant to Government Code §§ 6254(f), (k), (p), and 6255(a); Evidence Code § 1153; Government Code § 6276.04; Business and Professions Code § 6202; and Code of Civil Procedure §§ 2018.010 to 2018.080.” Moreover, while this request is made to obtain evidence that may later be used in a challenge under the Racial Justice Act, evidence of plea offers could not be used for that purpose. (See Evid. Code, § 1153, “Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals.”) The County believes that the release of plea offers and reasons for such offers will undermine the District Attorney’s ability to carry out his duties in future criminal cases. Given the ability to use the released data to evaluate any potential claims under the Racial Justice Act without hampering the ability of the District Attorney’s Office to seek future plea agreements in the interest of justice, the County also finds that “the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” (Gov. Code, § 6255, subd. (a).) For these reasons, data or records containing this information may not be released under Government Code sections 6254(p)(2), 6254(k), and 6255(a), Evidence Code section 1153, Government Code section 6276.04, Business and Professions Code section 6202, and Code of Civil Procedure sections 2018.010 to 2018.080.

### **Diversion Issue**

In the County’s letter dated August 8, 2022, the chart provides, “Some diversion information is made confidential pursuant to Penal Code section 13300(n),” which provides as follows: “(n) Notwithstanding subdivision (l) or (m), a local criminal justice agency shall not release information under the following circumstances: (1) Information concerning an arrest for

which **diversion** or a deferred entry of judgment program has been ordered without attempting to determine whether **diversion** or a deferred entry of judgment program has been successfully completed. (2) Information concerning an arrest or detention followed by a dismissal or release without attempting to determine whether the individual was exonerated. (3) Information concerning an arrest without a disposition without attempting to determine whether **diversion** has been successfully completed or the individual was exonerated.” Thus, once the records have been extracted and generated, further review and redaction may be necessary to ensure compliance with Penal Code section 13300(n).

If you have any questions regarding this response, please contact me at (442) 265-1120.

Sincerely,

A handwritten signature in cursive script that reads "Eric Havens".

Eric Havens  
County Counsel