BRAUNHAGEY & BORDEN LLP

San Francisco & New York

Kory DeClark, Esq.
declark@braunhagey.com

February 3, 2023

VIA EMAIL

Ryan Thompson
Assistant County Counsel
701 Ocean Street, Room 505
Santa Cruz, CA 95060
Email: ryan.thompson@santacruzcounty.us

Re: ACLU v. County of Santa Cruz (22 CV 00970)

Dear Mr. Thompson:

Thank you for your email correspondence of October 24, 2022 and January 10, 2023. Please find our responses below.

Regarding the ACLU of Northern California's July 23, 2021 Request for Policy and Training Documents relevant to Implementation of the Racial Justice Act.

1. Thank you for your response.

2. You have identified withholding documents on the basis that they are copyrighted materials by CDAA. This is the first we have heard of such copyrighted training materials not being produced. Please confirm these are all the training materials you are withholding. We object to your assertion that you cannot produce materials copyrighted by other parties. A third party's copyright interest in the material might be a restriction on the actual copying of the material but does not prevent disclosure by, for example, inspection. (*See, e.g., Cty. of Santa Clara v. Superior Court*, 170 Cal. App. 4th 1301, 1320 (2009) [noting that Section 6254(k) "is not an independent exemption. It merely incorporates other prohibitions established by law."]). Further, disclosure under the CPRA would undoubtedly qualify for an exemption under the "fair use" doctrine. (*See, e.g., City of Inglewood v. Teixeira*, 2015 WL 5025839, at *6 (C.D. Cal. Aug. 20, 2015) ["[T]he fair use of a copyrighted work, including such use by reproduction . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."]). We ask that you produce these documents immediately.

3. You have asserted that weekly emails prepared by a "research attorney" at your office are exempt as attorney work product. In your January 10, 2023 email, you communicated that the research attorney's weekly reports have no "segregable" portions, and are exempt from disclosure in their entirety. The work product doctrine must be narrowly construed. (*See Coastal*

States Gas Corp. v. Department of Energy, 617 F.2d 854, 864 (D.D.C. 1980) ["The work-product rule does not extend to every written document generated by an attorney."]; *League of California Cities v. Superior Court*, 241 Cal. App. 4th 976, 994 (2015) [denying work-product exemption where work was not performed on behalf of client].) It remains our position that, based on the information you have provided, 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* 880 F.3d 473, 484-89 (9th Cir. 2018) [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*, 926 F.Supp.2d 121, 142-44 (D.D.C. 2013) [ruling that memoranda communicating policies, guidelines, and "general standards" to ICE staff attorneys not protected by work-product privilege].)

Regarding the ACLU of Northern California's September 7, 2021 Request for Prosecutorial Data.

4. In your October 24, 2022 email, you asserted that, on August 15, 2022, "the DAO provided all non-exempt data that was extractable from the DAO's case management system" and that "[t]he DAO is not aware of any programming system that could extract information that is not tracked and/or maintained within the DAO's case management system." This response is inconsistent with your August 15, 2022 letter and data production.

Specifically, we read your August 15, 2022 letter to classify substantial categories of data as potentially extractable via programming. As we noted in our October 7 email, we would like to discuss the data you identified as potentially extractable via programming. This data, identified in (c) below, is entirely lacking from your production without explanation.

The only data you produced on August 15, 2022 was:

- In DefendantChargeList table: Race, defendant sex, filing date, case status description, defense counsel, ADA, charge code, charge code description, charge type, disposition (and disposition description
- In ReportLogSuspectChargeList table: Description, Received, Race, Sex, Filing Attorney, Charge Code, Charge Type, Charge Code Description, Description, Date, and Description

Your August 15, 2022 letter represents as follows with regard to your case management system:

a. You asserted that the following data exists and can be extracted, but is exempt:
    - Name of defendant
    - Court case number
    - Arresting agency number
    - Any other unique identifier
    - Age or date of birth

- Prior criminal convictions (would require programming to extract)
- Reasons for the declinations to prosecute (some data may require programming to extract)
- Plea offer information (may also require programming to extract)

b. You asserted that the following data does not exist in your records:
   - Ethnicity of defendant
   - Ethnicity of victim

c. You asserted that the following data *may* exist in your records and be extractable with programming:
   - Zip code of arrest
   - Date of arrest
   - Identity of person who made final decision to decline prosecution
   - Charges declined to prosecute
   - Diversion information
   - Factors considered in deciding charges to file
   - Bail/custody information
   - Sentences
   - Recommendations regarding parole
   - Recommendations regarding commutation

d. You asserted that the following data can be extracted via report but this data does not appear to be included in the produced records
   - Race of victim
   - Gender/sex of victim

We request that you produce the information in (c) delineated above, or explain why you will not produce it. The CPRA explicitly compels disclosure of information through programming and the fact that information is extractable only via programming does not warrant nondisclosure. (*See, e.g.*, Gov. Code § 7922.575.)

Moreover, we continue to have questions about how to read the data that you have produced to date. On October 7, we requested to speak with someone to better understand this data. But in your January 10 email, you refused to put us in touch with someone for this purpose. Please provide responses to the items below, or the data will be indecipherable or incomplete, and thus tantamount to a constructive withholding of disclosable information.

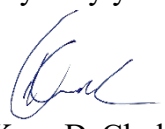
1. Please provide a code as to the columns in the tables as the meaning of the columns are not all clear.
2. Please clarify whether each line on the data sheet represents an individual case. If not, please reproduce the data with an anonymized identifier that separates out individual cases (rather than individual charges).

3. Please clarify whether the data sets can be combined. Please reproduce the data with anonymized identifiers that allow us to link the two sets of data together for analysis.
4. Please explain where the data includes the race and gender/sex of the victim, which is information you identified as extractable via report, but which we did not find in the data you produced. If this data is not included, please reproduce the data sets with this information included.

5. You provided in your January 10, 2023 email that, while the "DAO's case management system maintains certain aspects of the DAO's plea offer information," "identifying and producing such information would require a manual review for these particular documents within the system and potentially paper files for a large volume of cases." We do not seek a manual review of individual case files. However, your January 10 responses is ambiguous: If some plea information is recorded within the case management system, why would its production require an individualized review? Please clarify what data regarding plea offers is within the case management system, and what could be produced without a manual review of individual cases.

Although we are first seeking to understand whether some plea offer information can in fact be extracted without an individualized manual review, it remains our position that none of your asserted exemptions permit you to withhold records responsive to our request for data relating to plea offers. The work product exemption, deliberative process privilege, Evidence Code section 1153, and the CPRA's catchall exemption provide no basis for withholding such responsive records.

Very truly yours,



Kory DeClark