AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

February 23, 2024

VIA EMAIL

Paul Gero
Napa County District Attorney's Office
1127 First Street, Suite C
Napa, CA 94559

Re: November 17, 2023 California Public Records Act Request

Mr. Gero:

This letter is in response to the December 8, 2023 correspondence from the Napa County District Attorney's Office ("NDA") concerning the California Public Records Act ("CPRA") request submitted to the NDA by the American Civil Liberties Union of Northern California ("ACLU NorCal") on November 17, 2023 (the "CPRA Request"). The CPRA Request seeks information concerning prosecutorial data; policies and training materials; and other information relevant to the implementation of the California Racial Justice Act ("RJA"). In response to the data portion of the request, the NDA states that some of the requested prosecutorial data are disclosable, but that the cost would be $6,947.60 and that certain data points cannot be produced because they "are not kept in a database format" by the NDA. The NDA further conditionally asserts exemptions to justify its anticipated withholding of certain data. In response to the rest of the CPRA Request, the NDA asserts that copyright interests or deliberative process privilege justify nondisclosure. The NDA also claims that the request for training materials (Request C) is vague and overbroad and that the request for investigations into *Batson-Wheeler* motions (Request F) requires cost-shifting to the requester. ACLU NorCal contests the NDA's response and respectfully requests that the NDA reconsider whether certain responses require cost-shifting to the requester and its purported justifications for withholding responsive records, and provide further information as to certain responses, as described below.

I. Information Concerning Prosecutorial Data

A. The NDA Has Not Provided Sufficient Information Regarding Whether It Possesses And Can Produce The Information Requested.

Section 7922.600, subd. (a)(2) requires a public agency to "[d]escribe the information technology and physical location in which the records exist" "in order to assist" a requester "make a focused and effective request." To avoid confusion, ACLU NorCal requests that the NDA provide a written response to each subcategory of its request for prosecutorial data. In the response, please inform us:

1) If the data is accessible and used in any form by the NDA,

2) If the data is accessible and used, what method would be necessary to produce the data to ACLU NorCal (searching through paper files, manually searching individual electronic files, running a report in the NDA's case management system, writing code to extract the data because it is not available in a report, etc.), and
3) If the data could be produced, whether the NDA will produce it or plans to withhold it subject to a legal exemption. Please provide the specific exemption the NDA plans to assert to withhold the data for that subcategory.

B. ACLU NorCal Requests Further Detail Concerning NDA's Responses To Certain Specific Requests.

ACLU NorCal requests further clarification concerning the NDA's responses to certain specific requests contained in the data portion of CPRA Request, described below:

Request No.	ACLU NorCal's Request	NDA's Response	Further Clarification Requested
3. c.	Information regarding each arrest – Charge identified by law enforcement referring individual (including top charge by law enforcement referring)	"The DA's Office does NOT keep the following information in a database format, and thus could not compile…'top charge' although that could be first in order"	This request seeks all charges. Please confirm whether the NDA is able to distinguish the "top charge," *i.e.* the most serious offense, from the rest of the charges.
4. b.	ADA assigned to the case	"This data is not normally kept in a database format, but some information might be included in other database fields. To the extent such data is readily available for a specific case, the DA's Office could potentially compile this data, as available."	Please describe what data categories or fields this information would exist under and confirm whether it is available for all cases.
6. b.	Diversion offers and decisions (formal and informal, and including collaborative court and deferred prosecution) – Type of diversion offered	"The DA's Office does NOT keep the following information in a database format, and thus could not compile…Diversion offered by type (only pre-plea)"	Please confirm whether this response means that the NDA distinguishes between type for pre-plea diversion.
6. c.	Diversion offers and decisions (formal and	"The DA's Office could potentially	Please confirm whether this response means that

	informal, and including collaborative court and deferred prosecution) – Whether diversion accepted	compile…Whether pre-plea diversion accepted"	the NDA distinguishes between type for pre-plea diversion.
11. c.	Case outcomes - Sentences	"The DA's Office could potentially compile…Sentence received if convicted and sentenced to state prison or summary probation" "The DA's Office does NOT keep the following information in a database format, and thus could not compile…Sentence received if convicted and on formal probation"	Please confirm whether the NDA can produce data for individuals sentenced to county jail. Please explain why the NDA is unable to produce sentence data for individuals convicted and on formal probation.
12. b.	Counsel for defendant, whether public defender or private counsel	"The DA's Office does NOT keep the following information in a database format, and thus could not compile…If not the public defender, whether it is the conflict public defender or private counsel."	With this request, ACLU NorCal seeks to understand whether a defendant was represented by public counsel or private counsel. Please confirm whether the data that the NDA can produce distinguishes between those two categories.

C. The CPRA Broadly Defines "Public Records," And Requires Disclosure of Data Even When Not Kept In A Database Format.

The NDA states that it is unable to produce certain data points and categories of data because they "are not kept in a database format" by the NDA. The CPRA, however, contains no restriction that would require records to be kept in any specific format to be disclosable. Section 7920.545 broadly defines "writing" to mean "every…means of recording upon any tangible thing any form of communication or representation…and any record thereby created, ***regardless of the manner in which the record has been stored***." (Emphasis added.) Thus, the manner in which the record is stored by the NDA, whether in a database or otherwise, is irrelevant to the determination of whether the NDA possesses disclosable public records.

D. The NDA's Assertion Of Exemptions Lacks Legally Required Information.

The NDA states "[c]ertain information you have requested is exempt from disclosure" pursuant to Sections 7922.000 (the "catch-all" exemption), 7923.600 through 7923.625[1] (the investigatory files exemption), and 7927.705 (exemption under federal or state law). Preemptive objections such as these, where the agency conditionally asserts that it will not produce records that fall under particular exemptions if the request seeks such records, do not justify a denial. 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."].) The NDA has not done so here.

E. The NDA's Assertions Of Exemptions Lack Merit.

1. Catch-All Exemption

The NDA asserts that the catch-all exemption found in Section 7922.000 justifies the withholding of:

1. "Records and data containing the County's or a County department's deliberative process or decisionmaking process, the disclosure of which would inhibit frank and open discussion among County agents. (Govt. Code sec. 7922; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325; *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159.)…"
2. "Records and data – particularly, data relating to cases where charges are not filed or the alleged perpetrator is found to factually innocent – the disclosure of which could expose innocent individuals to potential harm, threats, and other adverse actions. (Govt. Code sec. 7922; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325; *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159.)…"
3. "Information that contains contact or identifying information of complainants, including complaining victims, the release of which would discourage candid discussion of policy matters. (Govt. Code sec. 7922; *Times Mirror Company v. Superior Court* (1991) 53 Cal.3d 1325; *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159; *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008.)"

As a threshold matter, the CPRA Request does not seek "data relating to cases where charges are not filed" or "[i]nformation that contains the contact or identifying information of complainants." Regarding the latter, the CPRA Request explicitly only seeks the race, ethnicity, and gender/sex

[1] In its December 8, 2023 correspondence, the NDA refers to "Govt Code sec. 6254(f)." Under the CPRA Recodification Act of 2021, Section 6254(f) has been recodified as Sections 7923.600 through 7923.625.

of the victim. (*See* CPRA Request, Section A. 13.) While the CPRA Request does seek "data relating to cases where…the alleged perpetrator is found to be factually innocent," it only seeks anonymized data, which would not expose the individual.

It is unclear what data the NDA expects to withhold on the basis of deliberative process privilege, but it has not met its burden to withhold information on this ground. The "the key question" in examining the applicability of the deliberative process privilege is "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* (1991) 53 Cal.3d 1325, 1342.) Records that are factual in nature, like the data requested, are generally not subject to the deliberative process. (*No. Cal. Police Practices Project v. Craig* (1979) 90 Cal.App.3d 116, 123–24 [memoranda consisting of factual material or severable factual material contained in memoranda along with deliberative material may be disclosed without doing harming the public interest]; *see also Times Mirror Co. v. Superior Court*, *supra*, 53 Cal.3d at pp. 1352–1353 [Justice Kinnard, dissenting] ["Purely factual material may be withheld only if it is 'inextricably intertwined with policy-making processes' [citation], if it would expose the deliberative process by the manner in which the factual material is organized or presented (*Ryan v. Department of Justice* (D.C.Cir.1980) 617 F.2d 781, 790), or if it would compromise the agency's ability to gather information in the future (*Brockway v. Department of Air Force* (8th Cir.1975) 518 F.2d 1184, 1191–1192)"].) Without a fact-specific showing, the data remain raw material disclosable under the CPRA.

An assertion of deliberative process privilege also requires a demonstration on the part of the agency that there is a weightier public interest in withholding the records than disclosing them. (§ 7922.000; *see generally ACLU of N. Cal. v. Deukmejian* (1982) 32 Cal.3d 440, 453 [the CPRA's catch-all exemption "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.) The NDA cannot meet the requirements of the catch-all exemption for the records requested here. The RJA strengthens the case for disclosure. 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 data concerning decisions about whether and how California prosecutes cases and whether such prosecutions are tainted by bias.[2] This goal substantially outweighs any theoretical burden to

[2] 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

your office. (*See Weaver v. Superior Court*, *supra*, 224 Cal.App.4th at p. 752 [concluding that "it is inconceivable to us that any countervailing interest the District Attorney could assert outweighs the magnitude of the public's interest" in the death penalty where a petitioner was seeking to find evidence of selective prosecution].)

2. Investigatory Files Exemption

The NDA asserts that the investigatory files exemption may apply to certain requested records by merely stating the text of the provision. This does not satisfy the agency's burden, and certain of the requested records cannot be withheld on this ground.

The NDA cannot invoke the investigatory file exemption merely because it has placed a record in a file labelled investigatory. (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Ca[l.]4th 278, 291.) Moreover, the agency must still disclose certain investigatory information, even if the exemption is properly met. (*See, e.g.*, *Williams v. Superior Court*, *supra*, 5 Cal.4th at p. 361, *citing* Sections 6254, subd. (f)(2) (now recodified as Section 7923.615, subd. (a)(2)) & 6254, subd. (f)(1) (now recodified as Section 7923.610) [requiring the disclosure of, e.g., details of requests for assistance, the occurrence, the arrestee, charges, and the factual circumstances around the arrest].)

3. Records Exempt Or Prohibited Under Federal Or State Law

The NDA asserts that Penal Code section 13300, as incorporated into Section 7927.705, serves to justify withholding "records and data that, when compiled, constitute local summary criminal history information, the disclosure of which is prohibited except to specified institutions and individuals." Penal Code section 13302 expressly states, however, that "a public prosecutor" is not prohibited "from accessing and obtaining information from the public prosecutor's case management database to respond to a request for publicly disclosable information pursuant to the California Public Records Act." Because the NDA is a public prosecutor and the data requested presumably exists in its case management system, Penal Code section 13300 does not bar disclosure. Moreover, Penal Code section 13300 only serves to protect against the disclosure of identifiable information, which is not requested here.

F. The NDA Has Not Established That Responding To The Data Portion Of The CPRA Request Requires Data Compilation, Extraction, Or Programming To Produce Responsive Records.

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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.

The NDA states that, "based on a review of the data kept in database format" by the NDA, it "could potentially extract and compile some of the data" requested. However, "any data that could potentially be provided from it would need to be extracted and compiled into a separately accessible format, such as a delimited file or Excel spreadsheet, to prevent breach of confidential data." Therefore, the NDA asserts, ACLU NorCal would bear the cost of the "data compilation to be paid pursuant to Govt Code sec. 7922.575, subd. (b)(b)(2)."[3] In support, the NDA states that "[w]hen a Public Records Act request seeks electronic data that must be compiled into a format not otherwise available, the Public Records Act requires the requestor to bear the cost of that data compilation," citing Government Code[4] section 7922.575, subd. (b). The NDA further asserts that "[t]he data must be compiled in this manner because…the data does not currently exist in a compiled format, and releasing the data in its original format would jeopardize or compromise the security or integrity of the propriety software in which it is maintained," citing Section 7922.575, subd. (b)(f).[5]

Section 7922.575, subd. (b)(2) states that "the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and 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." (Emphasis added.) The NDA's December 8, 2023 correspondence does not provide sufficient information to confirm whether "data compilation, extraction, or programming" under Section 7922.575, subd. (b)(2) is necessary to produce responsive records or whether the work involved is more akin to "'searching the records, reviewing records for information exempt from disclosure under law, and deleting such exempt information.'" (*Nat'l Laws. Guild , San Francisco Bay Area Chapter v. City of Hayward* (2020) 9 Cal.5th 488, 506, *quoting North County Parents Organization v. Department of Education* (1994) 23 Cal.App.4th 144, 146.) Work that falls into the latter category is not subject to cost-shifting to the requester. (*Id*.)

Section 7922.580, subd. (c) states that "[n]othing in Section 7922.570 or 7922.575 shall be construed to require a public agency to release an electronic record in the electronic form in which it is held by the agency if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained." The NDA has not established that producing records in response to the data portion of the CPRA Request would jeopardize or compromise the security or integrity of NDA's proprietary software. ACLU NorCal, therefore, requests that NDA either withdraw this assertion or provide an explanation as to how the security or integrity of the software would be compromised by releasing the data in its original format. Under Section 7922.600, subd. (a)(2), ACLU NorCal also requests a description of the "information technology…in which the records exist."

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[3] ACLU NorCal assumes for purposes of this correspondence that NDA's reference to Section 7922.575, subd. (b)(b)(2) is a typo and the NDA instead intended to refer to Section 7922.575(b)(2).

[4] All further statutory references are to the California Government Code, unless otherwise indicated.

[5] ACLU NorCal assumes for purposes of this correspondence that NDA's reference to Section 7922.575, subd. (b)(f) is a typo and the NDA instead intended to refer to Section 7922.580(c).

In any case, ACLU NorCal does not find a fee of $6,947.60, or $173.69 per hour, to be reasonable to fulfill the data portion of the CPRA Request. ACLU NorCal does wish to pursue collection of any responsive data but as an initial matter requests that the NDA provide further detail on its estimate, including the title of the employee tasked with compiling, the number of hours being charged, the rate per hour, and an explanation of why the work is necessary so that it can confirm whether the cost-shifting the NDA deems necessary to produce the record is permitted by statute.

II. Policies And Other Materials Relevant To The Implementation Of The California Racial Justice Act

The non-data portion of the CPRA Request seeks:

1) prosecutorial policies, memoranda, or guidance documents (Request B);
2) any and all training agendas, training materials, and recorded trainings (Request C);
3) records concerning the implementation of, and compliance with the RJA (Request D);
4) communications concerning the RJA (Request E); and
5) all investigations into *Batson-Wheeler* motions, including, but not limited to motions filed and/or granted, internal discipline, and/or reports to the State Bar (Request F).

The NDA produced an aggregate of ten records responsive to Requests B and D. In response to Request B, the NDA directed ACLU NorCal to its website, District Attorney Reports & Documents | Napa County, CA (countyofnapa.org), and produced the following records:

1) "Diversion Eligibility";
2) "Diversion Offenses";
3) "earlydiversion";
4) "Juvenile Transfer to Adult Court per WIC 707 April 2021";
5) "Lifer Memo";
6) "Memo – AB 150 and Humphreys";
7) "Napa Co DA Brady Policy";
8) "Policy on Sealing of Juvenile Police Records of Minors April 2021"; and
9) "pre-filing diversion to go live on Aug 3."

In response to Request D, the NDA also directed ACLU NorCal to the Napa County Superior Court's Criminal Record and Files Search Request form, produced a link to a press release from Governor Gavin Newsom's press release concerning Newsom's signature on the RJA (available at Governor Newsom Signs Landmark Legislation to Advance Racial Justice and California's Fight Against Systemic Racism & Bias in Our Legal System | California Governor), and produced a single record, "RJA Tracking Sheet."

The NDA asserts that it could, or is, withholding policies, training materials, RJA records, RJA communications, and investigations into *Batson-Wheeler* motions, on the grounds of 1) copyright, and 2) deliberative process privilege. The NDA has also asserted that it need not produce certain records because the request is vague or overbroad and that cost-shifting to the

requester is required to produce certain records. For the reasons elaborated below, the asserted exemptions and reasons for nondisclosure are improper.

A. Blanket Exemptions Are Insufficient Under The CPRA.

The NDA's blanket assertions of copyright and deliberative process privilege do not satisfy the NDA's statutory obligations under the CPRA. The government bears the burden of affirmatively showing that withheld materials need not be disclosed. (*City of San Jose v. Superior Court*, *supra*, 2 Cal.5th at p. 629; *County of Santa Clara v. Superior Court*, *supra*, 170 Cal.App.4th at p. 1321 (citations omitted) ["Since disclosure is favored, all exemptions are narrowly construed" and the "agency opposing disclosure bears the burden of proving that an exemption applies."].) NDA's failure to cite and justify with particularity the exemptions it asserts does not satisfy the agency's obligations here.

B. The NDA's Asserted Exemptions Lack Merit.

1. Copyright Cannot Support The Withholding of Records Responsive To Requests B, C, D, and F.

In response to requests for prosecutorial policies, memoranda, or guidance documents, any and all training agendas, training materials, and recorded trainings, records concerning the implementation of, and compliance with, the RJA, and all investigations into *Batson-Wheeler* motions, the NDA states that some responsive records "are records produced and copyrighted by a third party" and it is "not able to make and distribute copies of copyrighted works. (Gov. Code sec. 7927.705; 17 U.S.C. sec. 101, 102, and 106.)" These materials cannot be properly asserted as copyright protected. To do so would undermine the very purpose of the CPRA as it would "allow an agency 'to mask its processes or functions from public scrutiny' simply by asserting a third party's copyright." (*Weisberg v. U.S. Dep't of Just.*, 631 F.2d 824, 828 (D.C. Cir. 1980) [rejecting the NDA's position as it applies to records requests under the federal Freedom of Information Act].) Moreover, the NDA has not established that the records it objects to producing on the basis of copyright are, in fact, copyrighted. (*See Register Div. of Freedom Newspapers v. County of Orange* (1984) 158 Cal.App.3d 893, 909-910; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 776; § 7921.005 ["A state or local agency may not allow another party to control the disclosure of information that is otherwise subject to disclosure pursuant to this division."].) Finally, requesting and receiving the records responsive to the CPRA Request likely falls within the fair use doctrine of federal copyright law. *ACLU of Utah Foundation, Inc. v. Davis County*, No. 180700511, 2021 WL 1215891 (Utah Dist.Ct. Mar. 25, 2021) is particularly on point. The records at issue in that case were the written standards used or relied upon for the administration and operation of a jail, which were copyrighted by a third party. The court weighed the four statutory factors of fair use and found that that the material was disclosable under the state's public records law because they were intended for "noncommercial use of education and advocacy." (*See also Lindberg v. Cnty. of Kitsap* (1997) 133 Wash. 2d 729, 747.) Such is the case here, too.

2. The Deliberative Process Privilege Cannot Justify The Withholding Of All Records Responsive To Requests B, C, D, E, and F.

NDA also claims that the deliberative process privilege may support withholding records responsive to Requests B, C, D, E, and F. However, the deliberative process privilege embodied in Section 7922.000 does not support withholding the requested records. As stated above, 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. *See also ACLU of N. Cal. v. Superior Court*, *supra*, 202 Cal.App.4th at p. 76 ["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 PRA would not require much of government agencies."].)

Policies, training materials, RJA records, RJA communications, and investigations into *Batson-Wheeler* motions do not categorically "expose an agency's decision-making process," but rather tend to articulate finalized decisions after deliberations have concluded. (*Times Mirror Co. v. Superior Court*, *supra*, 53 Cal.3d at p. 1342.) Furthermore, where the agency cites Section 7922.000 for withholding, the burden falls on the agency to elaborate the public interest protected by nondisclosure and to demonstrate the "clear overbalance" in favor of withholding the records sought. (*Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1071.) The NDA has not met this burden.

C. Request C Is Neither Vague Nor Overbroad.

The NDA improperly "objects" to Request C "on the grounds that the request is vague and overbroad."

Request C clearly requests "all training agenda, training materials, and recorded trainings which are mandatory or optional for prosecutors." "Unquestionably," such a request describes public records "clearly enough to permit the agency to determine whether writings of the type described are under its control." (*California First Amend. Coal. v. Superior Court* (1998) 67 Cal.App.4th 159, 165.) "[U]pon a request for a copy of records that reasonably describes an identifiable record or records," the agency "shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable." (§ 7922.530, subd. (a).) "Feigned confusion based on a literal interpretation of the request is not grounds for denial." (*California First Amend. Coal. v. Superior Court*, *supra*, 67 Cal.App.4th at pp. 166-167.)

Request C is also not overbroad. 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.) Any claim that the request is overbroad is without merit.

Nevertheless, a government agency must offer an opportunity to the requester to cure any claims that a request is vague or overbroad. The NDA must (1) "[a]ssist" in the identification of records or refining of the request; (2) "[p]rovide suggestions for overcoming any practical basis for denying access to the records or information sought," and (3) "mak[e] a reasonable effort to elicit additional clarifying information from the requester that will help identify the record or records." (§ 7922.600 subds. (a) and (b).) Even if a request *is* vague or overbroad, the NDA has an obligation "to assist the member of the public make a focused and effective request that reasonably describes an identifiable record or records." (§ 7922.600, subd. (a).) Thus, if the NDA continues to contend that compliance with the CPRA Request would be vague or overbroad, please provide practical alternatives to make a request that would be less burdensome or identify which portions of the request NDA considers vague and why, so that we can practically cure any overbreadth or vagueness. Your response has not provided any such clarity.

D. The NDA Has Not Established That Request F Requires Data Compilation, Extraction, Or Programming To Produce Responsive Records.

Request F seeks documents regarding the NDA's investigation into *Batson-Wheeler* motions filed against the NDA, those that were granted, any internal training and/or discipline that the NDA carried out after a *Batson-Wheeler* motion was filed or granted, and any reports by the NDA to the State Bar following the filing or granting of such motions. In response, the NDA replied:

> This request seeks data that may not be kept by Napa County. If such data actually exists, to fulfill your information request, County staff would have to manually compile the data you seek. The Public Records Act requires the requestor to bear the cost of compiling data into a format not otherwise available. (Govt. Code sec. 7922.575, subd. (b).) Should you wish for this data to be compiled, the County would require the cost of data compilation to be paid prior to compilation. Said data would be compiled in such a manner that confidential information would continue to be protected.

Section 7922.575 does not, as the NDA's response implies, permit a public agency to shift the cost of producing a copy of the record to "compil[e] data into a format not otherwise available." Instead, Section 7922.575(b)(2) mandates cost-shifting to the requester when "[t]he request would require data compilation, extraction, or programming to produce the record."

While there is a rule that agencies are not required "to generate new substantive content to respond to a PRA request," this "rule does not mean that an agency may disregard a request for government information simply because the information must first be retrieved and then exported into a separate record before the information can be released"—"the PRA does not relieve agencies of the obligation to retrieve data to construct disclosable records; it instead protects them from any obligation to generate new substantive content for purposes of public release." (*Nat'l Laws. Guild , San Francisco Bay Area Chapter v. City of Hayward*, *supra*, 9 Cal.5th at p. 502-503 [*quoting Sander v. Superior Court* (2018) 26 Cal.App.5th 651, 667]

["[T]he PRA does require agencies to gather and segregate disclosable electronic data and to 'perform data compilation, extraction or computer programming if 'necessary to produce a copy of the record,'" but not to perform "extensive 'manipulation or restructuring of the substantive content of a record'"].)

ACLU NorCal, therefore, requests that the NDA describe the process required to "manually compile the data," especially how it is distinct from searching, reviewing, and redacting records, so that it can assess whether cost-shifting to the requester is appropriate here.

E. The NDA Has Discretion To Disclose Responsive Records In The Public Interest.

As the NDA is aware, 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 any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law." (§ 7921.500.) 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. ACLU NorCal seeks to use these records to implement the RJA. Underlying 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, ACLU NorCal respectfully requests that the NDA exercises its discretion to override the statutory exemptions it has cited to the extent which they apply.

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Please let us know at your earliest convenience if the NDA intends to stand on its exemptions as grounds for withholding certain records, or whether the NDA would consider re-evaluating, or waiving any, or all of the asserted exemptions. It is our goal to avoid unnecessary litigation, which can be costly and time consuming. We would be happy to discuss this matter over the phone if you believe we may be able to find an amenable solution.

However, if you do not believe further discussions would be helpful, please advise us of this position. Should we determine that we are entitled to documents you have refused to produce,

we may litigate to obtain them. In that event, we will seek all attorneys' fees and costs for the litigation.[6]

Thank you again for your response to the CPRA Request. We look forward to any further discussion and your production of records.

Sincerely,

Shaila Nathu
Staff Attorney, Democracy and Civic Engagement Program
ACLU of Northern California

[6] § 7923.115. 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.* (2001) 88 Cal.App.4th 1381, 1391.)