AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

April 26, 2024

VIA EMAIL ONLY

Michael Blazina
Sacramento County District Attorney's Office
901 G Street
Sacramento, CA 95814

Re: November 17, 2023 California Public Records Act Request

Mr. Blazina:

This letter is in response to the December 11, 2023 correspondence from the Sacramento County District Attorney's Office (the "DA") concerning the California Public Records Act ("CPRA") request submitted to the DA 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 DA states that only a small portion of the requested prosecutorial data are disclosable, and ACLU NorCal would have to pay the cost to retrieve that data. The DA further asserts that the rest of the data requested is properly withheld as "complaints and investigatory files within the meaning of" Government Code[1] section 7923.600 subd. (a), as attorney work product, under Section 7922.000's public interest balancing test and the deliberative process privilege, because retrieval of the data would be "unduly burdensome," or because the request is "vague." In response to the rest of the CPRA Request, the DA produced some responsive records but asserts that other records are being withheld on the basis of a handful of the CPRA's exemptions to disclosure and undue burden. ACLU NorCal contests the DA's response and respectfully requests that the DA reconsider whether certain responses require cost-shifting to the requester and its purported justifications for withholding responsive records, as described below.

I. Information Concerning Prosecutorial Data (Category I of the CPRA Request)

The DA states that, of all of Category I of the CPRA Request, it can only feasibly "conduct a search of [its] computerized case management system and create a spreadsheet that would include each defendant's name, court case number, and primary arresting agency case number" as well as "the name of the deputy district attorney assigned to the case" and the applicable code section(s), severity, and any enhancements for charges filed. The DA further states that ACLU NorCal would be "responsible for paying the costs associated with preparing the computer inquiry to retrieve the data" under Section 7922.575, subd. (b). Section 7922.575, subd. (b)(2)

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

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.)

ACLU NorCal does wish to pursue collection of any responsive data and, therefore, accepts the DA's offer to "ask [its] IT section to prepare an estimate of the amount of programming time required." ACLU NorCal further requests that this estimate include a detailed description of 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 DA deems necessary to produce the record is permitted by statute.

In the December 11, 2023 correspondence, the DA expressed confusion at the term "unique identifier" in the CPRA Request. As discussed over video conference on March 20, 2024, ACLU NorCal does not seek names, driver's license, social security numbers, or California Criminal Identification Numbers and only seeks the "local identifier (county cross-reference ('x-ref') number which are set forth in [the DA's] criminal complaints and information [*sic*] filed with the court as public documents." ACLU NorCal also confirms that the CPRA Request "only seeks information regarding cases prosecuted in adult court (adult defendants or minors prosecuted in adult court) and not minors prosecuted in juvenile court in Sacramento County."

Also in the December 11, 2023 correspondence, the DA claimed that Requests A.9 and A.10 are vague. For Request A.9.a (bail amount requested), the ACLU seeks all information the DA possesses concerning a defendant's bail amount regardless of where it exists or when it was requested. Similarly, for Request A.9.b (detention orders sought), the ACLU seeks all detention orders sought by the DA's office. For Requests A.9.c through e and 10, the DA objects on the basis that the data may change over time. This, however, does not support a claim that the request is vague. Again, the ACLU seeks all data responsive to these requests that exists at any point during a case's progression.

II. The DA's Assertions Of Exemptions Lack Merit.

A. Records Are Not Categorically Exempt As Investigatory Files Merely Because They Are Held By The DA And Identified as Investigatory.

The DA asserts that Government Code section 7923.600 exempts the following categories of records from disclosure as "investigatory files":

- Demographic and other information concerning each defendant (A.2);
- Information regarding each arrest (A.3);
- Data concerning decisions declined to prosecute (A.5);
- Data concerning diversion offers and decisions (A.6);
- Bail/custody information (A.9);
- Data concerning plea offers (A.10);
- Data concerning case outcomes (A.11);
- Counsel for defendant, whether public defender (A.12);

- Demographic and other information concerning victims (A.13);
- Data concerning recommendations regarding parole (A.14);
- Data concerning recommendations regarding pardon or commutation (A.15);
- "[M]aterials related to diversion that may be contained in any…investigatory files" (B.a);
- Policy, memoranda, or guidance documents concerning custody and/or bail recommendations (B.b);
- Policy, memoranda, or guidance documents concerning charging recommendations and/or decisions (B.c);
- Policy, memoranda, or guidance documents concerning compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) (B.d);
- "[M]aterials contained within…investigatory files" concerning jury selection (B.e);
- Policy, memoranda, or guidance documents concerning sentencing recommendations (B.f);
- Policy, memoranda, or guidance documents concerning prosecution of minors (B.g);
- Policy, memoranda, or guidance documents concerning parole recommendations (B.h);
- Policy, memoranda, or guidance documents concerning pardon and commutation recommendations (B.i);
- Policy, memoranda, or guidance documents concerning data collection relating to criminal matters, including demographic data of defendants and victims (B.k);
- Policy, memoranda, or guidance documents concerning referral of cases for federal prosecution (B.l);
- Records concerning the implementation of, and compliance with, the RJA (D);
- Communications concerning the RJA (E); and
- 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 (F).

The DA asserts that the investigatory files exemption may apply to certain requested records by stating that "such materials are part of our investigatory files and are thus exempt from production under the CPRA," "would come from our investigatory files," or "may be contained in any of our investigatory files." This does not satisfy the agency's burden, and certain of the requested records cannot be withheld on this ground.

An agency 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 Cal.4th 278, 291.) "[T]he content of the document at issue, not the location in which it is stored, [is] determinative." (*Ibid.*; *see also ibid.* ["We consider it unlikely the Legislature intended to render documents confidential based on their location. . ."]; *Williams v. Superior Court* (1993) 5 Cal.4th 337, 355 ["T]he law does not provide . . . that a public agency may shield a record from public disclosure, regardless of its nature, simply by placing it in a file labelled 'investigatory.'"].) The investigative files exemption also applies to individual records rather than entire files; the existence of individual exempt records within a file does not render the entire file exempt. (*Commission on Peace Officer Standards & Training v. Superior Court*, *supra*, 42 Cal.4th at p. 291.)

In addition, even if the investigatory file exemption applies to some of the requested records, the agency must still disclose certain information. "[E]ven when the CPRA's exemption for law enforcement investigatory files applies, the investigating agency ordinarily must still disclose to the public 'the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, [and] the time and date of the report, the name, age, and current address of the victim . . .'" (*Williams v. Superior Court*, *supra*, 5 Cal.4th at p. 361 [citing § 6254, subd. (f)(2) (now recodified as § 7923.615, subd. (a)(2))].) "Agencies must also disclose to the public "[t]he full name, current address, and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds." (*Ibid.* [citing § 6254, subd. (f)(1) (now recodified as § 7923.610)].)

B. The CPRA's Catch-All Exemption Does Not Support Withholding The Requested Records, 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. (§ 7922.000; *see generally ACLU of N. Cal. v. Deukmejian* (1982) 32 Cal.3d 440, 453 [Section 7922.000 "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 DA asserts that the following items are exempt under Section 7922.000 because the public interest served by nondisclosure outweighs the public interest served by their disclosure:

- Prior criminal convictions of a defendant (A.2.f);
- Data concerning decisions declined to prosecute (A.5);
- Factors considered in deciding charges to file, and level of charges (A.8);
- Policy, memoranda, or guidance documents concerning compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) (B.d);
- Policy, memoranda, or guidance documents concerning jury selection (B.e);
- Any and all training agendas, training materials, and recorded trainings (C); and
- Records concerning the implementation of, and compliance with, the RJA (D).

The withholding of 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* (2011) 202 Cal.App.4th 55, 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 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."].)

The DA cannot meet this burden where the records requested here pertain to compliance with and implementation of the RJA. 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 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].)

C. The Deliberative Process Privilege Also Does Not Support Withholding The Requested Records, Particularly Where Such Records Are Relevant To The RJA.

The DA also asserts that the deliberative process privilege protects the following items from disclosure:

- Data concerning decisions declined to prosecute (A.5);
- Factors considered in deciding charges to file, and level of charges (A.8);
- "[D]ocuments identifying office policies or guidelines regarding diversion courts" (B.a);
- "[W]ritten policies concerning how prosecutors exercise their discretion in charging and sentencing" (B.a and B.b);
- Policy, memoranda, or guidance documents concerning custody and/or bail recommendations (B.b);
- Policy, memoranda, or guidance documents concerning charging recommendations and/or decisions (B.c);
- Policy, memoranda, or guidance documents concerning compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) (B.d);
- Policy, memoranda, or guidance documents concerning jury selection (B.e);

[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 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.

- Policy, memoranda, or guidance documents concerning prosecution of minors (B.g);
- Any and all training agendas, training materials, and recorded trainings (C); and
- Records concerning the implementation of, and compliance with, the RJA (D).

The deliberative process privilege is not a standalone exemption. Instead, it is one of the many interests to be balanced under the catch-all exemption. While it is unclear what data the DA expects to withhold on the basis of deliberative process privilege, it nevertheless 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.

Additionally, office policies, guidance documents, and training materials 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.)

Again, 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*, *supra*, 38 Cal.4th at p. 1071.) The DA cannot meet the requirements of the catch-all exemption for the records requested here. As discussed in Section II.B, *supra*, the RJA strengths the case for disclosure.

D. The Requests Are Not Unduly Burdensome.

The DA asserts that producing the following items is unduly burdensome:

- Demographic and other information concerning each defendant (A.2);
- Information regarding each arrest (A.3);
- Data concerning diversion offers and decisions (A.6);
- Bail/custody information (A.9);

- Data concerning plea offers (A.10);
- Counsel for defendant, whether public defender (A.12);
- Demographic and other information concerning victims (A.13);
- Policy, memoranda, or guidance documents concerning diversion eligibility and/or programming (B.a);
- Policy, memoranda, or guidance documents concerning custody and/or bail recommendations (B.b);
- Policy, memoranda, or guidance documents concerning compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) (B.d);
- Policy, memoranda, or guidance documents concerning jury selection (B.e);
- Policy, memoranda, or guidance documents concerning sentencing recommendations (B.f);
- Any and all training agendas, training materials, and recorded trainings (C);
- Records concerning the implementation of, and compliance with, the RJA (D);
- Communications concerning the RJA (E); and
- 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 (F).

Like the deliberative process privilege, undue burden is not a standalone exemption. Instead, it is one of the many interests to be balanced under the catch-all exemption.

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.) "There is nothing in the [CPRA] to suggest that a records request must impose no burden to the government agency." (*CBS Broadcasting Inc. v. Superior Court* (2001) 91 Cal.App.4th 892, 909; *see also ibid.* [$43,000 cost of compiling an accurate list of names not "a valid reason to proscribe disclosure of the identity of such individuals"].) The DA has not demonstrated that the burden of searching for and producing the requested materials is excessive. This is particularly true in light of the public interest in the disclosure of the records relevant or necessary for the implementation of the RJA. (*See Weaver v. Superior Court*, *supra*, 224 Cal.App.4th at p. 752 ["concluding that [t]he approximately $3,400 expense of generating the list of cases at issue here is substantially less of a reason and pales in comparison to the interests of [the requester] and the public in disclosure" where the requester seeks information to show selective prosecution].)

Nevertheless, a government agency must offer an opportunity to the requester to cure any claims that a request is unduly burdensome. The DA 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* unduly burdensome, the DA 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 DA continues to contend that portions of the CPRA Request are unduly burdensome, please provide practical alternatives to make a request that would be less burdensome.

E. Attorney Work Product Does Not Support The Type of Blanket Withholding Called For By The DA.

The DA asserts that the following items are exempt from disclosure as attorney work product:

- Data concerning decisions declined to prosecute (A.5);
- Factors considered in deciding charges to file, and level of charges (A.8);
- "Other notations regarding specific cases" that may contain policy, memoranda, or guidance on diversion eligibility and/or programming (B.a);
- Policy, memoranda, or guidance documents concerning custody and/or bail recommendations (B.b);
- Policy, memoranda, or guidance documents concerning compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) (B.d);
- Policy, memoranda, or guidance documents concerning jury selection (B.e);
- Policy, memoranda, or guidance documents concerning sentencing recommendations (B.f);
- Policy, memoranda, or guidance documents concerning prosecution of minors (B.g);
- Any and all training agendas, training materials, and recorded trainings (C); and
- Records concerning the implementation of, and compliance with, the RJA (D).

The exemption for attorney work product 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].)

The DA's blanket assertion of the attorney work product exemption as grounds for withholding certain data categories, certain policies, memoranda, or guidance documents, all training materials, and RJA records stretches the exemption beyond its breaking point. While some of the information *may* be properly withheld relying on this exemption, it strains credulity that *all* requested records do; moreover, the DA has not substantiated this justification for any records. Some of the requested information constitutes public records that lay out "general standards to guide [] Government lawyers," or are improperly asserted as attorney work product for other reasons. (*ACLU of N. Cal. v. United States 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][3]*; Judicial Watch, Inc. v. United States Department of Homeland Security* (D.D.C. 2013) 926 F.Supp.2d 121, 142-44

[3] 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*, *supra*, 53 Cal.3d at p. 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."].)

[ruling that memoranda communicating policies, guidelines, and "general standards" to government staff attorneys not protected by work-product privilege]; *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]. *See Coastal States Gas Corp. v. 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."].)

F. Copyright Cannot Support The Withholding Of Responsive Records.

The DA asserts that training agendas, training materials, and recorded trainings are subject to federal copyright law, stating that "[c]opyrighted materials produced by an outside source which this office has are not the type of public records being contemplated for release within the meaning of the CPRA." 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 DA's position as it applies to records requests under the federal Freedom of Information Act].) Moreover, the DA 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.

G. Requests for Policies, Memoranda, or Guidance Documents Concerning Data Collection Relating To Criminal Matters, Including Demographic Data Of Defendants And Victims, and Training Are Not Vague.

The DA improperly objects to the requests for policies, memoranda, or guidance documents concerning data collection relating to criminal matters, including demographic data of defendants and victims (B.k) and training (B.m) on the grounds that they are vague. The ACLU seeks policies, memoranda, and guidance documents on data collection in Request B.k and training in Request B.m.

"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.)

Nevertheless, a government agency must offer an opportunity to the requester to cure any claims that a request is vague. The DA 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, the DA 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 DA continues to contend that portions of the CPRA Request are vague, please provide practical alternatives to make a request that would be less burdensome or identify which portions of the request DA considers vague and why, so that we can practically cure any vagueness.

III. The DA Has Discretion To Disclose Responsive Records In The Public Interest.

As the DA 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 DA 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 DA intends to stand on its exemptions as grounds for withholding certain records, or whether the DA 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.[4]

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

[4] § 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.)